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THE NEW SPACE RACE: EXPLORATION AND EXPLOITATION IN THE COMMONS OF THE TWENTY-FIRST CENTURY

Devin E. Miller*

I. Introduction

On October 4, 1957, the USSR launched the Earth's first artificial satellite, Sputnik, into low Earth orbit.[1] Unbeknownst to the Kremlin and amid a cold war with the United States, the USSR had inaugurated the "space age."[2] The United States military, scientific community, and government "were caught off guard by the Soviet technological achievement" and, being weary of the USSR's stated intentions for their launch, thrust forth its own, similar effort.[3] The efforts of these communities to duplicate and surpass the USSR's achievements added a "space race" to an already delicate international relationship.[4] In a stunning feat for humankind, on July 20, 1969, the United States led crew of the Apollo 11 mission successfully landed the first human beings on the moon.[5]

However, the risk that completely unregulated space posed for humankind was not lost on the international community in the interim between the two feats. In an attempt to proactively curtail the risk that

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[1] *Oct 4, 1957 CE: USSR Launches Sputnik*, NAT'L GEOGRAPHIC (May 20, 2022), *available at* https://education.nationalgeographic.org/resource/ussr-launches-sputnik (last visited Sept. 27, 2022).

[2] *Sputnik Launched*, Hist. (Nov. 24, 2009), *available at* https://www.history.com/this-day-in-history/sputnik-launched (last visited Sept. 27, 2022).

[3] *Id.*

[4] *Id.*

[5] *Apollo 11 Launches into History*, NASA (July 16, 2020), *available at* https://www.nasa.gov/image-feature/apollo-11-launches-into-history (last visited Sept. 27, 2022).

this space race posed to global stability, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space [hereinafter the Outer Space Treaty] was entered into force on October 10, 1967.[6] However, while pivotal to space relations, the Outer Space Treaty was flawed from its inception. To be discussed in subsequent sections, this Agreement is inadequate for many reasons, but its fundamental flaw is found in the timing of its creation. At its signing, Sputnik had launched but the Apollo moon mission had not yet occurred. By virtue of its timing alone, this treaty simply could not have fathomed the idea of humankind amongst the stars, let alone create a treaty to adequately govern it. As such, the United States' swift rate of space centered innovation rendered newly governing space law outdated by 1969.[7]

Since 1969, other international agreements have been instituted in a manner that, while still inefficient to deal with the issues of tomorrow, exhibits a willingness to work together that is generally absent from twenty-first century global politics.[8] Notwithstanding this surprising stream of cooperation, the United States and the world are behind the curve of an age of extraterrestrial expansion in which stability will need to be constantly assessed. This stability will need to be established by international law that is not simply a new application of old norms, but rather a whole new system cultivated to meet the issues of today, tomorrow, and beyond. In other words, the law must evolve just as much as our technology and our ambitions. In the days since Apollo, not only has the world changed, but so has the nature of space exploration in general. An area the United States once coveted as the pinnacle of American ingenuity has ceased to be the pinnacle of its government's concern.[9] Yet, humankind's inclination to look upward has not dwindled. Like most other potential industries, where the United States government begins to lessen its grasp, the private sector will be quick to fill the void. US billionaires such as Jeff Bezos, Elon Musk and others are battling to

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[6] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, 61 I.L.M. 386.

[7] *Id.*

[8] *See Infra* Sec. V

[9] *See* Glenn H. Reynolds, *America is behind in the new space race China is determined to win*, NEW YORK POST (Dec. 2, 2021), *available at* https://nypost.com/2021/12/02/america-is-behind-in-space-race-china-is-determined-to-win/ (last visited Mar. 1, 2022).

be the twenty-first century's space pioneers.[10] Recently, Jeff Bezos was aboard a privately launched space flight which brought him and his passengers to low Earth orbit and then safely back to Earth again.[11] The efforts of Bezos and his competitors are just the beginning of the private industry's launch into the final frontier. But the billionaires will not be alone. Nations other than the United States and Russia are beginning to set their sights on the stars.[12] Most notably, China has expanded its space program.[13] With spaceborne capabilities returning to the forefront of scientific development at the hands of billionaires and adversarial nations, the United States and the world must ask themselves: Are terrestrial ailments and conflicts going to find their way into space? And if so, are we currently equipped to deal with them? The answer to those questions respectively is, almost certainly and definitely not.

With the recent surge in spaceborne development, the world must once again venture to find common ground in a new global commons. As the world looks towards the heavens, we must impart on future space-goers that which has become increasingly difficult to enforce on Earth. At the present moment, humans have a chance to proactively regulate the space commons in a manner beneficial to all of humankind. Without regulation, we risk allowing space exploration to devolve into space exploitation.

II. Current State of Space Laws and Regulations and Their Pitfalls

The Outer Space Treaty as is has many flaws, some more serious than others. For example, this framework treaty fails to even define where space begins.[14] This omission alone leaves room for dispute. However, for this analysis, the Outer Space Treaty fails to adequately

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[10] Maricia Dunn, *Jeff Besos blasts into space on his own rocket: Best Day ever!*, ASSOCIATED PRESS (July 21, 2021), *available at* https://apnews.com/article/jeff-bezos-space-e0afeaa813ff0bdf23c37fe16fd34265 (last visited Mar. 1, 2022).

[11] *Id.*

[12] *See* W.J. Hennigan & Ralph Vartabedian, *Foreign nations push into space as U.S. pulls back*, LOS ANGELES TIMES (July 22, 2011), *available at* https://www.latimes.com/business/la-xpm-2011-jul-22-la-fi-0722-space-race-20110722-story.html (last visited Mar 1, 2022).

[13] *See* Luke Harding, *The space race is back on – but who will win?*, THE GUARDIAN (Jul. 16, 2021), *available at* https://www.theguardian.com/science/2021/jul/16/the-space-race-is-back-on-but-who-will-win (last visited Mar. 1, 2022).

[14] *Supra* note 6

regulate the following three categories of space activity in the twenty-first century, each of which pose a significant threat: Environmental concerns, militarization, and space commerce.

Just as humankind has been reckless with the terrestrial environment that surrounds us; there are signs of our disregard for the environment above us.[15] Already there is a concerning amount of "space junk" orbiting Earth at this moment, which poses a risk to space travelers and Earth dwellers alike.[16] Advancements in space technology will ultimately result in more space travel with the transitive effect being that the space junk issue will only get worse. Considering the huge environmental threat space junk creates, there is clearly a need for international regulation moving forward.

Another area of necessary international regulation is that of space militarization. While the Outer Space Treaty does contemplate some militarization of outer space, it fails to adequately police new technological advancements. Article IV for example prohibits the presence of nuclear weapons or weapons of mass destruction in space.[17] However, the Outer Space Treaty fails to address the emergence of other potentially damaging weapons such as Anti-Satellite Technology [hereinafter ASAT], which can have an effect not only on space-borne activities, but also on activities on Earth.[18] ASATs have the potential to disrupt everything from cell phone reception to military infrastructure by virtue of the devastating effect they can have on a nation's satellite capabilities.[19] While some may argue that, logically, not all space exploration will be peaceful, and as such this defensive measure is necessary, ASAT's potential for abuse puts Article I (which states that space exploitation "shall be carried out for the benefit and in the interests of all countries") and Article IV (which states that the only weapons banned in space are "nuclear weapons" or "any other kinds of weapons

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[15] *Id.*

[16] *Space Debris*, NASA (July 1, 2019), *available at* https://www.nasa.gov/centers/hq/library/find/bibliographies/space_debris (last visited Sept. 21, 2022).

[17] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, *supra* note 6, at Art. IV.

[18] L. Col. EHJ Roberds, *Failure of Outer Space Treaty*, 40 CANADIAN FORCES COLLEGE 1, 1-12 (2016).

[19] *Id.* at 2-3.

of mass destruction") at odds with each other.[20] How a dispute of this kind would be handled is unclear by the language of the treaty. As will be discussed further, this grey area puts a powerful tool in the hands of U.S. adversaries, who are actively pursuing spaceborne development with a vigor not matched by the United States.

Finally, the Outer Space Treaty fails to address the economic reality of future space travel and commercialization. As will be discussed in subsequent sections, issues of a similar nature to those seen on Earth are likely to find their way into space.[21]National Security concerns, among others, are points of contention that are just as likely to happen above Earth as they are on it. With private industry heading into space, world leaders must consider how they wish to regulate space commerce as the Outer Space Treaty does not begin to regulate these activities in a manner commensurate to the plans private industry likely has in store.

The seminal Outer Space Treaty does not stand alone; a handful of other treaties, agreements, and committees, while still not comprehensive enough, show that international groups have already begun considering space regulation. Some examples of these agreements include the Moon Agreement, the Rescue Agreement, the Liability Convention, and the Registration Convention, but there are many others.[22] Together, these subsequent agreements represent the basis for further, bolder, and necessary regulation. Together, these subsequent agreements represent the basis for further, bolder, and necessary regulation.

III. A Potential Solution: Learning from a Long History of Regulating Global Commons

Physical space, considering our surface level knowledge of it relative to the unknowns of the final frontier, is complicated to the point of confusion for most human beings. As such, regulation in this

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[20] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, *supra* note 6, at Art. I & IV.

[21] *Infra* Sec. IV - VII

[22] *See* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 22, 18 I.L.M. 1434 (1979); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Dec. 19, 1967, 9 U.S.T. 7570, 672 U.N.T.S. 119, 7 I.L.M. 149 (1968); Convention on International Liability for Damage Caused by Space Objects, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 i.L.M. 965 (1972); Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 28 U.S.T. 695, 1023 U.N.T.S. 15, 14 I.L.M. 43 (1975).

area will become increasingly intricate as human beings continue to make advancements in space travel technology. In human history, only one other commons has come close to comparing to space by means of its vast wonders: The sea. The United Nations Convention on the Law of the Sea [hereinafter UNCLOS] is one of the most comprehensive pieces of regulation ever achieved on a global scale.[23] UNCLOS was designed not only to address a complex set of issues with specific rules and regulations, but also to ensure that in doing so, the values of humankind were reflected therein. This is precisely what is needed in space.

Space, like the sea, will require an intricate document that enumerates values, laws, and regulations, not simply a loose framework of ideas. To that end, it would be appropriate that the world comes together to construct the United Nations Convention on the Law of Space. As nations and businesses alike look upward, it would be wise of the world to parallel the scale of the UNCLOS while taking advantage of an opportunity to improve on the framework of what is a widely respected document. By the time UNCLOS was ratified, sea travel had existed for centuries.[24] So while it did enact specific provisions[25] for those issues that required it, UNCLOS primarily codified the norms of traveling the seas. Our efforts in space law do not need to be hampered by after-the-fact regulations on issues that truly matter in twenty-first century space travel. At the moment, space law is underregulated, but this has not yet become an issue because our capabilities to travel within it are relatively limited. Humankind has a chance to define what we think space law should look like in real-time by virtue of the scientific advancements that will make them increasingly necessary.

In the sections to follow, we will examine the risk that scientific advances outpacing regulation pose to stability and the reasons that a UN Convention on the Law of Space will remedy these issues to the greatest extent possible.[26] This will be achieved by drawing parallels

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[23] *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 833 UNTS 397, 21 ILM 1261 (1982).

[24] *See History of Ships*, Britannica, *available at* https://www.britannica.com/technology/ship/History-of-ships (Sept. 21, 2022).

[25] *Supra* note 23.

[26] *Infra* Sec. VII.

to terrestrial conflicts that are likely to find their way into space when the technology allows for it.

IV. National Security in Space: Familiar Threats in the Final Frontier

The implications that space will have on national security are potentially sweeping. However, some of these issues are predictable as we will likely see similar conflicts of law imputed from Earth to space. Just as the seas became inundated with erroneous or troublesome claims and actions, so too will space. With adversaries of the United States, many of whom already running afoul of well-established international law, and billionaires leading the way into the new space race, humankind will find renewed meaning in the phrase "old habits die hard." To mitigate this, it is vital that the UN Convention on the Law of Space takes some cues from UNCLOS. There are some contentious areas of sea law that are almost certain to make their way upward as those who break the law on the seas head into space.

As we see companies and nations alike head to space, we risk imputing the environmental crisis from Earth's surface to its atmosphere as well as space becoming a breeding ground for mankind's next major conflicts, both of which constitute paramount national security concerns. This section explores environmental concerns as they relate to national security, the militarization of space, and the risks posed to space commerce as its focal points.

A. ENVIRONMENTAL CONCERNS: THE BYPRODUCT OF ANOTHER GIANT LEAP FOR MANKIND

On Earth, environmental alarm bells have been ringing without an indication that the planet's major environmental offenders are ready or able to do anything about it.[27] Inaction or ineffective action on climate change seems to be par for the course in most global meetings on the matter. As such, it is important as we head into space that we

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[27] *See* Brad Plumer & Raymond Zhong, *Climate Change is Harming the Planet Faster than We Can Adapt, U.N. warns*, N.Y. TIMES (Feb. 28, 2022), *available at* https://www.nytimes.com/2022/02/28/climate/climate-change-ipcc-report.html (last visited Sept. 21, 2022).

do not cause more irreparable harm to the Earth in the name of human advancement.

Space debris, or "space junk," is the environmental issue to watch as Earth once more looks upward. One reason for this heightened concern is that space debris is already arguably out of control.[28] To date, there 27,000 pieces of space junk orbiting Earth that are tracked by NASA at any given time.[29] However, there is much more space junk out there that NASA cannot track due to their small size.[30] Despite their size, this space junk still poses a threat to space bound aircraft, the International Space Station, and other objects due to the speed at which the debris and the aircraft are moving.[31] While these are only estimates, NASA believes that there are half of a million pieces of debris that are one centimeter or larger, 100 million pieces of debris that are one millimeter or larger and an innumerable amount of debris that is even smaller than that.[32] Given the sheer volume and potential speed, which for some debris is around 17,500 miles per hour, this space junk poses an immense risk to humans.[33] Even more concerning, this number is expected to rise exponentially as space activities inevitably increase.[34] Paired with increased space bound activity, an already pressing risk to humans will become that much more severe. When speaking to just how dire the situation is, some have already recognized the exigency of this matter. Comments go so far as to say that "[i]f left unchecked, thick fields of debris created by spent spacecraft parts colliding and breaking apart could pose a dangerous obstacle to space exploration itself—and imperil a new era of space travel just as it begins."[35] Alongside the risk to those who are

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[28] *See* Kathy Jones, Krista Fuentes & David Wright, *A Minefield in Earth Orbit: How Space Debris is Spinning Out of Control*, SCIENTIFIC AMERICAN (Feb. 1, 2012), *available* at https://www.scientificamerican.com/article/how-space-debris-spinning-out-of-control/ (last visited Sept. 21, 2022).

[29] *Space Debris and Human Spacecraft*, NASA (May 26, 2021), *available at* https://www.nasa.gov/mission_pages/station/news/orbital_debris.html (last visited Sept. 28, 2022).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Space Debris and Human Spacecraft*, *supra* note 29.

[35] W. Robert Pearson & Benjamin L. Schmitt, *The Crisis in Space*, Foreign Policy (May 15, 2021), *available at* https://foreignpolicy.com/2021/05/15/space-junk-

space bound, there is a risk to those of us still on Earth when space junk decides to fall out of orbit and plumet to the ground.[36] This worry extends to private space activities as well as those of nation states. Policy experts are worried about programs such as Elon Musk's planned Star Link program, a satellite-based internet service.[37] The rapid development of such programs raises "legitimate concerns over the proliferation of space junk" as well as how it may hinder ground based scientific efforts.[38]

This is an issue that already seems to garner international support. Some experts are already calling for a reaffirmation of current space policy such as the Outer Space or Moon treaties.[39] As such, this is a potential entry way into a larger conversation on the proposed UN Convention on the Law of Space. Using UNCLOS as a guide, there must be anti-pollution provisions or in this case, anti-space junk provisions, within the proposed Convention on the Law of Space. Article 145 of UNCLOS reads the following:

Necessary measures shall be taken[40] in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

> a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

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rocket-debris-long-march-starlink-elon-musk-moon-asteroids-travel-militarization-resource-competition/ (last visited Sept. 28, 2022).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] United Nations Convention on the Law of the Sea, *supra* note 23, at art.145.

b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.[41]

Language such as this would be vital to ensuring that a bad situation does not turn for the worst. However, this provision in UNCLOS does not go far enough; the Convention on the Law of Space must have more specific language. The above language from UNCLOS was the result of a compromise derived from a fear that less developed nations would be effectively boxed out of international trade by being forced to meet stringent international standards.[42] The efforts of a UN Convention on the Law of Space has a chance to push past this. At the moment, only a handful of companies and corporations even have the capability to launch objects or people into orbit.[43] In recognition of this, the United Nations has the ability to deal with two issues at once. First, while the rest of the world is updating their space capabilities, this body will have a chance to hold powerful, preexisting space capable nations to task under these provisions. This will not only be a testing ground for the convention but will breathe legitimacy into enforcement mechanisms therein. Second, this will give lesser developed but space-hopeful nations an opportunity to pursue their space bound dreams in a manner in keeping with this convention. So, rather than preventing them from doing something they already were doing, such as trading via the sea, this convention simply asks that as these countries undergo an already expensive journey towards space, they give their due diligence for the environmental concerns associated with space travel.

Included in this expanded section on environmental concerns must be some aspects of the Convention on International Liability for

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[41] *Id.*

[42] Amy DeGeneres Berret, *UNCLOS III: Pollution Control in the Exclusive Economic* Zone, 55 L.A. L. Rev. 1165 (1995).

[43] Org. for Econ. Co-operation and Dev. (2011), *The Space Economy at a Glance 2011*, OECD Publishing (Jul. 22, 2011), *available at* https://www.oecd-ilibrary.org/docserver/9789264113565-15-en.pdf?expires=1640224172&id=id&accname=guest&checksum=DE0C41E7C26DDE866118FB608718325B (last visited Sept. 30, 2022).

Damage Caused by Space Objects.[44] Article III of this Convention reads: In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[45]

This Article gives a general idea of the purpose of the convention and is a good launching point for the efforts towards a UN Convention on the Law of Space. However, Article III and counterparts from the Convention must be adapted to the changing conditions of space. Using the Convention as a framework, policy makers must find ways to apply it to states and corporations alike as they become decreasingly linked.[46] These provisions must be strongly worded and strict in their effect insofar that it is nearly always disadvantageous of a nation or corporation to needlessly increase the amount of space junk in our atmosphere.

Overall, these provisions are not only the international community's chance to find common ground early in the formation of this newfound Convention, but also learn from the mistakes of climate abuse on Earth. As we see terrestrial environmental efforts getting bogged down in international and national systems alike, this must be an imperative of space law. There always has seemed to be a culmination of goodwill towards progress from most, if not all, parties involved in molding space law; the world must use that to bolster its efforts here or risk our terrestrial shortfalls leaking into the formation of our extraterrestrial efforts.[47] As the next section will illustrate, these concerns are intertwined in national security to an alarming extent.

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[44] Convention on International Liability for Damage Caused by Space Objects, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 I.L.M. 965 (1972).

[45] *Id.* at art. III

[46] *See generally* Nicholas Reimann, *Leaving A Planet In Crisis: Here's Why Many Say The Billionaire Space Race Is A Terrible Idea*, Forbes (Jul. 12, 2021), *available at* https://www.forbes.com/sites/nicholasreimann/2021/07/12/leaving-a-planet-in-crisis-heres-why-many-say-the-billionaire-space-race-is-a-terrible-idea/?sh=7f1a8d1477c9 (last visited Oct. 2 2022); *see generally* Eric Mack, *In 2022, the new space race will get more heated, crowded and dangerous*, CNET (Jan. 4, 2022), *available at* https://www.cnet.com/news/in-2022-the-new-space-race-will-get-more-heated-crowded-dangerous/ (last visited Oct. 2, 2022).

B. MILITARIZATION OF SPACE: CAN SPACE REALLY BE FOR ALL OF MANKIND?

The Outer Space Treaty, as previously mentioned, was flawed from its inception.[48] Its failure to anticipate technology that arose a matter of years after its signing pales in comparison to what it fails to regulate decades later. Subsequent treaties do not do much better. Most of the concern lies with nuclear weapons, weapons that are placed on celestial bodies, or other concerns.[49] But as our technological ability to explore space has improved, so too has our military's technological abilities.

The military ambitions of most space bearing nations grows alongside their technological advances, with space operations already having great significance in terrestrial military actions.[50] By all indications, the use of space for military initiatives only seems to be intensifying.[51] Western military powers already "have developed significant network-centric warfare concepts that rely heavily on space-borne assets for success."[52] Further, Senior United States Military officials recognize the strategic significance of space; they see space as "the ultimate high ground" and regards superiority in this commons to be the "future of warfare."[53] By extension, NATO allies recently declared space an "operational domain."[54] This preexisting

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[48] *See supra*, Sec. II

[49] *See* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 U.N.T.S. 22, 18 I.L.M. 1434 (1979); *see* Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 9 U.S.T. 7570, 672 U.N.T.S. 119, 7 I.L.M. 149 (1968); *see* Convention on International Liability for Damage Caused by Space Objects, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 i.L.M. 965 (1972); *See* Convention on Registration of Objects Launched into Outer Space, 28 U.S.T. 695, 1023 U.N.T.S. 15, 14 I.L.M. 43 (1975).

[50] Dale Stephens, *Military Space Operations and International* Law, JUST SECURITY (Mar. 2, 2020), *available at* https://www.justsecurity.org/68815/military-space-operations-and-international-law/ (last visited Sept. 23, 2022).

[51] Dale Stephens & Cassandra Steer, *Conflicts in Space: International Humanitarian Law and its Application to Space Warfare,* 40 Annals of Air and Space L. 1 (2015).

[52] *Id.*

[53] *Id.*

[54] Hitoshi Nasi, *Nato recognizes Space as an "Operational Domain": One Small Step Towards Rules-Based International Order in Space,* JUST SECURITY (Mar. 4,

military ambition with regards to space contains a heightened concern in the face of other nations' seemingly fast improving space bound capabilities.[55] Like western powers, as the space capabilities of these nations expand, so too will the military presence of those nations in space.[56] The ambitions of adversarial nations, such as China, represent a challenge of regulating space without a new framework through which to do so.[57]

One major threat to mankind peacefully navigating space is the increased use of Anti-Satellite or ASAT technology. ASATs are generally surface to air or air to space weapons with the purpose of destroying a satellite.[58] Both the United States and China have publicly exhibited their ASAT capabilities by destroying their own satellites.[59] These displays bring to the forefront two concerning realities.

First, two powerful military nations, China, and the United States, are dedicated to the regular usage of ASATs. Not only does this imply that these weapons are going to become commonplace in a new space era, but it also creates the risk of another arms race. The appeal of these weapons coupled with the ambitions of two adversarial nations in these endeavors all but ensures that some form of an arms race is to ensue. ASATs appeal to these nations begins with the reliance on space for military and civilian communications.[60] "The threat, however, is greatest for the United States. The United States has

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2020), *available at* https://www.justsecurity.org/68898/nato-recognizes-space-as-an-operational-domain-one-small-step-toward-a-rules-based-international-order-in-outer-space/ (last visited Oct. 16, 2022)

[55] *Id.*

[56] *See* William J. Broad, *How Space Became the Next 'Great Power' Contest between the US and China*, THE NEW YORK TIMES (Jan. 24, 2021), *available at* https://www.nytimes.com/2021/01/24/us/politics/trump-biden-pentagon-space-missiles-satellite.html (last visited Sept. 30, 2022).

[57] *See* Loren Grush, *China unveils five-year plan for space exploration that continues push into lunar space*, THE VERGE (Jan. 28, 2022), *available at* https://www.theverge.com/2022/1/28/22906277/china-space-exploration-white-paper-five-year-plan (last visited Sept 30, 2022).

[58] Stephens & Steer, *supra* note 51.

[59] *See* Brian Britt, *Arms control in outer space won't work*, THE SPACE REVIEW (Feb. 21, 2022), *available at* https://www.thespacereview.com/article/4336/1 (last visited Oct. 16, 2022).

[60] Talia M. Blatt, *Anti Satellite Weapons and the Emerging Space* Race, HARVARD INTERNATIONAL REVIEW (May 26, 2020), *available at* https://hir.harvard.edu/anti-satellite-weapons-and-the-emerging-space-arms-race/ (last visited Oct. 16. 2022)

realized that via the telephone, computers, and eventually the internet, the United States pioneered the use of space-based communications for most civil and military functions. The benefits of satellite-based communications—namely increased efficiency, precision, and volume of information transmitted—are self-evident; however, the US lead in the transition to space-based systems posed a threat: relying on satellites for military use more than any other country created an asymmetric dependency."[61]

By extension, these weapons can potentially serve as great conflict deterrents.[62] Even countries with ASAT technology must consider the high risk of engaging in hostilities with a country like the United States or China, who possess advancing versions of this technology. Simply stated, "[i]f they both can 'turn off' each other's militaries—or deny access to the satellites upon which their opponent's conventional and nuclear forces rely—both countries are rendered close to defenseless, a risk they would be extremely reluctant to take."[63] As such, the United States has a particularly high interest in the continued proliferation of these weapons. But this means that other nations also share this interest. This runs of the risk of the onset of a "uniquely dangerous" arms race because despite the theoretical deterrent that ASATs purport to be, they are more likely to exacerbate tensions than chill them.[64] This is ultimately because ASATs and other space borne weapons make space an offensive dominant sphere.[65] Due to the expense and the technological limitations needed to create a more defensive posture vis a vis space weaponry, "offensive tactics like weapons development are prioritized over defensive measures, such as improving GPS or making satellites more resistant to jamming."[66] The recognition that nations will almost certainly choose offensive over defensive measures makes the nature of this potential conflict volatile. Professor Jonson Freese of the Naval War College, in light of the risks posed by ASATs and other space weaponry, presented the ultimate question: "How do we protect our space assets without

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Blatt, *supra* note 60
[65] *Id.*
[66] *Id.*

creating the exact conditions for an arms race that leads to a war in space?"[67]

Second, this arms race will likely encourage the creation and proliferation of other types of space weaponry that current regulatory schemes are unable to properly curtail. This arms race showcases the weaknesses of current space regulations.[68] Civilian and military operations in space are, for the most part, regulated by means of five treaties: The 1967 Outer Space Treaty, the 1968 Astronaut Rescue Agreement, 1971 Liability Convention, 1975 Registration Convention, and the 1979 Moon Convention.[69] Despite these regulations, ASAT proliferation has continued and evidences how countries will push the boundaries of conflict and strategic superiority in space. While further proliferation is certainly a primary concern, nations and international organizations alike should be more concerned for what happens after they are put into use. Not only are countries finding gaps to militarize space, but they are also likely to find gaps that allow them to absolve themselves of legal responsibility if they decide to use these weapons. While areas of terrestrial international law are extended to Space, their direct application is unclear at best. Here, space can draw a parallel to terrestrial cyber-attacks and cyber law to further exhibit the shortfalls of current international law as a whole in space. Article 2(4) of the UN Charter states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[70] In an era of increased risk of cyber-attacks on both military and civilian targets, the international community has yet to come up with a universal regulatory response. As of now "there are no internationally accepted criteria yet for determining whether a nation state cyber-attack is a use of force equivalent to an armed attack, which could trigger a military

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[67] Bryan Bender & Jacqueline Kilmas, *Space War is Coming – and the U.S. is not ready*, POLITICO, (Apr. 6, 2018), *available at* https://www.politico.com/story/2018/04/06/outer-space-war-defense-russia-china-463067 (last visited Sept. 27, 2022).

[68] *See* Dale Stephens, *Military Space Operations and International Law*, JUST SECURITY (Mar. 2, 2020), *available at* https://www.justsecurity.org/68815/military-space-operations-and-international-law/ (last visited Sept. 27, 2022).

[69] *Id.*

[70] U.N. Charter art. 2, ¶ 4.

response."[71] Even as countries like China, Russia and Iran persistently and with increasing audaciousness engage in cyber-attacks, the world has yet to concretely define if these actions violate their own laws and if so, what the legally permissive response is.[72] This will almost certainly be even more problematic in under regulated space. The following questions of international law are of the utmost importance and their dubious or non-existent answers foreshadow the risk that reactionary, rather than proactive, regulation in space poses:

Does jamming, dazzling, or damaging a satellite amount to a use of force prohibited under Article 2(4) of the United Nations Charter and customary international law? If so, when? Is it lawful to declare and operate "space exclusion zones," even though States are prohibited from claiming sovereignty in space under Article II of the Outer Space Treaty? During an international armed conflict, does a belligerent State have right to capture and detain astronauts when they are also members of enemy armed forces, even though States are obliged to rescue and return them as "envoys of mankind" under Article V of the Outer Space Treaty?[73]

These questions of international law are currently only theoretical due to our technological limitations, but will almost definitely breed an exigent crisis when the technology finally matches the ambitions of these nations. In particular, the confusion stemming from the lack of or under regulation of space will set off a pattern of "cherry picking" international law.[74] This phenomenon would involve nations choosing which provisions of current international law it would like to see applied in the outer space context.[75] By virtue of this risk, and the havoc that would ensue if it became a common practice of nations,

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[71] *See Use of Force in Cyber Space,* CONGRESSIONAL RESEARCH SERVICE (Dec. 10, 2021), *available at* https://sgp.fas.org/crs/natsec/IF11995.pdf (last visited Sept. 27, 2022).

[72] *See China Cyber Threat Overview and Advisories*, CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY, *available at* https://www.cisa.gov/uscert/china (last visited Sept. 26, 2022).

[73] Hitoshi Nasu, *NATO Recognizes Space as an "Operational Domain": One Small Step Toward a Rules-Based International Order in Outer Space*, JUST SECURITY (Mar. 4, 2020), *available at* https://www.justsecurity.org/68898/nato-recognizes-space-as-an-operational-domain-one-small-step-toward-a-rules-based-international-order-in-outer-space/ (last visited Sept. 26, 2022).

[74] *Id.*

[75] *Id.*

there is an urgent need to establish the rules by which state actors and private companies or individuals operate in space.[76]

To minimize the risk of yet another convention that is obsolete at the time of signing, the UN Convention on the Law of Space should begin to codify the provisions of the Woomera Manual with regards to these issues.[77] The Woomera Manual is an academic endeavor to "objectively articulate and clarif[y]" existing international space law.[78] The impetus of the Woomera Manual's creation was the risk outlined in the above section.[79] The authors of the Woomera Manual saw the need for this non-governmental guidance because the

> lack of normative clarity presents the risk of State or non-State actors taking action involving outer space that might be misunderstood by others, or even characterized as unlawful. It also allows States that might wish to conduct hostile space operations to do so in a zone of uncertainty, that complicates responses by other States.[80]

This is not the first time an endeavor like this has been undertaken. The authors of the Woomera Manual bolster their claim that this manual is a positive contribution to a new domain by pointing to other instances in which similar manuals have borne success. Specifically, they point to the San Remo Manual on International Law Applicable to Armed Conflict at Sea, the Harvard Manual on International Law Applicable to Air and Missile Warfare, and both versions of the Tallinn Manual on International Law Applicable to Cyber Operations.[81] These are shining examples of why Woomera not only needs to be expanded upon as space technology advances, but ultimately relied on as the regulatory body develops.

Using Woomera as a starting point for this Convention's provisions, the drafters will be solving multiple issues at once. First, the world would be that much closer to having a universal understanding as to how current international law applies to space.[82]

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[76] *Id.*

[77] *See Woomera Manual*, UNIV. OF ADELAIDE, *available at* https://law.adelaide.edu.au/woomera/ (last visited Sept. 26, 2022).

[78] *Id.*

[79] *Id.*

[80] *See Woomera Manual*, UNIVERSITY OF ADELAIDE, *available at* https://law.adelaide.edu.au/woomera/ (last visited Sept. 24, 2022).

[81] *Id.*

[82] *See Woomera Manual*, University of Adelaide, *available at* https://law.adelaide.edu.au/woomera/ (last visited Sept. 24, 2022).

Second, this would provide the newer provisions with much needed foundational support. Nations will be freer to explore the implications of new provisions of the Convention once they are confident that existing international law is adequately applied and understood. Further, once nations understand how international law already applies to space, they will be more aptly situated to truly cultivate what they want space regulation to look like.

By codifying what the Woomera Manual has found to be settled in international space law and having open debate about the areas of law it perceives to contain conflicting positions, this Convention will be better overall.[83] In particular, it will imbue upon space some of the important tenants of other comparable areas of international law. Specifically, this section of the convention will serve to clarify what distinction, proportionality, and precautions in space look like.[84] Customary international law has generally made the distinction between that which is civilian and that which is military.[85] In space, humans will once again need to establish what levels of distinction are necessary. International scholars already struggle with this idea in cyber law.

Cyber-attacks are to be carried out on targets with a military purpose.[86] However, systems that are dual use, insofar that they contain military and civilian elements, present a unique challenge for policy makers and world leaders alike.[87] It is possible for

a civilian object like a computer, computer networks, and cyber infrastructure, or even data stocks, [to] become a military target, if used either for both civilian and military purposes or exclusively for the latter. However, in cases of doubt, the determination that a civilian computer is in fact used to make an effective contribution to military action may only be made after a careful assessment. Should

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[83] Hitoshi Nasu, *NATO Recognizes Space as an "Operational Domain": One Small Step Toward a Rules-Based International Order in Outer Space*, JUST SECURITY (Mar. 4, 2020), *available at* https://www.justsecurity.org/68898/nato-recognizes-space-as-an-operational-domain-one-small-step-toward-a-rules-based-international-order-in-outer-space/ (last visited Sept. 27, 2022).

[84] Stephens & Steer, *supra* note 51.

[85] *Id.*

[86] *Military Objectives,* INTERNATIONAL CYBERLAW TOOLKIT, *available at* https://cyberlaw.ccdcoe.org/wiki/Military_objectives (last visited Sept. 26, 2022)

[87] *Id.*

substantive doubts remain as to the military use of the object under consideration, it shall be presumed not to be so used.[88]

In the cyber sphere, consideration of an attack's effect sits at the center of most distinction questions.[89] Similarly, the world must decide with specificity what distinctions should be made with regards to dual use space assets. From GPS to communications, conflict in space will be riddled with discussions of how to distinguish civilian from military uses. In this regard, the Woomera Manual can help international policymakers determine the appropriate rule to promulgate in the sphere of space regulation.[90] Distinction questions are further complicated when countries begin to consider proportionality and precautions to be taken in these matters; all are issues that cyber law currently grapple with; but all are issues that space law could address proactively.[91]

National security will be a concern as human beings look upward, but the militarization of space will be the paramount concern. The implementation of the Woomera Manual as a starting point for not only discussions but also a bedrock framework for this section of the UN Convention on the Law of Space keeps this proposal on the right track.

C. THE FUTURE OF COMMERCE AS A NATIONAL SECURITY CONCERN IN SPACE

Professor Steven Freeland spoke of "'technology encouraging law' or, as might be more accurate in the case of outer space regulation, 'law chasing technology' . . . ."[92] In particular, he spoke about the risks involved in space tourism.[93] As he describes it, space tourism presents a wide array of complex legal issues that policy

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[88] *Id.*

[89] *Id.*

[90] *See* Roger Handberg, *Dual Use as Unintended Policy Driver: The America* Bubble, in SOCIETAL IMPACT OF SPACEFLIGHT 353-68 (Roger Launius & Steven Dick eds., 2007), *available at* https://history.nasa.gov/sp4801-chapter18.pdf (last visited Sept. 27, 2022).

[91] Stephens & Steer, *supra* note 51.

[92] Steven Freeland, *How Will International Law Cope with Commercial Space Tourism*, 11 MELBOURNE J. OF INT'L L. 93 (2010).

[93] *Id.*

makers must grapple with in this subsection of an already complex area of the law.[94]

Professor Freeland reiterates that

[i]n essence, outer space is "free" for use—tourist activities that take place in outer space are not subject to prior consent on the part of any sovereign state, although they will remain subject to the obligation of the "appropriate" state to authorize and continually supervise such private commercial ventures, as specified in art VI of the *Outer Space Treaty*.[95]

However, without a clear definition of where space begins, not only is there a question of how to regulate, but there is also a broader conflict as to at what altitude space law begins to govern.[96] Clarity here is vital for some reasonable expectation of freedom from harm from other states in an already risky endeavor upwards.

As Elon Musk and Jeff Bezos set their sights on space, distinction of when space begins has deep-seated business implications and is also a concern for human life..[97] Billionaires such as Jeff Bezos and Elon Musk wish to build business parks and expand the commercial use of space in the coming decade.[98] These ambitious plans pose a national security risk in future space travel. Much like on Earth's seas, space has the potential for abuse by nations, particularly if left underregulated. Specifically, the freedom of navigation that is generally assured on Earth's seas needs to be assured in space if commerce is to truly thrive. This concern is heightened by two realties: [1] Space will increasingly be occupied by adversaries of the United States, especially as its interest in space wanes, and [2] companies that head to space will unavoidably be more vulnerable there than they are on the seas.

First, while China, Russia, and other adversaries head upwards, some of their international law violations will likely follow them upwards.[99] China presents a special concern for space bearing

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[94] *Id.*

[95] *Id.*

[96] Freeland, *supra* note 92.

[97] Supra Sec. IV(B).

[98] *See* A. Tarantola, *Billionaire space barons want to build 'mixed use business parks' in low Earth orbit*, ENGADGET (Feb. 4, 2022), *available* at https://www.engadget.com/billionaire-space-barons-want-to-build-mixed-use-business-parks-in-low-Earth-orbit-153050603.html (last visited Sept. 26, 2022).

[99] *See* Broad, *supra* note 56.

companies due to their established aversion to freedom of navigation on the seas.[100] A prime example of this is a recent maritime rule promulgated by China in the South China Sea.[101] This rule, which is in clear violation of international law, including the UN Convention on the Law of the Sea, "requires foreign vessels to report information such as their name, call sign, current position, destination and cargo before sailing through the country's 'territorial sea.'"[102] Such affronts to international law, which are already a risk to free navigation and commerce on Earth, will almost definitely find their way into underregulated space. The striking absence of the United States in space makes this prediction even more concerning.

On the seas, order can generally be assured by virtue of the United States Navy, which is viewed as the world's preeminent "blue water" navy.[103] The US Navy generally maintains peace and ensures compliance with international law; if present space policy remains, companies and nations alike will not have this protection in space.[104] While the world cannot control what the United States does with its own foreign policy, it can mitigate the risks associated with their absence. The United Nations Convention on the Law of Space is a mitigation tactic and more. At the very least, by filling in the gaps left by inadequate space regulation, the world has a chance to curtail predicted abuses in space by means of a clearly promulgated set of

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[100] *See 7th Fleet Destroyer Conducts Freedom of Navigation Operation in the South China Sea*, NAVY. MIL (Feb. 16, 2021), *available at* https://www.navy.mil/Press-Office/News-Stories/Article/2505124/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/ (last visited Sept., 27, 2022).

[101] Jong Feng, *U.S. Says China Maritime Law Poses 'Serious Threat' to Freedom of the Seas*, Newsweek (Sept. 2, 2021), *available at* https://www.newsweek.com/us-says-china-maritime-law-poses-serious-threat-freedom-seas-1625257 (last visited Sept. 27, 2022).

[102] *Id.*

[103] *See* Kyle Mizokami, *Blue Water Navy Time: How China is Close to Overtaking America*, THE NATIONAL INTEREST (Jan. 28, 2020), *available* at https://nationalinterest.org/blog/buzz/blue-water-navy-time-how-china-close-overtaking-america-117916 (last visited Sept, 27, 2022).

[104] *See* Jonathan Masters, *Sea Power: The US Navy and Foreign Policy*, Council on Foreign Relations (Aug. 19, 2019), *available at* https://www.cfr.org/backgrounder/sea-power-us-navy-and-foreign-policy (last visited Mar. 8, 2022).

rules that coincide with a clearly promulgated set of consequences attached.[105]

Wrapping the risks to commerce into national security concerns will be strategically essential for all nations, and it is likely that increased cooperation between governments and corporations in the early years of the new space era will be needed. The risks of conflict involving private actors being imputed back to their home nations is too high to not plan accordingly. By these circumstances alone, there is an exigent need for this Convention, or some form a piecemeal regulation while the world waits for it to arrive.

V. Current Status of International Space Affairs From a US Perspective

The risk that underregulated space poses to the security of the United States has not been lost on the leadership of the world's most expensive military.[106] In December of 2019, the United States established a new branch of the military: The US Space Force.[107] One justification for a military branch dedicated to space was that "the military and civilian advantages created by greater use of space have also created new vulnerabilities."[108] The fact of the matter is that the US military, as well as its civilian economy, are becoming

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[105] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 18 U.S.T. 2410 610 U.N.T.S. 205, 61 I.L.M. 386 (1967);
see Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 U.N.T.S. 22, 18 I.L.M. 1434 (1979); *see* Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 9 U.S.T. 7570, 672 U.N.T.S. 119, 7 I.L.M. 149 (1968); *see* Convention on International Liability for Damage Caused by Space Objects, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 i.L.M. 965 (1972); *see* Convention on Registration of Objects Launched into Outer Space, 28 U.S.T. 695, 1023 U.N.T.S. 15, 14 I.L.M. 43 (1975).

[106] *See* Stephens & Steer, *supra* note 51.

[107] *United States Space Force History*, UNITED STATES SPACE FORCE, *available at* https://www.spaceforce.mil/About-Us/About-Space-Force/History/ (last visited Mar. 1, 2022).

[108] Robert Farley, *Space Force: Ahead of Its Time or Dreadfully Premature?*, CATO Institute (Dec. 10, 2020), *available at* https://www.cato.org/policy-analysis/space-force-ahead-its-time-or-dreadfully-premature#what-space-why-does-it-need-military (last visited Oct. 16, 2022)

increasingly dependent on space for basic necessities.[109] This all comes at a time when adversarial nations, such as Russia, are bolstering their militarizing efforts in space, including the implementation of ASATs.[110] Reducing this risk down to a single assessment, there are systemic and potentially crippling threats to both civilian and military infrastructure that stem from a global effort towards space.

The Department of Defense has its eyes on China in particular. China is looking to expand its reach both terrestrially and extra-terrestrially.[111] In both instances, the Department of Defense has stated that it will constantly assess its strategy and capabilities to "meet the China challenge."[112] However, there may be some hope that China's increased presence in space is merely a threat. In 2008, China and Russia submitted the beginnings of a treaty that would essentially prevent the placement of weapons in outer space.[113] This treaty ended up getting bogged down by questions of its ability to be a binding document.[114] Even still, the UN commissioned a group to explore some version of international agreement on the subject, but they ultimately came to no consensus.[115]

Regardless, this effort on China's part cannot distract the world from their increased interest in space in consideration of their actions here on Earth. China is currently planning a mission to the moon, a mission to explore Jupiter, and a wide array of space tourism.[116] These

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[109] *Id.*

[110] *See* Stephens & Steer, *supra* note 51.

[111] *See Global Conflict Tracker*, COUNCIL ON FOREIGN RELATIONS, *available at* https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea (last visited Sept. 22, 2022).

[112] Terri Moon Cronk, *Hicks Says DOD to Link Strategy, Capabilities to Meet China Challenge,* United States Space Command (Sept. 8, 2021), *available at* https://www.defense.gov/News/News-Stories/Article/Article/2767985/hicks-says-dod-to-link-strategy-capabilities-to-meet-china-challenge/ (last visited Mar. 1, 2022)

[113] Hitoshi Nasu, *NATO Recognizes Space as an "Operational Domain": One Small Step Toward a Rules-Based International Order in Outer Space*, JUST SECURITY (Mar. 4, 2020), *available at* https://www.justsecurity.org/68898/nato-recognizes-space-as-an-operational-domain-one-small-step-toward-a-rules-based-international-order-in-outer-space/ (last visited Oct. 16, 2022).

[114] *Id.*

[115] *Id.*

[116] Arjun Kharpal, *China plans crewed moon mission, tourism and Jupiter exploration in space race with the U.S.*, CNBC (Jan. 31, 2022), *available at*

efforts seem to only be the beginning. China has a busy five years planned for their space efforts.[117] Experts comment "[i]n the next five years, China will continue to improve the capacity and performance of its space transport system and move faster to upgrade launch vehicles." China's give-year plan states "[i]t will further expand the launch vehicle family, send into space new-generation manned carrier rockets and high-thrust solid-fuel carrier rockets and speed up the R&D [research and development] of heavy-lift launch vehicles."[118] Some people see these efforts as a positive step for China and the world stating that "[t]he space industry will contribute more to China's growth as a whole, to global consensus and common effort with regard to outer space exploration and utilization and to human progress."[119] But, China's actions on Earth may be an indicator as to what their posture in space may be. In particular, the South China Sea conflict illuminates two overarching risks. First, there is a risk that involves China holding too much of the power in forming traditional and customary international law in this new commons.[120] Second, there is a concern as to whether China will comply with established international law once space law is more established, like they do with their maritime claims in the South China Sea.[121]

In tandem with the aims of nations, multinational corporations show no sign of lessening their space ambitions. Jeff Bezos, Elon Musk, and others are all but destined to continue to innovate in this sphere. What do all of these space ambitions have in common? They are all a risk if space is underregulated. From commercial to military uses, space has the potential to create or exacerbate conflict here on Earth. As such, space regulation is quickly taking precedence over other policy concerns as it engulfs twenty-first century research. As

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https://www.cnbc.com/2022/02/01/china-space-plans-crewed-moon-mission-tourism-jupiter-exploration.html (last visited Sept. 22, 2022).

[117] Mike Wall, *China lays out ambitious space plans for next 5 years*, Space.com (Jan. 29, 2022), *available at https://www.space.com/china-five-year-plan-space-exploration-2022* (last visited Sept. 22, 2022).

[118] *Id.*

[119] *Id.*

[120] *See Study on the People's Republic of China's South China Sea Maritime Claims*, U.S. DEPARTMENT OF STATE (Jan. 12, 2022), *available at* https://www.state.gov/study-on-the-peoples-republic-of-chinas-south-china-sea-maritime-claims/ (last visited Sept. 19, 2022).

[121] *Id.*

such, it is in the interest of all nations to have adequate, specific, and meaningful legislation in this area. The UN Convention on the Law of Space meets these needs and once again prioritizes the need for international cooperation in space.

VI. Recommendation: The United Nations Convention on the Law of Space

Much like the sea, space's vastness challenges not just our understanding of the commons, but also how humans should interact within it. As such, the world must enact a UN Convention on the Law of Space.

First, the UN Convention on the Law of Space will make up for the inadequacies of current regulations. While the Outer Space Treaty and other subsequent agreements embody the spirit of space regulation, they do not nearly go far enough. In the new space race, the risks of space under-regulation increases in tandem with humankind's advancements in space travel, commerce, and militarization. The emergence of ASATs and the increase in both national and private action in space facilitate the need for clear boundaries if we are to be proactive in our efforts above Earth.

Second, this agreement would begin to ensure security for countries, businesses, and individuals alike. The fact is that space is about to change at an unanticipated rate. From private actors to new state actors, what was once a vast emptiness will ultimately become a bustling and relatively busy commons. Unlike the sea, space does not have a blue water navy equivalent to police its rules. As such, the risk of states and corporations flexing their muscle is too high to be left unchecked. While these types of agreements are not perfect in enforcement or deterrence, they stand as the backbone of humankind's view for what the fair and equitable use of space is.

Lastly, the UN Convention on the Law of Space is the world's chance to truly shape a commons rather than simply codify and correct past norms. Unlike the sea, humans are new to traveling space. As such the law now has an opportunity to, at the very least, pace our advancements in space. Human beings are now faced with a unique opportunity to prevent issues rather than react to them. In the decades to come, this proposed agreement can stand as the building block of a truly peaceful attitude towards space and represent hope that humans

will be able to leave our petty differences on the ground where they belong.

VII. Why Does a UN Convention on the Law of Space Solve the Problem?

As stated above, this convention allows the international community to get a better handle on a rapidly changing situation. But, with UNCLOS as a guide, there is so much more that a UN Convention on the Law of Space has to offer.

First, this convention, like UNCLOS, will offer a space-specific dispute resolution method. If one of the main concerns about space is the conflict therein, then there must be a "one stop shop" for resolving space conflicts in an amicable manner; keeping not only with this Convention but the UN Charter at large.[122] Particularly, the UN Convention on the Law of Space needs to mirror specific provisions of the UN Convention on the Law of the Sea. Article 279 of UNCLOS requires that disputes be settled by "peaceful means" in accordance with the UN Charter.[123] It must also encompass many, if not all, of the Articles from 280 onward to facilitate a clear and equitable process by which to bring and try disputes.[124]

Second, this Convention will set clear guidelines for what human beings want to permit in space activities. This will range from the specific provisions needed to regulate space to broader and more symbolic provisions. Specifically, the world needs to reaffirm that space is, was and will continue to be for the common and peaceful use of mankind.[125]

Third, it will officially establish long-lasting and adaptable space law. The impetus of this Convention is simply that, as is, space law is obsolete. The UN Convention on the Law of Space will do what UNCLOS before it accomplished for the Sea. The UN Convention on the Law of the Sea is "[a]n unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses

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[122] *See* U.N. Charter art. 1 & 2.

[123] United Nations Convention on the Law of the Sea, *supra* note 23, at art 279.

[124] United Nations Convention on the Law of the Sea, *supra* note 23, at arts. 280 – 299.

[125] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 18 U.S.T. 2410 610 U.N.T.S. 205, 61 I.L.M. 386 (Dec. 19, 1967).

of the ocean, and thus bring a stable order to mankind's very source of life."[126] The proposed United Nations Convention on the Law of Space has the potential to do this and more. The UN Convention on the Law of the Sea, entered into force in 1994, came centuries after humankind found themselves navigating the seas.[127] By contrast, the United Nations Convention on the Law of Space will enter into force only decades after human beings first found their way into space.[128] As such, human beings will get to actively form the basis upon which all future space law is built, rather than dealing with centuries-old customs such as with the Law of the Sea.

Fourth, the Convention can ensure that all peoples and nations have access to this commons by setting uniform standards. Space is an area of human interest that seems, more so than most other international issues, to have some form of a common stride towards global consensus. As such, standards must be set to ensure that certain realities of terrestrial law and operations do not make their way into space. At the moment, mostly rich and powerful nations have space bound capabilities. But this will not be the case forever. The UN Convention on the Law of Space gives poorer and less powerful nations the chance to have a say in regulations that do not apply to them currently but will when they eventually achieve space travel. This moment is a chance to get things right by demanding that the political realities of Earth do not hamper the efforts to regulate a commons for the good of all mankind.

VIII. How Do We Get to the Space Convention?

The prospect of forming, let alone broadly passing, a UN Convention on the Law of Space is not only daunting but is seemingly a longshot at best. Agreements like these have their foundation in hard fought, and generally unlikely, international cooperation. The UN

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[126] *See The United Nations Convention on the Law of the Sea (A historical perspective)*, UN (1998), *available at* https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (last visited Sept. 25, 2022).

[127] *United Nations Convention on the Law of the Sea Overview and Full Text*, UN (last updated July 13, 2022), *available at* https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (last visited Sept. 25, 2022).

[128] NATIONAL GEOGRAPHIC, *supra* note 1.

Convention on the Law of Space not only would clarify humans' rights and obligations in space, but it would also put forth a sweeping regime paralleled only by the UN Convention on the Law of the Sea. This is a lofty goal to say the least. However, there is some hope that meaningful strides can be taken in this direction. Space, unlike most other areas of international concern and regulation, harbors a refreshing amount of international cooperation.[129] It would behoove the would-be drafters and proponents of this convention to utilize this unique cooperation to make incremental, yet meaningful, steps towards the ultimate goal of drafting and ratifying a UN Convention on the Law of Space.

The first area to be tackled would be the militarization of space.[130] Implementing the broader strokes of the Woomera Manual would serve two purposes in the lead up to eventually passing a UN Convention on the Law of Space. First, implementation of the Woomera Manual prior to the formation of this Convention is an important step which would minimize the risk of conflict in the interim. Woomera contains clarifications of current international law and seeks to identify broader conflicts in this sphere as well.[131] Codifying this legal framework while simultaneously making strides to resolve known conflicts of international space law lessens the risk that comes with waiting for a UN Convention on the Law of Space to be ratified. Second, a preexisting framework will make the ultimate cultivation of the UN Convention on the Law of Space easier. Much of what was encompassed within the UN Convention on the Law of the Sea was codified preexisting customary law and international law norms.[132] Negotiations then centered around those provisions that were more dubious in their acceptance or simply had not been regulated prior.[133] Implementing some of the recommendations of the Woomera Manual will have a similar effect. By summarily transferring an existing legal framework into this Convention, time

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[129] *See International Cooperation in Outer Space*, U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN VIENNA (Apr. 30, 2021), *available at* https://vienna.usmission.gov/international-cooperation-in-outer-space/ (last visited Sept. 25, 2022).

[130] *Supra* Sec. IV(B).

[131] *See Supra* note 80.

[132] *See United Nations Convention on the Law of the Sea*, *supra* note 126.

[133] *Id.*

can be spent on issues of genuine dispute which all nations should expend time and effort to resolve.

The second concern that should be addressed, and that should be worked into existing conversations about terrestrial pollution, is extraterrestrial pollution. As mentioned above, space debris has a potentially detrimental effect on both our national security and our commerce.[134] With civilian and military assets becoming increasingly dependent upon satellites, space debris threatens further expansion in space and the protection of preexisting assets.[135] As such, the threat to human beings' way of life cannot wait any longer to be addressed. Much like terrestrial pollution, space pollution is a pressing issue that should be at the forefront of international conversation for the sake of mankind's long-term well-being.

Overall, pre-Convention efforts such as regulating space debris or codifying the Woomera Manual represent a piecemeal approach to this convention that serves two important ends. First and most importantly, it begins to close the gap on how far behind the law is compared to the advancements of space technology and space bearing nations. Secondly, it ensures that the dialogue that will lead to this essential United Nations Convention on the Law of Space occurs. In the end, this convention will benefit all of mankind and as such we must not be intimidated by the uphill battle to bring it to fruition but rather, we should plan for all different avenues to make it so.

We cannot allow space exploration to become space exploitation.

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[134] *See Space Debris and Human Spacecraft*, *supra* Sec. IV(A).

[135] *See* Stephens, *supra* Sec. IV(A)(B).

NUCLEAR ENERGY FOR THE TABLE, PLEASE

Ryan Ockenden

Introduction

When you hear the word "nuclear," what comes to mind is likely the image of a bright green, viscous liquid; or maybe you see Homer Simpson squirrelly working at the Springfield nuclear power plant. When you hear the word "energy," you likely think of that feeling you try to achieve through countless cups of coffee throughout the workday. Separately, these words are innocent enough; together, not so much. Fears of nuclear meltdowns, radiation, and a generation of people with three arms and fifteen toes live rent-free in many people's imaginations. The environment, however, would benefit from a societal paradigm shift to see nuclear energy for what it is: An energy option worth investing in.

At COP21[1] in 2015, the international community adopted a legally binding treaty on climate change, better known as the Paris Climate Agreement [hereinafter Paris Agreement].[2] The Paris Agreement was monumental for climate change efforts, coming a long way to extinguish the controversies surrounding Al Gore's climate change crisis warning in *"An Inconvenient Truth."*[3] With the Paris Agreement came a goal-setting process that binds nations under the common cause of combating global warming by lowering greenhouse gas emissions as soon as possible, and

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[1] "The [Conference of the Parties] is the supreme decision-making body of the [U.N. Framework Convention on Climate Change]. All States that are Parties to the Convention are represented at the COP, at which they review the implementation of the Convention and any other legal instruments that the COP adopts and take decisions necessary to promote the effective implementation of the Convention." *Conference of the Parties (COP)*, UNFCCC (n.d.), *available at* https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop (last visited Jan. 16, 2023).

[2] *COP 21*, UNFCCC (n.d.), *available at* https://unfccc.int/event/cop-21 (last visited Jan. 16, 2023).

[3] Al Gore's warning on the effects of climate change were viewed by many as politically motivated; people saw it as him setting up a platform to run for president again. Many Americans discredited the science behind climate change, and the world lost valuable time to heed the impending dangers. *See* Peter S. Canellos, *Gore's Ecology Film Gets An 'Inconvenient' Label of Liberalism*, THE BOS. GLOBE (June 6, 2006), *available at* http://archive.boston.com/news/nation/articles/2006/06/06/gores_ecology_film_gets_an_inconvenient_label_of_liberalism/ (last visited Jan. 16, 2023).

helping one another to do so.[4] Nearly a decade out from the birth of this agreement, and the very goals set forth are at risk of falling apart.[5] Scientists suspect that financial assistance for climate efforts, water security, and food systems will all worsen at the current warming rate, which will lead to tension within and across borders.[6] Additionally, a warmer planet will cause more intense heat waves, wildfires in areas that do not have the infrastructure to combat them, and rising sea levels causing coastal city flooding and species extinctions.[7] In order to address these horrifying outcomes, daring solutions should be encouraged.

Please welcome to the table: Nuclear energy. Why on Earth should the international community reinvest in nuclear energy? It is expensive,[8] people fear nuclear waste and the effects of radiation,[9] and countries have been decommissioning nuclear power plants for years.[10] Plus, renewable energy technologies, such as wind, solar, and hydro-power, can fix climate change right now, so why go backwards with technology, right? Wrong. Nuclear energy is the cleanest, most efficient energy on the market,[11] and although renewable energy has grown significantly during the twenty-first century, there are significant roadblocks for full renewable reliance.

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[4] *The Paris Agreement*, UNFCCC, *available at* https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited Jan. 16, 2023).

[5] *See World is off track to meet Paris Agreement Climate Targets*, U.N. ENV'T PROGRAMME (Sept. 16, 2021), *available at* https://unepccc.org/world-is-off-track-to-meet-paris-agreement-climate-targets/ (last visited Jan. 16, 2023).

[6] *See United in Science 2021*, U.N. ENV'T PROGRAMME (Sept. 16, 2021), *available at* https://library.wmo.int/doc_num.php?explnum_id=10794 (last visited Jan. 16, 2023).

[7] *See Climate Change and International Responses Increasing Challenges to U.S. National Security Through 2040*, NAT'L INTEL. COUNCIL (Oct. 21, 2021), *available at* https://www.dni.gov/files/ODNI/documents/assessments/NIE_Climate_Change_and_National_Security.pdf (last visited Jan. 16, 2023).

[8] *See generally Status Report 2021*, WORLD NUCLEAR INDUS. STATUS REP., *available at* https://www.worldnuclearreport.org/IMG/pdf/wnisr2021-lr.pdf (last visited Jan. 16, 2023).

[9] *Why America is Scared of Nuclear, But Shouldn't Be*, CONSERVAMERICA (Oct. 18, 2019), *available at* https://www.conservamerica.org/latest-news/why-america-is-scared-of-nuclear-but-shouldnt-be (last visited Jan. 16, 2023).

[10] Stuart Braun, *Nuclear Melts Down Ahead of Climate Summitt,* DEUTSCHE WELLE (Sept. 28, 2021), *available at* https://www.dw.com/en/world-nuclear-industry-status-report-climate-renewables/a-59338202 (last visited Jan. 16, 2023).

[11] *Fundamentals: Nuclear Provides Carbon-Free Energy 24/7*, NUCLEAR ENERGY INST., *available at* https://www.nei.org/fundamentals/nuclear-provides-carbon-free-energy (last visited Jan. 16, 2023).

Proceeding in five parts, this paper addresses the value of reinvesting in nuclear energy, and why continuing nuclear power plant decommissioning is harmful for international climate objectives. In Part I, this paper provides the background on nuclear energy use across the planet, as well as where the international community stands on meeting climate objectives under the Paris Agreement. In Part II, this paper addresses the concerns surrounding nuclear energy. In Part III, this paper analyzes why renewable energy alternatives are not ready to, and simply cannot, take over as the primary energy source for power grids. This includes assessing a rapidly growing global power demand, energy grid issues, productivity concerns, and the lack of land for renewable technologies to call home. In Part IV, this paper addresses the environmental value in expanding nuclear energy investment. This includes a discussion on how nuclear divestment leads to an erasure of existing environmental gains, and how nuclear energy will assist in closing the energy gap currently plaguing international climate objectives. Finally, in Part V, this paper offers how the international community can pursue nuclear reinvestment through utilizing license extensions, and investing in new nuclear technologies. Investment in nuclear energy will help the international community get closer to the path that climate change mitigation must be on if there stands a chance to prevent the horrifying effects of climate change.

I. Nuclear Energy and the Current Climate Crisis

Countries vary significantly in the amount that they rely on nuclear energy.[12] This reflects different sentiments that countries and their people have toward imagining nuclear power as part of their energy future. The over-arching trend is that the use of nuclear energy is waning, and countries are seeking alternatives.[13] At the same time, the climate objectives deemed necessary, under the Paris Agreement, to avoid irreparable harm to the planet are in dire straits.

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[12] *See generally* Hannah Ritchie ET AL., *Nuclear Energy*, Our World in Data (2020), *available at* https://ourworldindata.org/nuclear-energy (last visited Jan. 16, 2023).

[13] *Nuclear Power in a Clean Energy System*, INT'L ENERGY AGENCY 1, 3-4 (May 2019), *available at* https://www.iea.org/reports/nuclear-power-in-a-clean-energy-system (last visited Jan. 16, 2023).

A. THE HISTORY OF NUCLEAR ENERGY

Nuclear is the ugly duckling of the energy sector; perceived by many as unattractive and dangerous, but underneath, it holds the key to a beautiful, carbon-free energy future. Nuclear power plants operate in thirty-two countries, and account for meeting slightly more than ten percent of the world's energy demands.[14] In total, there are about 440 nuclear power reactors that operate practically year-round to provide electricity to those countries, and to countries without nuclear power plants that choose to import nuclear energy.[15] In order to construct and operate nuclear power plants, it takes a global effort. For example, a nuclear reactor built in China likely contains components constructed in South Korea, Canada, or Germany, and utilizes uranium from Australia or Namibia.[16] As mentioned, the amount that a country relies on nuclear power varies around the world. In 2020, nuclear energy generated 19.7% of electricity in the U.S., a whopping 70.6% of electricity in France, but only 4.9% of electricity in China.[17]

What also varies are countries' opinions on the role of nuclear power in their respective energy futures. In the U.S., the plan is to continue decommissioning nuclear power plants. During the second half of the last decade, the U.S. federal government closed ten nuclear power plants, representing about ten percent of the nuclear fleet.[18] The majority of those were closed before the end of their licensed periods, which the government justified due to high operating costs.[19] Similarly, many European countries are not interested in ramping up nuclear investments. For example, Germany, Denmark, and Spain are pushing back on efforts by other European nations—led by France—to include more nuclear power in the green energy future within the E.U.[20] Germany has long had

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[14] Ritchie ET AL., *supra* note 12.

[15] *Id.*

[16] *See id.*

[17] *Id.*, at illus. 4.

[18] *Nuclear Explained: U.S. Nuclear Energy*, ENERGY INFO. ADMIN. (Apr. 6, 2021), *available at* https://www.eia.gov/energyexplained/nuclear/us-nuclear-industry.php (last visited Jan. 16, 2023).

[19] Lois Parshley, *The controversial future of nuclear power in the U.S.*, NAT'L GEOGRAPHIC (May 4, 2021), *available at* https://www.nationalgeographic.com/environment/article/nuclear-plants-are-closing-in-the-us-should-we-build-more (last visited Jan. 16, 2023).

[20] Liz Alderman & Stanley Reed, *Europe Revisits Nuclear Power as Climate Deadlines Loom*, THE N.Y. TIMES (Nov. 29, 2021), *available at*

plans to phase out nuclear energy reliance starting around 2022,[21] primarily in response to the Fukushima meltdown in Japan in 2011, and their desire to increase reliance on renewable energy systems.[22] China, on the other hand, has a much more optimistic outlook on increasing nuclear energy use as part of their clean energy future. As the world's largest carbon dioxide [hereinafter CO_2] emitter, China plans to build at least 150 new reactors in the next fifteen years, with their eyes on outsourcing that energy to other nations, as well.[23] Although China, as a major polluter, is optimistic about the future of nuclear energy in meeting their international climate goals, other major polluters remain hesitant.

Nuclear energy usage worldwide decreased by nearly 4% between 2019 and 2020[24] and for now that same trend appears to continue with further retirements inevitable. The reasons behind nuclear energy hesitancy center around public fear of radiation, government regulations that make nuclear energy expensive,[25] nuclear waste concerns, and cross-border contamination in the event of an accident.[26] Proponents of continued nuclear energy investments are looking toward Small Modular Reactors [hereinafter SMRs] as safer and cheaper nuclear alternatives that do not sacrifice the inherent efficiency of nuclear power.[27] This alternative is thought to be easier to build and install than the large nuclear reactors that are used in current power plants.[28] There is optimism that SMRs can be lent to countries with less experience in the nuclear energy

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https://www.nytimes.com/2021/11/29/business/nuclear-power-europe-climate.html (last visited Jan. 16, 2023).

[21] Ritchie ET AL, *supra* note 12.

[22] Judy Dempsey & Jack Ewing, *Germany, in Reversal, Will Close Nuclear Plants by 2022*, THE N.Y. TIMES (May 30, 2011), *available at* https://www.nytimes.com/2011/05/31/world/europe/31germany.html?searchResultPosition=9 (last visited Jan. 16, 2023).

[23] Dan Murtaugh & Krystal Chia, *China's Climate Goals Hinge on a $440 Billion Nuclear Buildout*, BLOOMBERG (Nov. 2, 2021), *available at* https://www.bloomberg.com/news/features/2021-11-02/china-climate-goals-hinge-on-440-billion-nuclear-power-plan-to-rival-u-s (last visited Jan. 12, 2023).

[24] *Nuclear Power in a Clean Energy System*, *supra* note 13.

[25] *See* Samuel Miller McDonald, *Is Nuclear Power Our Best Bet Against Climate Change*, BOSTON REVIEW (Oct. 12, 2021), *available at* https://bostonreview.net/science-nature/samuel-miller-mcdonald-nuclear-power-our-best-bet-against-climate-change (last visited Jan. 12, 2023).

[26] Alderman & Reed, *supra* note 20.

[27] *Id.*

[28] *4 Key Benefits of Advanced Small Modular Reactors*, Off. of Nuclear Energy (May 28, 2020), *available at* https://www.energy.gov/ne/articles/4-key-benefits-advanced-small-modular-reactors (last visited Jan. 12, 2023).

market[29] thereby allowing faster worldwide implementation and reliance, not just production in countries that already have the appropriate technologies and infrastructure.

Utilizing nuclear power brings plenty of benefits to justify sustaining investments and implementing SMRs in future clean energy initiatives. First, nuclear power plants help to keep power grids stable because they can adjust their operations to meet demand changes.[30] This is important in instances of natural disasters, changing seasons, and growing populations, to prevent energy surges or energy losses. Second, currently operating nuclear reactors can operate (safety permitting) beyond their initial functional lives, often by multiple decades.[31] This benefits the energy sector by extending the use of a clean energy source without requiring the heavy time and money investment to construct new nuclear power plants using old reactor technologies.[32] In conjunction with extending operating licenses, investing in SMRs appears to be a cheaper alternative to constructing large-scale nuclear reactors, while lending a hand to expanding nuclear energy systems. Third, continuing nuclear power production buys time for the renewable energy sector to advance technologically without placing too large of a burden on power grids or the existing renewable energy market. At present, cutting out nuclear energy would require countries to further invest in fossil fuels since renewable energy technologies have not yet developed enough to handle the inevitable rise in energy demands.[33] Fourth, expanding nuclear energy investments has the potential to close the emissions gap by furthering the environmental gains already realized by utilizing nuclear energy.[34] Abandoning nuclear energy would be a critical mistake. If done, the cumulative CO_2 emissions are projected to rise by four billion tons over the next twenty years.[35] France recognized this reality and, in 2015, decided to push back their nuclear energy reduction plans by ten years because they feared rising CO_2 emissions.[36] Now, France is part of the group of European countries that are looking to

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[29] *See id.*

[30] *Nuclear Power in a Clean Energy System*, *supra* note 13.

[31] Office of Nuclear Energy, *What's the Lifespan for a Nuclear Reactor? Much Longer Than You Might Think*, U.S. Dep't. of Energy (Apr. 12, 2020), *available at* https://www.energy.gov/ne/articles/whats-lifespan-nuclear-reactor-much-longer-you-might-think (last visited Jan. 12, 2023).

[32] *Nuclear Power in a Clean Energy System*, *supra* note 13, at 4.

[33] *See id.*

[34] *Supra* note 13, at 4.

[35] *Id.*

[36] *Nuclear Power in a Clean Energy System*, *supra* note 14.

expand nuclear energy investments and integrate it into clean energy initiatives in the face of large-scale, global failure to meet international climate change goals.[37] It will be critical for the world's largest CO_2 polluters to recognize the value in reversing course on nuclear decommissioning as a way to meet the critical deadlines set forth in international climate treaties and agreements.

As of now, "around one-quarter of the current nuclear capacity in advanced economies is set to be shut down by 2025."[38] With this problematic move comes an important question: Has the international community quietly given up on saving the planet? Unfortunately, it feels that way. Without nuclear energy in the mix, a clean energy future, and keeping the Earth from dangerous warming, seem to be increasingly difficult mountains to climb.

B. THE CURRENT STATE OF CLIMATE CHANGE

On Earth Day 2016, the Paris Agreement opened for signature; entering force that November.[39] The agreement sets out ambitious climate change goals. Notably, the agreement seeks to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels" as a way to reduce the impacts of climate change.[40] The goal remains to significantly reduce carbon emissions by 2030, and to reach a net-zero emissions by mid-century.[41] Unfortunately, the failure alarm bells have already begun to ring.

As of the autumn of 2021, greenhouse gases in the atmosphere continue to rise at record levels, which is the largest indicator of future warming.[42] According to the United in Science 2021 Report, "there is an increasing likelihood that temperatures will temporarily breach the threshold of 1.5°C above the pre-industrial era in the next five years."[43] This means that the chance that global temperature will go above the end-of-century goal within the next five years is ever-increasing. This is a direct threat not only to climate targets, but to all living species and the

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[37] Alderman & Reed, *supra* note 20.

[38] *Nuclear Power in a Clean Energy System*, *supra* note 13.

[39] *The Paris Agreement*, U.N., *available at* https://www.un.org/en/climatechange/paris-agreement (last visited Jan. 24, 2023).

[40] Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

[41] *The Paris Agreement*, *supra* note 4.

[42] *World Is Off Track to Meet Paris Agreement Climate Targets*, *supra* note 5.

[43] *United in Science 2021*, *supra* note 6.

environment; a threat that is unique to the present. According to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, over the last two decades, global surface temperatures are nearly 1°C warmer than in 1850.[44] In the last decade, that number increased to about 1.1°C, but about 1.6.C° over land.[45] According to the report, it is more likely than not that human conduct has increased greenhouse gas concentrations which has led to more polar ice melting, heat waves, hurricanes and cyclones, and droughts.[46] These events have implications for coastal communities, species living on those coasts, global economies, and international security.

The U.S. intelligence community had stated that failure to meet global climate goals, as the world is set to do, will worsen geopolitical tensions, aggravate social stability, and cause an increase in the need for humanitarian aid.[47] Amongst the concerns, the National Intelligence Council identifies several key issues that will likely worsen. The need for financial and technological assistance for developing countries is currently rated a medium-level concern but by the end of the decade, the report projects this to be a high-level concern.[48] Additionally, cross-border water tensions and conflicts are currently rated as a low-level concern but by 2040, the intelligence community expects it to be a high-level concern.[49] Further, the strain on energy and food systems are a low-level concern but by 2040, it is expected to be a high-level concern.[50] In order to change these projections, "global emissions would have to drop sharply in the next decade and reach net zero by 2050" to change course on the international community's inevitable failure to limit warming to 1.5 C° above pre-industrial levels.[51] The impacts that global warming pose to human security because of these worsening issues are concerning. According to the report, more frequent and intense heat waves will impact

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[44] *Climate Change 2021: The Sixth Assessment Report*, UNIPCC at 5 (Aug. 7, 2021), *available at* https://www.ipcc.ch/report/ar6/wg1/#FullReport (last visited Oct. 18, 2022).

[45] *Id.*

[46] *See id.*

[47] Christina Pazzanese, How Climate Change Will Impact National Security, THE HARVARD GAZETTE (Nov. 24, 2021), available at https://news.harvard.edu/gazette/story/2021/11/how-climate-change-will-impact-national-security/ (last visited Oct. 18, 2022).

[48] *Climate Change and International Responses Increasing Challenges to U.S. National Security Through 2040, supra* note 7.

[49] *See id.*

[50] *See id.*

[51] *Id.* at 1.

labor productivity, wildfires, and human health.[52] More frequent and longer droughts will threaten food supplies, drive migration, and impact border security of wealthier and more secure nations.[53] Further, if Arctic ice continues to melt faster with the rising global temperatures, ocean circulation and salinity will be impacted, which will burden ocean and lake ecosystems, increase competition to trade routes, endanger coastal cities because of more dramatic storm surges, and threaten species' existence.[54] Each of these consequences will have a chain-reaction impact on trophic systems, which will worsen food and health security all the way up to humans, regardless of nationalities or borders.

Since the passage of the Paris Agreement, the emissions gap is larger than ever.[55] The emissions gap is the difference between projected emissions under current climate commitments, and the emission levels necessary to meet the goals of the Paris Agreement.[56] This indicates that current policies are missing the mark, and without large-scale decarbonization efforts, the Paris Agreement will be rendered useless. All of the aforementioned human security issues outlined in the U.S. intelligence community's report are more likely than not to occur, unless drastic changes are made in climate change mitigation plans.[57] Current climate mitigation plans are doomed to fail, and although high-polluter nations seem hard-pressed to make a change, they have yet to commit to the meaningful and necessary changes to keep their goals realistic. In the fall of 2021, at COP26, the international community reaffirmed their commitment to the objectives of the Paris Agreement, including phasing out fossil fuels,[58] one of the worst polluters for increasing global temperatures. While this commitment is important, it ignores the insufficiencies in present-day renewable energy capabilities. In 2019,

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[52] *Id.* at 2.
[53] NAT'L INTELLIGENCE COUNCIL, *supra* note 7.
[54] *Id.*
[55] U.N. ENV'T PROGRAMME, *supra* note 6.
[56] UNEP Copenhagen Climate Centre, *Emissions Gap Report 2021*, U.N. ENV'T PROGRAMME at 29 (Oct. 26, 2021), *available at* https://www.unep.org/resources/emissions-gap-report-2021 (last visited Jan. 16, 2023).
[57] NAT'L INTELLIGENCE COUNCIL, *supra note 7.*
[58] Alice Hill & Madeline Babin, *What COP26 Did and Didn't Accomplish*, COUNCIL ON FOREIGN RELATIONS (Nov. 15, 2021), *available at* https://www.cfr.org/in-brief/cop26-climate-outcomes-successes-failures glasgow?gclid=CjwKCAiA7dKMBhBCEiwAO_crFPnO-b6_IqeNu_rhocJ80VnTJQHf (last visited Jan. 16, 2023).

electricity generation made up 25% of all greenhouse gas emissions.[59] That is not a menial number. Almost all of those emissions come from fossil fuels, with fossil fuels making up about 62% of all electricity generation.[60] In order to meet climate goals, and to make significant changes to greenhouse gas pollution, countries must look to feasible and realistic solutions. Giving up on nuclear energy, as countries around the world are doing, is unwise. The role of nuclear energy moving forward is doomed if people continue to believe that renewables are well-positioned to fully replace all other energy sources. That position poses grave consequences to climate objectives because under those circumstances, fossil fuel reliance is only slated to rise, and all progress made on reducing greenhouse gases would be effectively erased.

II. The Risks of Nuclear Energy INVESTMENT

Nuclear energy must be part of the clean energy transition. In order to do so, the hazards of nuclear energy investment must be dissected. First, nuclear energy production comes with high operating costs that tend to drive away investors. Second, there are regulatory risks associated with continued operation of nuclear power plants. Third, nuclear energy creates waste that could be difficult to dispose of. Fourth, concerns about nuclear meltdowns and weapons impact public perception and investment. Fifth, nuclear energy skeptics do not believe that SMRs are even useful in the clean energy transition. Each of these concerns must be neutralized.

A. HIGH OPERATING COSTS

A first concern about nuclear energy is the high operating cost of continued investment. To determine the cost of an energy source over its lifetime, economists look to calculate the levelized cost of electricity [hereinafter LCOE]. LCOE is the calculation of the "present value of the total cost of building and operating a power plant over [its] lifetime," which is also referred to as the cost per megawatt hour [hereinafter MWh].[61] Nuclear energy is the most expensive energy source. From 2009 to 2020, the cost of nuclear energy has increased from $123/MWh

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[59] *Sources of Greenhouse Gas Emissions,* U.S. ENV'T PROT. AGENCY (July 27, 2021), *available at* https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Jan. 16, 2023).

[60] *Id.*

[61] DOE Office of Indian Energy, *Levelized Cost of Energy (LCOE)*, U.S. DEPT. OF ENERGY at 3 (Aug. 2015).

to $163/MWh.[62] Compared to other energy sources, the price tag of nuclear energy looks pretty unattractive. Over the same time period, the price of coal has remained stable, only increasing one dollar to $112/MWh.[63] On the other hand, the price of renewables has decreased between 2009 and 2020. Solar energy has decreased from $359/MWh to $37/MWh, and wind energy has decreased from $135/MWh to $41/MWh.[64]

Unfortunately for the nuclear energy industry, as renewables have gotten cheaper, nuclear energy has gotten more expensive, with projections forecasting further increases.[65] Driving these high costs are public perception and government regulations.[66] Fossil fuels make nuclear energy look expensive because governments are not doing enough to make fossil fuels unattractive; thus, investors hesitate to invest, supplies become more expensive, and so on. Carbon taxes across the world have been historically low or non-existent.[67] As of the end of 2021, countries that collectively represent 54% of greenhouse gas emissions[68] do not have federal-level carbon taxes to deter investment in or use of the fossil fuels.[69] This allows governments to manipulate prices to make nuclear power more expensive when compared to fossil fuels; thereby giving investors an incentive to avoid nuclear energy and ultimately fulfilling the governments' objective to move away from nuclear power. Economists have found that low CO_2 prices in the U.S. make nuclear power plants too expensive to operate, yet conversely, high CO_2 prices in Europe makes nuclear energy competitive.[70] For example, high CO_2 prices induced by bold carbon taxes have increased the cost of coal by about $23 across Europe,[71] leveling nuclear power prices.

In order to address high operating costs, governments around the world must adopt aggressive carbon taxes to deter fossil fuel investment,

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[62] *Status Report 2021 supra* note 8.
[63] World Nuclear Industry Status Report, *supra* note 8, at 293.
[64] World Nuclear Industry Status Report, supra note 8, at 293.
[65] Miller-McDonald, *supra* note 25, at 8.
[66] *See* Nuclear Power in Clean Energy System, *supra* note 13, at 4.
[67] *See* Nuclear Power in Clean Energy System, *supra* note 13, at 40.
[68] *Greenhouse Gas Emissions by Country 2021*, WORLD POPULATION REV., *available at* https://worldpopulationreview.com/country-rankings/greenhouse-gas-emissions-by-country (last visited Jan. 16, 2023), (the referenced countries are China, the U.S., India, and Russia).
[69] *Carbon Pricing Dashboard*, The World Bank, *available at* https://carbonpricingdashboard.worldbank.org/map_data (last visited Jan. 16, 2023).
[70] *See,* Nuclear Power in Clean Energy System *supra* note 13, at 41-45.
[71] Nuclear Power in Clean Energy System *supra* note 13, at 45.

and to level the playing field for continued investment in an environmentally valuable energy like nuclear power. This is important to put international climate commitments into action by deterring investment in energies that will prevent the international community from meeting the Paris Agreement goals.

B. REGULATORY HURDLES

A second concern about nuclear energy comes in the form of regulatory hurdles. The National Environmental Policy Act [hereinafter NEPA] requires federal agencies to assess environmental impacts of federal actions through environmental impact statements.[72] Consequently, the Nuclear Regulatory Commission [hereinafter NRC], a federal agency, is required to consider all environmental impacts of extending licenses for nuclear power plants when an extension is requested.[73] This process ensures that the NRC is considering pertinent environmental concerns, and that they can act in the best environmental interests, giving them discretion to shut down nuclear power plants that are environmentally consequential.[74]

When seeking a license extension, applicants must describe the impacted area around the plant, how any modifications they make or plan to make affect the environment, and any future activities at the plant that may impact the environment.[75] As is the case for almost all existing power plants, when seeking a license renewal, the plants are exempt from conducting plant-specific severe accident mitigation analyses, so long as one is on the record,[76] which eases the regulatory process slightly. However, the public and interest groups retain the ability to stall the process. Upon request of any interested person, the NRC must grant a hearing to address and mitigate any issues raised.[77] Interested parties can stall the re-licensing process of an otherwise properly and safely operating power plant, through lengthy and heavy public comment periods, and forcing extensive evidentiary hearings on the challenges they bring.[78]

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[72] Nat'l Env't Policy Act, 42 U.S.C. §§ 4321-4347 (1962).
[73] *See id.*
[74] Office of Enforcement and Compliance, et al., *§309 Reviewers Guidance for New Nuclear Power Plant Environmental Impact Statements*, U.S. ENV'T PROT. AGENCY at 10 (Sept. 2008).
[75] Postconstruction Environmental Reports, 10 C.F.R. § 51.53(c)(1)-(2) (2014).
[76] *Id.* at (c)(3)(ii)(L).
[77] Hearings and Judicial Review, 42 U.S.C. § 2239(a)(1)(A).
[78] *See generally* NRDC v. U.S. NRC, 823 F.3d 641 (D.C. Cir. 2016).

At first glance, the primary concern for the power plants is that they could rack up massive costs in defending their re-licensure request. Additionally, depending on when applicants apply for re-licensure, and how long the challenges carry out, it is entirely possible that the license expires before the disputes are settled. With that comes more harm to the environment because the clean energy produced by the power plant is removed from the grid and, as later detailed,[79] reliance on fossil fuels will increase as the consequence.

C. MANAGING NUCLEAR WASTE

A third concern surrounding nuclear power is that although nuclear power generation does not produce carbon dioxide emissions, there are harmful radioactive byproducts. Luckily, there are no technological problems with nuclear waste disposal. Most waste from nuclear power plants have relatively low-levels of radioactivity.[80] These wastes, such as uranium mill tailings and spent reactor fuel, are subject to special regulations that govern their disposal.[81] Uranium mill tailings and other low-level radioactive wastes make up about 90% of all nuclear waste.[82] The accepted disposal process involves burying waste at special sites, and covering it with clay, rocks, and soil.[83] This method helps to prevent harmful radiation from entering the atmosphere or impacting the people living around the dump sites. Intermediate and high-level radioactive wastes require further measures to ensure environmental safety. To allow for radioactive decay, spent reactor fuel is stored in water or dry casks for at least five years.[84] The waste can either remain in the dry casks or be stored in deep-Earth sites. In much of the world, deep-Earth sites are underdeveloped options. Finland has led the deep-Earth model of disposal. Intermediate and high-level nuclear waste would be sealed in copper caskets, buried 1,400 feet down in man-made caverns, surrounded

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[79] *Infra* sec. III (A).

[80] *Nuclear explained: Nuclear power and the environment*, U.S. ENERGY INFO. ADMIN. (Jan. 15, 2020), *available at* https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php (last visited Oct. 6, 2022).

[81] *Id.*

[82] *Storage and Disposal of Radioactive Waste*, WORLD NUCLEAR ASS'N (May, 2021), *available at* https://world-nuclear.org/information-library/nuclear-fuel-cycle/nuclear-waste/storage-and-disposal-of-radioactive-waste.aspx (last visited Jan. 16, 2023).

[83] U.S. ENERGY INFO. ADMIN., *supra* note 80.

[84] *Id.*

by granite and packed with clay.[85] Experts have reviewed the Finnish plan, and it is believed to be sufficient to prevent leaks to the Earth's surface or into water tables.[86]

A plan like this is feasible anywhere in the world. Canada, Russia, China, and France are exploring deep-Earth waste repositories and seem to trust that this option is the best nuclear waste management practice currently available.[87] In the U.S., deep-Earth options have been discussed by multiple presidents but none have felt the need to pursue it.[88] Environmental reviews would likely be necessary for countries to move forward with these plans. For example, under a NEPA review in the U.S.,[89] the political hesitancies should be put to rest, so long as the same environmental findings from around the world are reflected in U.S. environmental studies. Expectedly, most people accept that waste produced by nuclear power plants within their country should be disposed of in their country.[90] Although multi-national nuclear waste repositories are an idea of the past,[91] storing nuclear energy in these national deep-Earth sites still carries global implications if mismanaged. It is important for countries to pick deep-Earth repository locations that are not likely subject to earthquakes or human development and interference, to ensure that the chance of a radioactive leak into the air, ground water, or soil, is next to zero.

Nuclear waste around the world is not unmanageable either. The total amount of intermediate and highly radioactive nuclear waste

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[85] Henry Fountain, *On Nuclear Waste, Finland Shows U.S. How It Can Be Done*, THE N.Y. TIMES (Jun.e 9, 2017), *available at* https://www.nytimes.com/2017/06/09/science/nuclear-reactor-waste-finland.html (last visited Jan. 16, 2023).

[86] *Id.*

[87] *What Other Countries Are Doing*, NUCLEAR WASTE MGMT. ORG., *available at* https://www.nwmo.ca/en/Canadas-Plan/What-Other-Countries-Are-Doing (last visited Jan. 16, 2023).

[88] *What is the Yucca Mountain Repository?* U.S. ENV'T PROT. AGENCY, *available at* https://www.epa.gov/radiation/what-yucca-mountain-repository (last visited Jan. 16, 2023).

[89] *What is the National Environmental Policy Act?* U.N. ENV'T PROGRAMME, *available at* https://www.epa.gov/nepa/what-national-environmental-policy-act (last visited Jan. 16, 2023) (NEPA requires "all federal agencies...to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment.").

[90] Kerri Morrison, *National and Multinational Strategies for Radioactive Waste Disposal*, 47 UNI. OF MD. ENV. L. PROGRAM 10300, 10309 (2017).

[91] *See id.*

produced in U.S. history currently hovers around 90,000 tons,[92] and would fill only one football field about thirty feet deep.[93] The same can be said for other countries, as well. In 2020, there was about a quarter million tons of intermediate and highly radioactive waste around the world,[94] which is just two more football fields, thirty feet down. Since disposal of nuclear waste is not unfeasible from a technological standpoint, it becomes clear that the problem lies with governments that refuse to further nuclear waste disposal research. They would rather the waste sit in vats down the street from grandma and grandpa's house. This perpetuates the idea that nuclear waste is dangerous and not worthy of continued investment, which ultimately increases operating costs, and the cycle perpetuates. In association with their respective environmental reviews, the international community should adopt the Finnish deep-Earth model in order to sustainably remove highly radioactive wastes from Earth's surface, and to help heal its reputation while working toward a carbon-free future.

D. PUBLIC PERCEPTION OF NUCLEAR MELTDOWNS AND WEAPONS

A fourth concern surrounding nuclear power is public fear. Much of the global concern associated with nuclear energy rests on what the world knows about a few nuclear power plant accidents, as well as the misplaced belief that nuclear power plants equate to nuclear weapons. It is of initial importance to briefly describe the complex science behind what constitutes a nuclear meltdown. Operating a nuclear reactor involves creating carefully controlled reactions where uranium atoms are split by neutrons, called nuclear fission.[95] As the atoms split, heat is produced, cold water within the reactor is heated, and resulting steam powers turbines within the reactor that ultimately generate electricity.[96]

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[92] Mitch Jacoby, *As nuclear waste piles up, scientists seek the best long-term storage solutions*, CHEMICAL & ENG'G NEWS (Mar. 30, 2020), *available at* https://cen.acs.org/environment/pollution/nuclear-waste-pilesscientists-seek-best/98/i12 (last visited Jan. 15, 2023).

[93] Hannah Hickman, *What Happens to Nuclear Waste in the U.S.*, NUCLEAR ENERGY INST. (Nov. 19, 2019), *available at* https://www.nei.org/news/2019/what-happens-nuclear-waste-us (last visited Jan. 15, 2023).

[94] Jacoby, *supra* note 92.

[95] Jenny Marder, *Mechanics of a Nuclear Meltdown Explained*, PBS (Mar. 15, 2011), *available at* https://www.pbs.org/newshour/science/mechanics-of-a-meltdown-explained (last visited Jan. 16, 2023).

[96] *Id.*

In a meltdown, this process runs uncontrolled due to mismanaged and excessive heating, which causes water to rapidly evaporate, increasing pressure with the reactor, and resulting in a "rupture" that releases radioactive vapors into the atmosphere.[97] Beyond the science, three nuclear meltdowns remain ever-present in people's mind: Chernobyl, Three Mile Island, and Fukushima Daiichi.

The Chernobyl nuclear power plant meltdown was not a product of nuclear fission or anything inherent to nuclear energy production; in fact, the cause was human idiocy.[98] Technologists working at the plant decided to run an experiment in complete violation of established safety procedures, all the while giving plant operators no warning in which they could attempt to mitigate or plan for the experiment.[99] The Three Mile Island meltdown was once again caused by negligent human error. This time, operators ignored emergency procedures, and shut off the cooling mechanism based on their own gross misreading of data.[100] Many people in the surrounding area claimed they were affected; however, the science does not support this. The NRC concluded that the average dose of radiation exposure to the approximately two-million people around the power plant was less than the radiation people are exposed to when they get an x-ray;[101] a harmless amount of radiation. The Fukushima Daiichi meltdown was caused by a mixture of human error and natural disaster. A tsunami crashed over the flood walls around the nuclear power plant, entering the reactors, and causing the cooling mechanisms to shut down.[102] As a result, the reactors over-heated and exploded.[103] An inspection report conducted by the International Atomic Energy Agency [hereinafter IAEA] determined that the Japanese government failed to prepare adequate backup systems in emergency situations,[104] which, unfortunately, was on display after the tsunami.

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[97] GALEN J. SUPPES & TRUMAN S. STORVICK, SUSTAINABLE NUCLEAR POWER, 341 (Academic Press, 1st ed. 2006).

[98] *Id.*

[99] *Id.* at 342.

[100] *Id.* at 343.

[101] *Three Mile Island Accident*, NUCLEAR REGUL. COMM'N (Mar. 2004), *available at* https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html (last visited Jan. 16, 2023).

[102] Martin Fackler, *Report Finds Japan Underestimated Tsunami Danger*, THE N.Y. TIMES (June 1, 2011), *available at* https://www.nytimes.com/2011/06/02/world/asia/02japan.html (last visited Jan. 16, 2023).

[103] *Id.*

[104] DIRECTOR GENERAL, THE FUKUSHIMA DAICHI ACCIDENT at 3-7 (Int'l Atomic Energy Agency eds.) (2015).

Each of these instances have led to safety, regulatory, procedural, and technological reform in operating nuclear power plants.[105] It is notable that despite the perception of danger in nuclear power plants, per each 1000TWh of energy generated, they remain the least deadly energy source. Solar and wind technologies result in 440 and 150 deaths/1000TWh of energy generated, respectively,[106] primarily from construction and installation accidents.[107] Hydroelectric power production results in about 1500 deaths/1000TWh of energy generated,[108] overwhelmingly due to dam breaks and flooding.[109] Fossil fuel technologies are an entirely scarier bear: Coal leads to 100,000 deaths/1000TWh of energy produced, oil leads to 36,000 deaths/1000TWh of energy produced, and gas leads to 4,000 deaths/1000TWh of energy produced.[110] Nuclear on the other hand leads to 90 deaths/1000TWh of energy produced.[111] The studies are clear and counter to public perception: Nuclear energy is the least dangerous. Period.

Another misconception is that nuclear power plants are similar to or encourage nuclear weapons. While the underlying science behind how nuclear power plants and nuclear weapons operate,[112] they operate in their respective lanes. Both are addressed in the Treaty on the Non-Proliferation of Nuclear Weapons [hereinafter NPT]. The NPT is an international treaty with the objective to stop the spread of nuclear weapons technology to countries without the ability to build nuclear weapons, while also encouraging the peaceful use of nuclear energy.[113] At the time they each joined the NPT, Russia [formerly as the Soviet

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[105] *Id.*

[106] Madhumitha Jaganmohan, *Global Mortality Rate by Energy Source 2012*, STATISTA (Jan. 29, 2021), *available at* https://www.statista.com/statistics/494425/death-rate-worldwide-by-energy-source/ (last visited Jan. 16, 2023).

[107] James Conca, *How Deadly is Your Kilowatt? We Rank Your Killer Energy Sources*, FORBES (June 10, 2012), available at https://www.forbes.com/sites/jamesconca/2012/06/10/energys-deathprint-a-price-always-paid/?sh=454ba191709b (last visited Oct. 2, 2022).

[108] Jaganmohan, *supra* note 106.

[109] Conca, *supra* note 107.

[110] Jaganmohan, *supra* note 106.

[111] *Id.*

[112] Lars Sorge & Anne Neumann, *Warheads of Energy: Exploring the linkages between civilian nuclear power and nuclear weapons in seven countries*, 81 ENERGY RESEARCH & SOCIAL SCIENCE, Nov. 2021, at 14.

[113] Treaty On the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 729 U.N.T.S. 161.

Union], the United States, France, the United Kingdom, and China all had nuclear weapons, effectively grandfathered in, and allowed to possess nuclear weapons.[114] The remaining parties all pledge to honor the IAEA's guidelines that requires countries possessing nuclear energy technologies to demonstrate that they are not diverting efforts or technologies to develop nuclear weapons.[115] At this juncture, thirty-two of the thirty-four countries with or planning nuclear power plants, have not developed nuclear weapons after joining the NPT.[116] The two countries that have nuclear weapons and nuclear power plants are, in fact, not even members of the NPT.[117] Additionally, the two other non-NPT parties that have nuclear weapons do not have nuclear power plants within their borders.[118] What can be ascertained from this information is that nuclear power plants do not equate to nuclear weapons. They operate in their own lanes, regulated on different grounds, and for the most part, it does not appear to be a pre-requisite that when a country has nuclear power plants, they develop nuclear weapons.

With all of this in mind, is the fear of nuclear power really warranted?

E. SMR'S INFANCY

A fifth concern surrounding nuclear power is that although SMRs are a burgeoning technology with great potential, some people doubt how effective SMRs can be in combatting climate change. Their concerns stem from issues of cost and time. First, manufacturing SMRs is not a solidified process. There are still significant kinks to work out. For example, finding the lowest cost cooling process for the reactors,[119] and ensuring that SMRs retain the same capacity factor as normal nuclear power plants.[120] Additionally, SMRs have to be created outside of mass

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[114] *Id.* at art. I.

[115] *Id.* at art. III.

[116] NUCLEAR POWER REACTORS IN THE WORLD, INT'L ATOMIC ENERGY AGENCY (2020).

[117] Id.; supra note 113 (those two countries are India and Pakistan).

[118] *Supra* note 113*; supra note 116; (those two countries are North Korea and Israel).*

[119] Arjun Makhijani & M.V. Ramana, *Why Small Modular Nuclear Reactors Won't Help Counter the Climate Crisis,* EWG (Mar. 25, 2021), available at https://www.ewg.org/news-insights/news/why-small-modular-nuclear-reactors-wont-help-counter-climate-crisis (last visited Jan. 15, 2022).

[120] M.V. Ramana, *Eyes Wide Shut: Problems with the Utah Associated Municipal Power Systems Proposal to Construct NuScale Small Modular Nuclear Reactors,*

manufacturing, to establish the legitimacy of the technology, in order to stimulate investment to create the supply chain to warrant mass manufacturing and further investment.[121] Second, the SMR contribution to reducing carbon emissions over the next decade will be very minimal. As of 2021, projected deployment dates for SMRs are 2029,[122] which is the year before the first climate target set in the Paris Agreement. If they are barely deployed, how can they help meet climate concerns today?

While these concerns are legitimate, they are a bit too pessimistic. All of the issues with renewables will not be solved today either; they too, will take years to resolve. Further, the ability to deploy SMRs to remote areas is a long-term goal, on top of the climate crisis. Since SMRs take up very little space, and are readily connectable to power grids, they are better options for those areas than renewables. If investments in SMRs are cut because their issues will not be resolved yesterday, then investment in renewables should be cut, too—but that would never happen, and it should not happen. It will take decades to fully move away from fossil fuels, so why is investing in SMRs a waste of time but investing in renewables is not? Additionally, SMRs are not going to be the only solution to climate change; other strategies are necessary to lower emissions across all industries, not just the energy industry. Coupled with many other carbon reducing technologies, SMRs still can be deployed for well over half of the twenty-first century, which is the aspiring deadline for international climate objectives.

III. Renewable Energy Is Not Ready Yet

It is clear from the UNEP's *United in Science 2021*[123] and *Emissions Gap 2021*[124] reports, along with the National Intelligence Council's 2040 projections report,[125] that not only are climate change mitigation plans not aggressive enough to meet the objectives of the Paris Agreement or the commitments made at COP26, but that detrimental effects to the environment and all living species are inevitable under current plans. In order to prevent the negative consequences facing the planet, governments need to embrace logical efforts, however mistakenly controversial, for the planet's long-term benefits. To meet international

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OR. PHYSICIANS FOR SOC. RESP. at 15 (Sept. 2020), *available at* https://www.oregonpsr.org/report-uamps-nuscale-smrs (last visited Jan.15, 2022).

[121] Makhijani & Ramana, *supra* note 119.

[122] Ramana, *supra* note 120, at 8.

[123] *See discussion supra* I(B), at ¶ 2.

[124] *See discussion supra* I(B), at ¶ 4.

[125] *See discussion supra* I(B), at ¶ 3.

climate change goals, seeking aggressive decarbonization policies to create a carbon-free energy sector are vital, and should have begun yesterday. In pursuit of meeting these goals, many policymakers and environmentalists believe that renewable energies are ready to bear the load.[126] This fallacy poses significant harm in the short and long-term, and will lead to a regression of global climate change progress. In pursuit of global climate mitigation goals and a clean energy sector, the insufficiencies of the renewable energy sector must be addressed to avoid unintended consequences of misinformed policy.

A. CURRENT RENEWABLE TECHNOLOGIES CANNOT MEET RISING DEMANDS

As renewable energy technologies continue to mature, they must be able to meet energy demands. The International Energy Agency's Electricity Report says that the demand for electricity will continue to rise for the foreseeable future,[127] understandably so as the global population continues to rise. Electricity generation from renewable sources will also continue to rise, but it cannot keep up with the increasing demand.[128] Even though renewables grew by an average of 8% over the last couple of years, global electricity demand continues to grow more, and as a result, electricity generation via coal and gas hit record highs.[129] Essentially, the expansion and implementation of renewable energies is not happening fast enough to counter the growth in energy demand. What this indicates is that even though renewables are growing like never before, with the decommissioning of nuclear power plants and growing populations, fossil fuel reliance will rise in the immediate future, and so will greenhouse gas emissions. There is no reason to move away from nuclear energy, a clean energy source, when the absence of it will increase fossil fuel reliance, and erase climate change mitigation progress.

International Energy Agency Director of Energy Markets and Security, Keisuke Sadamori, bluntly stated that renewable power is not

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[126] The Sky's the Limit: Solar and Wind Energy Potential is 100 Times as Much as Global Energy Demand, CARBON TRACKER INITIATIVE (Apr. 23, 2021), available at https://carbontracker.org/reports/the-skys-the-limit-solar-wind/ (last visited Jan 15, 2023).

[127] Electricity Market Report, INT'L ENERGY AGENCY (Jan. 2022), *available at* https://www.iea.org/reports/electricity-market-report-january-2022 (last visited Oct. 3, 2022).

[128] *Id.*

[129] *Id.*

"where it needs to be to put [the world] on a path to reaching net-zero emissions by mid-century."[130] Sadamori went on to say that "to shift to a sustainable trajectory, [countries] need to massively [increase] investment in clean energy technologies."[131] Certainly, this means increasing funding and efforts for developing renewable energy technologies, but his advice also leaves open the door to other clean energy options—such as nuclear energy. Renewable energies are the future of energy generation but the technologies are simply not developed enough to take over right now. If nuclear energy is removed from the equation while renewables are not ready to bear the load, that only invites increased reliance on fossil fuels to fill the gap left by the absence of nuclear energy. Continued nuclear energy investments in existing technologies will allow renewables the time to develop, without backtracking on climate progress in the process.

B. ENERGY GRIDS ARE NOT READY YET

Not only is the renewable energy sector not growing fast enough to substantially and rapidly reduce reliance on fossil fuels, energy grids are not equipped for a quick transition either. Energy grids need to be modified to integrate larger amounts of wind and solar energy.[132] Wind and solar are energy types with low load factors, which means that their inputs are inconsistent[133] and not always available when needed.[134] This lack of reliability stems from the nature of relying on the weather to generate energy. When renewable sources are the primary energy input onto power grids, the grids must be flexible to account for less reliable energy inputs, to balance supply and demand, and to integrate energy storage capabilities for such intermittent inputs.[135]

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[130] Anmar Frangoul, *Renewable electricity generation is growing – but it's not enough to meet rising demand, IEA says*, CNBC (July 15, 2021), *available at* https://www.cnbc.com/2021/07/15/renewable-generation-growing-but-not-enough-to-meet-demand-iea-says.html (last visited Jan. 20, 2023) (the International Energy Agency collaborates with countries to shape energy policies to reach a sustainable future).

[131] *Id.*

[132] Susan Tierney & Lori Bird, *Setting the Record Straight About Renewable Energy*, WORLD RES. INST. (May 12, 2020), *available at* https://www.wri.org/insights/setting-record-straight-about-renewable-energy (last visited Oct. 3, 2022).

[133] *Supra* note 13, at 67.

[134] *Supra* note 13, at 72.

[135] *Supra* note 13, at 72-73.

Unlike renewable energy sources, nuclear energy is an inherently flexible energy source.[136] Not only is nuclear energy input already flexible on power grids, but the output from nuclear power plants can be modified to meet the demands on certain power grids.[137] With or without nuclear energy in the mix, renewable energy input requires flexibility on power grids that is not available yet. In order to counter the intermittent supply of renewables, there would need to be large-scale energy storage units that can house energy for times when wind or solar inputs are producing less efficiently. An option to handle the flexibility issue is battery storage.[138] However, battery technologies necessary to support power grids are still in their infancy. Current batteries do not have large enough storage capabilities to accommodate power grids that rely primarily on renewable energy input.[139] Much like the renewable energy technologies, energy storage technologies are not ready to replace the amount of fossil fuel generated energy that currently supplies energy grids. By continuing to invest in nuclear energy, time is given to the battery storage technologies to advance in order to fit power grids that are primarily supplied by renewable sources. Until there is a uniform and advanced mechanism for managing intermittent energy inputs onto grids, renewables are not ready to take over the role as the primary energy supplier to power grids.

C. INHERENT FLAWS IN RENEWABLE ENERGY PRODUCTION

Renewables are less reliable energy sources because when the sun does not shine, when the wind does not blow, and when the water does not flow, energy is not produced.[140] Nuclear power plants, on the other hand, do not have this problem, and operate at significantly higher productivity levels, also called the capacity factor. The capacity factor of a power source is the measure of the average percent of time that energy

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[136] 3 Ways Nuclear Is More Flexible Than You Think, OFF. OF NUCLEAR ENERGY (June 23, 2020), available at https://www.energy.gov/ne/articles/3-ways-nuclear-more-flexible-you-might-think (last visited Jan. 20, 2023).

[137] *Id.* (modification involves ramping up or decreasing reaction speeds within nuclear reactors).

[138] *Supra* note 13, at 75.

[139] *Id.*

[140] *See* Christopher McFadden, *Is 100% Renewable Energy Enough For The World?*, INTERESTING ENGINEERING (Dec. 12, 2018), *available at* https://interestingengineering.com/is-100-renewable-energy-enough-for-the-world (last visited Jan. 15, 2023).

is produced.[141] On average, renewables have relatively low capacity factors. Solar panels produce energy ninety-two days of the year, thus having a capacity factor of 25.1%.[142] For wind and hydro power, these numbers are slightly higher at 127 days (34.5%) and 138 days per year (38.2%), respectively.[143] Nuclear power plants have a capacity factor of 336 days, or 92.3%.[144]

The amount of energy produced by these different sources are not equivalent per power plant, factory, or solar or wind farm. For example, a typical nuclear reactor generates around one gigawatt (GW) of electricity.[145] Given the differing capacity factors, in order to replace one nuclear power plant, there would need to be about three or four one-GW solar or wind farms to replace to productivity of the single nuclear power plant.[146] This number translates to over three million solar panels, and over 400 large utility-scale wind turbines.[147] The land required for replacing nuclear power plants is immense. To shut down the nearly ninety remaining nuclear power plants in the U.S. would require, for example, at least around 300 million solar panels. But an easier solution remains. Nuclear power is highly efficient and highly reliable. Nuclear energy generation does not rely on uncontrollable factors, like the weather. Further, nuclear energy is flexible, and can produce higher quantities of energy without requiring more land to do so, since energy production occurs within the nuclear reactors at the power plants.

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[141] Richard Rhodes, *Why Nuclear Power Must Be Part of the Energy Solution*, YALE SCH. OF THE ENV'T (July 19, 2018), *available at* https://e360.yale.edu/features/why-nuclear-power-must-be-part-of-the-energy-solution-environmentalists-climate (last visited Jan. 15, 2023).

[142] *Id.*

[143] *Id.*

[144] *Id.* [the non-operating days occurred because of general maintenance to the power plants, not because of flaws in the energy production process].

[145] *Nuclear Power is the Most Reliable Energy Source and It's Not Even Close*, OFF. OF NUCLEAR ENERGY (Mar. 24, 2021), *available at* https://www.energy.gov/ne/articles/nuclear-power-most-reliable-energy-source-and-its-not-even-close (last visited Jan. 18, 2023).

[146] *Id.*

[147] *How Much Power Does A Nuclear Reactor Produce?*, Off. of Nuclear Energy (Mar. 31, 2021), *available at* https://www.energy.gov/ne/articles/infographic-how-much-power-does-nuclear-reactor-*produce* (last visited Oct. 24, 2022).

D. LAND ISSUES IN ACCOMMODATING RENEWABLE ENERGY GROWTH

Space concerns continue to trouble the renewable energy sector. Large amounts of land are necessary when constructing solar or wind farms. Two studies offer realities on this issue. First, it has been estimated that if all of the roofs in the U.K. had solar panels, the energy produced would only provide for five percent of the country's needs.[148] Second, it has been calculated that in order to have a 100% renewable world, there would need to be 3.8 million large wind turbines, 90,000 utility-sized solar farms, 490,000 tidal turbines, 5,350 geo-thermal installations, and 900 hydro-electric plants.[149] Those estimations do not even account for a rising global population, or land scarcity caused by growing populations and land destruction resulting from fires, floods, or droughts. With less viable land, the quantity of usable space becomes scarcer.

Additionally, moving energy requires large power cable networks, significant amounts of land, and extensive construction that would take years. Currently, there are 34 million kilometers of power lines to transfer solar and wind energy that is produced in one location to another to accommodate regional weather differences and regions with varied amounts of daylight.[150] Expanding solar and wind energy will require an increase in power lines to about 50 million kilometers by 2040.[151] Where to put solar and wind fields is a major hurdle to renewable energy expansion. Combined with the space required for nearly doubling the power cable network, there is a significant land challenge that is difficult to rectify in the short time necessary for an effective renewable energy take-over by mid-century in order to meet international climate goals.

To meet international climate goals on its own, renewable energy would need to grow three times faster than it is currently,[152] while overcoming serious issues related to land scarcity, technological lapses, and inherent energy production handicaps. It would be unwise to continue rapidly closing nuclear power plants when there remains so much to configure on the renewable energy front. Renewables are not capable of bearing the load that is an ever-rising energy demand. Extending nuclear energy investments offers a crutch for the pitfalls of

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[148] McFadden, *supra* note 140.
[149] *Id.*
[150] McFadden, *supra* note 140.
[151] McFadden, *supra* note 140.
[152] *Nuclear Power in a Clean Energy System, supra* note 13.

renewables as the international community looks toward a carbon-free future in the energy sector.

IV. Environmental Benefits of Extending Nuclear Energy Investments

Since the birth of nuclear power into the energy market, large amounts of CO_2 have been withheld from polluting the atmosphere. As a clean energy source, nuclear also holds the line of additional CO_2 emissions that would otherwise result from fossil fuel use in the absence of nuclear energy. If countries continue to decommission nuclear power plants before renewable energy sources are ready to bear the burden, existing environmental gains will be erased. Further, maintaining investments in nuclear energy will help the international community to close the emissions gap and make real progress in climate change mitigation.

A. DIVESTMENT ERASES EXISTING ENVIRONMENTAL GAINS

In order to ensure that international climate objectives are met, further investment in nuclear energy will be critical. Over the last fifty years, countries' use of nuclear power has avoided sixty-three gigatons of CO_2 emissions from entering the atmosphere.[153] If nuclear power was not part of the energy mix during this period, it is estimated that CO_2 emissions from the electricity generation industry would have been about 20% higher.[154] These savings were most substantial in the U.S., European Union, and in developing economies, but is consistent across the globe where the total amount of emissions avoided continues to rise.[155] The upward trend persists even with the boom of renewable energies. This is important because the decarbonization efficiency of nuclear energy is unaffected by diminished investment, and thus there remains value in what the use of nuclear energy can continue to keep out of the atmosphere. Until fossil fuels are almost entirely removed from the energy equation, CO_2 emissions will remain a problem if nuclear energy disappears.

Greenhouse gas emissions are measured in emissions of CO_2-equivalents per kilowatt hour of electricity through the life of the energy

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[153] *Nuclear in a Clean Energy System*, *supra* note 13 at 9.
[154] *Id.*
[155] *Id.*

source [hereinafter gCO_2eq/kWh].[156] This measurement takes into account the mining, construction, operation, and waste management phases of an energy source.[157] When broken down by energy type, nuclear has one of the lowest lifecycle emissions, which means it is one of the cleanest energy sources from extraction to burial. On average, coal, natural gas, and oil have lifecycle emissions of 820, 490,[158] and 720[159] gCO_2eq/kWh of electricity produced, respectively. Nuclear energy, on the other hand, has an average lifecycle emission of twelve gCO_2eq/kWh of electricity produced, as compared to solar (about forty-five gCO_2eq/kWh) and wind (about eleven gCO_2eq/kWh).[160] For reference, when comparing nuclear and coal at the same productivity level, coal produced sixty-eight times the emissions than nuclear. If solar and wind technologies are not yet ready to bear the burden as the primary energy source, it is problematic for countries to decommission one of the cleanest energy sources that is more productive than renewables and far cleaner than similarly efficient fossil fuels. From 1971-2018, if nuclear power was not a component in the energy system, "emissions from electricity generation would have been 25% higher in Japan, 45% higher in [South] Korea and over 50% higher in Canada."[161] It is odd to give up on nuclear energy at this juncture. This fact becomes more puzzling considering that closing nuclear power plants is proven to have immediate detrimental environmental consequences.

When nuclear power plants close, progress in decarbonizing the environment reverses. In the U.S., after every nuclear power plant closure, carbon emissions have increased.[162] For example, in 2013 the San Onofre Nuclear Generating Station in California closed, which had produced 8% of California's electricity.[163] Following the closure,

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[156] Thomas Bruckner, Et Al., *Annex III: Technology-specific Cost and Performance Parameters*, *in* CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE 1329, 1335 (2015).

[157] *See id.*

[158] *Id.*

[159] Max Roser, *Why did renewables become so cheap so fast?*, OUR WORLD IN DATA (Dec. 1, 2020), *available at* https://ourworldindata.org/cheap-renewables-growth (last visited Jan. 16, 2023)

[160] Bruckner, *supra* note 156.

[161] *Supra* note 13.

[162] *Second License Renewal*, NUCLEAR ENERGY INST., *available at* https://www.nei.org/advocacy/preserve-nuclear-plants/second-license-renewal (last visited Jan. 24, 2023).

[163] Lois Parshley, *The controversial future of nuclear power in the U.S.*, NAT'L GEOGRAPHIC (May 4, 2021), *available at*

scientists observed not only an increase in the cost of electricity, but also an increase in CO_2 emissions by 9.2 million tons the following year.[164] In another instance, when the Vermont Yankee nuclear power plant closed in 2014, it raised electricity rates in Vermont, increased the state's carbon footprint, and required more natural gas importation to replace the hole left in the absence of nuclear energy.[165] Worsening carbon emissions following a nuclear power plant closure points back to the fact that renewables are not ready to meet the energy demand when nuclear power is gone. Vermont did not look toward increasing solar or wind fields in preparation to close the nuclear plant—they simply reversed course on environmental progress and defaulted to a dirty, high carbon-emitting energy source. And for what reason? Who wins in this scenario? Certainly not the environment, but perhaps the government trying to "save" money.

In the U.S., on average, nuclear power plants need a penny/kWh as a subsidy, while wind and solar get twice that.[166] Further, countries around the world simply have not given equitable support to the nuclear energy industry as they do other energy types, and generally continue to throw substantial amounts of money behind fossil fuels.[167] An example of positive nuclear investment can be found in New Jersey. The State enacted a nuclear energy subsidy program to assist nuclear power plants competing in the energy market.[168] In order for a plant to be eligible for a subsidy, a handful of requirements must be met. One of the requirements is that there must be evidence that the existing plant "makes a significant and material contribution to the air quality in the State by minimizing emissions that result from electricity" consumption across the State.[169] A second requirement is that there must be evidence that in

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https://www.nationalgeographic.com/environment/article/nuclear-plants-are-closing-in-the-us-should-we-build-more (last visited Jan. 24, 2023).

[164] *Id.*

[165] James Conca, *Communities Surrounding Closed Nuclear Power Plants Face Terrible Challenges Moving Forward,* FORBES (Oct. 25, 2020), *available at* https://www.forbes.com/sites/jamesconca/2020/10/25/communities-surrounding-closed-nuclear-power-plants-face-terrible-challenges-moving-forward/?sh=5e9a4d8f6278 (last visited Jan. 24, 2023).

[166] *Id.*

[167] *Energy Subsidies*, WORLD NUCLEAR ASS'N (Feb. 2018), *available at* https://world-nuclear.org/information-library/economic-aspects/energy-subsidies.aspx (last visited Jan. 24, 2023).

[168] Matter of Implementation of L. 2018, C. 16 Regarding the Establishment of Zero Emission Certificate Program for Eligible Nuclear Power Plants, 250 A.3d 1136, 1141 (N.J. Super. Ct. App. Div. 2021).

[169] *Id.*

absence of the nuclear power plant, there would be a significant and negative impact on State emission reduction efforts.[170] Amongst other non-environmental requirements, the nuclear power plants at issue in *Matter of Implementation of L. 2018* were subsidized further after positive environmental reports.[171]

New Jersey upheld the subsidizations in recognition of the importance nuclear energy has to a clean energy future, and how losing a significant clean energy source would cause destruction to the environment.

Without as much government support, it is obvious that the nuclear energy industry would face some issues, like lack of funding for long-term waste management. Continued divestment in the most productive, clean energy source is strange. When, such as in the case of the Vermont plant, fossil fuels are brought in to replace nuclear energy, there remains doubts that governments are even trying to save the environment anymore. It is highly unlikely that renewables alone are ready to carry the torch to a clean energy future.[172] Since renewables are unprepared, policymakers must consider what they care more about: Making real efforts to meet climate commitments, or making decisions that, frankly, are going to harm future generations.

B. FURTHER INVESTMENT WILL HELP CLOSE THE EMISSIONS GAP

With the emissions gap at its recorded worst, the disparity is enough to cause at least a 2.7°C warming above pre-industrial levels by the end of this century.[173] This prediction is not only a failure of international climate goals, but also poses reason to be afraid for the health of the planet. It would be great for an immediate renewable energy transition today because that would cut the emissions gap nearly overnight. Since that is not possible, utilizing nuclear power and increasing its use in the clean energy transition will help to do the same. Given what is known about the difficulties of full renewable reliance now, nuclear power appears to be the only reliable, low-carbon source of energy that should

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[170] *Id.*

[171] *See id.*

[172] *See, supra* Sec. III.

[173] Ajit Niranjan, *COP26: How to close the emissions gap and keep global warming to 1.5C,* DEUTSCHE WELLE (Nov. 1, 2021), *available at* https://www.dw.com/en/cop26-paris-agreement-solutions-climate/a-59681099 (last visited Jan. 24, 2023).

play a role in the energy future. This makes sense. Nuclear energy is clean, has a high capacity factor, occupies a relatively small spatial footprint, and is adjustable to meet fluctuating energy demands without needing to add storage capacities to existing power grids. All critical to closing the emissions gap.

Since about one gigaton of CO_2 emissions prevented from entering the atmosphere each year, this equates to removing the same amount of CO_2 emissions as taking 100 million passenger vehicles off the world's roads.[174] Removing or preventing one $GtCO_2e$ from the atmosphere will not save the planet itself, but governments will be hard pressed to find a policy change that does as much for decarbonization efforts as increasing nuclear dependency would do. In the 2021 Emissions Gap Report, various scenarios estimate by 2030 what amount of greenhouse gas emission ($GtCO_2e$) reductions are required to meet certain climate targets. It is projected that by 2030, current policies would only reduce greenhouse gas emissions to 55 $GtCO_2e$.[175] This estimate is still almost double the amount needed to meet the Paris Agreement objectives. In order to ensure the 2030 Paris Agreement benchmarks are met, scientists estimate a minimum carbon emissions reduction of 13 $GtCO_2e$ below current levels to achieve the 2°C goal, and a minimum carbon emissions reduction of 28 $GtCO_2e$ below current levels to achieve the 1.5°C goal.[176] In the context of nuclear energy investment and closing the emissions gap, this calls for two actions. First, as discussed in the next section, further investment in nuclear energy by countries that already rely on nuclear energy.[177] Second, encouraging expansive nuclear use in developing nations, such as China and India.

There is great potential for further nuclear energy use to keep massive amounts of CO_2 from the atmosphere. For about the last ten years, China and India have had the fastest growing contributions to global pollution.[178] This accompanies their rapidly growing populations, which will inevitably cause a continued increase in energy demands. Demands that will outpace the growth of renewables.[179] In 2019, China

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[174] *Advantages: Climate*, NUCLEAR ENERGY INST., *available at* https://www.nei.org/advantages/climate (last visited Jan. 24, 2023).

[175] *Emissions Gap Report 2021, supra* note 56, at 34.

[176] *Id.* at 35.

[177] *Infra* Sec. V.

[178] *Report: China emissions exceed all developed nations combined*, BBC NEWS (May 7, 2021), *available at* https://www.bbc.com/news/world-asia-57018837 (last visited Jan. 24, 2023).

[179] *Supra* Sec. III(A).

contributed to 27% of global greenhouse gas emissions, while India contributed 7%.[180] At the same time, they both are rapidly expanding their nuclear energy usage. Of the fifty-two nuclear power plants currently under construction, fourteen are in China, and six are in India.[181] In addition to those plants, China and India show no signs of slowing down with dozens more planned.[182] As of 2020, nuclear generated about 5% of China's electricity, and about 3% in India.[183] Unlike most countries in the world, China and India are excited to invest and to expand on nuclear energy use. Their governments do not have massive decommissioning plans, and they believe that nuclear energy is part of their clean energy futures.[184] Since China and India are large greenhouse gas emitters, further investments in nuclear energy are highly beneficial to global climate objectives. It is estimated that if each coal-fired power plant brought online in China in 2018 was replaced by a nuclear power plant instead, China would have avoided 0.32 $GtCO_2e$.[185] Considering the emissions needed to be withheld from the atmosphere by 2030,[186] China's nuclear expansion alone would bring enormous benefits over the next eight years, and could account for nearly 20% of the progress needed to correct and maintain pace with the objectives of the Paris Agreement.

The World Energy Council conducted projections on how to achieve a sustainable energy transition as the world moves away from fossil fuels. In every single projection, the energy mix scenario includes nuclear

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[180] *Id.*

[181] Under Construction Reactors, *Power Reactor Information System,* INT'L ATOMIC ENERGY AGENCY, *available at* https://pris.iaea.org/PRIS/WorldStatistics/UnderConstructionReactorsByCountry.aspx (last visited Jan. 24, 2023).

[182] Florian Zandt, *Asia's Going Nuclear*, STATISTA (Dec. 21, 2021), *available at* https://www.statista.com/chart/26439/number-of-nuclear-reactors-currently-in-construction-or-in-preliminary-construction-stages/ (last visited Jan. 24, 2023).

[183] Ritchie & Roser, *supra* note 14.

[184] Murtaugh & Chia, *supra* note 23; *see also* Vishwa Mohan, *India to increase nuclear energy capacity three times in next 10 years to reduce its carbon footprints*, THE TIME OF INDIA (Sept. 15, 2021), *available at* https://timesofindia.indiatimes.com/india/india-to-increase-nuclear-energy-capacity-three-times-in-next-10-years-to-reduce-its-carbon-footprints/articleshow/86222428.cms (last visited Jan. 24, 2023).

[185] *Guide to Chinese Climate Policy*, CTR. ON GLOB. ENERGY POL'Y,, COLUM. UNIV., available at https://chineseclimatepolicy.energypolicy.columbia.edu/en/nuclear-power (last visited Jan. 24, 2023).

[186] *Supra* Sec. IV.B., at para. 2.

power.[187] In the most middle-ground scenario, the share of nuclear energy grows six-fold by 2050,[188] recognizing that in order to meet the decarbonization objectives and dates imposed by the international community, further nuclear power investment is not just encouraged, but required. The projections also indicate that the more ambitious the decarbonization and climate targets, the greater the role that nuclear energy must play.[189] With this information in mind, China and India's plans seem to match with these climate projections. To turn away from nuclear energy at a point when the world needs realistic climate policy to meet international goals, makes little logistical, technological, and scientific sense if achieving a carbon-free future is the goal.

V. How to Pursue Further Nuclear Investment

As many nuclear power plants across the world reach the end of their licensed lives, policymakers must decide how, or if, to replace nuclear energy. Additionally, given refined nuclear energy technologies, utilizing SMRs are an increasingly attractive option for expanding the nuclear energy sector in the short-term. With the dangers of fossil fuels, and the infancy-related flaws of renewable energies, the international community should not yet give up on nuclear energy. Nuclear power plants are the only high-capacity, reliable low-carbon energy source that has years of productivity left in them; yet plans to decommission them come at the expense of climate progress.

A. UTILIZING LICENSE EXTENSIONS

Nuclear power plants are licensed to operate for varying lengths of time, based on a country's policy. In the U.S., when a nuclear power plant is built, it is initially licensed by the federal government to operate for forty years.[190] In France, initial licenses are for ten years, and in Russia licenses are for thirty years.[191] Although these license terms are imposed, the licenses can be renewed. Given improved technologies and engineering assessments, many nuclear power plants, specifically the reactors, can operate beyond the initial license period.[192] The extension periods also vary from country to country. In the U.S., the extensions are

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[187] Nuclear Power in a Clean Energy System, *supra* note 34.
[188] *Id.*
[189] *See generally id.*
[190] *Second License Renewal, supra* note 162.
[191] *Under Construction Reactors, supra* note 181.
[192] *See id.*

for twenty years, while in France they are for ten years, and in Russia they are for fifteen or thirty years, depending on the age of the reactor.[193] In order to be eligible for a renewal, governments perform checks to determine the future of a plant. For example, in the U.S., in order for the government to grant a license extension, a power plant must pass safety and environmental reviews.[194] During these reviews, the power plant is checked against regulations for fire protection, environmental impact, and meltdown prevention mechanisms, all of which are established and monitored by the U.S. Nuclear Regulatory Commission.[195] All countries with nuclear power plants have similar agencies that check for safety to determine if a nuclear reactor should be granted a license extension, or if it should be decommissioned.[196] Safety dependent, the benefits of license extensions are primarily economic because building new, traditional nuclear reactors is a long and expensive project.[197]

Governments continue to renew licenses for nuclear power plants that have sought the extensions.[198] Many nuclear power plants in the U.S. have already received their first license renewal.[199] Over the next decade, those plants may seek additional license extensions for twenty more years,[200] unless the U.S. government continues decommission rates either before or at the time renewals are requested. Power plants are not given an expiration date, rather, the license expiration dates are meant for conducting reviews. [201] It is not a matter of the plants being too old to operate. Countries should take advantage of the operating lives of their power plants and seek to extend licenses, when safety and environmental checks are satisfied, rather than shutting down the plants. This is a move that could play a critical role in advancing decarbonization efforts to meet international climate goals. The U.S. government has closed eleven

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[193] *Id.*

[194] *Background on Reactor License Renewal*, U.S. NUCLEAR REGUL. COMM'N. (Jan. 2022), *available at* https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-reactor-license-renewal.html (last visited Jan. 16, 2023).

[195] *Id.*

[196] *See generally Nuclear Regulation & Regulators*, WORLD NUCLEAR ASS'N, *available at* https://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/appendices/nuclear-regulation-regulators.aspx (last visited Jan. 16, 2023).

[197] *See Construction and Commission of Nuclear Power Plants*, INT'L ATOMIC ENERGY AGENCY, *available at* https://www.iaea.org/topics/construction-and-commissioning-of-nuclear-power-plants (last visited Jan. 16, 2023).

[198] *Under Construction Reactors, supra* note 181.

[199] *Under Construction Reactors, supra* note 162.

[200] *Id.*

[201] *Id.*

nuclear power plants in the last five years, rationalized by high operating costs.[202] Other countries rationalize decommission efforts on similar grounds.[203] Governments are closing nuclear power plants without consideration of how to replace the lost energy. It is premature to remove nuclear power from the global energy sector without any plan to mitigate the productivity problem facing renewables, or without addressing the imminent carbon emissions increase to follow the inevitable reliance on fossil fuels in the absence of nuclear energy input.

B. INVESTING IN ADVANCED SMALL MODULAR REACTORS

Although standard nuclear power plant technologies have not developed much because of increased decommissioning efforts, smaller sized nuclear reactors have burst into the market. SMRs are nuclear reactors that have about one-third of the generating capacity of traditional nuclear reactors.[204] Although producing a third of the electricity that standard nuclear reactors can, SMRs still produce a large amount of low-carbon electricity.[205] The advantages of using SMRs are linked to their size and efficiency. First, SMRs can be factory made, and can be transported and installed as a ready-to-use unit.[206] This is an advantage over standard nuclear reactors because this process is cheaper, requires less labor,[207] and does not require lengthy on-site construction. Not only that, but SMRs cover a very small amount of land for the amount of energy that is produced, particularly when compared to the land needed for wind and solar farms.

Across the world, rural and isolated people's access to electricity is an ongoing equity issue. A second advantage of SMRs is that since they are transportable, governments can send them to isolated regions, install them into existing power grids, and use them to meet energy demands.[208]

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[202] *Nuclear Power in a Clean Energy System*, *supra* note 13, at 42.
[203] *Nuclear power: Downward trend ahead of climate summit*, *supra* note 10.
[204] Joanne Liou, *What are Small Modular Reactors (SMRs)?*, INT'L ATOMIC ENERGY AGENCY (Nov. 4, 2021), *available at* https://www.iaea.org/newscenter/news/what-are-small-modular-reactors-smrs (last visited Jan. 24, 2023).
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Small Modular Reactors*, NUCLEAR ENERGY INST., *available at* https://www.nei.org/advocacy/build-new-reactors/small-modular-reactors (last visited Jan. 24, 2023).

Again, the moveable nature of SMRs lends a hand to closing the gap in electricity inequity, providing clean and reliable power supplies to more people. A third advantage of SMRs is that they can serve as backup power supplies.[209] This becomes particularly helpful in looking toward transitioning to a majority renewable energy power system. Since renewables are intermittent energy supplies, and the technologically underdeveloped batteries are critical to supporting a predominantly renewable sourced power grid, SMRs can lend a further hand to fill the gaps that are produced by renewable energy's inherent flaws. A fourth advantage is that SMRs are safer than standard nuclear reactors. For example, SMRs rely on passive systems as well as low power and low operating pressures inside the reactors.[210] This means that human intervention to shut down a reactor is not required because natural circulation, convection, gravity, and self-pressurization are used as a self-safety check.[211] A fifth advantage is that factory production helps to avoid the slow and lengthy license application process, specifically as it relates to design issues because mass-industrial production would ideally have design kinks ironed out.[212] These factors increase safety and lowers the possibility of radioactive leaks and thus reduce the harm to the public and the environment.[213]

SMRs are tested and developed throughout Asia and the Americas.[214] Further investment in nuclear energy will be beneficial to mitigating climate change. Whether extending licenses on existing standard nuclear power plants, or ramping up investment and implementation of SMRs, either option will allow nuclear energy to operate flexibly and efficiently to continue meeting energy demands and preventing harmful pollutants from entering the atmosphere.

Conclusion

Whether the term "nuclear energy" invokes ideas of Homer Simpson, green goo, or fear of sprouting another limb, much of the internal biases surrounding nuclear energy are misplaced. The Paris Agreement sets forth critical benchmarks that the international community needs to meet in order to avoid widespread harm to air

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[209] Liou, *supra* note 204.
[210] *Id.*
[211] *Id.*
[212] Carl Stenberg, *Energy Transitions and the Future of Nuclear Energy: A Case for Small Modular Reactors*, 11 WASH. J. ENV'T L. & POL'Y 57, 81 (2020).
[213] *Id.* at 84.
[214] *Id.*

quality, oceans, animals, and humanity. Current policies are insufficient, and have already begun to lay the groundwork for embarrassing failure.

Fossil fuels plague every aspect of our planet, and rather than taking their hazards seriously, governments seem complacent and ready to allow fossil fuels to tighten their suffocating grip on the world. By decommissioning nuclear power plants in the face of renewable energy shortcomings, CO_2 levels will rise because of increased fossil fuel reliance. This reality bastardizes the sanctity of the Paris Agreement, all but ensuring the predicted harms of climate change come true: Prolonged heat waves, stronger storms, increased coastal flooding, and so on.

To prevent these results, the international community should maintain existing investment in nuclear power plants and seek to expand nuclear energy's long-term benefits by investing in new nuclear technologies, such as SMRs. Although there are an array of concerns surrounding nuclear energy, these concerns are misplaced; either due to incorrect public understanding, or government manipulation that can be solved with proper, environmentally focused policy-making. Renewable energy technologies are not ready to bear the burden of the ever-increasing technology demand. Further, moving away from nuclear energy before renewables are ready will cause decades of environmental progress to regress.

Nuclear energy must be part of the plan to reach the climate goals of the Paris Agreement, and to attain a CO_2-free energy future. While this plan will not solve climate change in its entirety, this policy objective will make a substantial impact in curbing the wretched impact that climate change is capable of unleashing on every living being on the planet. Countries should order nuclear energy for the table. Please.

THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER EXTRAORDINARY RENDITIONS FROM THE TERRITORY OF STATES PARTIES

The Global Accountability Network's Ukraine Task Force

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THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER EXTRAORDINARY RENDITIONS FROM THE TERRITORY OF STATES PARTIES

The Global Accountability Network's Ukraine Task Force*

EXECUTIVE SUMMARY

This white paper argues China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the International Criminal Court ("ICC"), may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In the cases where non-States Parties deport lawfully present persons from a State Party and at least a part of the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the ICC should logically follow its decision in the 2018 and 2019 Rohingya rulings, despite the territorial reversal, and find it has jurisdiction in such cases.

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* The Global Accountability Network ("GAN") is a collective of international criminal prosecutors and practitioners who supervise and work with law students on specific atrocity projects for Syria, Yemen, Venezuela, Ukraine, and the Pacific Rim region. The Ukraine Task Force ("UKTF") aims to produce non-partisan, high quality analysis of opensource materials and to catalogue that information relative to applicable bodies of law including, the Geneva Conventions, the Rome Statute of the International Criminal Court, and the Criminal Code of Ukraine. The UKTF creates documentation products in a narrative and graphical format, as well as a quarterly and annual trend analysis of ongoing crimes. Furthermore, the UKTF publishes issue specific white papers. UKTF clients include transnational NGOs, the United Nations, the U.S. Department of State, and the Public Interest International Law & Policy Group ("PILPG"). The UKTF is grateful for its ongoing partnerships with the Ukrainian Bar Association ("UBA") and the New York State Bar Association ("NYSBA"). Their volunteers have provided invaluable support to the UKTF.

The GAN-UKTF collectively produced this article, including the Project Leader Professor David M. Crane, Former Chief Prosecutor of the Special Court for Sierra Leone and Founder of GAN; Executive Director Mia Bonardi; Director Alexandra Lane; Lead Writers Lotta Lampela, Kate Metzer, Richard J Naperkowski, Masha Pobedinsky, Joel Shambaugh, and Annika Stimac; Contributors Aaron Ernst, Adrienne Pohl, and Bryan Sicard; and Editors Professor Sara Dillon of Suffolk University Law School and GAN Executive Director Kate Powers.

Furthermore, this white paper reiterates that selective justice, or even the appearance of such, threatens the rule of law. Just as forty-three States Parties rightly referred the grave "Situation in Ukraine" for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC. Since the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, it should also gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute if all other admissibility requirements are met.

The U.S. has an infamous extraordinary renditions program. This white paper acknowledges this history and argues that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it if all other admissibility requirements are met.

Part I includes an introduction by Professor David M. Crane, Founding Chief Prosecutor of the U.N. Special Court for Sierra Leone, and Founder of the Global Accountability Network. Part II discusses the difference between ordinary and extraordinary rendition and how modern extraordinary renditions persist under the facade of their necessity. Part III first presents the foundation of international human rights law, the Universal Declaration of Human Rights and subsequently discusses key international agreements and foundational prohibitions relating to extraordinary rendition, including: the Rome Statute; Genocide Convention; Convention Against Torture; International Covenant on Civil and Political Rights; Geneva Conventions IV Arts. 45, 49, AP I 78, AP I 85; Refugee Convention; and International Covenant for the Protection of all Persons from Enforced Disappearance.

Part IV argues that the ICC should follow its decision in the 2018 the Pre-Trial Chamber I Rohingya ruling despite the territorial reversal, and find it has jurisdiction in the cases where non States Parties deport or forcibly transfer lawfully present persons from a State Party and at least part of the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction). It argues that China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a

State which has accepted the jurisdiction of the ICC, may violate Rome Statute Article 7(1)(d).

Part V discusses the Chinese Communist Party's extraordinary rendition program of Uyghurs and other Muslims, with a focus on extraordinary renditions from States Parties to the Rome Statute. Part V further analyzes extraordinary renditions in the context of the genocide, deportations and enforced disappearances, torture, and transnational repression of Uyghurs. Part V includes analysis of the cases of (A) Israel Ahmet, (B) Mutellip Mamut, and (C) Gulbahar Haitiwaji under Rome Statute Articles 7(1)(d) and (i).

Part VI discusses Russia's extraordinary rendition program of Ukrainians, with a focus on extraordinary renditions from Ukraine, a State which has accepted the jurisdiction of the ICC. Part VI further analyzes extraordinary renditions in the context of the filtration camps, kidnapping and detention of journalists and local officials, torture, forceful transfer of Ukrainian children, and ongoing war crimes in Ukraine. Part VI includes analysis of the cases of (A) Timofey Lopatkina, (B) Viktoria Andrusha, (C) Yevgeny Malyarchuk, (D) Ihor, and (E) Kira Obedinsky under Rome Statute Articles 7(1)(d) and (i).

Part VII names individuals bearing the greatest responsibility for extraordinary renditions conducted by China and Russia from the territory of States Parties, or from the territory of a State which has accepted the jurisdiction of the ICC.

Part VIII discusses the infamous U.S. extraordinary renditions program. Part VIII argues that just as the individuals in Russia and China most responsible for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it if all other admissibility requirements are met.

Part IX argues that when a State not Party to the Rome Statute is reaching into States Parties and coercing people through extreme pressure tactics (whether on the ground or online) to travel to that State not Party (even if they never do travel), where such persons likely face persecution, this practice may qualify as an attempted deportation. Part IX analyzes China and Russia's attempted extraordinary renditions under Rome Statute Article 7(1)(d). Part IX specifically focuses on transnational repression and the technological aspects used in modern attempts at extraordinary renditions.

Part X examines complicity in China and Russia's extraordinary renditions programs by States Parties to the Rome Statute. Part X includes specific analysis of Rome Statute Articles 25 and 30. Part X discusses specific examples of potential complicity by individuals in Tajikistan and Cambodia in the extraordinary rendition of Uyghurs. Part X further discusses the potential complicity of individuals adopting children from Russia.

I. INTRODUCTION

As the world watches one member of the United Nations Security Council wreak havoc upon a fellow member state, another member of the Security Council sinisterly cloaks its global oppression of a minority ethnic group. Direct evidence shows that the Russian Federation is removing whole populations from Ukraine to Russian territory. Meanwhile, numerous cases demonstrate China is reaching into Tajikistan, Cambodia, Afghanistan, and other states, and abducting Uyghurs as well as exerting its influence transnationally to coerce Uyghurs back to China. These acts are extraordinary in that they are fundamentally wrong legally, morally, and politically. Forced movement and removal of peoples is an ages old practice: one only has to read the Old Testament and the extraordinary rendition of Hebrews from Judea to Babylon by way of immediate example.

Alas, extraordinary rendition is a state practice in the modern era. Its use as a tool of dominance in the geopolitical space is a fact. States that have the political clout employ it with impunity and with little concern for accountability. This must change and the extraordinary renditions currently being perpetrated in Ukraine and Tajikistan should be a catalyst for recognition that it is a wrongful state practice (regardless of the already clear prohibition under international law) and accountability must be had.

This white paper discusses various examples of the use of extraordinary rendition, a practice that highlights the two major powers in the modern era—China and Russia. Though other States use it as a practice, these two States are masters of the wholesale movement of peoples for their internal and external political and military gain. The international community will have to deal with both countries now and in the future.

The geopolitical balance is shifting in ways that are not completely understood. Both China and Russia face dangerous economic upheaval, pandemic challenges, and, in the case of the Russian Federation, military defeat. The world is looking at both countries with fresh eyes through a

lens of the rule of law and a democratic-based world order. Governments based on lawless tyranny are inherently weak and over time never succeed in their political gains.

Lawless behavior in the twenty-first century is a threat to international peace and security and the world community. Under the leadership of the United Nations, the international community is reassessing its response to tyranny and unacceptable behavior. The last few years has been a wake-up call for democracies around the world that government of the people and by the people is not a given. We are at a moment in our history that the decisions made in the year 2023 will impact the entire twenty-first century.

Accountability under the rule of law and the United National paradigm has and must remain the cornerstone to State action. Strong condemnation and action against the tyranny of lawlessness must take place, with legal and military force considered, in protecting international peace and security. War crimes, crimes against humanity, aggression, and even genocide, to include extraordinary rendition, must be dealt with under law. Our time is NOW, not tomorrow. The forces of evil gather at the gates of a United Nations that must smite them and restore a balance to world order. Peace through strength should be our watch words.

II. ORDINARY VS. EXTRAORDINARY RENDITION

Ordinary rendition is the movement of a person or persons *legally* under international law to trial and justice.[1] Extraordinary rendition, on the other hand, is the movement of a person or persons *illegally* under international law to interrogation, indefinite pretrial detention, or complete disappearance.[2] Extraordinary rendition is thus the forcible removal and displacement of a person or persons from one jurisdiction to the state enacting the removal, or to a third-party state wherein human rights are often held in question, and legal rights are denied.[3] Extraordinary rendition is referred to in several ways—namely also as "extraterritorial abduction" or "international abduction."[4]

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1. *See generally* Ingrid D. Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT'L L. 657 (2007).

2. *Id.*

3. *Extraordinary rendition*, BRITANNICA, https://www.britannica.com/topic/extraordinary-rendition (last visited 19 Dec. 2022).

4. *Id.*

The Rome Statute of the International Criminal Court Article 7(1)(d) includes the two distinct crimes of (1) deportation and (2) forcible transfer.[5] In 2018, the Pre-Trial Chamber I explained that the difference between these two crimes is that deportation is only completed when the victim is forced across an international border, and that forcible transfer[6] may be completed within one state.[7] As such, this white paper considers "deportation" as the crime most akin to "extraordinary rendition," with note that evidence of "enforced disappearance" can be used to prove the *actus reus* of the crime of deportation.[8]

The U.S. Department of Justice has used the term "extraordinary rendition" since the late 1980s, when it actively engaged in the practice of abducting suspects abroad and bringing them to the U.S. or another country to stand trial.[9] The modern age and understanding of extraordinary rendition rose out of the Clinton administration's practice of extraordinary rendition.[10] After 11 September 2001, the practice and understanding of extraordinary rendition accelerated under a global fear of terrorism.[11]

The CIA systematically captured persons of interest and sent them to black sites in countries where they faced a high risk of abuse or

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5. Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, Art. 7(1)(d) [hereinafter Rome Statute]; ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ¶ 53-60 (6 Sept. 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF.

6. *See* INT'L CRIM. CT., ELEMENTS OF CRIMES, at Art. 7(1)(d) n.12, https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (last visited 4 Jan. 2023) [hereinafter ELEMENTS].
(explaining "The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.").

7. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 53-60.

8. *Id.* at ¶ 61.

9. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *See also* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 n. 33 (2006) (citing Richard Sisk & Patrice O'Shaughnessy, *Streetwise Safir's Return*, DAILY NEWS (New York), Apr. 14, 1996, at 7).

10. James D. Boys, *The Clinton Administration's Development and Implementation of Rendition (1993–2001)*, 42 STUDIES IN CONFLICT & TERRORISM 1090 (2019).

11. *Extraordinary Rendition*, ACLU, https://www.aclu.org/issues/national-security/torture/extraordinary-rendition (last visited 19 Dec. 2022).

torture.[12] Former CIA agent Robert Baer said: "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt."[13]

The term "extraordinary rendition" became a "euphemism describing abduction designed not only to circumvent extradition procedures, but also to avoid the protections of [the U.S.] or other judicial authorities."[14] The infamous Guantanamo Bay detention center was created to evade prisoners' rights and, twenty years on, thirty-five prisoners remain in this legal black hole.[15]

Established under the guise of combating terrorism, modern extraordinary renditions persist under the facade of their necessity.[16] Current practices of extraordinary rendition are applied to members of minority populations due to the fear that ideological separatism or religious practice threaten sovereignty or imperialist efforts.[17] At present, extraordinary rendition persists as a weapon of war and is actively employed in contravention of international law and the *Universal Declaration of Human Rights* ("UDHR").[18]

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12. Patricio Galella & Carlos Espósito, *Extraordinary Renditions in the Fight Against Terrorism*, 9 SUR 7 (2012).

13. *Fact Sheet: Extraordinary Rendition*, ACLU (Nov. 6, 2018), https://www.aclu.org/other/fact-sheet-extraordinary-rendition (last visited 19 Dec. 2022).

14. Weissbrodt & Bergquist, *supra* note 9 (citing Gloria Cooper, *State of the Art,* COLUM. L. REV., 1 July 2005, at 13.).

15. *See* Mia Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, VI CARDOZO INT'L & COMP. L.R. (forthcoming Apr. 2023); Hina Shamsi, *20 Years Later, Guantánamo Remains a Disgraceful Stain on Our Nation. It Needs to End.*, ACLU (11 Jan. 2022), https://www.aclu.org/news/human-rights/20-years-later-guantanamo-remains-a-disgraceful-stain-on-our-nation-it-needs-to-end; Sarah Almukhtar et al., *The Guantánamo Docket*, THE NEW YORK TIMES, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html (last visited 19 Dec. 2022).

16. *See e.g.*, All Things Considered, *Who The Uyghurs Are And Why China Is Targeting Them*, NPR (31 May 2021) https://www.npr.org/2021/05/31/1001936433/who-the-uyghurs-are-and-why-china-is-targeting-them.

17. *See infra.*

18. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (10 Dec. 1948) [hereinafter UDHR].

III. EXTRAORDINARY RENDITION VIOLATES INTERNATIONAL LAW

Extraordinary rendition is a hybrid violation of international law, including elements of enforced disappearance, deportation, torture, denial of access to consular officials, and denial of impartial tribunals,[19] and may amount to a crime against humanity, war crime, and/or a crime of genocide under the Rome Statute.[20] This section first presents the foundation of international human rights law, the UDHR. The subsequent sections discuss key international agreements and foundational prohibitions relating to extraordinary rendition, including:

A. *Rome Statute of the International Criminal Court* ("Rome Statute")
B. *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention")
C. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT")
D. *International Covenant on Civil and Political Rights* ("ICCPR")
E. *Geneva Conventions*—GC IV Arts. 45, 49, AP I 78, AP I 85
F. *Convention Relating to the Status of Refugees* ("Refugee Convention")
G. *International Convention for the Protection of All Persons from Enforced Disappearances* ("ICPPED")

Each subsection addresses the provisions of these international treaties relevant to extraordinary rendition and limitations in their application and enforcement.

A. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UDHR, adopted by the United Nations General Assembly ("UNGA") in 1948,[21] is considered the foundation of international human rights law.[22] It created the baseline for fundamental human rights to be

19. Weissbrodt & Bergquist, *supra* note 9.
20. Rome Statute, *supra* note 5, at arts. 7(1) & 7(2).
21. UDHR, *supra* note 18.
22. *The Foundation of International Human Rights Law*, UNITED NATIONS, https://www.un.org/en /about-us/udhr/foundation-of-international-human-rights-law (last visited 31 Dec. 2022).

universally protected, which have since been developed through individual specialized human rights treaties.[23] The UDHR is not legally binding and thus it is not independently enforceable. However, several of its provisions have achieved the status of customary international law,[24] including the right to life (Art. 3), freedom from torture (Art. 5), and the right to a fair trial (Art. 10).[25]

In addition to the aforementioned rights—the right to life, freedom from torture, and the right to a fair trial—a number of articles of the UDHR are directly implicated by extraordinary rendition.[26] Victims of extraordinary rendition may be denied their "right to recognition as a person before the law" under Article 6 and their right to an "effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" under Article 8. Extraordinary rendition can constitute "arbitrary arrest, detention or exile," prohibited by Article 9, and victims may be deprived of their right "to seek and to enjoy in other countries asylum from persecution" under Article 14. Article 13 is also implicated, which provides people with "the right to leave any country and to return to their home country." Finally, several other rights established by the UDHR, such as the prohibition against arbitrary deprivation of property,[27] may be violated indirectly by extraordinary rendition.[28]

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23. *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited 31 Dec. 2022). Together with the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), the UDHR forms the so-called International Bill of Human Rights. *See The International Bill of Human Rights*, UNITED NATIONS: HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights (last visited 31 Dec. 2022).

24. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

25. *See* U.N. Econ. & Soc. Council (ECOSOC), Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andris Aguilar, Appointed Pursuant to Resolution 1984/54, on the Human Rights Situation in the Islamic Republic of Iran*, ¶¶ 14-15, U.N. Doc. E/CN.4/1985/20 (1 Feb. 1985).

26. *See* Weissbrodt & Bergquist, *supra* note 9, at 130-132.

27. UDHR, *supra* note 18, at Art. 17.

28. Weissbrodt & Bergquist, *supra* note 9, at 130-132.

B. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute does not explicitly address extraordinary renditions, but at least crimes against humanity under Article 7(1) and war crimes under Article 7(2) may be applicable in such situations. Article 7(1) of the Rome Statute defines crimes against humanity. In the Rome Statute framework, a crime against humanity means any of the enumerated acts, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[29] Deportation or forcible transfer of population and enforced disappearance of persons are included as separate crimes.[30]

Article 7(1)(d) defines that deportation or forcible transfer of population is "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[31] The Pre-Trial Chamber I of the ICC explained:

> consistent with customary international law, article 7(1)(d) of the Statute contains two related but distinct crimes: deportation and forcible transfer. Deportation is distinguished from forcible transfer by the legal requirement that the victim is forced to cross an international border, whether *de jure* or *de facto*. In circumstances where the enforced bordercrossing takes the victim *directly* into the territory of another State, this legal element is completed in that second State.[32]

Further guidance as to the concept is found in the Elements of Crimes, which assist the ICC in its interpretation of Articles 6, 7, 8, and 8bis of the Statute.[33] A deportation or forcible transfer of population can be a crime against humanity if the following elements are found:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

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29. Rome Statute, *supra* note 5, at Art. 7(1).

30. *Id.* at arts. 7(1)(d) & 7(1)(i).

31. *Id.* at Art. 7(2)(d).

32. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 13.

33. The Elements are adopted by a two-thirds majority of the Assembly of States Parties. *Id.* at Art. 94.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[34]

A forcible transfer may take place if there is the threat of force or coercion, without a direct physical element.[35] Element 1 can be established through evidence of various conducts, including enforced disappearance.[36] In its assessment, the ICC will consider factors such as the presence of fear of violence, duress, or detention.[37] It is to be noted that the Rome Statute definition of transfer of population also covers such situations within a territory of a state.[38] Thus, crimes against humanity under Article 7 include so-called "ethnic cleansing."[39]

The crime against humanity of enforced disappearance of persons is a relatively recent addition to the crimes against humanity: it was codified for the first time in the Rome Statute.[40] Enforced disappearance of persons means "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."[41] Thus, the *actus reus* consists of two main elements: (1) the deprivation of liberty and (2) the withholding

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34. ELEMENTS, *supra* note 6, at Art. 7(1)(d)

35. *Id.* at Art. 7(1)(d) n. 12.

36. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 61.

37. *Id.*

38. Chandra Jeet, *Definitions and Elements of Crimes in the Rome Statute: Some Critical Reflections,* 6 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 169, 178 (2006).

39. *Id.*

40. While state involvement is well established as the constitutive element of the crime of enforced disappearance, the Rome Statute, unlike any other convention addressing enforced disappearances, attributes the crime also to a "political organization." For further analysis, *see* Irena Giorgiou, *State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute,* 11 J. INT'L CRIM. JUST. 1001 (2013).

41. Rome Statute, *supra* note 5, at Art. 7(2)(i).

of information. These elements are defined in more detail in the Elements of Crimes as follows:

1. The perpetrator:
   (a) Arrested, detained or abducted one or more persons; or
   (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
   (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give
   information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a

> widespread or systematic attack directed against a civilian population.[42]

The perpetrator's awareness in Element 3, an element which the drafters "inserted because of the complexity" of the crime, is to be assessed on par with the General Introduction to the Elements of Crimes.[43] The criminal responsibility turns on the perpetrator's intent and/or knowledge, which can be inferred from relevant facts and circumstances.[44]

Article 8 of the Rome Statute governs war crimes, which entail grave breaches of the *Geneva Conventions of 12 August 1949* and other serious violations of the laws and customs applicable in international armed conflict, as well as serious violations of Article 3 common to the four *Geneva Conventions of 12 August 1949* and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[45] Among the listed war crimes under Article 8(2) are unlawful deportation or transfer or unlawful confinement as well as torture or inhuman treatment, both of which may be applicable in the context of this study.[46]

The war crime of unlawful deportation or transfer and the war crime of unlawful confinement share four elements: (1) the victim of the perpetrator's conduct was protected under one or more of the *Geneva Conventions of 1949*; (2) the perpetrator was aware of the factual circumstances that established that protected status; (3) the conduct took place in the context of and was associated with an international armed conflict; and (4) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.[47] Additionally, in the case of unlawful deportation, the perpetrator must have deported or transferred one or more persons to another State or to another location; in unlawful confinement, the perpetrator confined or continued to confine one or more persons to a certain location.[48]

States Parties to the Rome Statute accept the ICC's jurisdiction under Article 12(1) regarding Article 5 crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; or (d) The crime of

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42. ELEMENTS, *supra* note 6, at Art. 7(1)(i)
43. *Id.* at Art. 7(1)(i) n.27.
44. *Id.* at General Introduction, ¶ 3.
45. Rome Statute, *supra* note 5, at Art. 8(2). *See infra.*
46. *Id.* at Art. 8(2)(a)(vii).
47. ELEMENTS, *supra* note 6, at arts. 8(2)(a)(vii)-1 & 2.
48. *Id.*

aggression.[49] Under Article 12(2)(a), the ICC may also exercise its jurisdiction if the "State on the territory of which the conduct in question occurred" has accepted the jurisdiction of the ICC.

The Rome Statute has not been ratified by any of the four countries in this paper's focus (China, Russia, Ukraine, U.S.). China has neither signed nor ratified the treaty. The Russian Federation and the U.S. have signed, but not ratified it. The U.S. signed the Statute in December 2000, but a bit over a year later informed the Secretary-General that the U.S. did not "intend to become a party to the treaty" and accordingly had "no legal obligations arising from its signature." Russia signed the Rome Statute in September 2000, but in November 2016, announced its intention not to become a party.[50] This coincided with the release of the ICC Prosecutor's 2016 Report on Preliminary Examination Activities, where the Prosecutor suggested that the situation in Crimea and Sevastopol amounted "to an international armed conflict between Ukraine and the Russian Federation."[51]

Ukraine signed the Rome Statute in January 2000, but there seems to be little political will to ratify it.[52] However, Ukraine has officially accepted the ICC's jurisdiction by submitting two declarations pursuant to Article 12(3) of the Rome Statute. The first declaration, submitted in April 2014, accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014; the second, submitted in September 2015, extended this time period

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49. The jurisdictional regime of the crime of aggression is different from that of the other three international crimes. Based on the Rome Statute Articles 15 *bis* and 15 *ter*, the ICC cannot exercise its jurisdiction over crimes of aggression committed by nationals of states not party to the Rome Statute or on those states' territories, unless the Security Council, acting under Chapter VII of the Charter of the United Nations, refers the situation to the Prosecutor. The temporal jurisdiction of the ICC over the crime of aggression was activated as of17 July 2018. *Assembly of State Parties to the ICC*, Res. ICC-ASP/16/Res.5 (14 Dec. 2017), https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

50. *Chapter XVIII Penal Matters, 10 . Rome Statute of the International Criminal Court,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited 31 Dec. 2022).

51. ICC OFFICE OF THE PROSECUTOR, REP. ON PRELIMINARY EXAMINATION ACTIVITIES (2016), ¶ 158 (Nov. 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

52. On reasons behind the ratification resistance, *see, e.g.,* Aloka Wanigasuriya, *After all this time, why has Ukraine not ratified the Rome Statute of the International Criminal Court?*, JUSTICE IN CONFLICT (14 Mar. 2022), https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court/.

on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.[53] With these declarations, Ukraine has accepted ICC jurisdiction "for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine" from 21 November 2013, onwards.[54]

C. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Genocide as an international crime was born out of the atrocities of the second World War and the Holocaust and charged for the first time in Nuremberg.[55] In 1946, the UNGA affirmed that genocide, a denial of the right of existence of entire human groups, was a crime under international law.[56] In the same resolution, UNGA tasked the Economic and Social Council to start preparing for a draft convention on the crime of genocide.[57] On 9 December 1948, the *Convention on the Prevention and Punishment of the Crime of Genocide* became the first human rights treaty adopted by UNGA.[58] It entered into force on 12 January 1951.[59]

A critical difference between the Charter of the Nuremberg Tribunal and the Genocide Convention is that the Convention covers also crimes committed during times of peace.[60] Article II of the Convention defines genocide:

Article II

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53. *Ukraine*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/ukraine (last visited 13 Jan. 2023).

54. Declaration by the Government of Ukraine, accessible at *Ukraine*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/ukraine (last visited 13 Jan. 2023).

55. Henry T. King Jr., Benjamin B. Ferencz, & Whitney R. Harris, *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT'L L. 13, 15–17 (2007).

56. G.A. Res. 96 (I), *The Crime of Genocide* (11 Dec. 1946).

57. *Id.*

58. *Crimes Against Humanity*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited 31 Dec. 2022).

59. G.A. Res. 96 (I), *supra* note 56.

60. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, Art. I [hereinafter Genocide Convention].

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.[61]

Article III condemns acts related to genocidal conduct broadly: in addition to the act of genocide *per se*, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are also punishable.[62]

There are 152 States Parties to the Genocide Convention.[63] Russia (formerly the "U.S.S.R.") and Ukraine ratified the Convention in 1954. Decades later, China ratified the Convention in 1983 with a critical reservation: China does not consider itself bound by article IX, which provides that disputes relating to the interpretation of the Convention "including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice ("ICJ") at the request of any of the parties to the dispute."[64] The U.S. finally joined in 1988, but with a number of reservations and understandings. These include limiting the jurisdiction of the ICJ with a requirement of case-specific consent of the U.S. and establishing that acts committed in the course of an armed conflict without specific genocidal intent are not sufficient to constitute genocide.[65] Some commentators have called the U.S. adherence to the Genocide Convention "symbolic."[66]

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61. *Id.* at Art. II.

62. *Id.*

63. *The Genocide Convention*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, https://www.un.org/en/genocideprevention/genocide-convention.shtml (last visited 31 Dec. 2022).

64. *Chapter IV Human Rights, 1. Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec (last visited 31 Dec. 2022).

65. *Id.*

66. King, Benjamin B. Ferencz, & Harris, *supra* note 55.

D. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Contrary to most rules in international human rights law, the protection from torture is not a relative, contextual norm, but an absolute right.[67] This is explicitly stipulated in CAT Article 2, which declares that "[n]o exceptional circumstances whatsoever" may justify torture.[68] CAT Article 3 addresses expulsion, refoulement, and extradition and appears directly applicable in extraordinary renditions:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[69]

Whether the sending state is aware of the threat of torture is not material.[70]

CAT's definition of torture—intentionally inflicted severe physical or mental pain or suffering[71]—has not, however, been coherently

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67. *See, e.g.*, Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U. L. REV. 837, 842 (2007).

68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2),
Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

69. *Id.* at Art. 3.

70. *See, e.g.*, Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309, 320 (2005-2006).

71. CAT, *supra* note 68, at Art. 1(1) ("For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

incorporated into domestic legislation by all States Parties.[72] The U.N. Committee Against Torture has emphasized that the elements of intent and purpose in the definition "do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of the chain of command as well as that of the direct perpetrator(s)."[73]

The obligations of States Parties extend to any territory under its jurisdiction,[74] including all areas where the State Party in question exercises "directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law."[75] This encompasses areas under military occupation, military bases, and detention facilities.[76]

CAT was adopted by the UNGA in December 1984, and it entered into force in 1987.[77] The Ukrainian Soviet Socialist Republic ratified CAT in February 1987, the Soviet Union in March 1988, China in October 1988, and the U.S. in October 1994.[78] The U.S., however, has rejected the application of CAT in its ongoing military operations, which it considers to be governed by the law of armed conflict.[79]

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capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

72. Comm. Against Torture on Its Thirty-Ninth Session, *General Comment No. 2, Implementation of article 2 by States Parties*, ¶ 9, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

73. *Id.*

74. CAT, *supra* note 68, at Art. 2(1). *See* Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

75. Comm. Against Torture on Its Thirty-Ninth Session, *supra* note 72, at ¶ 16.

76. *Id.*

77. Historic Archives, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, https://legal.un.org/avl/ha/catcidtp/catcidtp.html (last visited 8 Jan. 2022).

78. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en (last visited 4 Jan. 2023). In 1999, China submitted a Communication informing the Secretary-General of the United Nations that China would assume responsibility for the international rights and obligations arising from the application of the Convention to Macau and that the Chinese reservations to Article 20 and Article 30.1 would equally apply to Macau. 2086 U.N.T.S. 124.

79. Walter Kalin, *Extraterritorial Applicability to the Convention against Torture*, 11 N.Y. CITY L. REV. 293 (2008).

E. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR is a U.N. human rights treaty monitored by the U.N. Human Rights Committee ("UNHRC") that entered into force in 1976.[80] Ukraine and the Russian Federation both ratified the ICCPR in 1973 without a substantive reservation and are currently bound by its prohibitions.[81] The U.S. also ratified the treaty in 1992 but maintained a reservation that the Treaty's substantive obligations are not self-executing.[82] The People's Republic of China is currently a signatory of the ICCPR but has yet to ratify it.[83] These noted reservations potentially obscures ICCPR compliance and leaves potential enforcement up to a State's domestic law and policy.

The ICCPR is designed to codify human rights protections for individuals within States Parties.[84] The protections specifically include the prohibition against torture or inhumane treatment under Article 7, the right to liberty under Articles 9 and 10, and the protection of ethnic or religious minorities under Article 27.[85] These underlying protections may be violated as a consequence of extraordinary rendition by either belligerent States in conflict or by similar deprivations of liberty to a state's internal populations.

The ICCPR provides a baseline prohibition against torture under Article 7 stating, in relevant part, that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[86] These prohibitions may be extended to situations of extraordinary rendition through the UNHRC's General Comment 20: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[87] While comments are non-binding on States Parties, this comment could create a positive

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80. *See* International Covenant on Civil and Political Rights, 16 Dec. 1966, 933 U.N.T.S. [hereinafter ICCPR].

81. *Id.*

82. *Id.*

83. *Id.*

84. ICCPR, *supra* note 80, at Preamble.

85. *Id.* at arts. 7, 9, 10, 27.

86. *Id.* at Art. 7.

87. UNHRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 2 (10 Mar. 1992), https://www.refworld.org/docid/453883fb0.html (last visited 22 Nov. 2022).

obligation to prevent any instance of rendition or internal detention under Articles 9 and 10 where an individual is put at risk of torture.

ICCPR Article 9(1) provides protections for individual liberty against detention by the state: "Everyone has the right to liberty and security of person."[88] The UNHRC remarked in General Comment 35 that "Everyone" is intended to be read expansively and covers all genders, sexes, occupations, residents, aliens, refugees, convicts, *and even those who have engaged in terrorist activity*.[89] Intending to mirror Article 3 of the UDHR, the UNHRC defined "liberty" as concerning a person's freedom of bodily confinement without free consent and includes situations of unlawful detention in police custody or involuntary hospitalization.[90] Additionally, "security" concerns freedom from mental or bodily injury and integrity regardless of whether they are detained.[91] These protections require a state to take appropriate measures to prevent depravations or liberty or threats of violence by other persons or States solely within their territory.[92]

The remaining elements of Article 9(1) state that, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[93] The prohibition on the deprivation of liberty necessarily refers to the acts of "arrest," or the beginning the deprivation of liberty and "detention" or the process of adjudication.[94] Both instances also share the same standard of arbitrariness. In order for an arrest or detention to not be considered arbitrary it must broadly meet the general elements of due process—appropriateness, predictability, reasonableness, necessity, and proportionality.[95] However, Article 9(1) does not forbid the detention of persons seeking asylum or immigrants but does require such detention to meet the same requirements for arbitrariness.[96]

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88. ICCPR, *supra* note 80, at Art. 9.

89. UNHRC, *CCPR General Comment No. 35: Article 9 (Liberty and security of person)*, 1 (16 Dec. 2014), https://documents-dds ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451 (last visited 20 Nov. 2022).

90. *Id.* at 1-2 (emphasis supplied). *See* UDHR, *supra* note 18, at Art. 3.

91. *Id.*

92. *Id.*

93. ICCPR, *supra* note 80, at Art. 9.

94. UNHRC, *CCPR General Comment No. 35*, *supra* note 89 at 3-4.

95. *Id.*

96. *Id.* at 5.

Read together, these prohibitions illustrate a general protection from detention by a state or from another entity for anyone within a State's borders. In any case, where arrest or detention can meet the lawful and non-arbitrary requirements, conditions must still conform with Article 7 and 10.[97] Article 10 requires the humane treatment of individuals deprived of their liberty while Article 7 sets a general prohibition of torture or inhuman treatment or punishment.[98]

ICCPR Article 10(1) builds on Article 9 and codifies the treatment of persons who are lawfully detained by a state: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[99] A person *lawfully* deprived of liberty under Article 10 retains all protections under the ICCPR, regardless of the institution in which they are held.[100] These institutions include, but are not limited to, a state's prisons, correctional facilities, hospitals, and psychiatric institutions.[101]

It is incumbent on a state to ensure that all institutions within their jurisdiction operate in accordance with the ICCPR.[102] This imposes a positive obligation on a state to treat all individuals with the humanity and dignity required under ICCPR Article 7.[103] The application of this standard is not contingent on a State's material resources and extends equally to all persons regardless of sex, gender, national origin, or status.[104]

Finally, Article 27 contains a specific prohibition on persecution of minorities and its protections apply to any ethnic, religious, and linguistic minorities within a State Party.[105] When a minority exists within a State, they "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."[106] A person qualifies for Article 27 protection whenever they seek to practice their language or

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97. *Id.* at 4.

98. ICCPR, *supra* note 80, at arts. 7, 10.

99. *Id.* at Art. 10.

100. UNHRC, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 1 (16 Dec. 2014), https://www.refworld.org/docid/453883fb11.html (last visited 20 Nov. 2022).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. ICCPR, *supra* note 80, at Art. 27.

106. *Id.*

culture within a State's minority group regardless of their citizenship or visitor status.[107] The UNHRC commented that a minority does not need to permanently exist or be formally recognized within a State to fall under Article 27 projections.[108] These protections apply equally to citizens as well to migrant groups and are assets on an objective factual basis.[109] The UNHRC further notes that Article 27 creates a positive right where a State must take measures to protect a minority group's freedom to worship, to speak their languages, and a culture's way of life so long as it does not conflict with other provisions of the ICCPR.[110]

F. GENEVA CONVENTIONS—GC IV ARTS. 45, 49, AP I 78, AP I 85

The 1949 Fourth Geneva Convention ("GC IV") is an almost universally recognized international treaty ratified by China, Russia, Ukraine, and the U.S. as observing States Parties.[111] At its core, GC IV is intended to define and provide protections to civilians in times of war.[112] GC IV Article 2 outlines that these civilian protections extend to armed conflict between two or more State Parties and applies to all cases of partial or total occupation regardless of armed resistance.[113] It is specifically the civilian protections in areas of conflict under Article 45 and areas of occupation under Article 49 that are likely violated in situations of extraordinary rendition.[114]

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107. UNHRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 2 (8 April 1994), https://www.refworld.org/docid/453883fc0.html (last visited 23 Nov. 2022).

108. *Id.*

109. *Id.*

110. *Id.* at 3.

111. ICRC, *Treaties, State Parties and Commentaries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last visited 20 Nov. 2022).

112. *See* ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287 [hereinafter GC IV];
Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1957, ICRC INT'L HUMANITARIAN L. DATABASES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument.

113. GC IV, *supra* note 112, at Art. 2.

114. *Id.* at arts. 45, 49.

Article 45 is largely concerned with civilian transfers between powers during a conflict and does not affect existing extradition treaties or post conflict civilian repatriation.[115] Under Article 45, a State in conflict that has control over foreign civilians may only transfer these protected persons to another State that is a party to the GC IV.[116] The receiving State must be willing and able to apply the GC IV and it is the responsibility of the original detaining State to take effective measures to correct any failure to uphold the GC IV.[117] The specific responsibilities of a detaining State over protected persons are outlined under GC IV Articles 4, and 27 to 34.[118] Overall, the transfer provisions under Article 45 are intended to prevent belligerent States from transferring protected persons into dangerous or inhumane conditions.[119]

Article 45 also contains an explicit prohibition that supersedes any State's ability to transfer protected persons. Article 45, paragraph 4 provides, "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[120] The 1957 Geneva Commentary further illustrates that even the threat of discrimination against protected persons is violative of the Convention and a detaining State can only transfer if it is absolutely certain such persons will be free from political and/or religious persecution.[121]

Occupying powers must also follow the prohibitions under Article 49 which prevents a State from undertaking "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[122] The Commentary notes that this clause is intended to be absolute unless the transfer is voluntary by a protected person or falls into the narrow exceptions of Article 49.[123]

An Occupying State may only evacuate protected persons if their security is at risk or an imperative military reason demands it.[124] In these

115. *Id.* at Art. 45.
116. *Id.*
117. *Id.*
118. *Id.* at arts. 4, 27-34.
119. *Commentary of 1957*, *supra* note 112, at Art. 45.
120. GC IV, *supra* note 112, at Art. 45.
121. *Commentary of 1957*, *supra* note 112, at Art. 45.
122. GC IV, *supra* note 112, at Art. 49.
123. *Id.*
124. *Id.*

circumstances, the population may not be moved outside the occupied territory unless material reasons require it.[125] However, these evacuations must be temporary, the Occupying State must provide for the health and safety of the protected persons, and the Protecting Power must be notified of the evacuation.[126] The Commentary also stipulates that the Protecting Power may verify the conditions of the evacuees in all phases and extends outside of the occupied territory.[127] An Occupying State also may not deport or transfer its own population into occupied territory.[128] Finally, GC IV Article 147 further provides that any expulsion or deportation of protected persons in violation of the Convention is considered a grave breach.[129]

In addition to GC IV, China, Russia, and Ukraine have also ratified the *Geneva Convention's 1977 Additional Protocol I* (AP I).[130] AP I Article 85 further refines what constitutes grave breaches of population transfer in accordance with Article 49.[131] Article 85 first adds that a State must act willfully in order to commit a grave breach for the preceding Conventions.[132] Then under subsection 85(a), these willful actions also apply specifically when, "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 . . . ." Thus, creating a nexus between Articles 49 and 85 of willful State action.

AP I Article 78 concerns additional protections for the evacuation of children.[133] This Article only allows an Occupying State to transfer children internally within an occupied territory and only for compelling

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125. *Id.*

126. *Id. See Commentary of 1957*, *supra* note 112, at Art. 49.

127. *Id.*

128. *Id.*

129. GC IV, *supra* note 112, at Art. 147. *See e.g.*, Prosecutor v. Naletilić (Mladen) AKA Tuta and Martinović (Vinko) AKA Štela, Case No. IT-98-34-T, ICC, 2003, https://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf.

130. The U.S. has signed but has not ratified AP I. *See* ICRC, *Treaties, State Parties and Commentaries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last visited 22 Nov. 2022).

131. ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 78 & 85, 8 June 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

132. *Id.*

133. *Id.* at Art. 78.

reasons of health or safety.[134] These evacuations cannot separate a child from their parent or guardian and must be supervised by the Protecting State.[135] The 1987 Commentary adds that Article 78 is intended to facilitate evacuation of children to allied or neutral countries based on effective historical precedent.[136]

These four Articles represent some of the foundational international prohibitions on when and how a State may move protected persons. It is clear that there is significant elemental overlap with extraordinary rendition. In any case where prohibitions are willfully violated by a State in conflict, specifically in the context of AP I States Parties, it likely constitutes a grave breach of international law.

G. CONVENTION RELATING TO THE STATUS OF REFUGEES

The 1951 Refugee Convention contains specific prohibitions on refoulement, otherwise referred to as expulsion or return, that limit a State Party's ability to expel refugees.[137] China, Russia, and Ukraine have all either ascended or ratified the Refugee Convention and are bound as States Parties, with the U.S. only ratifying the additional 1967 Protocol.[138] These additional prohibitions may be applied to certain instances of extraordinary rendition.

Article 33 of the Refugee Convention prohibits States Parties from expelling or returning a refugee to any territory where that person's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[139] However, this protection does not extend to instances where a nation has "reasonable grounds" to believe a refugee is a danger to

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134. *Id.*

135. *Id.*

136. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary of 1987*, ICRC INT'L HUMANITARIAN L. DATABASES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B420929F958AB3A3C12563CD00436DA5 (last visited 4 Jan. 2023).

137. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

138. *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (last visited 13 Dec. 2022).

139. Refugee Convention, *supra* note 129, at Art. 33.

national security or has previously been convicted of a dangerous crime.[140]

This protection from expulsion is intended to expand Article 5 of the 1938 Convention which prevented countries from returning refugees to Germany without just cause.[141] The official U.N. Commentary first clarifies that the term refugee under Article 33 extends to any Convention refugee as defined in Article I who is present within a States Party's territory irrespective of their legal status.[142]

The Commentary also clarifies the lawful exception to refoulement. Article 33 does not require a strict or international standard of proof for determining who is a threat to national security.[143] The standard for "reasonable grounds" is instead left to each nation to decide if a person is a future danger to the people of the nation.[144] This logic extends to the conviction requirement for dangerous crimes as well. A State Party may expel a refugee under the same reasonableness standard so long as the person received a "final conviction" for what the host nation may consider a dangerous crime.[145] This standard also requires that the person in question still presents a danger to the community to be lawfully expelled.[146]

H. INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

The ICPPED provides basic protections against state–orchestrated disappearances and was drafted in order to provide awareness, prevention, and justice for the families and victims of enforced

140. *Id.*

141. *Commentary of the Refugee Convention 1951*, DIVISION OF INTERNATIONAL PROTECTION OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 135-136 (1997), https://www.unhcr.org/3d4ab5fb9.pdf (last visited 7 Jan. 2022).

142. *Id.*

143. *Id.* at 138-39.

144. *Id.*

145. *Id.* at 142-43

146. *Id.*

disappearances.[147] Currently, China, Russia, and the U.S. have not signed or ratified the ICPPED, leaving only Ukraine as a State Party.[148]

ICPPED Article 2 defines an enforced disappearance, in relevant part, as an "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization . . . followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person . . . ."[149] Under ICPPED Article 1, this type of action by a State Party is intended to be prohibited without exception even in times of war or public emergency.[150] A State that allows for widespread or systematic violations of this prohibition essentially commits a crime against humanity.[151]

The ICPPED also obligates States Parties to take various proactive measures to prevent and investigate enforced disappearances.[152] States Parties are required to search for disappeared persons and investigate their disappearances, as well as provide access to justice and reparation to these victims and families.[153] Access to justice includes the obligation to maintain records for all detention, guarantee legal minimum standards for detention, and creation of penal penalties for those who take part in such deprivation of liberty.[154]

The ICPPED Article 16 contains a specific prohibition on refoulement and prohibits a state from expelling a person to another state where "there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."[155] It is up to the host State to consider all relevant considerations including the existence of human rights law violations in the potential return State.[156]

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147. International Convention for the Protection of All Persons from Enforced Disappearance, Preamble, *opened for signature* 6 Feb. 2007, 2716 U.N.T.S. 3 (*entered into force* 23 Dec. 2010) [hereinafter ICPPED].

148. *Id.*

149. ICPPED, *supra* note 147, at Art. 2.

150. *Id.* at Art. 1.

151. *Id.* at Art. 5.

152. *Background to the International Convention for the Protection of All Persons from Enforced Disappearance, UN Committee on Enforced Disappearances*, UNITED NATIONS: HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/treaty-bodies/ced/background-international-convention-protection-all-persons-enforced-disappearance (last visited 4 Jan. 2023).

153. *Id.*

154. *Id.*

155. ICPPED, *supra* note 147, Art. 16.

156. *Id.*

The reach of the ICPPED appears rather limited due to the lack of major signatory nations. However, the ICPPED may still have an effect outside of its State Parties due to its overlapping protections with many other major international treaties. A State may not be subject to the jurisdiction of the ICPPED but a violation of one of its provisions will likely violate a mirrored provision within CAT, ICCPR, or Refugee Convention.

IV. ICC JURISDICTION OVER EXTRAORDINARY RENDITIONS FROM THE TERRITORY OF STATES PARTIES

China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the ICC, may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In both China and Russia, it appears that orders for the extraordinary renditions discussed in this report go all the way up the chain of command.[157]

Rome Statute Article 7(1)(d) includes the two distinct crimes of (1) deportation and (2) forcible transfer.[158] In 2018, the Pre-Trial Chamber I of the ICC explained that the difference between these two crimes is that deportation is completed when the victim is forced across an international border, and that forcible transfer[159] may be completed within the borders of a single state.[160] As mentioned above, this white paper considers "deportation" and "extraordinary rendition" as reference to the same transnational crime at the ICC, but "forcible transfer" as distinct.[161]

In 2018, the Pre-Trial Chamber I concluded that it could exercise jurisdiction over crimes perpetrated in Myanmar (a non–State Party) because part of the crime occurred in Bangladesh (a State Party).[162] This decision specifically regarded deportations of Rohingya people to

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157. *See infra* Section VII for a list of individuals bearing the greatest responsibility for these crimes.

158. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 53-60.

159. *See* ELEMENTS, *supra* note 6, at Art. 7(1)(d) n.12 (explaining "The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.").

160. *Id.*

161. *See supra* Section II.

162. ICC-RoC46(3)-01/18, *supra* note 5.

Bangladesh.[163] Pre-Trial Chamber I of the ICC determined that it "may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute."[164] The ICC reasoned that "an element of the crime of deportation is forced displacement across international borders, which means that the *conduct* related to this crime necessarily takes place on the territories of at least two States."[165]

This white paper argues that the ICC can logically come to the same conclusion in cases of extraordinary rendition. In 2018, the Pre-Trial Chamber I concluded that "acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute."[166] In some cases of extraordinary rendition, deportations are initiated *in* (not necessarily *by*) a State Party (via forced transport or excessive coercion) and completed *by and in* a State not Party (by forced importation of victims).

In 2019, Pre-Trial Chamber III of the ICC explained that "The only clear limitation that follows from the wording of [A]rticle 12(2)(a) of the [Rome] Statute is that at least part of the conduct (*i.e.* the *actus reus* of the crime) must take place in the territory of a State Party."[167] The ICC lists the five elements of Article 7(1)(d), the crime against humanity of deportation, which would govern an extraordinary rendition.[168] The first element "The perpetrator deported or forcibly, transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts" is the *actus*

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163. *Id.*

164. *Id.* at ¶¶ 30-33. The Court used the principle of la compétence de la compétence to come to its conclusion, explaining that it is "an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction." *See also* ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 48 (14 Nov. 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF (noting that "the notions of 'conduct' and 'crime' in article 12(2)(a) of the Statute have the same functional meaning.").

165. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 71.

166. *Id.* at ¶ 73.

167. ICC-01/19-27, *supra* note 164, at ¶ 61.

168. ELEMENTS, *supra* note 6, at Art. 7(1)(d).

reus of the crime of deportation.[169] As such, the ICC can assert jurisdiction under Article 12(2)(a) if *at least part of* element one is committed *in* the territory of a State Party.

The Pre-Trial Chamber I explained "various types of conduct may, if established to the relevant threshold, qualify as 'expulsion or other coercive acts' for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting."[170] As such, the following sections analyze cases under Article 7(1)(i), because if such cases of extraordinary rendition meet the threshold of enforced disappearance under Article 7(1)(i), such cases could be used to prove the first element of Article 7(1)(d).

In the cases where non States Parties deport lawfully present persons from a State Party and the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the Court should logically follow its decision in its 2018 Rohingya ruling, despite the territorial reversal, and find it has jurisdiction in such cases.[171] Neither China nor Russia are States Parties to the Rome Statute. However, evidence shows both are engaging in extraordinary renditions of lawfully present persons *in* States Parties and deporting (importing) such persons into their territory—under the guise of "repatriation."[172] While the Rohingya were deported out of a State not Party (Myanmar) and into a State Party (Bangladesh), Uyghurs are being forcibly transferred out of States Parties (Tajikistan, Afghanistan, and Cambodia) and imported into a State not Party (China), and Ukrainians are being forcibly transferred out of a state which has granted the ICC jurisdiction (Ukraine) and imported into a State not Party (Russia[173]). As such, the ICC should apply its 2018 Rohingya decision as precedent in these cases.[174]

On 6 July 2020, the East Turkistan Government in Exile ("ETGE") and the East Turkistan National Awakening Movement ("ETNAM") requested an ICC investigation into acts of genocide and crimes against humanity by the Chinese Communist Party in Xingjiang, specifically the forced importation of Uyghurs from the States Parties of Tajikistan and

169. *Id.*

170. ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 61.

171. If all other admissibility requirements are met. *See* Mia Bonardi, *More Problems from Hell: The Uyghur Genocide*, 12 J. GLOB. RTS. & ORGS. 1 (2022).

172. *See infra*.

173. And Russian occupied territory.

174. *Id.*

Cambodia.[175] The Prosecutor denied this first complaint.[176] Notably, the Prosecutor stated that a "majority" of the alleged crimes did not fall within the jurisdiction of the court, but addressed separately the alleged deportation crimes in Cambodia and Tajikistan from the overall alleged crimes of genocide and crimes against humanity ongoing in Xingjiang.[177] While the Prosecutor concluded at the time (2020) that there was insufficient evidence for the alleged deportation crimes in Cambodia and Tajikistan to fall within Article 7(1)(d), the Prosecutor did not deny the claim on a jurisdictional basis under Article 12(2)(a).[178] Rodney Dixon, lawyer for the Uyghurs, submitted additional evidence in July and November 2021 and in June 2022, arguing that the new evidence in fact falls within the scope of Rome Statute 7(1)(d).[179]

On 28 February 2022, four days after Russia's full-scale invasion of Ukraine, the Prosecutor opened an investigation into the "Situation in Ukraine" on the basis of its prior conclusions from its preliminary examination covering events from 2014.[180] Notably, in the 2020 preliminary examinations, the Office of the Prosecutor found a reasonable basis to conclude that "in the context of the period leading up to and during the (ongoing) occupation of Crimea" violations of Rome Statute Article 7(1)(d) occurred.[181] On 2 March 2022, with numerous

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175. ICC OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020, ¶ 70 (Dec. 14, 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf [hereinafter 2020 OTP REPORT]. *See also* Marlise Simons, *Uighur Exiles Push for Court Case Accusing China of Genocide*, THE NEW YORK TIMES (6 July 2020, Updated 15 Dec. 2020), https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uighur-court.html; Tia Sewell, *Unpacking the Recent Uighur ICC Complaint Against Chinese Leaders*, Lawfare (21 July 2020), https://www.lawfareblog.com/unpacking-recent-uighur-icc-complaint-against-chinese-leaders.

176. 2020 OTP REPORT, *supra* note 175, at ¶ 73. *See also* Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, THE NEW YORK TIMES (15 Dec. 2020, Updated 10 May 2021), https://www.nytimes.com/2020/12/15/world/asia/icc-china-uighur-muslim.html.

177. 2020 OTP REPORT, *supra* note 175, at ¶ 74-6.

178. *Id.* at ¶ 73-6.

179. *The case against China at the ICC*, Eurasianet (12 Aug. 2022), https://eurasianet.org/the-case-against-china-at-the-icc.

180. *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, ICC OFFICE OF THE PROSECUTOR (11 Dec. 2020), https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine.

181. 2020 OTP REPORT, ¶ 279. *See also Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, *supra* note 180.

referrals of the situation by States Parties under Article 14 filed—referrals which the Prosecutor indicated would expedite investigations if provided—the Prosecutor indicated that the investigations would proceed.[182]

Selective justice, or even the appearance of such, threatens the rule of law.[183] For if the rule of law cannot be upheld in one place, it is threatened in every place.[184] As Areesha Shahid writes, "Selective justice serves no justice, rather it sponsors injustice."[185] Thus, just as forty-three States Parties rightly referred the grave "Situation in Ukraine" for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC.[186] As Rodney Dixon argues, just as the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, so too should it gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute.[187]

V. THE CHINESE COMMUNIST PARTY'S EXTRAORDINARY RENDITION PROGRAM OF UYGHURS & OTHER MUSLIMS

The Chinese Communist Party ("CCP"), under the guise of targeting separatists and terrorists, have pushed ethnic and religious minorities into ideological conformity with the goal of eradicating their cultural

182. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, ICC OFFICE OF THE PROSECUTOR (2 Mar. 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states

183. Areesha Shahid, *Selective Justice: A Threat to the Rule of Law*, RESEARCH SOCIETY OF INT'L L. (2021), https://rsilpak.org/2021/selective-justice-a-threat-to-the-rule-of-law/.

184. *See* Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

185. Shahid, *supra* note 183.

186. *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, *supra* note 180.

187. Asim Kashgarian, *ICC Urged to Investigate China's Treatment of Uyghurs*, VOA NEWS (23 June 2022), https://www.voanews.com/a/icc-urged-to-investigate-china-s-treatment-of-uyghurs/6630740.html.

identities.[188] The most expansive campaign of the CCP against a minority population has been its targeting of the Uyghurs, a Turkic ethnic group native to the Xinjiang Uyghur Autonomous Region ("XUAR") in northwest China.[189] After a violent outbreak in Ürümqi, the capital of the XUAR, in 2009, Chinese authorities launched crackdowns on the Uyghur population, which included dramatic increases in surveillance.[190] The CCP's efforts expanded in 2014 in line with the principle of "reeducation" and escalated in 2017 with the formal holding of Uyghurs as detainees in political education camps, pre-trial detention centers, and prisons.[191]

A. GENOCIDE

It is estimated that around one million detainees have been held at the political "reeducation" camps wherein concerns for health, physical and psychological abuse, harsh conditions, and indefinite confinement raise many concerns.[192] Along with internment camps, the CCP has also initiated the mass sterilization of Uyghur women, separation of children from their families, forced labor camps, and massive security crackdowns

188. Doug Bandow, *Chinese Oppression of the Uyghurs Goes Global*, CATO INSTITUTE (9 June 2022), https://www.cato.org/commentary/chinese-oppression-uyghurs-goes-global.

189. HUMAN RIGHTS WATCH, "BREAK THEIR LINEAGE, BREAK THEIR ROOTS" CHINA'S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS (19 Apr. 2021), https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting. Notably, the CCP built upon the measures it took in Tibet, brought them to the XUAR, and are reimlimenting such measures in Tibet. *See* The Editorial Board, *The Xingjiang Model Comes to Tibet*, THE WALL STREET JOURNAL (22 Sept. 2020), https://www.wsj.com/articles/the-xinjiang-model-comes-to-tibet-11600816095; Adrian Zenz, *Xinjiang's System of Militarized Vocational Training Comes to Tibet*, 20 CHINA BRIEF 7, 9 (2020).

190. *Uyghur*, BRITANNICA, https://www.britannica.com/topic/Uyghur (last visited 20 Dec. 2022).

191. Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELATIONS (22 Sept. 2022), https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights.

192. HUMAN RIGHTS WATCH, "ERADICATING IDEOLOGICAL VIRUSES" CHINA'S CAMPAIGN OF REPRESSION AGAINST XINJIANG'S MUSLIMS(9 Sept. 2018), https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs.

designed to control the population and break the cultural traditions of the minority groups.[193]

International experts and some States have labeled the CCP's systematic erasure of the Uyghurs a genocide.[194] Several reports by organizations, including the Newlines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights ("Newlines Report") and the Global Accountability Network ("GAN Report") have found evidence to support a finding of genocide against the Uyghurs in breach of each and every act prohibited in Article II (a) through (e) of the Genocide Convention.[195]

Adrian Zenz, a leading expert on CCP government policies in Tibet and the XUAR, provides evidence that the CCP's dual systematic strategy of detaining Uyghur men while also instituting a forced birth control and sterilization regime on Uyghur women meets *at least* section (d) of Article II: 'imposing measures intended to prevent births within the group.'[196] Both the Newlines Report and the GAN Report have extensive analyses on the 'intent to destroy' element of the Genocide Convention Article II.[197]

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193. BBC, *Who are the Uyghurs and why is China being accused of genocide?* (24 May 2022), https://www.bbc.com/news/world-asia-china-22278037.

194. *See, e.g.*, NEWLINES INSTITUTE FOR STRATEGY AND POLICY AND THE RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, THE UYGHUR GENOCIDE: AN EXAMINATION OF CHINA'S BREACHES OF THE 1948 GENOCIDE CONVENTION (Mar. 2021) [hereinafter 'NEWLINES REPORT']; ADRIAN ZENZ, STERILIZATIONS, IUDS, AND MANDATORY BIRTH CONTROL: THE CCP'S CAMPAIGN TO SUPPRESS UYGHUR BIRTHRATES IN XINJIANG, The Jamestown Foundation (June 2020, Updated 17 Mar. 2021); Evidence, *Uyghur Tribunal* (Statements and testimony, 4 June—27 Nov. 2021), https://uyghurtribunal.com/statements/; THE GLOBAL ACCOUNTABILITY NETWORK, A MULTI-GENERATIONAL EFFORT TO ELIMINATE THE UYGHURS: AN ONGOING GENOCIDE (Sept. 2022) [hereinafter 'GAN REPORT']; Benjamin Fearnow, *United States Becomes First Country in World to Declare China's Uighur Treatment Genocide*, NEWSWEEK (19 Jan. 2021), https://www.newsweek.com/united-states-becomes-first-country-world-declare-chinas-uighur-treatment-genocide-1562717; John Hudson, *At the 11th hour, Trump administration declares China's treatment of Muslims in Xinjiang "genocide"*, THE WASHINGTON POST (19 Jan. 2021), https://www.washingtonpost.com/national-security/trump-china-genocide-uighur-muslims/2021/01/19/272a9df4-5a7f-11eb-aaad-93988621dd28_story.html.

195. NEWLINES REPORT, *supra* note 194; GAN REPORT, *supra* note 194.

196. ZENZ, STERILIZATIONS, IUDS, AND MANDATORY BIRTH CONTROL, *supra* note 194.

197. NEWLINES REPORT, *supra* note 194; GAN REPORT, *supra* note 194.

B. DEPORTATIONS AND ENFORCED DISAPPEARANCES

On 31 August 2022, the Office of the UN High Commissioner for Human Rights ("OHCHR") finally released its report concluding that serious human rights violations have been committed against the Uyghur people.[198] China vehemently denies all such allegations.[199] The OHCHR report specifically addresses deportations, including family separations and reprisals.[200] In fact, the increasing number of allegations of family separations and enforced disappearances are what first brought the plight of the Uyghurs to the attention of the OHCHR.[201] Specifically, the OHCHR saw an uptick in allegations starting in 2017—the same year China passed its infamous anti-extremism legislation prohibiting people from growing long beards and wearing veils in public, and recognized the use of "training centers" to eliminate "extremism".[202]

The OHCHR report concludes, "Over the past few years, credible information has been received about members of the Uyghur community living abroad in several countries, having been forcibly returned, or being placed at risk of forcible return to China, in breach of the prohibition under international law of *refoulement*."[203] It further warns "countries hosting Uyghurs and other Muslim minorities from XUAR should refrain from forcibly returning them, in any circumstance of real risks of breach of the principle of non-refoulement."[204]

The GAN Report provides a statement by Dr. Erkin Sidick, a Uyghur-American and the President of the Uyghur Projects Foundation and senior advisor to the World Uyghur Congress, that "international reports on the situation in Xinjiang are at least two years behind—that the

198. OHCHR ASSESSMENT OF HUMAN RIGHTS CONCERNS IN THE XINJIANG UYGHUR AUTONOMOUS REGION, PEOPLE'S REPUBLIC OF CHINA, OHCHR (31 Aug. 2022), https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf [hereinafter 2022 OHCHR REPORT]. *See also China responsible for 'serious human rights violations' in Xinjiang province: UN human rights report*, UN NEWS (31 Aug. 2022), https://news.un.org/en/story/2022/08/1125932.

199. PRC Response to 2022 OHCHR Report, No.GJ/56/2022 (Aug. 2022), https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/ANNEX_A.pdf.

200. 2022 OHCHR REPORT, *supra* note 198, at ¶¶ 129-142.

201. *Id.* at 40.

202. *Id. See also* Maizland, *supra* note 191.

203. 2022 OHCHR REPORT, *supra* note 198, at ¶ 139.

204. *Id.* at ¶ 142.

situation is worse than initially thought to be."[205] Also, the Washington-based Campaign for Uyghurs expressed a similar sentiment, accusing China of being "a primary perpetrator of forced disappearances.[206]

C. TORTURE

The GAN Report details evidence of rape and other sexual violence used against both male and female Uyghurs. It notes how former inmates reported that especially younger and unmarried women were taken from their cells at night to be raped—and that some never returned. The GAN Report provides accounts of brutal and public gang rapes of both male and female Uyghurs while detained.

The GAN Report further details four different electroshock methods used on former inmates: the chair, the glove, the helmet, and a stick. It explains how detainees have been subjected to beatings during interrogations and that inmates as young as 14 were beaten and kicked until bruised, swollen, and crying. Additionally, some suspects were hung from the ceiling during interrogations.

Finally, the GAN Report explains that torture techniques also target the Uyghurs religious practices. Specifically, inmates exhibiting "bad behavior" were forced to eat pork; others accused of religious extremism were forced to drink alcohol. If detainees moved their lips, police would assume they were reciting the Quran and torture them badly.

D. TRANSNATIONAL REPRESSION

The CCP's control of the Uyghur people has further extended beyond the borders of China with the deportation of Uyghurs to China, allowing for the CCP to "transnationally repress" the Uyghur people.[207] According to Freedom House, China conducts the most sophisticated, global, and comprehensive campaign of transnational repression in the world.[208] China's campaign includes a full spectrum of tactics such as direct attacks like renditions, to co-opting other countries to detain and

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205. GAN REPORT, *supra* note 194, at 29.

206. *Id.*

207. Catherine Putz, *China's Transnational Repression Leaves Uyghurs No Space to Run*, THE DIPLOMAT (24 June 2021), https://thediplomat.com/2021/06/chinas-transnational-repression-leaves-uyghurs-no-space-to-run/.

208. *China: Transnational Repression Origin Country Case Study,* FREEDOM HOUSE (2021), https://freedomhouse.org/report/transnational-repression/china.

render exiles, to mobility controls, to threats from a distance like digital threats, spyware, and coercion by proxy.[209]

A report by the Woodrow Wilson Center's Kissinger Institute on China and the United States finds that "The People's Republic of China has engaged in transnational repression in 44 countries since 1997. From then until January 2022, there were 1,574 publicly reported cases of detentions and refoulements of Uyghurs to China, where they faced imprisonment and torture in police custody."[210] Notably, "Of the 523 most detailed cases . . . [the report] logged 108 deportations, 89 incidents of Uyghurs being coerced to return to the XUAR, 11 renditions, and nine extraditions."[211]

Similarly, Human Rights Watch reports that "Chinese authorities have tracked down hundreds of Turkic Muslim asylum seekers around the world and forced them to return to repression and in some cases detention."[212] Human Rights Watch specifically notes cases in Egypt, Malaysia, Saudi Arabia, and Thailand—all non States Parties to the Rome Statute.[213]

There is, however, evidence of Chinese officials attempting to deport and actually deporting Uyghurs from the territory of States Parties to the Rome Statute.[214] Specifically, in a November 2021 evidence submission to the ICC, Rodney Dixon, lawyer for the Uyghurs, provided "insider witness testimony" which showed how Chinese officials "would focus their strategies on coming into Tajikistan and getting Uyghurs detained, arrested and deported out."[215] Such evidence is critical to

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209. *China: Transnational Repression Origin Country Case Study,* FREEDOM HOUSE (2021), https://freedomhouse.org/report/transnational-repression/china.

210. BRADLEY JARDINE, GREAT WALL OF STEEL: CHINA'S GLOBAL CAMPAIGN TO SUPPRESS THE UYGHURS, xviii, (Wilson Center, 2022).

211. *Id.*

212. HUMAN RIGHTS WATCH, "BREAK THEIR LINEAGE, BREAK THEIR ROOTS" CHINA'S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS, *supra* note 189, at 33.

213. *Id.*

214. *See e.g., Evidence Of Chinese Operatives In Tajikistan Rounding Up Uyghurs And Deporting Them Submitted To ICC Prosecutors To Establish Jurisdiction*, EAST TURKISTAN GOVERNMENT IN EXILE (10 June 2021), https://east-turkistan.net/press-release-evidence-of-chinese-operatives-in-tajikistan-rounding-up-uyghurs-and-deporting-them-submitted-to-icc-prosecutors-to-establish-jurisdiction/. *See also* Kashgarian, *ICC Urged to Investigate China's Treatment of Uyghurs*, *supra* note 187.

215. Helen Davidson, *Chinese Agents Operating Abroad to Get Uyghurs Deported, ICC Told,* THE GUARDIAN (11 Nov. 2021),

proving "how Chinese officers are operating on Tajikistan soil."[216] Dixon explained how such Chinese officials would create a legal problem for the Uyghurs, such as visa and paperwork issues, which China would then use to import them back into China from Tajikistan.[217] Such weaponization of the passports of Uyghurs has been heavily documented and criticized.[218]

E. CASES OF UYGHUR DEPORTATIONS AND THE ARTICLE 7(1)(D) ELEMENTS

Case A: Deportation of Israel Ahmet[219]

Element 1. In the summer of 2014, Chinese emigrant Israel Ahmet was arrested in Kabul, his home for over ten years, on charges of lacking legal documentation, carrying counterfeit money, and espionage. He was held in a jail cell with over two dozen other Uyghurs, including women and children, before being taken to Kabul International Airport. There, Chinese officials were waiting for him and forced him to board a plane. Ahmet has not been heard from since.

Element 2. Ahmet lived in Kabul for over ten years, and citizenship by naturalization in Afghanistan, at the time of his arrest, required just five years.

Element 3. Ahmet lived in a small mud-brick house in Kabul and had established residency.

Element 4. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people.

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https://www.theguardian.com/world/2021/nov/11/chinese-agents-operating-abroad-to-get-uyghurs-deported-icc-told.

216. *Id.*

217. *Id.*

218. *See e.g.*, UYGHUR HUMAN RIGHTS PROJECT, WEAPONIZED PASSPORTS: THE CRISIS OF UYGHUR STATELESSNESS (1 Apr. 2020), https://uhrp.org/report/weaponized-passports-the-crisis-of-uyghur-statelessness/.

219. Bethany Matta, *China to neighbours: Send us your Uighurs*, AL JAZEERA (18 Feb. 2015), https://www.aljazeera.com/features/2015/2/18/china-to-neighbours-send-us-your-uighurs. *See also* Asim Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, VOA NEWS (1 Sept. 2021), https://www.voanews.com/a/south-central-asia_uyghurs-afghanistan-fear-deportation-china/6210234.html; WORLD UYGHUR CONGRESS, SEEKING A PLACE TO BREATH FREELY: CURRENT CHALLENGES FACED BY UYGHUR REFUGEES & ASYLUM SEEKERS (June 2016, Updated June 2017), https://www.uyghurcongress.org/en/wp-content/uploads/dlm_uploads/2017/06/WUC-Refugee-Report-Updated-June-2017.pdf.

Ahmet was held in a cell with about two dozen other Afghani Uyghurs, including, women and children, who were all meritlessly described by Afghanistan's National Directorate of Security as "spies" and "suicide bombers." The diversity of the Uyghurs' genders and ages suggests they were only detained for being Uyghur.[220]

Element 5. The perpetrator knew that Ahmet's deportation was part of the widespread and systematic attack against Uyghurs generally and under the guise of targeting ETIM because the remaining ETIM in the region, if any, "are largely isolated, small-scale, and lack either the resources, networks, or fighting prowess to warrant such disproportionate attention from China."[221]

Case B: Denial of right to asylum, deportation, and detention of Mutellip Mamut[222]

Element 1. In November 2009, Mamut and about 22 Uyghurs fled to Cambodia seeking asylum after suffering the CCP crackdown on Uyghurs. Before the UNHCR could decide their status, they were forcibly deported back to China and arrested. Mamut was sentenced to life in prison (under no known charges) after being deported.

Element 2. Seeking asylum, Mamut and the other Uyghurs were entitled to stay temporarily in Cambodia in accordance with the 1951 UN

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220. *See* UYGHUR HUMAN RIGHTS PROJECT, "NETS CAST FROM THE EARTH TO THE SKY": CHINA'S HUNT FOR PAKISTAN'S UYGHURS (11 Aug. 2021), https://uhrp.org/report/nets-cast-from-the-earth-to-the-sky-chinas-hunt-for-pakistans-uyghurs/ (providing further evidence widespread or systematic attack against uyghurs generally and under the guise of targeting ETIM: "In October 2014, President Xi Jinping and Afghan President Ashraf Ghani met to agree on a deal. In exchange for a pledge of hundreds of millions of Chinese dollars in assistance, training, and scholarships for Afghan students to study in China, Ghani assured Xi that Afghanistan would support China's fight against ETIM. Currently, an estimated 200 ETIM fighters are believed to be in Afghanistan's Taliban-controlled Kunar province and Pakistan's Federally Administered Tribal Areas (i.e., the 'Tribal Belt'). These groups are largely isolated, small-scale, and lack either the resources, networks, or fighting prowess to warrant such disproportionate attention from China.").

221. *Id.*

222. Shohret Hoshur, *Two More Uyghurs Get Life Sentence*, RADIO FREE ASIA (27 Jan. 2012), https://www.rfa.org/english/news/uyghur/life-01272012201754.html. *See also* Cong.-Exec. Comm'n on China, *New Information Available on Uyghur Asylum Seeker, Status of Others Remains Unknown* (7 Jan. 2011), https://www.cecc.gov/publications/commission-analysis/new-information-available-on-uyghur-asylum-seeker-status-of-others.

Refugee Convention and the 1967 Protocol, of which Cambodia is a State Party.[223]

Element 3. According to Chinese officials, Mamut and the other asylum seekers were "involved in crimes," but this would still have required a determination by the UNHCR.

Element 4. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. Mamut and others shared only one commonality—being Uyghur—yet collectively and individually, they were all wanted by the CCP.

Element 5. The CCP reached into Cambodia to accelerate their deportation. There is no evidence that any of the Uyghurs who fled were involved in the ethnic riots, and they do not appear to have been charged with a specific crime. Additionally, in December 2009, days after the Uyghurs were improperly deported to China, then-Chinese Vice-President Xi Jinping signed 14 trade deals with Cambodia worth nearly one billion dollars.[224]

Case C: Coerced transport, arrest, and detention of Gulbahar Haitiwaji[225]

Element 1. On 30 November 2016, Haitiwaji was arrested in China after being told to leave her home in France and return to her former employer in Xinjiang to update forms for her residence permit. Upon arriving, she was arrested and interrogated without a lawyer by the police and (along with her husband and daughter) accused of being a terrorist. She served two years of a seven-year "re-education" sentence and was released on 2 August 2019. She returned to France.

Element 2. Haitiwaji was at the time still a Chinese citizen toward the end of her ten-year residency permit which was renewable. Haitiwaji's husband (also Uyghur) was by then a French citizen. Both lived and worked in France.

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223. UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Sept. 2011), https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html.

224. Reuters staff, *Two Uighurs deported from Cambodia to China get life*, REUTERS (27 Jan. 2012), https://www.reuters.com/article/us-china-uighurs/two-uighurs-deported-from-cambodia-to-china-get-life-idUSTRE80Q0AW20120127.

225. Gulbahar Haitiwaji & Rozenn Morgat, *'Our souls are dead': How I survived a Chinese 're-education' camp for Uyghurs*, THE GUARDIAN (12 Jan. 2021), https://www.theguardian.com/world/2021/jan/12/uighur-xinjiang-re-education-camp-china-gulbahar-haitiwaji.

Element 3. The Chinese officials knew Haitiwaji was a legal resident of France, which was the subject of the initial phone call. Upon her return, her passport and papers were confiscated, which would indicate her legal residency in France.

Element 4. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. China is contacting emigrant Uyghurs beyond its borders to coerce and intimidate their return to China.[226] Haitiwaji is one such instance of this.

Element 5. When she was interrogated by the police, Haitiwaji was shown a picture of her daughter in France holding an East Turkestan flag (which are banned in China as a symbol of Uyghur separatism). China kept their knowledge of this photograph and their allegations a secret until Haitiwaji was in their custody. She was only released when a judge was convinced that she was re-indoctrinated with Chinese values.

F. CASES OF UYGHUR ENFORCED DISAPPEARANCES AND THE ARTICLE 7(1)(I) ELEMENTS

Case A: Deportation of Israel Ahmet[227]

Element 1(a). Ahmet was taken against his will by Chinese authorities at Kabul International Airport onto a plane bound for China.

Element 2(a). No information about Ahmet's whereabouts or those of the other Uyghur men who were initially held in Afghanistan are known from the time they boarded the plane. The Uyghur women and children that Ahmet was held with refused to go. Their current whereabouts are also unknown.

Element 3(b). At least up to the point when he was forced onto the plane, the Chinese officials gave Ahmet no information as to why he was being taken, refusing to acknowledge his abduction while they carried it out.

Element 4. Officials from the Chinese government led Ahmet onto the plane.

Element 5. No information from the CCP or from the officials present at the airport emerged acknowledging Ahmet's deportation, despite being fully aware of it.

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226. CBC Radio, *Uighurs in Canada fear deportation after China's crackdown on Turkic Muslims* (13 Sept. 2018), https://www.cbc.ca/radio/thecurrent/the-current-for-september-13-2018-1.4821663/uighurs-in-canada-fear-deportation-after-china-s-crackdown-on-turkic-muslims-1.4821690.

227. Matta, *supra* note 219. *See also* Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, *supra* note 219.

Element 6. Ahmet was deported on charges including lacking legal documentation, counterfeiting, and espionage, all of which involve long jail sentences, but there is no evidence Ahmet committed any of these crimes.

Element 7. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. China makes informal arrangements with the governments of Asian and Middle Eastern nations to deport Uyghurs back to China under the pretense of strengthening security between the nations and as ancillary agreements to lucrative trade deals.

Element 8. The only similarity between two dozen men, women, and children who Chinese officials sought to deport to China was that they were Uyghur.

Case B: Denial of right to asylum, deportation, and detention of Mutellip Mamut[228]

Element 1(a). Mamut was one of over twenty men arrested after fleeing China to Cambodia seeking asylum.

Element 2(a). The Chinese government sentenced Mamut and others to prison sentences without acknowledging that the UNHCR had yet to rule on Mamut's status as an asylum seeker.

Element 3(b). As a member of the U.N., the Chinese government would be aware that when it arrested Mamut that its actions would constitute a refusal to recognize the authority of the UNHCR and the U.N. Refugee Convention (1951) and Protocol (1967), to both of which China and Cambodia are States Parties.

Element 4. After his arrest, Mamut was sentenced to life in prison in Chinese courts.

Element 5. In both Mamut's arrest and sentencing, neither the officers nor did courts recognize or address the illegality of Mamut's arrest and deportation.

Element 6. Mamut was handed down a life sentence by the Chinese courts.

Element 7. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. Mamut and the other men were fleeing China because they had witnessed Chinese attacks against Uyghurs, they themselves were Uyghurs, and they were arrested and faced charges including terrorism and the political charge of splittism.

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228. Hoshur, *supra* note 222. *See also* Cong.-Exec. Comm'n on China, *supra* note 222.

Element 8. Mamut was arrested with more than twenty others, all of whom were clearly civilians. They shared little in common other than that they were Uyghurs.

Case C: Coerced transport, arrest, and detention of Gulbahar Haitiwaji[229]

Element 1(a). Haitiwaji was held by the Chinese state in a re-education camp for over two years from late–2016 until August 2019.

Element 2(a). Before returning to China, Chinese officials told Haitiwaji needed to return just to sign paperwork concerning her visa. After being arrested, she was charged as a "terrorist," and her French residency, along with her husband's French citizenship.

Element 3(a). When taken by police from her former employer's office, Haitiwaji was shown a photograph of her daughter at a pro-Uyghur rally in France. This "evidence," in Chinese officials' opinion, justified charging Haitiwaji with terrorism.

Element 4. Haitiwaji was initially contacted and then arrested by national and local members of the Chinese State.

Element 5. Haitiwaji was taken before a Chinese court for sentencing before being placed in a "re-education" camp.

Element 6. Haitiwaji was sentenced to seven years at a re-education camp.

Element 7. Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. According to the U.S. State Department, over one million Uyghurs have been held in camps since 2017, though this is likely a low estimate.[230]

Element 8. Haitiwaji's paperwork that indicated she was a civilian was confiscated upon her arrest and this paper also would have indicated her lawfulness as a French resident.

VI. THE RUSSIAN FEDERATION'S EXTRAORDINARY RENDITION PROGRAM OF UKRAINIANS

On 24 February 2022, the Russian bombing, shelling, and mobilization of forces into Ukraine signified the greatest launch of

229. Haitiwaji & Morgat, *supra* note 225.

230. U.S. DEP'T OF STATE OFFICE OF INT'L RELIGIOUS FREEDOM, 2021 REPORT ON INT'L RELIGIOUS FREEDOM: CHINA–XINJIANG, (2 June 2022), https://www.state.gov/reports/2021-report-on-international-religious-freedom/china/xinjiang/.

military force in Europe since the end of World War II.[231] By July 2022, a recorded seven million people were internally displaced by the conflict, while another six million were forced to flee to neighboring countries.[232] Thus far, 6,952 civilian deaths and 11,144 civilian injuries are recorded.[233] Many Russian attacks have been targeted against civilian locations such as bread lines, apartment blocks, and playgrounds;[234] health care facilities, namely maternity and children's hospitals;[235] and places of cultural significance including museums, churches, and historical buildings.[236]

Despite the destruction, Ukrainian forces have resisted the invasion of Russia and have begun retaking areas of southern and eastern Ukraine, including the liberation of settlements in Kherson[237], Kharkiv, Luhansk, and Donetsk.[238] Liberated areas have produced many reports of war crimes such as possible kidnappings, unlawful executions, confinement in degrading conditions, and cases of torture.[239] Mass graves containing

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231. Dan Bilefsky, Richard Pérez-Peña, & Eric Nagourney, *The Roots of the Ukraine War: How the Crisis Developed,* THE NEW YORK TIMES (12 Oct. 2022), https://www.nytimes.com/article/russia-ukraine-nato-europe.html.

232. *Ukraine Refugee Situation,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2022), https://data.unhcr.org/en/situations/ukraine.

233. *Ukraine: Civilian Casualty Update,* UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (10 Jan. 2023), https://www.ohchr.org/en/news/2023/01/ukraine-civilian-casualty-update-10-january-2023.

234. Daniel Victor & Ivan Nechepurenko, *Russia Repeatedly Strikes Ukraine's Civilians. There's Always an Excuse.,* THE NEW YORK TIMES (2 July 2022), https://www.nytimes.com/article/russian-civilian-attacks-ukraine.html.

235. Diane Cole, *Russia's 226 Attacks on Health-Care Targets in Ukraine are Part of a Larger Pattern,* NPR (24 May 2022), https://www.npr.org/sections/goatsandsoda/2022/03/16/1086982186/russias-strike-on-ukraine-maternity-hospital-is-part-of-a-terrible-wartime-tradi.

236. *Russia's Destruction of Ukraine Culture on Industrial Scale, Officials Say,* VOA NEWS (9 Oct. 2022), https://www.voanews.com/a/russia-s-destruction-of-ukraine-culture-on-industrial-scale-officials-say-/6782170.html.

237. Kherson City was recaptured by Ukrainian forces in November 2022.

238. Bloomberg News, *Ukraine Retakes More of South as Putin Signs off on Annexation,* BLOOMBERG (5 Oct. 2022), https://www.bloomberg.com/news/articles/2022-10-05/ukraine-retakes-more-of-south-as-putin-signs-off-on-annexation?leadSource=uverify%20wall.

239. Paul D. Shinkman, *Russian Carnage, Destruction Revealed in Newly Liberated Ukrainian Territory,* U.S. NEWS (17 May 2022), https://www.usnews.com/news/world-report/articles/2022-05-17/russian-carnage-destruction-revealed-in-newly-liberated-ukrainian-territory. *See also* Andrew E. Kramer, *Electrical Cords, Metal Pipes: In Kherson, Signs of Torture Emerge,* THE NEW YORK TIMES, (16 Nov. 2022), https://www.nytimes.com/2022/11/16/world/europe/kherson-ukraine-detain-

bodies displaying signs of torture have also been found on the outskirts of liberated areas.[240] On top of the destruction within Ukraine, estimates vary from 900,000 to 1.6 million people having been taken by Russian officials from the areas of Ukraine under Russian control and placed within camps inside of Russia.[241] Estimates also vary that between 200,000 to 700,000 children have been among those abducted.[242]

A. FILTRATION CAMPS

Filtration camps are appearing throughout Russian claimed territories in Ukraine and are believed to be "black holes" of human rights abuses.[243] As of June 2022, eighteen locations in eastern Ukraine and western Russia have been identified by the National Intelligence Council as possible filtration camps.[244] Originally set up to temporarily detain and screen Ukrainians and identify anyone perceived to pose a threat to

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torture.html. *See also* Anthony Deutsch, et al., *Scale of Alleged Torture, Detentions by Russian Forces in Kherson Emerges,* REUTERS, (12 Jan. 2023), https://www.reuters.com/world/europe/scale-alleged-torture-detentions-by-russian-forces-kherson-emerges-2023-01-12/.

240. Kat Lonsdorf & Claire Harbage, *Outside a Liberated Ukrainian Town, Inspectors Search for Evidence of War Crimes,* NPR (18 Sept. 2022), https://www.npr.org/2022/09/17/1123629627/ukraine-izium-russia-war-crimes.

241. HUMAN RIGHTS WATCH, "WE HAD NO CHOICE" FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA (1 Sept. 2022), https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians. *See also Hundreds of Thousands of Ukrainians forced to Russia, U.S. Claims,* POLITICO, (8 Sept. 2022), https://www.politico.com/news/2022/09/08/ukraine-forced-russia-deport-united-nations-00055394.

242. HUMAN RIGHTS WATCH, "WE HAD NO CHOICE" FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241; *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children,* MOLFAR GLOBAL (30 Dec. 2022), https://www.molfar.global/en-blog/ukrainian-children-stolen-by-russia. *See also* Jason Paladino, *Russian Filtration Camps: 'Black Holes of Human Rights Abuses' Where Ukrainians Face Torture and Loyalty Tests,* GRID NEWS (8 Aug. 2022), https://www.grid.news/story/global/2022/08/08/russian-filtration-camps-black-holes-of-human-rights-abuses-where-ukrainians-face-torture-and-loyalty-tests/.

243. Kristina Hook, *Why Russia's War in Ukraine Is a Genocide,* FOREIGN AFFAIRS (28 July 2022), https://www.foreignaffairs.com/ukraine/why-russias-war-ukraine-genocide. *See* Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

244. Marc Santora, *A U.S. intelligence report finds that Russia's use of 'filtration centers' to detain and deport Ukrainians has intensified,* THE NEW YORK TIMES (25 July 2022), https://www.nytimes.com/2022/07/25/world/europe/ukraine-russia-filtration-centers.html.

Russian occupation efforts, the use of filtration camps has only intensified with growing Ukrainian resistance in occupied territories.[245] The filtration process can be analogous to internally displaced persons and refugee processing, using tactics such as temporary detention, data collection, interrogation, and a variety of abuse.[246] Ukrainians passing through the filtration camps "have reported treatment ranging from humiliation to verbal abuse and physical torture" including confiscation of electronics, strip searches, use of electric shocks, and staged executions of detainees.[247]

Russia is using filtration camps as a means of solidifying political control in occupied areas by eliminating Ukrainians sympathetic to Kyiv and by diminishing the Ukrainian national identity through depopulation, an act that some human rights activists are deeming "cultural genocide."[248]And yet the Russian Ministry of Defense is framing this mass deportation of Ukrainians as a "humanitarian relief effort" claiming they are being "evacuated" to Russia.[249] Authorities further claim that they are providing accommodations and dispensing payments to the evacuees.[250]

A major concern is the data collection that Russian authorities have been able to capture. The filtration and screening process has allowed authorities to document vast amounts of personal data about Ukrainian civilians, including their biometrics.[251] Reports at filtration camps state that Russian officials took photographs of people and collected their fingerprints.[252] This is a mass illegal data collection carried out by

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245. *Id.*

246. *Id.*

247. Paladino, *supra* note 242.

248. Katie Bo Lillis, Kylie Atwood, & Natasha Bertrand, *Russia is depopulating parts of eastern Ukraine, forcibly removing thousands into remote parts of Russia,* CNN (26 May 2022), https://www.cnn.com/2022/05/26/politics/ukraine-filtration-camps-forcibly-remove-russia/index.html.

249. Santora, *supra* note 244.

250. *Ukraine says 400,000 citizens have been forcibly taken to Russia,* CBC (24 Mar. 2022), https://www.cbc.ca/news/world/ukraine-people-taken-russia-1.6396247.

251. HUMAN RIGHTS WATCH, "WE HAD NO CHOICE" FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241.

252. AMNESTY INTERNATIONAL, *Russia's unlawful transfer of civilians a war crime and likely a crime against humanity – new report* (10 Nov. 2022), https://www.amnesty.org/en/latest/news/2022/11/ukraine-russias-unlawful-transfer-of-civilians-a-war-crime-and-likely-a-crime-against-humanity-new-report.

Russian and Russian-affiliated forces, inflicted upon non-Russians that is a clear violation of the right to privacy with a clear path to continued abuse.[253]

Russia may have legitimate grounds for conducting said screenings if those individuals were voluntarily seeking refuge in Russia, but the filtration process's current scope and system is involuntary, punitive, and abusive.[254] Estimates from multiple sources indicate that Russian authorities have interrogated, detained, and forcibly deported between 900,000 and 1.6 million Ukrainian citizens, including between 200,000 to 700,000 children, from their homes to Russia—often to isolated regions in the Far East.[255] Amnesty International has documented cases of members of protected groups, including children, elders, and people with disabilities, being forcibly transferred.[256] Reports include abuse and torture, such as beatings, electrocution, interrogations, deprivation of food, water, and safe shelter, and finally threats of execution.[257]

In mid-December 2022, Russian Prime Minister Mijhail Mishustin issued an order allocating up to €2.5 billion for the resettlement of Ukrainian residents from the Kherson region to Russia.[258] Ukrainian officials explain that occupation authorities may be planning to deport more than 100,000 residents from the occupied Kherson region to fifty-seven regions in Russia, including the Far East, and place them in civilian roles.[259]

Rossiyskaya Gazeta, a newspaper owned by the Russian government, stated that 5,000 Ukrainians were processed at the camp in the Russian-controlled village of Bezimenne, near Novoazovsk and underwent checks to prevent nationalists dressed as refugees from

253. HUMAN RIGHTS WATCH, "WE HAD NO CHOICE" FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241.

254. *Id.*

255. *Id. See also Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

256. AMNESTY INTERNATIONAL, *Russia's unlawful transfer of civilians a war crime and likely a crime against humanity – new report*, *supra* note 252.

257. *Id.*

258. Oleksandra Vakulina, *Moscow is allegedly preparing to deport some 100,000 Ukrainians to Russia*, EURONEWS (15 Jan. 2023), https://www.euronews.com/2023/01/15/moscow-is-allegedly-preparing-to-deport-some-100000-ukrainians-to-russia.

259. *Id.*

infiltrating Russia.[260] Satellite images captured by U.S.-based Maxar Technologies showed the tented camps set up in Bezimenne.[261]

Ukrainians seeking shelter are being forcibly ushered into vehicles with Russian plates; taken to the Russian border where they are interrogated by Russian customs officers—their belongings including phones, bags, and passports searched and checked; and then taken to distribution camps.[262] Russian troops are confiscating identity documents and electronic devices, demanding passwords before interrogating civilians.[263] One Mariupol woman recalled that as an official went through her phone, she was questioned extensively about the Ukrainian army; if she had any acquaintances in the military; and her thoughts on Ukraine, Putin, and the conflict.[264]

Representatives of the two self-proclaimed republics in the Donbas stated they set up a "tent city" of thirty tents for Mariupol residents that has a capacity of up to 450 people.[265] Mariupol Mayor Vadkym Boichenko compared these kidnappings to those committed by Nazis during World War II.[266] Russia is forcing civilians through filtration camps, putting them on trains and sending them to various economically depressed cities to work for free.[267] Furthermore, during filtration procedures for women and girls, concerns of sexual abuse have arisen.[268]

During Russia's two wars in Chechnya, at least seventy thousand civilians perished and more than two hundred thousand Chechens passed

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260. Pjotr Sauer, *Hundreds of Ukrainians forcibly deported to Russia, say Mariupol women,* THE GUARDIAN (4 Apr. 2022), https://www.theguardian.com/world/2022/apr/04/hundreds-of-ukrainians-forcibly-deported-to-russia-say-mariupol-women.

261. *Id.*

262. Olena Hrazhdan, *Deported Ukrainians Seek Justice,* INST. FOR WAR & PEACE REPORTING (6 Sept. 2022), https://iwpr.net/global-voices/deported-ukrainians-seek-justice.

263. RFE/RL's Tatar-Bashkir Service, *Amid Intensified Fighting, Reports Continue To Surface Of Ukrainians Forcibly Relocated To Russia,* RADIOFREEEUROPE/RADIOLIBERTY (17 Apr. 2022), https://www.rferl.org/a/ukraine-refugees-forcibly-resettled-russia/31807244.html.

264. Sauer, *supra* note 260.

265. *Id.*

266. *Russia is kidnapping children in Ukraine, says US embassy,* SOUTH CHINA MORNING POST (23 Mar. 2022), https://www.scmp.com/news/world/russia-central-asia/article/3171461/russia-kidnapping-children-ukraine-says-us-embassy.

267. *Id.*

268. *UN Says 'Credible' Reports Ukraine Children Transferred to Russia,* AL JAZEERA (8 Sept. 2022), https://www.aljazeera.com/news/2022/9/8/un-says-credible-reports-ukraine-children-transferred-to-russia.

through similar filtration camps.[269] Researchers describe this process as not only an excruciating process for the disappeared but a form of collective punishment imposed on their families as well: "One woman, referring to a male relative who had been taken away, told the researchers, 'He's nowhere—not among the living, not among the dead.'"[270]

B. KIDNAPPING AND DETENTION OF JOURNALISTS AND LOCAL OFFICIALS

The U.N. Human Rights Monitoring Mission in Ukraine documented at least forty-eight local officials detained by Russian authorities.[271] By kidnapping and detaining local mayors, journalists, and active members of local communities, individuals who have authority in the community, Russia is hoping to squash the resilience of local populations and force them to submit to collaboration with their occupiers.[272]

Russian authorities have targeted journalists and their families to rescript what is currently being reported. Journalist Viktoria Roshchyna was taken by unidentified men while working in occupied areas in the east on 15 March 2022.[273] Six days later she was released along with a hostage-style video that recorded her denying being held captive and thanking Moscow for "saving her life."[274] Similarly, Melitpol journalist, Svetlana Zalizetskaya, stated Russian forces took her seventy-five-year-old father hostage in retaliation for her refusal to cooperate and retract her criticism of the invasion.[275]

The head of the Ukrainian National Union of Journalists, Sergiy Tomilenko, claimed that these detentions were part of a "wave of information cleansing" to intimidate journalists and other public

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269. David Kortava, *Inside Russia's "Filtration Camps" in Eastern Ukraine,* THE NEW YORKER (3 Oct. 2022), https://www.newyorker.com/magazine/2022/10/10/inside-russias-filtration-camps-in-eastern-ukraine.

270. *Id.*

271. Jen Kirby, *When Russian troops arrived, their relatives disappeared,* VOX (12 Apr. 2022), https://www.vox.com/23012456/ukraine-russia-war-disappearances-kidnappings.

272. *Id.*

273. Matt Murphy & Robert Greenall, *Ukraine War: Civilians abducted as Russia tries to assert control,* BBC (25 Mar. 2022), https://www.bbc.com/news/world-europe-60858363.

274. *Id.*

275. *Id.*

figures.[276] One public figure was Mayor Ivan Fedorov who was taken from a city crisis center and reported that other detainees were being tortured.[277] He stated that while he was not touched physically, "seven armed men were enough to make their position clear" and "in the next cell someone was being tortured—there were screams which generated plenty of psychological pressure."[278]

C. TORTURE

Ukrainians are being held without legal grounds while being subjected to beatings, torture, rape, and arbitrary execution.[279] Civilians are taunted, faced with death threats, and beaten unconscious.[280] The severity of the punishment that Russian officials impose may be contingent upon the potential military background and, above all, a detainee's political views—"specifically the degree to which he expressed 'support of state sovereignty.'"[281] A tactic, referred to as "the elephant," involves "placing a gas mask over the detainee's head and blocking the air flow.[282] There have been multiple accounts of public castrations and also one detainee having "bandera," the name of Ukrainian nationalist and Nazi collaborator, Stephen Bandera, carved into his chest prior to killing him.[283]

One woman reported that she spent over six months in captivity where she and other detainees were treated like animals.[284] She stated that Russian authorities tortured girls with electric currents and beat them with hammers, and "that's the lightest thing."[285] She reported that the authorities wanted to cut off the tattoos of anyone who had them and

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276. *Id.*

277. *Id.*

278. *Id.*

279. Charlene Rodrigues, *Ukrainians allege abuse, beatings at Russian 'filtration' camps*, AL JAZEERA (6 Dec. 2022), https://www.aljazeera.com/news/2022/12/6/ukrainians-allege-abuse-beatings-at-russian-filtration-camps.

280. *Id.*

281. Kortava, *supra* note 269.

282. *Id.*

283. *Id.*

284. Clarissa Ward, et al., *This teacher was tortured by the Russians and held for six months before returning to her town in Ukraine in a prisoner swap,* CNN (21 Oct. 2022), https://www.cnn.com/2022/10/21/europe/ukraine-civilians-kidnapped-filtration-russia-intl/index.html.

285. *Id.*

scalded them with boiling water "just because [they] are there . . . because [they] speak Ukrainian."[286]

These are not isolated incidents and there is strong belief that similar methods of torture are being conducted at present.[287] Reports from Ukrainian authorities and international human rights specialists that torture continues are supported by interviews with alleged victims.[288] War crimes investigators have witnessed tools for torture in the basement of one of the largest detention facilities in Kherson in a visit in December 2022 and observed tools for waterboarding at a courthouse detention center.[289]

D. FORCIBLY TRANSFERRING CHILDREN OF THE GROUP

The U.S. Department of Defense reported in October 2022 that Russian forces are abducting children in Ukraine by either deliberately splitting the children from their parents or taking them from schools, orphanages, and hospitals.[290] The U.S. Department of Defense's Europe Office and the U.S. Embassy in Kyiv reported that Russia has been kidnapping children from their homes since at least July 2022.[291] According to the U.N., in July 2022 alone, 1,800 Ukrainian children were transferred to Russia.[292] At least 1,000 children from the liberated Kherson area alone are reported to have been taken during the eight-month occupation.[293] Their whereabouts are still unknown.[294]

In addition to schools and orphanages, authorities are pillaging hospitals for children to abduct and bring back to Russia.[295] In response

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286. *Id.*

287. Anthony Deutsch, et al., *Scale of alleged torture, detentions by Russian forces in Kherson emerges,* REUTERS (12 Jan. 2023), https://www.reuters.com/world/europe/scale-alleged-torture-detentions-by-russian-forces-kherson-emerges-2023-01-12/.

288. *Id.*

289. *Id.*

290. Jerusalem Post Staff, *Russia abducting Ukrainian children, putting up for adoption in Russia,* THE JERUSALEM POST (17 Oct. 2022), https://www.jpost.com/international/article-719837.

291. *Id.*

292. *UN Says 'Credible' Reports Ukraine Children Transferred to Russia*, *supra* note 268.

293. Sam Mednick, *Ukrainians hid orphaned children from Russian deportation*, AP NEWS (2 Dec. 2022), https://apnews.com/article/russia-ukraine-health-europe-orphans-f283aa4d22fdab59a43a16ca0be54baf.

294. *Id.*

295. *Id.*

to the other kidnappings, staff at the Kherson hospital began fabricating the children's documents and medical records to make it appear that the children were too ill to travel or to be moved.[296] Dr. Olga Pilyarska, head of intensive care, stated they were scared that the Russians would find out, but knew that they needed to save the children at any cost.[297]

Once the children are kidnapped, they are subsequently put up for adoption in isolated regions of Russia, primarily in the far eastern region of the country.[298] Children arriving in Russia are often held in orphanages or sent to foster families throughout Russia regardless of whether or not their parents or other family members are alive.[299] Russia "has prepared a register of suitable Russian families for Ukrainian children, and pays them for each child who gets citizenship—up to $1,000 for those with disabilities. It holds summer camps for Ukrainian orphans, offers "patriotic education" classes and even runs a hotline to pair Russian families with children from Donbas."[300] Other children have been taken into Belarus where they face torture and beatings at Belarusian orphanages.[301] Children have been pressured to "forget" their parents, being told that their families abandoned them or were dead.[302]

In August 2022, Russia's Department for Family and Children in the Krasnodar region released a statement indicating that more than 1,000 children taken from Ukraine had been adopted to families in Russia.[303] Some of the families were located in the Altai Territory, located more than 2,000 miles from Ukraine.[304] Daria Herasymchuk, the top children's

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296. *Id.*

297. *Id.*

298. Jerusalem Post Staff, *supra* note 290.

299. Michela Moscufo, Britt Clennett, & Angus Hines, *Ukrainian Families Reunite with Children they say Russia Kidnapped but Put Up For Adoption*, ABC NEWS (23 Nov. 2022), https://abcnews.go.com/International/ukrainian-families-reunite-children-russia-kidnapped-put-adoption/story?id=93798931.

300. Sarah el Deeb, et. al., *How Moscow grabs Ukrainian kids and makes them Russian*, AP NEWS (13 Oct. 2022), https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6.

301. Michela Moscufo, Britt Clennett, & Angus Hines, *Ukrainian Families Reunite with Children they say Russia Kidnapped but Put Up For Adoption*, ABC NEWS (23 Nov. 2022), https://abcnews.go.com/International/ukrainian-families-reunite-children-russia-kidnapped-put-adoption/story?id=93798931.

302. Robyn Dixon & Natalia Abbakumova, *Ukrainians Struggle to Find and Reclaim Children Taken by Russia,* THE WASHINGTON POST (24 Dec. 2022), https://www.washingtonpost.com/world/2022/12/24/ukraine-stolen-children-maria-lvova-belova/.

303. *Id.*

304. *Id.*

rights official of Ukraine, announced in November 2022 that 10,764 Ukrainian children had been reported by family members as deported to Russia.[305]

Maria Lvova-Belova, the Presidential Commissioner for Children's Rights in Russia, is a key figure in the abduction of children from Ukraine and their placement among foster families and orphanages throughout Russia.[306] Lvova-Belova has openly advocated for stripping the Ukrainian identities of children and teaching them to love Russia instead.[307] Vladimir Putin has applauded her actions in the removal of children from Ukraine.[308] She is sanctioned by the U.S., Europe, the U.K., Canada, and Australia.[309]

Forcibly transferring the children of a group is one of the acts of genocide under the Genocide Convention.[310] Coupled with the requisite intent to commit genocide—the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"—this act could qualify as genocide.[311]

E. WAR CRIMES

All parties to the armed conflict in Ukraine are subject to international humanitarian law, including the Geneva Conventions, and customary international law.[312] Armed forces that have effective control of an area are subject to the international law of occupation from the Hague Convention 1907 and the Geneva Conventions.[313] Article 8 of the Rome Statute governs war crimes, which entail grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of

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305. *Id.*

306. *Maria Lvova-Belova Brought Children from Donetsk People's Republic to Russia*, PRESIDENT OF RUSSIA (7 Oct. 2022), http://en.kremlin.ru/events/administration/69571 (last visited 7 Jan. 2023).

307. Dixon & Abbakumova, *supra* note 302.

308. *Id.*

309. el Deeb, et. al., *supra* note 300.

310. Genocide Convention, *supra* note 60, at Art. II(e).

311. *Id. See also* Editorial Board, *Russia's abductions of Ukrainian children are a genocidal crime,* THE WASHINGTON POST (27 Dec. 2022), https://www.washingtonpost.com/opinions/2022/12/27/russia-genocide-ukraine-children.

312. *Ukraine: Executions, Torture During Russian Occupation*, HUMAN RIGHTS WATCH (18 May 2022), https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation

313. *Id.*

the laws and customs applicable in international armed conflict, as well as serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[314] Among the listed war crimes under Article 8(2) are unlawful deportation or transfer or unlawful confinement as well as torture or inhuman treatment.[315]

International organizations, including Amnesty International[316] and the Organization for Security and Co-operation in Europe ("OSCE")[317], have described Russia's use of the filtration and deportation system as a war crime. The U.S. Department of State has called on Russia to allow independent observers access to filtration facilities and to forced deportation relocation areas.[318] It is paramount that the International Committee of the Red Cross ("ICRC") and the U.N. Human Rights Monitoring Mission in Ukraine have "unimpeded access to all individuals detained in relation to [this] war."[319] The extent of the atrocity that Russia has inflicted upon Ukraine is constantly growing with more evidence coming to light each day.

F. CASES OF UKRAINIAN DEPORTATIONS AND THE ARTICLE 7(1)(D) ELEMENTS

Case A: Forced transportation and attempted deportation of Timofey Lopatkina[320]

*Element 1.*In mid-March 2022, 17-year-old Timofey Lopatkina acted as guardian over his siblings during Russian airstrikes of Mariupol that began after his mother sent them there on holiday. A local doctor

314. Rome Statute, *supra* note 5, at Art. 8(2).

315. *Id.* Art. 8(2)(a)(vii).

316. AMNESTY INTERNATIONAL, *Russia's unlawful transfer of civilians a war crime and likely a crime against humanity – new report*, *supra* note 252.

317. Paladino, *supra* note 242.

318. *Remarks at the Ukraine Accountability Conference by Uzra Zeya, Under Secretary For Civilian Security, Democracy, and Human Rights*, U.S. DEPARTMENT OF STATE (14 July 2022), https://www.state.gov/remarks-at-the-ukraine-accountability-conference/.

319. *U.S., UN Demand Access To Russian 'Filtration' Sites In Ukraine Amid War-Crimes Fears,* RADIOFREEEUROPE/RADIOLIBERTY (8 Sept. 2022), https://www.rferl.org/a/us-un-demand-access-russian-filtration-camps-ukraine-/32023811.html.

320. el Deeb, et. al., *supra* note 300.

arranged to take them out of Mariupol but still within Ukraine. At an intra-national checkpoint, pro-Russian forces intervened, denying Lopatkina admission and then sending him to a hospital in the self-proclaimed Donetsk People's Republic ("DPR"). He was there for about two months. Had he turned 18 he would have been conscripted into the Russian military.

Element 2. Lopatkina, his mother, and all his siblings were Ukrainian citizens.

Element 3. At the checkpoint, the pro-Russian forces refused to recognize Lopatkina and his siblings' documents—photocopies of official papers identifying them and their parents.

Element 4. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Lopatkina's mother Olga, Lopatkina and his siblings were "paraded" on Russian state television and told their mother did not love them. Timofey was also told by local officials that a DPR court would strip his parents of their guardianship, sending his siblings to a Russian orphanage. Russian ombudswoman Maria Lvova-Belova said the large-scale adoptions are to help "preserve [children's] right to live under a peaceful sky." However, Lvova-Belova highlighted the clear role nationalism plays in these adoptions stating that children sang the Ukrainian national anthem before adoption but have "transformed into a love of Russia."

Element 5. Along with the comments Timofey was told by officials about revoking Olga's parental rights, Olga herself also sent the documentation to Russian and Ukrainian officials repeatedly. DPR authorities eventually told Olga she could retain custody of her children, but only if she went to Donetsk herself to retrieve them. However, since no facts or evidence changed between the time of Olga's initial contact with DPR authorities to when she was offered the ultimatum to retrieve her kidnapped children, the facts tend to prove that the DPR authorities were aware that Olga was Lopatkina's mother and legal guardian long before they took action to reunite them.

Case B: Kidnapping, deportation, and detention of Viktoria Andrusha[321]

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321. Joshua Yaffa, *A Ukrainian Prisoner of War's Long Journey Home*, THE NEW YORKER (27 Oct. 2022), https://www.newyorker.com/news/dispatch/a-ukrainian-prisoner-of-wars-long-journey-home. *See also Russia: Forcible Disappearances of Ukrainian Civilians; Detainees Unlawfully Transferred to Russia, Possibly Held as Hostages*, HUMAN RIGHTS WATCH (14 July 2022),

Element 1. As Russian troops withdrew from the Chernihiv region of Ukraine, they forcibly transferred schoolteacher Viktoria Andrusha with them on 25 March 2022. They took her because she was admittedly disclosing Russian troop movements within her neighborhood to her friends in the Ukrainian military. Andrusha's family learned via unofficial channels that she was in a civilian detention facility in Kursk, Russia. She was later transferred to Bryansk, Russia and was released in early October 2022.

Element 2. Andrusha, as well as her family, are Ukrainian citizens. Andrusha was lawfully working in an elementary school at the time of her arrest.

Element 3. Andrusha performed her monitoring of Russian tanks arriving and departing from the living room and attic of her house. This was the same house where she was arrested. To have strong enough evidence to know Andrusha was relaying information to Ukrainian troops or officials, those seeking to arrest her would know the reporting was done from her established residence. This is evident by the arresting officers doing a house-by-house search of Andrusha's neighborhood, knowing the suspect lived in the neighborhood.

Element 4. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Andrusha was held in a boiler room in Kursk with about twenty others.

Element 5. While detained, the Russian guards knew Andrusha was a civilian. They would make her and other prisoners learn and recite the Russian national anthem, telling her "[y]ou're a schoolteacher. Now you're the one who has to pass the test."

Case C: Kidnapping, deportation, and detention of Yevgeny Malyarchuk[322]

Element 1. In late March 2022, Yevgeny Malyarchuk, a Ukrainian businessman, was held at gunpoint by DPR militants in Mariupol and was

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https://www.hrw.org/news/2022/07/14/russia-forcible-disappearances-ukrainian-civilians.

322. Igor Sevryugin (trans.), *100 days of captivity in the 'DNR'. What did the Ukrainian volunteer go through?*, CURRENT TV (22 July 2022), https://www.currenttime.tv/a/posudu-ispolzovali-po-krugu-odni-i-te-zhe-tarelki-na-250-300-chelovek-ih-nikto-ne-myl-ukrainskiy-volonter-o-100-dnyah-plena-v-dnr-/31954690.html. *See also* Meera Suresh, *Ukrainian Businessman Ate Off Unwashed Plate Used By 300 Others To Survive 100 Days In DPR Prison*, INT'L BUS. TIMES (22 July 2022), https://www.ibtimes.com/ukrainian-businessman-ate-unwashed-plate-used-300-others-survive-100-days-dpr-prison-3583326.

arrested without charges. He served 100 days in a penal colony functioning as a "filtration camp" in Yelenovka near Donetsk, DPR.

Element 2. Malyarchuk is a Ukrainian citizen, employed in Ukraine, and native to Mariupol.

Element 3. When arrested, Malyarchuk's car, used to evacuate civilians, was filled with relief supplies and labeled "volunteers." The civilians wore no uniforms, and Malyarchuk himself has never served in any military force.

Element 4. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Malyarchuk, many of the ~3,000 other POWs were civilians, including fellow Ukrainian businessmen, and directors of IT companies.

Element 5. At some point towards the end of Malyarchuk's detainment, the responsibility of the penal colony switched from DPR officials to Russian guards and Russian secret service ("FSB"). This indicates an intentional, coordinated transfer of authority between the DPR troops and officials with Russia regarding detainment of civilians.

Case D: Forced deportation and detention of Ihor[323]

Element 1. On 17 March 2022, Ihor, a farmer in a village in the Kharkiv region, was forcibly bused alongside 60 other civilian men to a filtration camp in the Russian city of Belgorod. Ihor was released relatively soon after, and fled to Moscow, then Belarus, and finally Poland.

Element 2. Ihor is a native Ukrainian citizen, who owns farmland in the village from which he was taken.

Element 3. After the markets in Ihor's village gave away their food to prevent Russian looting, Russian troops wandered to people's houses. They demanded homeowners give them food. On at least one occasion, a villager refused, ordering the Russians to "leave the yard of his house" and was shot immediately.

Element 4. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. When Ihor and other residents would ask if they could be taken to a non-shelled Ukrainian city, they were told by the Russian occupiers the buses would "go to Russia, [y]ou must go to Russia."

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323. Ihor's last name and village's name were not disclosed for safety reasons. Daria Shulzhenko, *Kharkiv Oblast resident forcibly deported to Russia: 'It's not a country, it's a prison'*, THE KYIV INDEPENDENT (18 Apr. 2022), https://kyivindependent.com/national/kharkiv-oblast-resident-forcibly-deported-to-russia-its-not-a-country-its-a-prison.

Element 5. Upon arrival in Ihor's village, Russian troops checked the town's administrative documents to learn the identities of all local Ukrainians who fought in the Donbas, before executing them. This was before Ihor and the remaining men were then loaded onto the buses for Russia. Therefore, at this point the Russians knew the men they deported were civilians.

Case E: Forced transportation and attempted deportation of Kira Obedinsky[324]

Element 1. In late March 2022, 12-year-old Kira Obedinsky was injured when fleeing Mariupol with her late-father's girlfriend, Anya, on foot. After Anya accidently kicked a landmine, causing them both serious injuries, Russian troops arrived on scene. They sent the two to a hospital in Manhush, Ukraine. They were then separated, and Obedinsky was transferred to a hospital in Donetsk for unclear reasons.

Element 2. Obedinsky is a Ukrainian citizen, and she and her late father (Ukrainian National Water Polo captain Yevhen Obedinsky) resided in Mariupol.

Element 3. All Obedinsky's paperwork at the hospital(s) indicated she was a Ukrainian citizen.

Element 4. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. The first hospital Obedinsky was taken to was about 20 minutes away from Mariupol. The second hospital was nearly two hours away, and across disputed state lines. There does not appear to be a clear reason why Obedinsky was transferred away from Anya, one of her few remaining adult contacts. According to Pavel Kirilenko, head of the Donetsk Regional Military Administration, Obedinsky had all her Ukrainian documentation taken from her and she was promised *new Russian documents* would be sent to Russia soon.

Element 5. Despite Obedinsky's Ukrainian grandfather being willing to legally adopt her, he was informed by hospital staff in Donetsk

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324. Phil Black, et al., *Injured, alone and destined for a Russian orphanage, a 12-year-old Ukrainian girl is recruited for Moscow's information war*, CNN (17 Apr. 2022), https://www.cnn.com/2022/04/17/europe/ukrainian-girl-russian-orphanage-intl-cmd/index.html. *See also* Mattew Harder, *Eugine Obendinskiy, Ex-Captain of Ukrainian Water Polo Team, Killed in Bombing*, SWIM SWAM (30 Mar. 2022), https://swimswam.com/eugine-obendinskiy-ex-captain-of-ukrainian-water-polo-team-killed-in-bombing/. *See also* Sandi Sidhu, et al., *After epic journey, orphaned Ukrainian girl is reunited with grandfather*, CNN (28 Apr. 2022), https://www.cnn.com/2022/04/28/europe/ukrainian-orphan-girl-grandfather-reunited-mariupol-intl/index.html.

that Kira, upon recovery, was to be sent to an adoption facility in Russia, despite knowing of his attempts to retrieve her.

G. CASES OF UKRAINIAN ENFORCED DISAPPEARANCES AND THE ARTICLE 7(1)(I) ELEMENTS

Case A: Forced transportation and attempted deportation of Timofey Lopatkina[325]

Element 1(a). Lopatkina and his siblings were attempting to evacuate Mariupol, but pro-Russian forces at a checkpoint sent them to a hospital in the DPR (even though they were not injured) and refused to recognize their legal guardianship documentation.

Element 2(a). Russia and the DPR considered Lopatkina and his siblings "orphans" even though their parents were still alive. The DPR then assumed a custodial role rather than working to reunite the children who (in Lopatkina's case) were actively trying to reach their mother. The DPR refused to recognize Lopatkina's legal guardianship documentation.

Element 3(a). Officials told Lopatkina the DPR courts could strip his mother of her guardianship.

Element 4. The attempted deportation of the children was supported by state-run television which paraded the children to audiences as orphans. Lopatkina and his siblings were told they were there because their birth families did not love them.

Element 5. Officials told Lopatkina that after DPR courts made him legally an orphan, he would be sent to a DPR school and likely (as he was nearly eighteen) enlisted in the DPR military.

Element 6. Children taken by Russian or DPR authorities are often then adopted by Russian families. These families intend to raise the children in Russia, as Russians, until at least age eighteen.

Element 7. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Thousands of Ukrainian children, either made orphans by the war or non-orphans whose parents have fled, remain in Russia and its "adoption" system.

Element 8. Officials told Lopatkina the DPR courts could strip his mother of her guardianship. He was also told his siblings would be sent to orphanages in Russia, furthering the cycle.

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325. el Deeb, et. al., *supra* note 300.

Case B: Kidnapping, deportation, and detention of Viktoria Andrusha[326]

Element 1(a). Andrusha was arrested by Russian troops at her house on 25 March 2022.

Element 2(a). In May and July 2022, Russian officials denied Andrusha was being held in a civilian jail in Kursk when asked in-person by the family's attorney, Leonid Krikum. The state never officially recognized Andrusha's detainment while in their custody.

Element 3(b). When Krikum inquired about Andrusha at the Kursk prison, it took two hours for him to be told "we have no such person." Andrusha was at the prison on the day her attorney inquired about her.

Element 4. The Russian troops who arrested Andrusha were acting on behalf of the Russian government who launched a full-scale invasion of Ukraine in February 2022.

Element 5. The prison's warden and local staff who denied Andrusha's presence to Krikum were employed by the Russian state. Additionally, Krikum noticed a large amount of Russian military-police cars at the civilian prison. They worked with local guards to monitor the inmates.

Element 6. Andrusha was never tried before a court, nor was there ever any intention to do so. Her captors gave her family no notice of any plan to acknowledge her detention, let alone release her. From the beginning, the intended length of her detention was indefinite.

Element 7. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. As of 3 October 2022, the OHCHR has found over 15,000 civilian casualties in Ukraine.

Element 8. Despite Andrusha reporting Russian troop movements in her neighborhood to Ukrainian military contacts from the attic of her home, she was a civilian, acting as a civilian in wartime. Moreover, she was held in a Russian civilian prison along with many other Ukrainian civilians.

Case C: Kidnapping, deportation, and detention of Yevgeny Malyarchuk[327]

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326. Yaffa, *supra* note 321. *See also Russia: Forcible Disappearances of Ukrainian Civilians*, *supra* note 321.

327. Sevryugin, *supra* note 322. *See also* Suresh, *supra* note 322.

Element 1(a). Malyarchuk, a civilian, was arrested in Mariupol in March 2022 and taken to Olemivka in the DPR.

Element 2(a). Before Malyarchuk's release, he and other inmates were forced to sign protocols that they had no complaints about the inhuman conditions they faced.

*Element 3(b).*The signing of the protocols directly led to the release of Malyarchuk (and others). They were required to state they had no complaints regarding their illegal detainment, while the detainment was ongoing.

Element 4. Pro-Russian authorities arrested Malyarchuk and Russian troops guarded the penal colony where he was held.

Element 5. The forms declaring Malyarchuk had no complaints were given to him by soldiers after they called his name out, indicating they wanted him to sign it.

Element 6. Malyarchuk was never told how long he would be held and did not even realize he was being released until it happened. After his release, he has tried and failed to get information on his friends held at the same facility, indicating a plan of prolonged, if not indefinite, holdings.

Element 7. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Malyarchuk, many of the ~3,000 other POWs were civilians, including fellow Ukrainian businessmen, and directors of IT companies.

Element 8. Soldiers continuously interrogated him, hoping to get him to acknowledge he was a soldier in the Ukrainian military. This failed and Malyarchuk was not interrogated the entire 100 days he was in captivity, such as when he spent three days in solitary confinement. Nonetheless, Russian forces seemed content to continue holding him.

Case D: Forced deportation and detention of Ihor[328]

Element 1(a). Ihor and about sixty others from his village were taken by bus to Belgorod, Russia by Russian troops.

Element 2(a). Other than being told they "must go to Russia," Ihor and the villagers received no information as to where specifically they were going. Additionally, requests from villagers to evacuate to Ukrainian cities outside the war zone were simply ignored. Likewise, after fleeing the filtration camp, when crossing a checkpoint to get to Belarus, Ihor and the woman he was driving were locked in a small room

328. Shulzhenko, *supra* note 323.

for seven hours by Russian guards and received no explanation afterwards.

Element 3(a). In Belgorod, the Russians set up a temporary filtration camp. At this point, no information as to where they were going was provided.

Element 4. Ihor and the villagers were taken by Russian soldiers. Each villager was questioned by a member of Russia's Federal Security Service when brought across the border.

Element 5. The soldiers never told the villagers where they were going.

Element 6. Many villagers lied and said they had family contacts in Belgorod, simply so the Russians would leave them there. The Russians did so, but those without contacts were presumably taken further into Russia, prolonging their abduction indefinitely.

Element 7. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Ihor's abduction was done under the pretense that after Russia had destroyed his village, the civilians needed to be evacuated to Russia for safety. The U.S. State Department estimates at least 900,000 Ukrainians have so far been forcibly moved into Russia since February 2022.

Element 8. The soldiers first went through the village's administrative records to determine who the veterans fighting against Russia in the Donbas were and executed them. After killing them, the soldiers knew that the villagers they were abducting were civilians.

Case E: Forced transportation and attempted deportation of Kira Obedinsky[329]

Element 1(a). Obedinsky was taken from the local hospital treating her and her late-father's girlfriend's injuries to a distant one in the DPR. She was supposed to be sent to a Russian orphanage after recovering.

Element 2(a). Russia claims that Ukraine has hindered their ability to assist countless children, including Obedinsky, in "evacuating" them to Russia.

Element 3(a). After her grandfather, Oleksander, contacted the hospital in the DPR where Kira was held, he was invited to travel to the DPR to claim her. However, Oleksander argued this ignored the reality of traveling through a war-torn nation across disputed state lines.

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329. Black, et al., *supra* note 324. *See also* Harder, *supra* note 324. *See also* Sidhu, et al., *supra* note 324.

Reuniting himself with his granddaughter would have been a much easier process before Russian troops sent her across Ukraine into the DPR.

Element 4. The Russian Federation assisted in getting Obedinsky a new Russian passport and Russian documentation, even though she was not, nor did she ever try or want to become, a Russian citizen.

Element 5. The hospital informed Oleksander that unless he came to collect his granddaughter, ignoring that the gravity of their separation was caused by Russian troops, Obedinsky would be sent to a Russian orphanage.

Element 6. Though Obedinsky was an orphan by this time, she was not Russian. Russia's efforts to get Obedinsky out of Ukraine and also Russian documentation suggests they intended to keep Obedinsky in Russia indefinitely.

Element 7. Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Thousands of Ukrainian children, either made orphans by the war, like Obedinsky, or non-orphans whose parents have fled remain in Russia and its "adoption" system.

Element 8. No explanation was given as to why Obedinsky was separated from her late-father's girlfriend at the initial hospital. Obedinsky was continuously moved further away from her home in Mariupol, first to the DPR, and then preparations were made for her to be sent to Russia indefinitely.

VII. INDIVIDUALS BEARING THE GREATEST RESPONSIBILITY

The ICC may prosecute any individual that is alleged to have committed a crime within its jurisdiction.[330] The ICC focuses on those who bear the greatest responsibility for the crimes, including those who hold official government positions.[331] An individual is not exempt from prosecution because of their official position at the time the crimes were committed.[332] Additionally, a person in authority may be held responsible for crimes committed by individuals under their command.[333] Amnesty is neither a defense before the ICC nor it can bar the ICC from asserting its

330. *Understanding the International Criminal Court*, INT'L CRIM. CT. 14 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf (last visited 7 Jan. 2022).

331. *Id.*

332. *Id.*

333. *Id.*

jurisdiction.[334] The ICC is a judicial institution, rather than a political institution.[335] The ICC's decisions are based on legal criteria and rendered by impartial judges based on the Rome Statute and other legal texts.[336]

A. PEOPLE'S REPUBLIC OF CHINA

The People's Republic of China (PRC) is governed by the National People's Congress, composed of individuals elected from provinces, autonomous regions, municipalities directly under the Central Government, special administrative regions, and deputies elected from the armed forces.[337] The permanent body of the National People's Congress is the Standing Committee of the National People's Congress.[338] These two bodies are the main legislative bodies in the Chinese government. [339] The National People's Congress of China also elects the President and Vice President of the People's Republic of China.[340] The President appoints and removes the Premier, Vice Premiers, State Councillors, Ministers in charge of ministries or commissions, and the Auditor General and the Secretary General of the State Council.[341]

The CCP is also an integral part of the Chinese government.[342] The CCP is organized under its own program and its own Constitution.[343] The CCP elects members to its highest leading bodies, the National Congress of the Party and the Central Committee.[344] The Central Committee of the Party has the power to make decisions on major national policies.[345] The Party organization of a department or locality may make suggestions to the Central Committee with regard to such policies but shall not make any decision or express their views outside the Party without

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334. *Id.*
335. *Id.*
336. *Id.*
337. *China's De Jure Structure*, UYGHUR TRIBUNAL 3 (2021), https://uyghurtribunal.com/wp-content/uploads/2022/09/Explanatory-documents-version_12.06.2021.pdf (last visited 7 Jan. 2022).
338. *Id.* at 5.
339. *Id.* at 3.
340. *Id.* at 7.
341. *Id.*
342. *Id.* at 11.
343. *Id.*
344. *Id.*
345. *Id.* at 12.

authorization.[346] The Central Committee then elects members to the Political Bureau and the Standing Committee of the Political Bureau.[347] Between sessions of the Central Committee, the Political Bureau exercises the powers and functions of the Central Committee.[348]

The most responsible individuals within China for the commission of extraordinary renditions, non-exhaustively, include:

1. Xi Jinping, President

Xi Jinping has been the president of China since 2013.[349] The president of China has the power to proclaim a state of emergency, proclaim a state of war, and issue mobilization orders.[350] His powers over foreign policy include appointing representatives abroad and ratifying or abrogating treaties and agreements with foreign nations.[351] China has signed 34 bilateral extradition treaties around the world, which have been instrumental in deporting Uyghurs back to China.[352] Xi Jinping is also the Chairman of the Central National Security Commission, General Secretary of the CCP, and Chairman of the Central Military Commission.[353] Through these positions, Xi Jinping directs the armed forces of China.[354] Xi Jinping declared that the Uyghur presence and their "radical Islam" was a crucial national crisis.[355] Through his various political positions, Xi Jinping has the power to negotiate and sign off on agreements for extraordinary renditions from foreign nations and command the military in executing extraordinary renditions.

2. Chen Quanguo, Communist Party Secretary of the XUAR

Chen Quanguo was Communist Party Secretary of Tibet Autonomous Region from 2011 to 2016 and has been Communist Party Secretary of the Xinjiang Uyghur Autonomous Region since 2016. Upon

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346. *Id.*
347. *Id.*
348. *Id.* at 13.
349. *Id.* at 19.
350. *Id.* at 7.
351. *Id.*
352. JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xlii.
353. *China's De Jure Structure*, *supra* note 337, at 8.
354. *Id.*
355. Austin Ramzy & Chris Buckley, *'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims*, THE NEW YORK TIMES (16 Nov. 2019), https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html.

entering this position, Chen issued a sweeping order: "Round up everyone who should be rounded up."

3. Chen Wenqing, Former, MSS

Chen Wenquing was the Minister of State Security ("MSS") from 2015 to 2022.[356] As the Minister of State Security, he decided on major issues within the department.[357] The MSS has cooperated with other global intelligence agencies, issuing lists of Uyghurs it was hunting in 2003, 2007, and 2012. These lists have resulted in the detention and refoulement of human rights activists, among others.[358] Chen Wenquing's successor is Chen Yixin.[359]

4. Wang Yi, Minister of Foreign Affairs

Wang Yi was appointed as Minister of Foreign Affairs in 2013.[360] The Ministry of Foreign Affairs directs China's embassies and consulates.[361] China's embassies and consulates have played an active role in surveilling and intimidating Uyghurs worldwide.[362] China's embassies have denied Uyghurs the renewal of their expiring passports, directing them to return to China, or denied their legal status abroad.[363]

B. RUSSIAN FEDERATION

The Russian Federation governmental power is distributed across *oblasti* (regions), *kraya* (territories), *okruga* (autonomous districts), and two Federal Cities.[364] The head of the Russian government is the

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356. Peter Mattis, *Chen Wenqing: China's New Man for State Security*, THE NATIONAL INTEREST (23 Oct. 2015), https://nationalinterest.org/feature/chen-wenqing-china%E2%80%99s-new-man-state-security-14153.

357. *China's De Jure Structure*, *supra* note 337, at 10.

358. JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xl.

359. Kevin Yao et al., *China Names Chen Yixin as State Security Minister*, REUTERS (30 Oct. 2022), https://www.reuters.com/world/china/china-names-chen-yixin-state-security-minister-parliament-2022-10-30/.

360. *The US-China Business Council*, Foreign Minister Wang Yi, https://www.uschina.org/foreign-minister-wang-yi (last visited 27 Dec. 2022).

361. JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xli

362. *Id.*

363. *Id.* at xlii.

364. UKRAINE TASK FORCE, RUSSIAN WAR CRIMES AGAINST UKRAINE: THE BREACH OF INTERNATIONAL HUMANITARIAN LAW BY THE RUSSIAN FEDERATION, app. C at 5 (The Global Accountability Network, 2d ed. Dec. 2022), https://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_a20440cdc50f4f33824d80348c25f0a4.pdf.

President.[365] The President of the Russian Federation determines the foreign policy of the State, represents the State in international relations, and is the Commander-in-Chief of the armed forces.[366] The President of the Russian Federation has the power to appoint the Chairman of the Government of the Russian Federation, informally known as the Prime Minister, with the agreement of Russia's legislative body, the State Duma.[367] The President of the Russian Federation also has the constitutional powers to form and head a Security Council, approve the Russian Federation's military doctrine, and appoint federal ministers.[368] The dominant political party in the Russian Federation is United Russia.[369] United Russia is a conservative, nationalist party that strongly supports President Putin.[370] The most responsible individuals within Russia for the commission of extraordinary renditions, non-exhaustively, include:

1. Vladimir Putin, President

Vladimir Putin has been president of Russia since 2012.[371] As president, he is also the Supreme Commander-in-Chief and the Chairman of the Security Council in Russia.[372] Vladimir Putin is responsible for launching the war of aggression against Ukraine.[373] Officials from Russia's presidential administration are overseeing and coordinating filtration camps for Ukrainians.[374] The officials in Putin's administration that are coordinating the filtration camps are known as the "siloviki," an elite class of security officials, including Nikolai Patrushev, Sergey Naryshkin, and Aleksandr Bortnikov.[375]

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365. *The political system of the Russian Federation: President and Government*, THE STATE DUMA (9 Nov. 2018), http://duma.gov.ru/en/news/28748/ (last visited 8 Jan. 2022).

366. *Id.*

367. Konstitutsiia Rossiĭskoĭ Federatsii [Konst. RF] [Constitution] Art. 83 (Russ.).

368. *Id.*

369. UKRAINE TASK FORCE, *supra* note 364, app. C at 16.

370. *Id.*

371. *Id.* at app. C part 2 at 4.

372. *Id.*

373. *Id.*

374. Claire Parker, *New findings expose machinery of Russia's 'filtration' of Ukrainians*, THE WASHINGTON POST (1 Sept. 2022), https://www.washingtonpost.com/world/2022/09/01/russia-ukraine-filtration-forced-transfer/.

375. Anton Troianovski, *The Hard-Line Russian Advisers Who Have Putin's Ear*, THE NEW YORK TIMES (30 Jan. 2022),

2. Alexander Bortnikov, FSB Director

Aleksandr Bortnikov has been the director of Russia's Federal Security Service ("FSB"), the successor of the Soviet Union's KGB, since 2008.[376] He is also the Chairman of the National Anti-Terrorism Committee and a permanent member of the Security Council of Russia.[377] As Director of the FSB, Bortnikov oversees the entirety of the FSB.[378] The filtration camps and processing centers are largely run by the FSB.[379] Western intelligence believes that before Russia invaded Ukraine, the FSB had already planned to establish and operate a filtration camp system to kill politically undesirable Ukrainians while shipping the rest to Russia.[380]

3. Sergei Shoigu, Minister of Defense

Sergei Shoigu has been the Minister of Defense in Russia since 2012.[381] As Minister of Defense, Shoigu is responsible for the Russian Armed Forces.[382] Shoigu oversees all military activity occurring in Ukraine.[383] Sergei Shoigu announced a plan to build three to five large cities with populations between 300,000 and 1 million people.[384] Oleksiy Danilov, Ukraine's Secretary of the National Security and Defense Council, believes that Shoigu planned for Ukrainians to build these cities.[385] Shoigu wrote in an article that citizens from the "Commonwealth of Independent States," should be brought in to do this work.[386] Danilov believes that Shoigu hinted in the article that Ukrainians were to work as forced labor to accomplish this goal.[387]

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https://www.nytimes.com/2022/01/30/world/europe/putin-top-advisers-ukraine.html.

376. UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 117.

377. *Id.*

378. *Id.*

379. Lillis, Atwood, & Bertrand, *supra* note 248.

380. *Id.*

381. UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 44.

382. *Id.* at 45.

383. *Id.* at 44.

384. Denys Karlovskyi, *Kremlin Wanted to Send Ukrainians to Concentration Camps in Siberia and Force Them to Build Cities – Danilov*, PRAVDA (21 Apr. 2022), https://www.pravda.com.ua/eng/news/2022/04/21/7341244/ (last visited 8 Jan. 2022).

385. *Id.*

386. *Id.*

387. *Id.*

4. Nikolai Patrushev, Secretary of the Security Council

Nikolai Patrushev has been Russia's Secretary of the Security Council since 2008.[388] Russia's Security Council is responsible for formulating Russia's security policy and interprets intelligence from Russian sources and networks abroad.[389] As Secretary of the Security Council, Patrushev exerts much influence over Putin.[390] He is one of Putin's closest advisors.[391]

5. Sergey Naryshkin, Director of the Foreign Intelligence Service

Sergey Naryshkin has been the director of Russia's Foreign Intelligence Service since 2016.[392] Naryshkin oversees the agency that assists in implementing measures taken by the state in the interest of ensuring Russia's security.[393] Naryshkin is in the *siloviki*, Putin's inner circle of advisors.[394] Within the *siloviki*, Naryshkin is one of Putin's closest advisors.[395]

6. Maria Lvova-Belova, Commissioner for Children's Rights

Maria Lvova-Belova is the Commissioner for Children's Rights responsible for Russian State interventions towards children in Ukraine, including the expedited citizenship program for children forcibly moved from Ukraine to Russia, and started the non-profit group "Into the Hands of Children," which is a division of Russian Humanitarian Mission (RHO), an organization which provides humanitarian aid in more than 10 countries.[396] However, as of 6 April 2022, all funds received as donations

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388. UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 123.

389. Susanne Sternthal, *As one of Vladimir Putin's closest advisers on Ukraine, Nicolai Patrushev spreads disinformation and outlandish conspiracy theories*, THE CONVERSATION (7 June 2022), https://theconversation.com/as-one-of-vladimir-putins-closest-advisers-on-ukraine-nicolai-patrushev-spreads-disinformation-and-outlandish-conspiracy-theories-183699.

390. Paul Kirby, *Ukraine conflict: Who's in Putin's inner circle and running the war?*, BBC NEWS (3 Mar. 2022), https://www.bbc.com/news/world-europe-60573261.

391. *Id.*

392. UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 127.

393. Federal'nyĭ Zakon O Vneshnyĭ Razvedke [Federal Law on Foreign Intelligence] 1995, Art. 1.

394. Troianovski, *supra* note 375.

395. Paul Kirby, *supra* note 390.

396. *Don't stay away. Join the campaign of the Commissioner for Children's Rights under the President of the Russian Federation "Into the hands of children". Let's help the children of Donbass and Ukraine together!*, RUSSIAN HUMANITARIAN MISSION,

for RHO may be used for "Into the Hands of Children," regardless of whether another purpose is stated in the "purpose of payment" field of the donation.[397]

VIII. THE U.S. EXTRAORDINARY RENDITION PROGRAM

The U.S. has an infamous extraordinary renditions program. This white paper acknowledges this history and argues that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it.[398]

In 1992, the U.S. Supreme Court established the principle that federal courts are able to assert personal jurisdiction over a defendant abducted from abroad in *United States v. Alvarez-Machain*.[399] The Court held that the act of kidnapping or abducting a foreign national from abroad would create no jurisdictional impediment to the trial's proceedings.[400] The U.S. received backlash for the ruling from the media and from neighboring countries including Canada and Latin American states, among others.[401] The Chinese press also notably condemned the U.S.'s decision.[402] The U.S. Supreme Court's ruling ultimately reaffirmed the U.S.'s judicial policy of non-inquiry into the methods employed to bring a criminal into the jurisdiction of the U.S. courts.[403]

The U.S. is notorious for its extraordinary rendition program in which foreign nationals suspected of involvement in terrorism have been transferred to third party countries to be detained or interrogated by U.S.

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https://rhm.agency/ne-ostavaytes-v-storone-detyam-v-ruki-pomozhem-detyam-donbassa-i-ukrainy-vmeste/ (last visited 2 Jan 2023).

397. *Id.*

398. Such jurisdiction would be subject to the ICC's admissibility criteria, including the gravity analysis.

399. United States v. Alvarez-Machain, 504 U.S. 655 (1992). *See also* Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, STAN. L. REV. (1993).

400. *Id.*

401. *Id.*

402. *Id.*

403. Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, DEPAUL L. REV. (1994).

personnel, or on behalf of the U.S. by foreign agents.[404] These U.S. detainees are often moved to countries where the U.S. Government views federal and international legal safeguards as no longer applicable.[405] The U.S., like Russia and China, is not a party to the Rome Statute and does not consider itself within the jurisdiction of the ICC.[406] The U.S.'s interactions with the ICC have always been tumultuous, relying on the current President's own agenda and whether or not supporting the ICC aligns with his base.[407]

The U.S., however, has ratified CAT and has established a federal statute against extraordinary rendition.[408] Despite its responsibility to preserve human rights, the U.S. has further argued that human rights law cannot be applied to the war on terror and that relevant norms are not applicable to its extraterritorial conduct.[409] The U.S. has attempted to elude these norms and avoid the due process rights of prisoners completely by sending detainees to be tortured under other governments outside of the jurisdiction of the U.S. Courts.[410]

The U.S. has infamously detained foreign nationals in "black sites"—secret prisons outside of the U.S. —in order to forego the legal procedures necessary for detaining a suspected criminal.[411] Suspects held in these "black sites" have often been subjected to harsh treatment, including "enhanced interrogation techniques" that would be deemed illegal if practiced inside the U.S.[412] Uyghurs have been among those captured and sent to Guantanamo.[413] The U.S. has previously argued for the establishment and continued practice of these programs, deeming

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404. See Sadat, *supra* note 70.

405. *Fact Sheet: Extraordinary Rendition, supra* note 13.

406. *The States Parties to the Rome Statute,* INT'L CRIM. CT., https://asp.icc-cpi.int/states-parties (last visited 7 Jan. 2022).

407. Mark Kersten, *Biden and the ICC: Partial Cooperation, Selective Justice,* ALJAZEERA (5 Mar. 2021), https://www.aljazeera.com/opinions/2021/3/5/biden-and-the-icc-partial-cooperation-selective-justice.

408. *Extraordinary Rendition FAQS,* ACLU, https://www.aclu.org/other/extraordinary-rendition-faqs (last visited 7 Jan. 2022).

409. Jeremiah Lee, *Rendered Meaningless: The Rule of Law in the US 'War on Terror',* JURIST (27 Mar. 2006), https://www.jurist.org/commentary/2006/03/rendered-meaningless-rule-of-law-in-us/.

410. *Id.*

411. Jane Mayer, *The Black Sites,* THE NEW YORKER (5 Aug. 2007), https://www.newyorker.com/magazine/2007/08/13/the-black-sites.

412. *Id.*

413. JARDINE, GREAT WALL OF STEEL, *supra* note 210.

them "irreplaceable" in combating terrorism.[414] The U.S. Guantanamo Bay Detention Camp is notable for its brutal treatment of prisoners, having subjected some of them to waterboarding, among other forms of torture.[415] The CIA obtained these prisoners secretly and extrajudicially, with many of the prisoners kept in Guantanamo Bay having never been charged with a crime, depriving them of due process indefinitely.[416] While the U.S. continues the operation of Guantanamo Bay, it presents a double front by decrying what it deems to be unlawful practices committed by foreign countries.[417] Although some U.S. Presidents have promised to close Guantanamo Bay, it remains open.[418] After the U.S. Supreme Court ruling of *Hamdan v. Rumsfeld*, in which it decreed that all detainees had to be treated "in a manner consistent with the Geneva Conventions," of which the U.S. is a party, President Bush announced the emptying of CIA prisons to Guantanamo Bay.[419] Thirty-five prisoners still remain in custody, with twelve having been charged with war crimes in the military commissions system—ten awaiting trial and two convicted.[420] Three detainees are being held indefinitely and another twenty are recommended for transfer to another country.[421]

IX. ATTEMPTED EXTRAORDINARY RENDITIONS

As technology advances and innovations are employed against people, international criminal law must evolve to capture the crimes that domestic law is unable or unwilling to bring to justice. In modern times, attempts at extraordinary rendition are not just perpetrated on the ground, but also online. In some cases, individuals are coerced and forced across international borders into countries where they face persecution without a perpetrator ever setting foot on the ground of the originating state. Perpetrators are technologically savvy and often state-sponsored, organized, and systematic. Some States, such as the U.S., make a

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414. Mayer, *supra* note 411.

415. Letta Taylor & Elisa Epstein, *Legacy of the "Dark Side"*, HUMAN RIGHTS WATCH (9 Jan. 2022), https://www.hrw.org/news/2022/01/09/legacy-dark-side.

416. Shamsi, *supra* note 15.

417. Taylor & Epstein, *supra* note 415.

418. Ben Fox, *Joe Biden's silence on Guantanamo Bay frustrates closure advocates as prison turns 20*, PBS NEWS HOUR (10 Jan. 2022), https://www.pbs.org/newshour/politics/joe-bidens-silence-on-guantanamo-bay-frustrates-closure-advocates-as-prison-turns-20.

419. Mayer, *supra* note 411.

420. Almukhtar et al., *The Guantánamo Docket*, *supra* note 15.

421. *Id.*

distinction between kidnapping and pressure when determining whether to act against a State.[422] However, this section argues that when a State not Party to the Rome Statute is reaching into States Parties and coercing people through extreme pressure tactics (whether on the ground or online) to travel to that State not Party (even if they never do travel), where such persons likely face persecution, this practice may qualify as an attempted deportation.

Regarding criminal liability for attempted crimes within the jurisdiction of the ICC, Rome Statute Article 25(3)(b) & (d) states, in pertinent part:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs *or is attempted*;
>
> (d) In any other way contributes to the commission *or attempted commission* of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;[423]

So long as at least part of the *actus reus* of the crime of deportation takes place on the territory of a State Party, the ICC may exercise jurisdiction.[424] The *actus reus* of the crime of deportation is the first element of the crime and states: "The perpetrator deported or forcibly,

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422. Zach Doefman, *The Disappeared; China's global kidnapping campaign has gone on for years. It may now be reaching inside U.S. borders,* FOREIGN POLICY (29 Mar. 2018), https://foreignpolicy.com/2018/03/29/the-disappeared-china-renditions-kidnapping/.

423 Rome Statute, *supra* note 5, at Art. 25(3).

424. *See supra* notes 162-69.

transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts."[425] In 2019, the Pre-Trial Chamber III of the ICC considered the crime of attempted deportation in the case of the Rohingya.[426] The Court explained "the victims' behavior or response as a consequence of a coercive environment is required to be established for the completion of the crime. *If the victims refused to leave the area despite the coercive environment* or they did not cross an international border, *it would constitute* forcible transfer or *an attempt to commit the crime of deportation*."[427] Likewise, a coercive environment can be and has been created by States not Party online. As such, the ICC should recognize, based on the reasoning in its 2019 Rohingya ruling, that the crime of attempted deportation may be perpetrated not only on the ground, but also online.

A. CHINA'S ATTEMPTED EXTRAORDINARY RENDITIONS

The global scale of China's transnational repression campaign is unparalleled.[428] Freedom House's conservative catalog of direct, physical attacks since 2014 covers 214 cases originating from China—far more than any other country.[429] These egregious and high-profile cases are only the tip of the iceberg of a much broader system of surveillance, harassment, and intimidation that leaves many overseas Chinese and exile minorities feeling that the CCP is watching them and constraining their ability to exercise basic rights *even when living in a foreign democracy*.[430] These tactics affect millions of Chinese and minority populations from China in at least thirty-six countries.[431] Political dissidents, human rights activists, journalists, and former insiders accused of corruption are specifically targeted.[432]

However, these attacks are not only perpetrated on the ground, they are also perpetrated online. The CCP transnationally pressures and

425. ELEMENTS, *supra* note 6, at Art. 7(1)(d).

426. ICC-01/19-27, *supra* note 164, at ¶ 52.

427. *Id.* (emphasis supplied).

428. *China: Transnational Repression Origin Country Case Study,* FREEDOM HOUSE (2021), https://freedomhouse.org/report/transnational-repression/china.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

controls the overseas population of Chinese and minority communities.[433] A recent case study conducted by the Wilson Center found that, in relation to the Uyghur population, there were 5,532 cases of intimidation, 1,150 cases of detention within in their host country, and a further 424 cases of Uyghur people being deported, extradited, or rendered back to China.[434] Additionally, 108 deportations have been logged as well as incidents of coercion being inflicted on 89 Uyghurs to return to the XUAR, 11 renditions, and 9 extraditions.[435] It is suggested that these figures illustrate only a fraction of what is actually occurring.[436] The primary evidence indicates that the atrocities are likely much more extensive than is officially reported.[437]

1. Transnational Repression of Uyghur Activists

The 2022 OHCHR Report identifies the Uyghur diaspora community as being particularly affected by family separations and enforced disappearances.[438] There have been allegations of reprisals and intimidations against those seeking information about their family members or expressing concern publicly.[439] There are numerous examples of the CCP reaching abroad to threaten activists and their families for speaking out against the government for allegedly perpetrating atrocities. Transnational repression has increased where Beijing has employed a range of tactics to pursue foreign critics. These tactics include cyberattacks, physical threats, and denial of consular services which have resulted in thousands of Uyghurs stranded without passports.[440]

For example, The New York Times followed the story of one individual, Tahir Imin, who is an activist abroad, speaking out against the Uyghur genocide.[441] Those who claim to be Chinese police threatened

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433. *Id.*

434. JARDINE, GREAT WALL OF STEEL, *supra* note 210.

435. *Id.*

436. *Id.*

437. *Id.*

438. 2022 OHCHR REPORT, *supra* note 198, at ¶ 129.

439. *Id.*

440. Bradley Jardine, *China's repression of Uyghurs extends far beyond its own borders,* THE NEW STATESMAN (16 May 2022), https://www.newstatesman.com/world/asia/china/2022/05/chinas-repression-of-uyghurs-extends-far-beyond-its-own-borders.

441. Max Fisher, *As Dictators Target Citizens Abroad, Few Safe Spaces Remain*, THE NEW YORK TIMES (4 June 2021),

Tahir Imin, even since he moved to the U.S.[442] Specifically, people who identified themselves as Chinese police flooded Imin's inbox with threatening messages.[443] Tahir Iman also got word that his mother and brother were arrested on bogus charges—a common occurrence for families of Uyghur activists abroad.

As another example, Dolkun Isa became an activist fighting for the enforcement of equal rights for the Uyghur people as a university student in China.[444] After facing multiple issues with the authorities, such as struggling to obtain the necessary licensing to open up a school as well as being questioned by local police, Isa fled to Turkey where he continued his activism.[445] This started to draw a lot of attention as the bond between China and Turkey strengthened.[446] Isa applied for asylum in Germany and moved to Germany in November 1996.[447] This followed years of harassment from the PRC, including the Chinese Government issuing an international warrant of arrest in 1997 against Isa.[448] In these charges, Isa was accused of murder, terrorism, and criminal conduct.[449] Interpol placed Isa's name on the "red notice" and his name remained on the list for 21 years.[450] Isa was detained on numerous occasions in Switzerland, South Korea, Italy and the U.S.[451] Only in 2018 was his name removed from the red notice list.[452]

In July 2021, activist Idris Hasan fled from Turkish authorities and was later detained in Morocco.[453] He was accused of being a member of a Uyghur terrorist organization by the Chinese government as they issued a red notice through Interpol for his arrest—a common accusation made against Uyghur activists.[454] Interpol found no evidence supporting

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https://www.nytimes.com/2021/06/04/world/europe/repression-uyghurs-belarus.html.

442. *Id.*

443. *Id.*

444. Dolkun Issa, *Full Statement*, UYGHUR TRIBUNAL (June 2021), https://uyghurtribunal.com/wp-content/uploads/2021/06/04-1450-JUN-21-UTFW-021-Dolkun-Isa-English-1.pdf.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. Jardine, *China's repression of Uyghurs extends far beyond its own borders*, *supra* note 440.

454. *Id.*

China's claims; noted its bylaws do not allow for persecution on a political, religious, or economic grounds; and suspended the red notice.[455]

2. China's Mass Surveillance Technologies

The extensive scope of China's transnational repression is a result of a broad and ever-expanding definition of who should be subject to extraterritorial control by the CCP.[456] The Chinese implemented an Integrated Joint Operations Platform ("IJOP") where the police and other officials could communicate with each other.[457] This system is used for mass surveillance as the program collects data on people and flags those that it deems to be potential threats. Some of the flagged people are detained and are sent to political education camps and other facilities.[458] Many of the surveillance practices followed by the Chinese government are against its own law as well as in violation of the internationally guaranteed rights: the right to presumption of innocence until proven guilty, the right to privacy, and the freedom of association and movement. This practice has also impacted other rights such as the right to freedom of expression and religion.

Human Rights Watch reverse engineered the IJOP and found that Chinese authorities have a massive amount of personal data, including features such as the color of a person's car and a person's height.[459] This is fed to the IJOP central system, and the data is linked to a person's national identification card number.[460] Chinese authorities consider many forms of common, legal and non-violent behavior suspicious.[461] This behavior can include "not socializing with neighbors" and "often avoiding using the front door".[462] The platform also considers the use of 51 network tools as suspicious, including many virtual private networks and encrypted communication tools such as WhatsApp and Viber.[463]

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455. *Id.*

456. HUMAN RIGHTS WATCH, CHINA'S ALGORITHM OF REPRESSION (1 May 2019), https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass.

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

3. Accountability in the U.S.

In 2014, the CCP launched "Operation Fox Hunt" to target Chinese nonconformists around the world.[464] The U.S. classified the operation as an "extralegal repatriation effort."[465] The FBI arrested 5 individuals who were caught attempting to force former Chinese municipal workers, who were residing in the U.S., to return to China.[466] The defendants were charged with attempting to "harass, coerce, and stalk" the former Chinese municipal worker, and current U.S. resident, to return to China.[467] The defendants attempted to coerce the U.S. resident back to China by using his father to encourage him to come back to China and by threatening his family.[468] The defendants used social media to attempt to lure the U.S. resident by following his daughter, conducting surveillance, and sending threatening messages via social media.[469]

On 20 October 2022, the U.S. Attorney's Office for the Eastern District of New York unsealed an eight-count indictment charging seven PRC nationals with participating in a scheme to forcibly repatriate a PRC national residing in the U.S.[470] Two of them were arrested on the same day.[471] As a part of "Operation Fox Hunt," the defendants were accused of conducting surveillance of and engaging in a campaign to harass and coerce a U.S. resident to return to the PRC.[472] Assistant Attorney General Matthew G. Olsen explained, "These cases highlight the threat the PRC government poses to our institutions and the rights of people in the United States

. . . We will not tolerate these brazen operations: the harassment and attempted repatriation by force of individuals living in the U.S.; the effort to corrupt our judicial system . . . ."[473]

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464. Masood Faivar, *FBI Arrests Five People in China's 'Operation Fox Hunt'*, VOA NEWS (28 Oct. 2020), https://www.voanews.com/a/usa_fbi-arrests-five-people-chinas-operation-fox-hunt/6197702.html.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. U.S Dep't of Justice Press Release No. 22-1141, *Two Arrested and 13 Charged in Three Separate Cases for Alleged Participation in Malign Schemes in the United States on Behalf of the Government of the People's Republic of China*, (24 Oct. 2022), https://www.justice.gov/opa/pr/two-arrested-and-13-charged-three-separate-cases-alleged-participation-malign-schemes-united.

471. *Id.*

472. *Id.*

473. *Id.*

B. RUSSIA'S ATTEMPTED EXTRAORDINARY RENDITIONS

Russia has a very similar concept of cyber sovereignty to China. Cyber sovereignty can be broadly defined as "the ability to create and implement rules in cyberspace through state governance."[474] Most states have some form of cyber sovereignty over the internet to protect citizens' privacy online and to reduce disinformation and cybercrimes. This allows the government's use of digital information technology to repress citizens and allows the Kremlin to surveil, control, and isolate its internet from the rest of the world.[475]

The Russian government took a number of legal steps to create the authoritarian and isolated RuNet.[476] In 2014, Russia established a data localization law.[477] Data localization policies escalate state access to information on dissidents, can result in the state economically coercing foreign companies, and can also serve as a means of coercing organizations to support the political regime.[478] Criticism of the Russian government is criminalized and enforced through the unfettered surveillance of citizens' online activities.[479] Some countries tried to mimic the localization restrictions that Russia established while others, such as China, opted for more restrictive laws.[480]

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474. Emily Tavener, *Russian Cyber Sovereignty: Global Implications of an Authoritarian RuNet*, AMERICAN UNIVERSITY CENTER FOR SECURITY, INNOVATION, AND NEW TECHNOLOGY (1 Feb. 2022), https://www.american.edu/sis/centers/security-technology/russian-cyber-sovereignty.cfm.

475. *Id.*

476. The internet within Russia. *See generally* Justin Sherman, *Reassessing RuNet: Russian internet isolation and implications for Russian cyber behavior*, ATLANTIC COUNCIL (12 July 2021), https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/reassessing-runet-russian-internet-isolation-and-implications-for-russian-cyber-behavior/.

477. This law required Russian and foreign companies to establish a data localization parlance, where a principal copy of its data must be stored in Russia but where other copies can exist outside of Russia. *See* Justin Sherman, *Russia is weaponizing data laws against foreign operations,* BOOKINGS (27 Sept. 2022), https://www.brookings.edu/techstream/russia-is-weaponizing-its-data-laws-against-foreign-organizations/.

478. *Id.*

479. Tavener, *supra* note 474.

480. Sherman, *Russia is weaponizing data laws against foreign operations*, *supra* note 477.

Russia uses its laws on overseas technology companies as a blatant tool of coercion.[481] The Russian government attempts to get these technology companies, such as Wikimedia, to place their content creators and editors in Russian territory where the Russian security forces can reach and detain them.[482] Multiple editors from Wikimedia have had their personal information leaked online in order to intimidate them and expose them to violence.[483]

Russian-installed authorities in occupied regions of Ukraine have blocked access to major social media networks including Google, YouTube, Facebook, and Instagram, as well as to Ukrainian news and independent media.[484] The Google search engine was disabled in the Donetsk, Kherson, and Luhansk regions on 22 July 2022, reasoning that Google was "openly propagating terrorism and violence against Russians."[485] Russia continues to shut off Ukrainian cellular networks, forcing the residents of Kherson to use Russian mobile service providers, which enable the Russian authorities to surveil, intercept, and block Kherson residents from communicating with the outside world.[486]

1. Foreign Agent Legislation

Since 2012, Russia has required that any organizations engaging in political activity and receiving funding from abroad to register as foreign agents.[487] Since the start of Russia's war in Ukraine, the Russian government has expanded this law.[488] First, in March 2022, the Russian government criminalized the dissemination of "deliberately false" information, holding a maximum sentence of fifteen years in prison.[489] Then, on 1 December 2022, the Russian government expanded the definition of "foreign agents" to include those that "received support from foreign entities and (or) is under foreign influence."[490] "Support" from

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481. *Id.*

482. *Id.*

483. *Id.*

484. Natalia Krapiva, *Update: Digital rights in the Russia-Ukraine conflict*, ACCESSNOW (18 Aug. 2022), https://www.accessnow.org/digital-rights-ukraine-russia-conflict.

485. *Id.*

486. *Id.*

487. Clare Sebastian, *As Russia struggles in Ukraine, repression mounts at home*, CNN (1 Dec. 2022), https://www.cnn.com/2022/12/01/europe/russia-foreign-agents-repression-intl/index.html.

488. *Id.*

489. *Id.*

490. *Id.*

foreign sources is defined as not only financial support, but "organizational and methodological, or scientific and technical help."[491] The Russian government defined "foreign influence" as "exacting an influence on an individual by coercion, persuasion or other means."[492]

Russia's foreign agent legislation targets nonprofits, news organizations, journalists, and activists.[493] It also targets both citizens in Russia and Russian activists abroad.[494] For example, former oil-tycoon Mikhail Khodorkovsky and ex-world class chess champion Garry Kasparov, both vocal critics of the Kremlin, were labeled as "foreign agents" by the Russian Justice Ministry.[495] Those designated as foreign agents face police raids, restrictions on their activities, fines, and potential criminal prosecution.[496]

To enforce these laws inside occupied Ukrainian territories, Ukrainians can be punished for subscribing to Ukrainian news sources.[497] The Russian-appointed administration of Zaporizhzhia Oblast announced that it would conduct "preventive spot checks of citizens' mobile phones" for evidence that the citizens subscribe to Ukrainian media.[498] The administration announced that for the first violation of this order, Ukrainian citizens would be given a warning.[499] For the second violation, Ukrainian citizens would be fined.[500] For "cases of serious violations of the law on foreign agents' activity," the Ukrainian citizens "will be subject to criminal prosecution."[501] As of January 2023, no available

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491. *Id.*

492. *Id.*

493. *Russia tightens legislation on 'foreign agents'*, DEUTSCHE WELLE (29 June 2022), https://www.dw.com/en/russia-tightens-legislation-on-foreign-agents/a-62307066.

494. *Russia adds Kasparov and Khodorkovsky to 'foreign agents' list*, REUTERS (20 May 2022), https://www.reuters.com/world/europe/russia-adds-kasparov-khodorkovsky-foreign-agents-list-2022-05-20/

495. *Id.*

496. U.S. Mission to the United Kingdom, *How Russia's 'foreign agents' law silences dissent*, U.S. EMBASSY & CONSULATES IN THE UNITED KINGDOM (12 Aug. 2021), https://uk.usembassy.gov/news-how-russias-foreign-agents-law-silences-dissent/.

497. Tetiana Lozovenko, *Russians penalise residents of occupied territories for subscribing to Ukrainian media outlets*, UKRAINNSKA PRAVDA (27 Oct. 2022), https://www.pravda.com.ua/eng/news/2022/10/27/7373758/.

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

sources indicate further expected changes to Russia's foreign agent legislation.

2. Transnational Repression

Unlike China, according to a 2021 Freedom House Report, "the [Russian] government does not use coercive measures against the Russian diaspora as a whole."[502] Rather, the Russian government focuses on maintaining control over domestic information by repressing activism and ensuring that exile dissidents do not reach a domestic audience.[503] However, the head of the Chechen Republic, Ramzan Kadyrov, "represents a significant exception by employing a brutal direct campaign to control the Chechen diaspora."[504] Russia utilizes several methods of physical transnational repression and is "responsible for assaults, detentions, unlawful deportations, and renditions in eight countries, mostly in Europe."[505] Furthermore, the report states twenty of the thirty-two documented cases of physical Russian transnational repression "have a Chechen nexus."[506] Additionally, the Kremlin's transnational repression extends to former insiders that defect to a NATO member state and cooperate with their intelligence agencies.[507] Representing "only a snapshot" according to Freedom House, between 2014 and 2021, Russia perpetrated forty-one public, direct, and physical, transnational repression attacks.[508]

In addition to physical transnational repression, Russia also utilizes digital transnational repression by using online harassment, disinformation, and smear campaigns to silence those that are critical of the government.[509] While some attacks originate from regime supporters,

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502. FREEDOM HOUSE, RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY (2021), https://freedomhouse.org/report/transnational-repression/russia.

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. Yana Gorokhovskaia and Isabel Linzer, *Defending Democracy in Exile*, FREEDOM HOUSE, 9 (2022), https://freedomhouse.org/sites/default/files/2022-05/Complete_TransnationalRepressionReport2022_NEW_0.pdf.

509. Marcus Michaelsen, THE DIGITAL TRANSNATIONAL REPRESSION TOOLKIT, AND ITS SILENCING EFFECTS, FREEDOM HOUSE (2022), https://freedomhouse.org/report/special-report/2020/digital-transnational-repression-toolkit-and-its-silencing-effects.

Russia has organized "groups of trolls to be unleashed against critics in concerted campaigns."[510]

A very common tactic of transnational repression used by the Kremlin is assassinations.[511] For example, Russia used radiation poisoning to assassinate former intelligence officer Alexander Litvinenko in 2006 and used a nerve agent in the attempted assassination of former intelligence officer Sergei Skripal in 2018.[512] Furthermore, there are many unexplained deaths of high-profile Russians in exile.[513] While the Russian government denies their role in these deaths, many of the deaths were caused by rare radioactive isotopes and nerve agents that are only used by the Russian government.[514] In 2021, UN experts believe that Russia attempted to assassinate Alexei Navalny, a Russian leader who openly opposes Putin and the Russian government.[515] Navalny was hospitalized in Germany, where doctors determined that he was poisoned with Novichok, a Russian nerve agent.[516] In 2022 alone, about two dozen notable Russians have mysteriously and unexpectedly died.[517] While the assassinations and attempted assassinations are aimed at Russia's elite, they serve as a reminder of the potential consequences of disloyalty to the Kremlin.[518]

Many Chechen dissidents abroad have also been assassinated.[519] In 2009, Sulim Yamadayev, a former Chechen military commander, was assassinated in Dubai.[520] Additionally, Umar Israilov, a witness against the Chechen regime, was assassinated in Austria.[521] In 2016, two Chechens were assassinated in Turkey.[522] In August of 2019, a Chechen was assassinated in Berlin. In 2020, one critic of the Chechen regime

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510. *Id.*

511. FREEDOM HOUSE, RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY, *supra* note 502.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Russia responsible for Navalny poisoning, rights experts say*, UNITED NATIONS NEWS (1 Mar. 2022), https://news.un.org/en/story/2021/03/1086012.

516. *Id.*

517. Elaine Godfrey, *Sudden Russian Death Syndrome*, THE ATLANTIC (2022), https://www.theatlantic.com/ideas/archive/2022/12/russian-tycoon-pavel-antov-dies-putin-ukraine/672601/.

518. *Id.*

519. FREEDOM HOUSE, RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY, *supra* note 502.

520. *Id.*

521. *Id.*

522. *Id.*

was assassinated in France, a second critic was assassinated in Sweden, and a third critic was assassinated in Austria.[523] While there is strong evidence connecting these assassinations to Kadyrov, they likely also required cooperation and engagement from the Kremlin.[524]

Along with political assassinations, the Kremlin also abuses the Interpol red notice.[525] Russia is responsible for 38% of all public red notices in the world, compared to the U.S.'s 4.3% and China's 0.5%.[526] Russia has used this method to detain asylum seekers residing in the U.S. for several years.[527]

Russia also uses hacking campaigns as a tactic of transnational repression.[528] Russian dissidents abroad experience surveillance and sophisticated hacking campaigns against them, like those used by the Russian government against national security threats.[529] In 2017, Russia targeted thousands of people in about 160 different countries, including Ukraine, Syria, Georgia, and the U.S.[530]

3. Persecution of Journalists

Russia has harassed and persecuted journalists in States Parties to the Rome Statute (or States that have granted the ICC jurisdiction).[531] Evidence shows journalists have been harassed, tortured, and abducted.[532] Furthermore, there have been dozens of murders and attempted murders of Russian journalists by Russian forces, both in

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523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. David Greene, AP: 'Digital Hit List' Provides Evidence Of Hackers' Links To Kremlin, NATIONAL PUBLIC RADIO (2017), https://www.npr.org/2017/11/02/561521906/ap-digital-hit-list-provides-evidence-of-hackers-links-to-kremlin.
531. *Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2022), https://www.ohchr.org/en/news/2022/10/human-rights-committee-considers-report-russian-federation-absence-delegation-experts. *See also* NOURA AL-JIZAWI ET AL., PSYCHOLOGICAL AND EMOTIONAL WAR: DIGITAL TRANSNATIONAL REPRESSION IN CANADA, (The Citizen Lab, 2022), https://citizenlab.ca/wp-content/uploads/2022/03/Report151-dtr_022822.pdf.
532. *Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters*, supra note 531.

Russia and Ukraine, for reporting on Russia's invasion of Ukraine.[533] Additionally, Russian forces have detained hundreds of journalists in Russia for reporting on protests against the invasion of Ukraine.[534] One journalist, Ivan Safronov, was sentenced to twenty-two years in prison on charges of "high treason" for sharing "state secrets" after reporting on Russia's military.[535] In Ukraine, journalists have been targeted by the Russian military.[536] As of 4 May 2022, seven journalists have been killed since the Russian invasion of Ukraine.[537] Additionally, there were numerous reports that journalists were kidnapped, attacked and killed, or refused safe passage between cities and regions by Russian forces.[538]

In Russian-occupied Crimea, journalists critical to the Russian-imposed Crimean government have been arrested and imprisoned within Russia.[539] One reporter, Irina Danilovych, was held in the basement of the Russian FSB headquarters for eight days, following years of harassment from Russian authorities.[540] At least fourteen of Crimea's bloggers and reporters were sentenced to six years in prison for terrorism charges and are currently held in Russian prisons.[541] Another Crimean journalist, Vilen Temeryanov, was charged with participating in a terrorist organization after working for a Russian exile media outlet.[542] He faces a possible sentence of twenty years in jail.[543] Another journalist working for the same media outlet, Remzi Bekirov, was sentenced to nineteen years in jail for similar charges.[544]

Soon after Russia invaded Ukraine, Russia released a list of 131 Canadian politicians and civil society activists banned from Russia.[545]

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533. *Id.*

534. *Id.*

535. *Id.*

536. *Ukraine: Journalists targeted and in danger, warn top rights experts*, UNITED NATIONS (2022), https://news.un.org/en/story/2022/05/1117462.

537. *Id.*

538. *Id.*

539. Russia has stepped up harassment of journalists in Crimea since invading Ukraine, REPORTERS WITHOUT BORDERS (12 Sept. 2022), https://rsf.org/en/russia-has-stepped-harassment-journalists-crimea-invading-ukraine.

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. Noura Aljizawi & Siena Anstis, *The Effects of Digital Transnational Repression and the Responsibility of Host States*, LAWFARE (27 May 2022), https://www.lawfareblog.com/effects-digital-transnational-repression-and-responsibility-host-states.

Among those listed was a Canadian journalist and policy analyst, Marcus Kolga.[546] Kolga and many other critics of Russia have been targeted through online and offline transnational repression.[547] Whenever Kolga speaks of Russia's human rights violations, he is subjected to online trolling, disinformation, and smear campaigns.[548] To discredit and silence him, he receives online death threats by some of the most popular media outlets.[549] This has translated to offline death threats by those that follow the information that the Kremlin puts out.[550] Russia has also used these tools to target and intimidate Russian diasporas and other critics of the Russian government.[551]

Similar to Kolga, a Syrian immigrant in Canada, Amir, was targeted by Russia for his pro-democracy political advocacy for Syria.[552] In 2011, Amir began to support and host media websites promoting democracy in Syria.[553] In 2012, Amir's email account was hijacked.[554] Additionally, in 2013, Amir's web-hosting business was victim to a Distributed Denial of Service attack, where hackers disrupt the ability for the public to access a website, perpetrated by Russian hackers. Amir suffered significant financial impacts due to this attack.[555]

X. COMPLICITY IN EXTRAORDINARY RENDITION PROGRAMS

This section examines complicity in China and Russia's extraordinary renditions programs by States Parties to the Rome Statute. It includes specific analysis of Rome Statute Articles 25 and 30. This section discusses specific examples of potential complicity by individuals in states which have detained or deported Uyghurs at the behest of China. It further discusses the potential complicity of third-party organizations facilitating the adoption of Ukrainian children by individuals in and outside of Russia, as Russia has kidnapped and deported several thousand Ukrainian children and put them up for adoption.

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546. *Id.*
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. NOURA AL-JIZAWI ET AL., *supra* note 531, at 26
553. *Id.*
554. *Id.*
555. *Id.*

A. COMPLICITY UNDER THE ROME STATUTE

Criminal complicity in assisting principal perpetrators can extend very far through many different types of networks, and where the complicity cascade ends can be impacted greatly by political prerogatives rather than legal imperatives.[556] Several sections of the Rome Statute describe forms of complicity. First, under Article 25(3)(c), a person can be held criminally responsible for aiding, abetting, providing the means for, or otherwise assisting in the commission of a crime when done so for the purpose of facilitating such a crime.[557] Aiding and abetting is the weakest form of complicity captured in the act, and the minimum requirements for these acts captured in Art. 25(3)(c) may be difficult to determine.[558] While Article 30 establishes a general *mens rea* requirement for criminal responsibility if not otherwise provided, in Article 25 there is higher subjective and lower objective threshold to establish complicity.[559]

The Rome Statute does not require that assistance from an individual complicit in a crime be either direct or substantial.[560] Unlike the International Law Commission's 1996 Draft Code, the Rome Statute does not limit aiding and abetting by requiring that the assistance "facilitate in some significant way" the commission of the crime or "directly and substantially" assist the commission of the crime.[561] The assistance need not be tangible or have 'a causal effect on the crime'—"[m]oral support and encouragement" is sufficient.[562] Mere presence at the scene of the crime could be sufficient if the presence had a legitimizing or encouraging effect on the principal perpetrators.[563] Assistance provided arguably only has to meet a very low threshold to meet the objective element of accomplice liability under the Rome Statute.[564] The subjective

556. Andrew Clapham, *On Complicity,* LE DROIT PENAL A L'EPREUVE DE 'INTERNATIONALISATION (10 Apr. 2002), https://ssrn.com/abstract=1392988, at 13.

557. Rome Statute, *supra* note 5, at Art. 25(3)(c).

558. Kai Ambos, *Article 25: Individual Criminal Responsibility,* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Second Edition ¶ 15 (Dec. 14 2011), https://ssrn.com/abstract=1972186.

559. *Id,* at ¶ 19.

560. Clapham, *supra* note 556, at 11.

561. Ambos, *supra* note 558, at ¶ 15.

562. Clapham, *supra* note 556, at 11; Ambos, *supra* note 558, at ¶ 16.

563. *Id.*

564. Clapham, *supra* note 556, at 12.

element would require a purpose to facilitate a crime together with knowledge that the action will assist in the offense.[565]

Second, a person who in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose may be held criminally liable through Article 25(3)(d).[566] Those who in any way contribute to the commission of a crime by a group of persons acting with a common person must either intend to further the illegal activity or purpose of the group, or know of the intention of the group to commit the crime.[567]An individual can be complicit for group criminality through Article 25(3)(d). The existence of a common purpose among the group must be established, which can be accomplished with evidence of references to any meetings during which group members agree on aspects of the plan or public statements where group members express intentions of the group.[568] Unlike 25(3)(c), 25(3)(d) deals with contributions to a group performed when the contributor had knowledge of the group's intention to commit crimes instead of liability for contributions to a specific crime.[569]

Third, the Article 25(3)(b) encompasses ordering, soliciting, or inducing the commission of a crime.[570] There needs to be a superior-subordinate relationship to find that a crime has been ordered, but physical or psychological pressure could be enough to be considered soliciting or inducing the commission of a crime.[571]

Incitement is limited to the crime of genocide.[572] Therefore, an individual is responsible for incitement of extraordinary renditions when accompanied with the intention to directly prompt or provoke genocide.[573] Incitement to commit genocide does not require the commission or attempted commission of the actual crime of genocide, because the act of incitement is itself considered sufficiently blameworthy to be punished.[574]

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565. *Id.*

566. Rome Statute, *supra* note 5, at Art. 25(3)(d).

567. *Id.* at Art. 25(3)(d).

568. Marina Aksenova, *Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen*, 30 WASH. INT'L L. J. 255 (2021), at 265.

569. *Id.*

570. Rome Statute, *supra* note 5, at Art. 25(3)(b).

571. *Id.*

572. *Id.* at Art. 25(3)(e).

573. Ambos, *supra* note 558, at ¶ 30.

574. *Id.* at ¶ 29.

Current international law developments have focused on individual rather than corporate criminal liability.[575] While individuals acting on behalf of a corporation themselves could be prosecuted, the prosecution of corporations as entities themselves would require amendments to the Rome Statute.[576] Corporate activity will only fall into ICC scrutiny if the conduct is part of a situation under the jurisdiction of the court through a proper referral or investigation.[577] Arguably, the corporate officers of an NGO could similarly be held criminally liable for complicity in atrocities investigated or referred to the Prosecutor.

B. COMPLICITY IN CHINA'S EXTRAORDINARY RENDITION PROGRAM

As explained above, although China does not fall under the jurisdiction of the ICC, the deportation of Uyghurs has been perpetrated from States Parties to the Rome Statute, giving the ICC authority over these actions when at least part of the *actus reus* of the crime of deportation takes place on the territory of a State Party and continue into China.[578] Therefore, States that either directly assist in human rights violations by facilitating deportations of Uyghur people or by providing rhetorical support for the Chinese campaign could be complicit.[579]

One report has found 336 fully verified detentions and renditions of Uyghurs living outside of China's borders with an upper estimate of 1,576 cases.[580] Evidence submitted to the ICC Office of the Prosecutor has identified Chinese authorities forcefully deporting Uyghurs from Tajikistan, a party of the Rome Statute.[581] In Tajikistan, Chinese

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575. Aksenova, *supra* note 568, at 258.

576. David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L. L. J. 35, 38 (2016).

577. *Id.*

578. *See supra* notes 162-69. *The States Parties to the Rome Statute*, *supra* note 406.

579. Bradley Jardine, *The Arab World Isn't Just Silent on China's Crackdown on Uighurs. It's Complicit,* TIME (2 Mar. 2022), https://time.com/6160282/arab-world-complicit-china-repression-uighurs/.

580. Bradley Jardine & Lucille Greer, *Beyond Silence: Collaboration Between Arab State and China in the Transnational Repression of Uyghurs,* UYGHUR HUMAN RIGHTS PROJECT (24 Mar. 2022), https://oxussociety.org/beyond-silence-collaboration-between-arab-states-and-china-in-the-transnational-repression-of-uyghurs/.

581. Stephanie van den Berg, *Lawyers Urge ICC to Probe Alleged Forced Deportations of Uyghurs from Tajikistan,* REUTERS (10 June 2021),

authorities have been responsible for unlawful acts such as arrests, enforced disappearances, and abductions.[582] Tajik police have also been used to carry out raids on places where Uyghurs are identified as living and working.[583] The evidence submitted includes witness testimonies accusing officials of threatening people to become informers, or create problems involving visas and other legal paperwork in order to have Uyghurs deported.[584] According to the East Turkistan Government in Exile, over the past ten to fifteen years, the population of Uyghurs living in Tajikistan has decreased from around 3,000 to approximately one-hundred.[585] Tajikistan has further held a role in facilitating the extraordinary rendition of Uyghurs from Turkey to China.[586] In August 2019, three Uyghurs were identified as being deported from Turkey to China through Tajikistan.[587]

Cambodia, another state party to the Rome Statute, has been reported to have fallen under the Chinese pressure to "detain and illegally extradite" Uyghurs residing in their country.[588] In 2009, the Cambodian government notoriously detained and deported twenty-two Uyghurs seeking asylum in a shelter run by the U.N.'s refugee agency in Phnom Penh.[589] Cambodia's raid on the refugee agency remains "particularly deplorable" due to Cambodia being one of the few Asian countries Party to the Refugee Convention and CAT.[590] Days after the Cambodian

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https://www.reuters.com/world/asia-pacific/lawyers-urge-icc-probe-alleged-forced-deportations-uyghurs-tajikistan-2021-06-10/.

582. East Turkistan Government in Exile, *PRESS RELEASE: Evidence of Chinese Operatives in Tajikistan Rounding up Uyghurs and Deporting them Submitted to ICC Prosecutors to Establish Jurisdiction,* East Turkistan Government in Exile (10 June 2021), https://east-turkistan.net/press-release-evidence-of-chinese-operatives-in-tajikistan-rounding-up-uyghurs-and-deporting-them-submitted-to-icc-prosecutors-to-establish-jurisdiction/.

583. Bruce Pannier, *Tajikistan Accused of Helping China in Campaign Against Uyghurs,* RADIOFREEEUROPE/RADIOLIBERTY (15 June 2021), https://www.rferl.org/a/31309627.html.

584. Davidson, *supra* note 215.

585. East Turkistan Government in Exile, *supra* note 582.

586. Pannier, *supra* note 583.

587. *Id.*

588. *Id.*

589. Aun Chhengpor, *ICC Prosecutor Says Cambodia's Uyghur Deportation Insufficient to Initiate Investigation,* VOA NEWS (17 Dec. 2020), https://www.voacambodia.com/a/icc-prosecutor-says-cambodia-uyghur-deportation-insufficient-to-initiate-investigation/5703104.html.

590. *China: Forcibly Returned Uighur Asylum Seekers at Risk,* HUMAN RIGHTS WATCH (22 Dec. 2009), www.hrw.org/news/2009/12/22/china-forcibly-returned-uighur-asylum-seekers-risk.

government improperly deported the Uyghurs, Xi Jinping, then Vice President of China, signed 14 trade deals with Cambodia, worth a combined total of $850 million.[591]

In Afghanistan, a state party to the Rome Statute, Uyghurs have begun fearing that they will be deported to China and placed in internment camps due to new discussions of Taliban and Chinese cooperation in combating the East Turkestan Islamic Movement ("ETIM"), an extremist terrorist organization.[592] The Chinese government considers any Uyghur living in Afghanistan to be a member of ETIM, meaning that in seeking to foster relations with China, or gain needed economic support, the Taliban may continue their history of deporting Uyghurs to China.[593] The Taliban notably deported thirteen Uyghurs to China following a meeting in 2000 between Taliban leader Mullah Omar and Chinese Ambassador to Pakistan Lu Shulin.[594] The Afghan government in 2015, separate from Taliban rule, was responsible for the deportation of Israel Ahmet.[595]

While not States Parties to the Rome Statute, some Arab states are actively assisting in the transnational repression and deportation to China of Uyghur people.[596] In Egypt, Morocco, Qatar, Saudi Arabia, Syria, and the UAE 109 cases have been confirmed with an upper estimate that 292 Uyghurs have been detained or deported to China since 2004.[597] These estimates are limited to public reporting by investigative reporters, which likely represent a small fraction of the total detentions and renditions other countries have been complicit in.[598]

C. COMPLICITY IN RUSSIA'S EXTRAORDINARY RENDITION PROGRAM

Ukraine has accepted ICC jurisdiction "for the purpose of identifying, prosecuting and judging the perpetrators *and accomplices* of

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591. Reuters Staff, *supra* note 224.

592. Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, *supra* note 219.

593. *Id.*

594. *Id.*

595. *Id.*

596. Jardine, *The Arab World Isn't Just Silent on China's Crackdown on Uighurs. It's Complicit*, *supra* note 579.

597. Jardine & Greer, *supra* note 580.

598. *Id.*

acts committed in the territory of Ukraine" from 21 November 2013, onwards.[599]

Neither Ukraine nor Russia both has not adopted the Hague Adoption Convention monitoring the adoption of children.[600] There is no guarantee that the adoption has followed proper safeguards and procedures to verify the adoptability of the child and the eligibility of the adoptive parents.[601] Countries allowing for the adoption of children from Russia ultimately may be accepting victims from Ukraine.[602] States Parties to the Rome Statute that continue to adopt children from Russia then run the risk of being complicit in Russia's crimes in Ukraine.[603]

In the context of the forced migration of Ukrainian children, the ICC should be able to prosecute individuals acting on behalf of third-party proxies which facilitate the forced migration of children. Under 25(3)(c), an individual can only be held liable for assistance which has an effect on the commission of a crime.[604] Therefore, third party proxy organizations which facilitate the forced migration of a child from Ukraine to Russia could be held liable through 25(3)(c).

It is reported that there is a strong relationship between the Russian Federation and non-profit organizations leading the migration effort in the region.[605] As such, individuals should consider the complicity of humanitarian organizations in the illegal forced migration of the estimated 200,000 to 700,000 Ukrainian children since 24 February 2022.[606] For example, the charitable non-profit Into the Hands of

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599. *Declaration by the Government of Ukraine*, accessible at Ukraine, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/ukraine (last visited 13 Jan. 2023) (emphasis supplied).

600. *Intercountry Adoption—United States Department of State,* US DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/Intercountry-Adoption.html/ (last visited 7 Jan. 2023).

601. Rob Kuznia, Blake Ellis, & Daniel A. Medina, *Americans Have Rushed to Rescue Ukrainian Orphans. One Mission Led to a Child Trafficking Probe,* CNN (22 Apr. 2022), https://www.cnn.com/2022/04/22/us/ukraine-orphans-rescue-missions-invs/index.html.

602. *Id.*

603. *Id.*

604. Aksenova, *supra* note 568, at 271.

605. *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

606. Dixon & Abbakumova, *supra* note 302; *Russia's Abductions of Ukrainian Children are a Genocidal Crime*, *supra* note 311; *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

Children under Russian Humanitarian Mission has claimed responsibility for the migration of at least 2,000 children.[607] Organizations which collaborate with the Russian Humanitarian Mission, and in particular the leadership members of such organizations, should consider their risk of complicity in the forced migration of Ukrainian children.[608]

XI. CONCLUSION

China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the ICC, may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In the cases where non-States Parties deport or forcibly transfer lawfully present persons from a State Party and the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the ICC should logically follow its decision in its 2018 Rohingya ruling, despite the territorial reversal, and find it has jurisdiction in such cases.

This white paper reiterated that selective justice, or even the appearance of such, threatens the rule of law. Just as forty-three States Parties rightly referred the grave "Situation in Ukraine" for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC. Since the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, it should also gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute.

The U.S. has an infamous extraordinary renditions program. This white paper acknowledged this history and argued that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country

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607. *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children, supra* note 242.

608. *Don't stay away. Join the campaign of the Commissioner for Children's Rights under the President of the Russian Federation "Into the hands of children". Let's help the children of Donbass and Ukraine together!**, RUSSIAN HUMANITARIAN MISSION, https://rhm.agency/ne-ostavaytes-v-storone-detyam-v-ruki-pomozhem-detyam-donbassa-i-ukrainy-vmeste/, (last visited 15 Jan. 2023).

not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it.

ANTI-SATELLITE WEAPONS & THE LAW OF ARMED CONFLICT

Connor Mallon

Introduction

In the past few decades, the world has witnessed some of the biggest changes to the space establishment since the Cold War.[1] The realm of outer space has always been defined by significant technological innovations. Unfortunately, it has also been tainted by complex terrestrial geopolitics. Since the Soviet Union launched Sputnik One in 1957, we have seen more countries join the ranks of "space faring nations," a diversification in space technologies, the establishment of defensive space commands, and an increased potential for conflict in a new domain. In addition to these, public actors are no longer the sole stakeholders in space as new private companies, led by billionaires who are as ambitious as they are eccentric, have entered the fray marking the dawn of the commercialization of space.[2] While all these issues and players grab the attention of the public, a key foundational issue has been left without support since the 1960s: Space governance.[3]

The dangers of this lack of progress in international space regimes can be exemplified by the issues with anti-satellite weapons (ASAT). These weapons threaten to jeopardize the peaceful exploration and exploitation of space.[4] Due to the security risks of these weapons, many experts across the globe are no longer asking *if* there will be a military conflict in space, but rather *when* will there be a conflict.[5] This less than

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[1] Sophie Goguichvili ET AL., *The Global Legal Landscape of Space: Who Writes the Rules on the Final Frontier?*, WILSON CTR. (Oct. 1, 2021), *available at* https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier (last visited Feb. 15, 2023).

[2] *See id.*

[3] *See id.*

[4] David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1188 (2009).

[5] *See* Stuart Clark, *'It's going to happen': is the world ready for war in space?*, THE GUARDIAN (Apr. 15, 2018), *available at* https://www.theguardian.com/science/2018/apr/15/its-going-to-happen-is-world-ready-for-war-in-space (last visited Feb. 1, 2023) (quoting Michael Schmitt, professor of public international law and a space war expert at University of Exeter

optimistic view can also be seen throughout the military and defense policies of the various major players in space. U.S. space doctrine calls for both defensive and offensive space capabilities considering space as a military domain.[6] While Department of Defense guidelines call for limiting U.S. space capabilities to self-defense options, emphasizing protection, deterrence, and international partnerships, the U.S. interprets the "peaceful purposes" provision in the Outer Space Treaty (OST) to mean non-aggressive uses of space—not non-military uses.[7] Other countries, such as Russia and China, have adopted similar views recognizing space as a domain for potential conflict and an environment for the assertion of self-defense.[8]

Since all three major players recognize space as a military domain of operations, and act accordingly to this, it is important to identify the applicable international law regimes and principles that would apply to a possible conflict. This paper seeks to identify how the Law of Armed Conflict would apply to the use of ASATs in a military conflict.

I. The Threat of ASATs

A. WHAT ARE ASATS

ASATs "are any intentional physical object or electromagnetic force directed against the normal functioning of a space-based asset."[9] ASATs are categorized as either kinetic physical weapons or non-kinetic physical weapons.[10] The most traditional form of kinetic ASAT weapons are direct-ascent ballistic missiles.[11] These weapons are launched on an intercept trajectory, and collide with the satellite causing different

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in the U.K., "[i]t is absolutely inevitable that we will see conflict move into space.").

[6] Matthew T. King & Laurie R. Blank, *International Law and Security in Outer Space: Now and Tomorrow*, 113 AM. J. INT'L L. UNBOUND 125, 126 (2019).

[7] *Id.*

[8] *See id.*

[9] Cort Thompson, *Avoiding Pyrrhic Victories in Orbit: A Need for Kinetic Anti-Satellite Arms Control in the Twenty-First Century*, 85 J. OF AIR L. & COM. 105, 111 (2020).

[10] *See* Todd Harrison et al., *Space Threat Assessment 2021*, CTR. FOR STRATEGIC & INT'L STUD. 1, 3-4 (Apr. 2021), *available at* https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210331_Harrison_SpaceThreatAssessment2021.pdf?VersionId=gVYhCn79enGCOZtcQnA6MLkeKlcwqqks (last visited Feb. 19, 2023).

[11] Thompson, *supra* note 9, at 111.

magnitudes of damage depending on the relative speed at the time of impact.[12] Other kinetic ASATs include co-orbital weapons which establish an orbit of their own that eventually will intercept the target's orbit.[13] They then either collide with or detonate next to the target, destroying it.[14]

Non-kinetic ASATs utilize a variety of different means to neutralize their targets. These types of ASATs can either manipulate the electromagnetic spectrum to interfere with the link between the satellite and the ground control station or be directed against the satellite itself.[15] Examples of the means and results of such an attack include exploiting "high-energy lasers, microwaves, cyber-attacks, or beams of sub-atomic particles to burn a hole in the satellite, permanently or temporarily blind its sensors, jam or spoof its communications, or scramble its internal electronics."[16] Additionally, cyber-attacks could be used to turn off a satellite, or "even commandeer it for the attacker's own use."[17]

B. BRIEF HISTORY OF ASATS

The threat of ASATs dates back to the Cold War and the start of the space race between the U.S. and the Soviet Union.[18] In fact, the U.S. first began researching ASATs only weeks after the Soviets launched Sputnik into orbit in 1957.[19] There are currently only four nations that have successfully conducted an ASAT test by striking their own orbiting satellite.[20] The U.S. and the Soviet Union have the longest histories of testing various ASAT capabilities throughout the Cold War.[21] China obtained ASATs much later and conducted its first successful strike in 2007.[22] In 2019, India became the latest nation to demonstrate effective

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[12] *See id.* at 111–12.
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] David Koplow, *An Inference About Interference: A Surprising Application of Existing International Law to Inhibit Anti-Satellite Weapons*, 35 U. PA. J. INT'L L. 737, 795 (2014).
[17] Koplow, *supra* note 4, at 1201.
[18] Koplow, *supra* note 16, at 794.
[19] *See id.*
[20] Thompson, *supra* note 9, at 108.
[21] Koplow, *supra* note 16, at 797, 801.
[22] *See id.* at 802.

ASAT capabilities when it launched a direct-ascent ASAT targeting an Indian defense satellite.[23]

Although all four of these countries have ASAT capabilities, there has only been one publicly acknowledged non-kinetic ASAT test using directed energy.[24] In 1997, the U.S. conducted its MIRACL (Mid-InfraRed Advanced Chemical Laser) experiment by pointing a two-megawatt laser at a defunct MSTI-3 satellite in attempt to either blind or destroy it.[25] The MIRACL laser failed to produce the intended results, but an accompanying lower-powered laser was able to temporarily blind the satellite.[26] This was an equally intriguing as terrifying result due to the fact that this commercially available laser displayed impressive military power.[27] Although this is the only publicly acknowledged non-kinetic ASAT test, it is speculated that in 2006 the Chinese attempted to "laser paint" an overhead U.S. satellite, and there are reports that the Russians are developing similar laser-based systems.[28] Additionally, the relevant technology for these weapons is within the reach of even modest military powers such as Libya, Cuba, and Iran.[29]

While these are the only known countries with some form of ASAT capabilities, this list could grow very quickly in the coming years. Due to technological overlaps, any country that pursues civilian space launch vehicles, military-long range ballistic missiles, or anti-missiles has the potential to develop an ASAT capacity.[30] This presents an especially difficult situation when dealing with anti-ballistic missiles (ABM). The equipment, knowledge, and flight test of ASATs and ABMs are remarkably similar and can be easily adapted to the other purpose.[31] An example of this crossover occurred in 2008 when the U.S. Navy shot down a failing U.S. satellite with a standard ship-borne ballistic missile.[32] The U.S. declined to characterize this event as an ASAT test, but many skeptics saw this as an undoubtable flex of U.S. ASAT muscles.[33] The similarities between ASATs and ABMs pose another issue when it comes to ASAT regulations as it can be difficult to discern whether a country is

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[23] Thompson, *supra* note 8, at 107.
[24] Koplow, *supra* note 4, at 1212.
[25] *See id.*
[26] *See id.*
[27] *See id.*
[28] Thompson, *supra* note 9, at 161.
[29] Koplow, *supra* note 4, at 1213.
[30] *See id.* at 1211.
[31] Koplow, *supra* note 16, at 798.
[32] Koplow, *supra* note 16, at 798-99.
[33] Koplow, *supra* note 4, at 1210.

engaging in ASAT or AMB activities.[34] However, Cold War bilateral-agreements that controlled ABMs and, in turn, ASATs are no longer a concern to the U.S. as in 2001 the Bush administration withdrew from the Treaty on Limitation of Anti-Ballistic Missile Systems in an effort to consolidate the U.S. policy of "space control."[35]

C. WHY DO ASATS MATTER?

ASATs and the regulation thereof is important and dangerous for two main reasons. The first reason is that space debris is created as the result of an ASAT kinetic strike.[36] Unlike a non-kinetic directed energy attack, when the interceptor rams into or detonates next to a satellite, it fragments into thousands of pieces.[37] The time it takes for the debris to degrade back into the Earth's atmosphere depends on the altitude of the orbiting target.[38] Objects in Low-Earth orbit will degrade quickly while objects in Mid-Earth orbit or Geostationary orbit can remain in space for centuries or indefinitely.[39] The debris that results from these strikes is worsening an already hazardous environment that is polluted with vast amounts of leftover "junk" from earlier launches.[40] As of January 1, 2023, NASA estimates that the amount of material orbiting the Earth exceeds 9,000 metric tons.[41]

The most significant debris-producing event occurred in 2007, when China launched a direct-ascent ASAT missile at one of their weather satellites.[42] The strike produced an estimated 35,000 pieces of debris, and accounts for 17% of all human-caused debris in orbit.[43] This is widely considered to be the worst debris-causing event predominantly because the altitude of the collision means that the resulting debris will remain in orbit for centuries, thus making future space operations more hazardous for all countries.[44] On November 15, 2021, these same worries

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[34] Koplow, *supra* note 16, at 798.
[35] Jackson Maogoto & Steven Freeland, *The Final Frontier: The Laws of Armed Conflict and Space Warfare*, 23 CONN. J. INT'L L. 165, 165 (2007).
[36] Koplow, *supra* note 4, at 1201.
[37] Koplow, *supra* note 4, 1201.
[38] Thompson, *supra* note 9, at 108–09.
[39] *See id.* at 110.
[40] Koplow, *supra* note 16, at 747.
[41] *Orbital Debris Program Office*, NASA, *available at* https://orbitaldebris.jsc.nasa.gov/faq/# (last visited Jan. 27, 2023).
[42] Thompson, *supra* note 9, at 119.
[43] *See id.* at 119–20; Koplow, *supra* note 16, at 802.
[44] Koplow, *supra* note 16, at 802–03.

were brought back to the forefront as Russia conducted a similar ASAT test against one of their own satellites.[45] The strike was said to have generated 1,500 pieces of trackable debris, and caused the crew aboard the International Space Station to make preparations to evacuate.[46]

Another factor that exacerbates the issue is the difficulty of tracking all this debris. Currently, only the U.S., with the Space Surveillance Network (SSN), and Russia can monitor objects that are approximately ten centimeters or larger in diameter.[47] The SSN currently tracks 22,000 of these items, but there is an estimated 1.5 million pieces of untraceable debris that are one centimeter or smaller.[48] These tiny pieces of debris should not be underestimated as they can have devastating results. An elucidating example of this is that the windows of the space shuttle, which are built to survive the enormous pressures of re-entry into the Earth's atmosphere, have been damaged by tiny flecks of dried paint causing them to be repeatedly replaced after missions.[49] This, and other large-scale incidents, has caused an increasing concern among experts for the future safe and successful use of space.[50]

ASATs and space debris illustrate a tragedy of the commons. Outer space is seen as a global commons beyond the sovereignty of all nations. However, due to gaps in the governing international regimes, States continue to act in their own self-interest without any regard for the consequences of their actions.[51] Without even accounting for the debris caused by ASAT testing, space is becoming "increasingly congested, competitive, and contested."[52] A "land grab" type of mentality has developed in space as countries race to launch as many satellites as they can.[53] These satellites then jockey for the most favorable orbits, which are limited in number.[54] This competition over a finite number of spots,

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[45] Kylie Atwood Et Al., *US Says it Won't Tolerate Russia's Reckless and Dangerous Anti-Satellite Missile Test*, CNN (Nov. 16, 2021), *available at* https://www.cnn.com/2021/11/15/politics/russia-anti-satellite-weapon-test-scn/index.html (last visited Feb. 20, 2023).

[46] *See id.*

[47] Koplow, *supra* note 16, at 749; Thompson, *supra* note 9, at 118.

[48] *See* Thompson, *supra* note 9 at 118.

[49] *See* Thompson, *supra* note 9 at 751; Koplow, *supra* note 4, at 1203.

[50] Koplow, *supra* note 4, at 1202, 1204 (describing 2009 event where a U.S. Iridium-33 commercial satellite was "blindsided" by a non-operational, but intact, Russian Cosmos 2251).

[51] Thompson, *supra* note 9, at 114.

[52] Koplow, *supra* note 16, at 746 (quoting the U.S. Department of Defense).

[53] Thompson, *supra* note 9, at 115 (citing that the annual launch rate of spacecraft more than doubled from 129 launches to 262 from 2010 to 2015).

[54] *See id.* (describing geostationary orbits as the most valuable).

with an increasing amount of actors who desire them, "presents a situation that is ripe for future conflict."[55] This leads to the second reason why ASATs are so dangerous, especially for the U.S.

ASATs and their resulting debris present particular dangers to the military and strategic interests of the U.S. The U.S. is a pioneer for the use of space-communications for both civilian and military functions.[56] In fact, the U.S. military "outspends the rest of the world combined on military space applications and commands half the world's dedicated military space assets."[57] However, because the U.S. is the most dependent nation on its space systems, a vulnerability or "Achilles heel" is created that is very attractive for American adversaries.[58] This is truly an asymmetric dependence and a denial of space capabilities would be more devastating to the U.S. than to any other country.[59] The U.S. itself has self-identified this weakness when in 2006 Donald Rumsfeld stated that, "the U.S. is an attractive candidate for a Space Pearl Harbor."[60] From a logistics standpoint, satellites make excellent targets.[61] Satellites usually lack armor or defensive capabilities, they follow predictable orbital paths making them easy to attack, and they are very expensive to build so replacements would not be readily available.[62] Therefore, ASATs represent a way for countries like China and Russia, who have overall weaker militaries, to even the playing field against a conventionally stronger opponent like the U.S.[63]

Despite all the serious concerns that ASATs raise, no country has ever used any type of ASAT against another country in hostilities; their use has been limited to only tests against the country's own assets.[64] However, as briefly explored above, the risk of these weapons being used in hostilities and their consequences appear to be an increasingly real possibility. Realizing this, various academics and other

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[55] *See id.* at 115, 117 (stating that in the past decade the number of states operating satellites has increased to 50 and that over 100 states use space systems and services).

[56] Talia Blatt, *Anti-Satellite Weapons and the Emerging Space Arms Race*, HARV. INT'L REV., 31 (2020).

[57] Koplow, *supra* note 16, at 741.

[58] *See id.* at 746 n.13, 804 n.201 (quoting Chinese news agency as saying, "[f]or countries that could never win a war by using the method of tanks and planes, attacking the U.S. space system may be an irresistible and most tempting choice).

[59] Blatt, *supra* note 56, at 31.

[60] Koplow, *supra* note 4, at 1219 n.102.

[61] *See id.* at 1200.

[62] *See id.*

[63] Blatt, *supra* note 56, at 31.

[64] Koplow, *supra* note 4, at 1215.

nongovernmental entities have united to assess and develop the legal landscape for the military uses of outer space. The two projects leading the charge in this area are the Woomera Manual on the International Law of Military Space Operations, and the Manual on International Law Applicable to Military Uses of Outer Space.[65] Although these manuals will not be binding law, they will be able to assist practitioners by laying out the applicable concepts relating to the Law of Armed Conflict (also known as International Humanitarian Law or Jus in Bello).[66] As of now, these manuals have not been publicized, but it is important to begin theorizing how the LOAC would be applied to the use of an ASAT.

II. Applying the Law of Armed Conflict

A. DOES THE LAW OF ARMED CONFLICT APPLY?

When analyzing what laws apply in space, it is first important to start with the Outer Space Treaty of 1967. The treaty, also known as the "constitution of space," was established to create binding obligations and restrictions on countries in their use and exploration of outer space.[67] The two most relevant provisions to the discussion of applying the LOAC to ASATs are Article III and Article IV. Article III states that parties must carry out their activities in space "in accordance with international law, including the Charter of the United Nations."[68] Article IV of the treaty places a restriction on countries as they are prohibited from installing nuclear weapons or any other weapons of mass destruction on the moon, any celestial body, or stationing them in orbit in any other manner.[69] It is also important to note here that scholars generally accept that space law is a form of *lex specialis* in cases of specific regulations, with general international law filling in the gaps to unregulated areas.[70]

Applying the Outer Space Treaty, two background principles to this discussion become clear. Space is not to be viewed as some lawless domain in a vacuum (literally and metaphorically) devoid of rules. This provision has the clear effect of applying customary and treaty principles

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[65] King, *supra* note 6, at 129.
[66] *See id.*
[67] Thompson, *supra* note 9, at 122.
[68] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. III, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (hereinafter Outer Space Treaty).
[69] *See id.* at art. IV.
[70] Thompson, *supra* note 9, at 122.

of international law that can be sensibly interpreted as extending to outer space.[71] Second, Article IV would not prohibit the placement of conventional weapons in orbit if they do not meet the definition of weapons of mass destruction (WMDs).[72] Currently, the United Nations Office for Disarmament Affairs (UNODA) recognizes three classes of WMDs: Nuclear, chemical, and biological.[73] As long as the ASATs do not utilize any WMDs to achieve their goals, nothing in Article IV prevents their use under the Outer Space Treaty.

The LOAC is comprised of an extensive set of conventional and customary rules, with the 1907 Hague Convention and the 1949 Geneva Convention lying at its foundation.[74] Article 22 of the 1907 Convention states that, "the right of belligerents to adopt means of injuring the enemy is not unlimited."[75] The convention also expressed another cardinal principle of the LOAC which is a prohibition on the employment of "arms, projectiles, or materials calculated to cause unnecessary suffering."[76] Both of these principles were later codified in Geneva Convention Additional Protocol I (AP I) which also requires "states to investigate the legality of new weapons, means, and methods in the course of their adoption."[77]

While this is a basic synopsis of a robust body of international law, some might point to the fact that many of the relevant clauses of these documents are grounded in vocabulary of a terrestrial nature.[78] For example, some might infer from the tile of the Hague Regulations that they are unable to apply in situations outside "war on land."[79] To counter this assertion, many scholars point to what is known as the "Martens Clause." The modern version of the clause is found in Article 1(2) of AP I, and states, "[i]n cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates

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[71] *See* Bill Boothby, *Space Weapons and the Law*, 93 INT'L L. STUD. 179, 201 (2017).

[72] Thompson, *supra* note 9, at 123.

[73] *See id.* at 124 n.82.

[74] Jack Mawdsley, *Applying Core Principles of Int'l Humanitarian L. to Military Operations in Space*, 25 J. OF CONFLICT & SEC. L. 263, 266 (2020)

[75] Thompson, *supra* note 9, at 141.

[76] Boothby, *supra* note 71, at 185.

[77] *See id.*; Thompson, *supra* note 16, at 141.

[78] *See* Mawdsley, *supra* note 74, at 266.

[79] *See id.*

of public conscience."[80] Due to the clause's dynamic phrasing, many have argued that this clearly shows an anticipation for the need to regulate unforeseen types of warfare.[81] This can be illustrated by the International Court of Justice's famous *Nuclear Weapons* Advisory opinion where the court had to clarify the scope of the relevant law in relation to a novel weapon.[82] The court held that although the United Nations Charter made no specific reference to nuclear weapons in its prohibition on the threat or use of force, the "intrinsically humanitarian character" of the document requires the LOAC to "apply to any use of force, regardless of the weapons employed."[83] The combination of treaty, customary international law, and case precedent make it clear that the LOAC would apply to the use of ASATs in space.

At the core of the LOAC are two competing interests: "That every act of war must be justified as necessary to the attainment of a discernible military advantage, and that humanity puts a break on actions that might otherwise be justified as militarily necessary."[84] Under the LOAC, there are four sub-principles that assist in applying the doctrine to a situation. These principles are military necessity, distinction, proportionality, and precaution in attack.[85]

B. MILITARY NECESSITY

Military necessity requires the reasonable connection between destruction and the overcoming of an enemy force.[86] The concept first appeared in Articles 15 and 16 of the Lieber Code which "allowed for all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication" but prohibited against "wanton devastation of a district."[87] The belligerent must specify the imperative military advantage intended to be gained by an attack.[88] The principle of necessity pertains to those measures "not forbidden by the law of war and required to secure the overpowering of the enemy."[89] The underlying theme of this principle is that attacks must be directed at legitimate

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[80] *See id.* at 267.
[81] *See id.*
[82] *See id.* at 268.
[83] *Id.*
[84] *See id.* at 270–71.
[85] *See id.* at 271; Maogoto, *supra* note 35, at 176.
[86] Maogoto, *supra* note 35, at 177.
[87] Thompson, *supra* note 9, at 142.
[88] *See* Maogoto, *supra* note 35, at 177.
[89] *Id.*

military targets whose destruction will concretely contribute to victory in armed conflict.[90]

When applying military necessity to ASATs, if the commander can identify how the destruction of the satellite would further the war effort then it is likely that the attack would proceed.[91] Necessity may, however, require that certain means and weapons be used to complete the objective.[92] If a country had both kinetic and non-kinetic ASAT capabilities, then a necessity analysis would compel the use of the non-kinetic ASAT.[93] As long as the non-kinetic ASAT was available and as equally effective in achieving the desired results, the use of a debris-producing kinetic ASAT would then no longer be necessary.[94]

C. DISTINCTION

Distinction is the principle that military commanders must distinguish between civilian objects and military objectives when targeting an adversary's infrastructure.[95] Military objectives are objects whose "destruction, capture, or neutralization offers a definite military advantage at the time of the action."[96] Under Article 48 of AP I, parties to a conflict shall "at all times distinguish between the civilian population and combatants and between civilian objects and military objects and shall direct their operations only against military objectives."[97] In order to determine whether an object is a legitimate military objective, Article 52(2) of AP I requires a commander to be satisfied that an object's "nature, location, purpose, or use" definitively makes an effective contribution to the enemy's military action.[98] Although the U.S. objects to AP I on other grounds, this definition is viewed as customary international law and aligns with the general practices of the U.S.[99]

Additionally, the existence of dual use objects further complicates this analysis. This problem has only grown in the modern era as the line between protected objects and lawful targets have blurred due to an increasing dependency on civilians and their activities during military

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[90] *See id.*; Thompson, *supra* note 9, at 142.
[91] *See* Thompson, *supra* note 9, at 145.
[92] *Id.*
[93] *Id.*
[94] Koplow, *supra* note 4, at 1248.
[95] Thompson, *supra* note 9, at 142.
[96] *Id.* at 142–43.
[97] Mawdsley, *supra* note 74, at 271.
[98] *See id.* at 272.
[99] Mawdsley, *supra* note 74, at 272.

operations.[100] The NATO bombing of Radio Television Serbia is a guiding illustration of dealing with an object that provides both civilian and military services.[101] The International Criminal Tribunal for the Former Yugoslavia determined that the station was a legitimate military target because it transmitted military communications.[102] The court made this determination despite the deaths of sixteen civilians inside.[103] This demonstrates that as long as the qualifiers of Article 52(2) are met, an object's contribution to civilian life may be disregarded.[104] Thus, the object's use for civilian purposes will ultimately not affect its classification as a military objective.[105]

Applying distinction to ASATs presents many complications that exist in a grey zone. Satellites are becoming increasingly dual use having both civilian and military purposes.[106] For example, the U.S. released an official policy in 2003 calling for the employment, to the largest extent as possible, of private sector satellite services for governmental, military, and intelligence purposes.[107] Regardless of this, U.S. military officials still believe that "satellites are too militarily useful to pretend that adversaries will consider them off limits."[108] Moreover, the U.S. has a broader interpretation of "military action" in a distinction analysis.[109] Under the U.S. interpretation, the destruction of an object does not need to offer immediate tactical or operation gains.[110] All that is needed is that the object was effectively contributing to the enemy's warfighting or war-sustaining capabilities.[111] Therefore the U.S. would believe that the principle of distinction would be satisfied if the enemy's satellite offered a definite military advantage at the time the decision to strike was made.[112] While other countries do not share the same interpretations as the U.S., the fact that the U.S. believes in such wide discretion could prompt other countries to adopt similar views. This could be a real possibility due to the nature of ASATs and the vital roles satellites play

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[100] *See* Maogoto, *supra* note 35, at 17.
[101] *See* Thompson, *supra* note 9, at 144.
[102] Thompson, *supra* note 9, at 144.
[103] Thompson, *supra* note 9, at 144.
[104] Mawdsley, *supra* note 74, at 274.
[105] *See* Mawdsley, *supra* note 74, at 274.
[106] *See id.*
[107] Koplow, *supra* note 16, at 742–43.
[108] Mawdsley, *supra* note 74, at 272.
[109] *See id.* at 273.
[110] *See id.*
[111] *See id.*
[112] *See id.*

in military infrastructure. Given this, and prior examples like Serbia, an argument that satisfies distinction could be made.

D. PROPORTIONALITY

The principle of proportionality requires a balancing of the positive, direct military value of a proposed attack against undesired harms to civilians.[113] Proportionality is found in AP I Article 51(5)(b) which states that "an act is disproportionate if the incidental loss of civilian life or damage to civilian objects is excessive in relation to the concrete and direct military advantage expected as a result of the attack."[114] Article 57(2) requires "commanders to minimize incidental loss or damage when evaluating the proportionality of an attack."[115] The essence of this principle is that military commanders must account for collateral damage that would result from a use of military force.[116] There is currently a debate over whether this concept of collateral damage should be limited to strictly "direct" damages, or if "indirect" damages should be considered as well.[117] Direct damages would be harm caused as the immediate result of an attack, such as the collapsing of a building hit by a bomb.[118] Indirect collateral damages, also referred to as reverberating damage, would be harms that occur after an attack but were a foreseeable result of it.[119] An example of this would be the loss of electricity to a hospital after bombing a powerplant.[120]

Generally, proportionality is the most subjective of the sub-principles. It is often very difficult to apply proportionality in practice because "different people ascribe different values to military advantage vis-à-vis civilian injury and damage."[121] This subjectivity means that different people can reach different but reasonable outcomes when conducting a proportionality analysis. Part of this subjectivity is deciding whether to factor indirect collateral damages into the analysis. Those who do not account for reverberating damages can be said to ascribe to a limited view of proportionality.[122] In the context of space, there are no

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[113] Koplow, *supra* note 4, at 1246.
[114] Thompson, *supra* note 9, at 143.
[115] *Id.*
[116] Mawdsley, *supra* note 74, at 275.
[117] *See id.*
[118] *Id.*
[119] *Id.*
[120] *See id.*
[121] Maogoto, *supra* note 35, at 178.
[122] Mawdsley, *supra* note 74, at 275.

local civilian populations who would incidentally be at risk as the result of an ASAT attack.[123] Because the LOAC is concerned with minimizing human suffering, and there is no risk for incidental loss of life or injury to civilians in the immediate scope of the attack, then proportionality would be satisfied.[124] Critics of this view, who would rather apply an enhanced proportionality analysis, state that this fails to account for both the possible indirect harm to civilians on Earth or damage to other space assets in orbit from the resulting debris.[125]

To better illustrate the application of the differing proportionality views, one could theorize an attack on a GPS satellite.[126] An attack on a GPS satellite would undoubtedly provide military advantage to an adversary. However, the attack would also cause widespread harm to civilians.[127] The attack would cause traffic accidents due to the loss of lane control systems, affect the navigation systems of ships, and affect the general infrastructure of the country.[128] Under limited proportionality, if there is no direct harm or damage then the attack was proportional.[129] Enhanced proportionality would enlarge the scope of the traditional test and require "decision makers to consider if the loss of a dual-use object's civilian function would be excessive as compared to the military advantage gained from its attack."[130] Since the reverberating harm to civilians would be foreseeable and clear, the attack would be disallowed.[131] However, this view is unlikely to become mainstream for two reasons. First, opponents will claim that the indirect effects are far too speculative and remote to be considered.[132] Second, there is a common notion in the LOAC that any civilian loss could be outweighed by an even greater military advantage.[133] Due to these reasons, the traditional limited view of proportionality will likely continue to apply and allow commanders to green light an ASAT strike.

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[123] *See id.*
[124] *See id.*
[125] *See id.* at 276.
[126] *See id.*
[127] Mawdsley, *supra* note 74, at 276.
[128] *See id.*
[129] *See id.*
[130] *Id.*
[131] *See id.* at 277.
[132] Mawdsley, *supra* note 74, at 277.
[133] *See id.* at 278.

E. PRECAUTIONS IN ATTACK

Intertwined with the concepts of some of the prior principles, is the requirement of taking precautions in attacks. Article 57(2)(ii) of AP I mandates that when a belligerent undertakes an attack on land they shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.[134] Article 57(4) of AP I modifies the test to a lower level of reasonable precautions for military operations at sea and in the air.[135] The Convention on Certain Conventional Weapons defines feasible precautions as those which are "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[136] The main thrust of this requirement is that States must understand and account for the potential impacts of the various weapons they use.[137]

The principle of precaution mainly pertains to the type of ASAT that a state would select in conducting an attack. As aforementioned, one of the biggest threats that ASATs present are the debris that result from a kinetic strike. The argument is that if a state uses a kinetic ASAT while non-kinetic means were available, then the use of the kinetic ASAT would produce "wanton destruction" through the creation of debris.[138] Here, computer modeling could be used to predict the amount of debris that would be produced and the altitude of where that debris would end up.[139] However, restricting the type of weapon used in this situation could decrease the military advantage to be gained from it, therefore outweighing the incalculable probabilities of future harm from resulting debris.[140]

III. Conclusion

Based on current projections of debris in orbit, "an accidental collision is expected to occur every five to nine years."[141] These projections account only for the objects and debris in space now. If

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[134] *See id.*
[135] *See id.* at 278–79.
[136] *Id.* at 278.
[137] Mawdsley, *supra* note 74, at 279.
[138] Thompson, *supra* note 9, at 145.
[139] *Id.* at 146.
[140] Mawdsley, *supra* note 74, at 281.
[141] Thompson, *supra* note 9, at 117.

current trends continue with the number of objects being launched into space increasing every year, ASATs represent a possible match to light the powder keg. Our actions in space have the potential to reach a point where we cannot reverse the harm we cause. As the amount of material in space grows, the risk of something known as Kessler Syndrome, does as well.[142] The theory postulates that "a chain reaction of orbital breakups may occur from debris colliding with either space assets or other debris, potentially causing a cascading effect and significantly reducing the number of viable orbits."[143]

The U.S. has the most to lose in the theater of space as most of their civilian and military infrastructures rely on space-based assets. U.S. adversaries know this and are actively seeking capabilities to exploit this. Therefore, the U.S. would have the most to gain in finding ways to curtail the use of ASATs that create debris. As previously explored, the usual grey zones produced from the various balancing tests of the LOAC is further obscured when applied to space. The U.S. should begin to call for a more scrutinizing application of the LOAC in space. Specifically, military commanders should consider the reverberating effects a kinetic ASAT strike would produce. This would include both the indirect effects on the Earth to civilians and the debris that indiscriminately jeopardizes all space assets. While the general tenets of this view may be unpopular and unlikely, it is not fully unsupported by commanders in the military. As Vice Admiral Crawford stated, "the military planner's job would not '. . . become unduly burdensome merely because an additional level of cognition is required . . . .'"[144]

Another future factor to consider is the role of private actors in space. Space is no longer the domain of government entities, and private companies are doing more now than just launching satellites. The actions of the world's militaries in space do not just affect their use of space but the entire world's. Debris threatens private objects in current orbit, and future opportunities to launch or traverse freely in outer space. There is a large amount of money to be made in outer space and this could incentivize private actors to lobby against the use of ASATs.[145]

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[142] *Id.*

[143] *Id.* at 117–18.

[144] Mawdsley, *supra* note 74, at 277.

[145] *See* Jamie Carter, *A Bizarre Trillion-Dollar Asteroid Worth More Than Our Planet Is Now Aligned With The Earth And Sun*, Forbes (Dec. 5, 2020, 10:00PM), *available at* https://www.forbes.com/sites/jamiecartereurope/2020/12/05/a-bizarre-trillion-dollar-asteroid-worth-more-than-our-planet-is-now-aligned-with-the-earth-and-sun (last visited Feb. 17, 2023) (describing asteroid worth 10,000 quadrillion dollars).

The overall theme of the Outer Space Treaty is that humanity shares a common interest in space and all aspects of human activity should be carried out for peaceful purposes. The use of ASATs not only threatens these general tenors, but also the future exploration of the domain that holds the answers to some of humanity's most existential questions.

THE ICC PLAYBOOK: STRATEGIES STATES USE TO INFLUENCE THE INTERNATIONAL CRIMINAL COURT

Christopher Moxley

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THE ICC PLAYBOOK: STRATEGIES STATES USE TO INFLUENCE THE INTERNATIONAL CRIMINAL COURT

Christopher Moxley[†]

Abstract

The International Criminal Court (ICC) has generated substantial controversy in recent years. Many states have welcomed its investigations, either assisting prosecutions at The Hague or working with the ICC to strengthen domestic accountability efforts. However, several powerful states have adopted a hostile posture towards the ICC over its involvement in geopolitically charged conflicts. The strategies states use to influence the Court will profoundly impact the future of the ICC and the pursuit of global criminal justice. This Article explores the history of interactions between states and the ICC across the first two decades of the Court's existence. Guiding the analysis, this Article classifies state engagement strategies into five categories: self-referral, partnership, litigation, extrajudicial engagement, and repudiation. By analyzing interactions between states and the ICC under this framework, this Article reveals advantages and disadvantages of each form of engagement and identifies the circumstances in which states prefer various sets of strategies.

I. Introduction

The International Criminal Court (ICC) has reached a critical juncture.[1] The push for investigations in Afghanistan and Palestine drew targeted sanctions from the United States (U.S.) under the Trump

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[†] J.D., Stanford Law School, 2022. The ideas expressed herein are solely my own and not necessarily the views of the U.S. government. I am deeply indebted to Professor Beth Van Schaack and Professor Todd Buchwald for their invaluable assistance throughout the research process. Thank you also to Justin M. Lange and the rest of the editors at the *Syracuse Journal of International Law and Commerce* for their diligent work and feedback.

[1] This Article is current as of December 2021. Subsequent developments with respect to the International Criminal Court or global politics are not addressed.

administration.[2] Investigation or calls for investigation in Ukraine,[3] Georgia,[4] Syria,[5] and Xinjiang[6] implicated conduct by major powers, including Russia and China. Meanwhile, the United Kingdom (U.K.), one of the most influential supporters of the ICC, criticized the Court's governance and case strategy amid the OTP's now-resolved examination of the U.K.'s conduct in Iraq.[7] At the same time, the current moment presents an opportunity to reset several significant relationships, with a new prosecutor taking over the OTP, the Biden administration at the helm in the U.S., a U.K. government no longer facing potential investigation,[8] and the Assembly of States Parties (ASP) considering the implementation of structural reform.[9] As governments assess their posture towards the ICC at this transitional moment, it is useful to reflect on lessons learned from states–both parties and non-parties to the ICC's governing Rome

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[2] Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020); *see* Alex Ward, *Why the Trump administration is sanctioning a top international court*, VOX (June 12, 2020), *available at* https://www.vox.com/2020/6/12/21287798/trump-international-criminal-court-sanctions-explained (last visited Oct. 24, 2021).

[3] *Report on Preliminary Examination Activities (2020)* 68, ICC-OTP (Dec. 14, 2020) [hereinafter PE Report 2020], *available at* https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf (last visited Oct. 30, 2021).

[4] *Report on Preliminary Examination Activities (2015)* 52–60, ICC-OTP (Nov. 12, 2015) [hereinafter PE Report 2015], *available at* https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep- 2015-Eng.pdf (last visited Oct. 29, 2021).

[5] *Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), *available at* https://www.bbc.com/news/world-middle-east-27514256.

[6] PE Report 2020, *supra* note 3, at 18–20; Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, N.Y. TIMES, Dec. 15, 2020, *available at* https://www.nytimes.com/2020/12/15/world/asia/icc-china-uighur-muslim.html.

[7] Andrew Murdoch, *UK statement to ICC Assembly of States Parties 17th session* (Dec. 5, 2018), https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session#:~:text=The%20United%20Kingdom%20is%20determined,Syria%2C%20Iraq%2C%20and%20Burma; *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last visited Oct. 30, 2021).

[8] *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last visited Oct. 30, 2021).

[9] *See* GROUP OF INDEPENDENT EXPERTS, INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM: FINAL REPORT (Sept. 30, 2020).

Statute[10]–engaging with the Court over the first two decades of its operation.

Motivations underlying states' strategies for dealing with the ICC can cut in opposing directions. In tension with the ICC is a state sovereignty interest in resolving issues of justice in-house.[11] To turn a domestic investigation over to an international institution is to relinquish some control over the parameters and outcome of that investigation. Political motivations weigh for and against working with the ICC. On the one hand, the OTP can support a government by bringing greater investigative resources to bear upon its enemies in a complicated justice situation,[12] and leaders may view the OTP as a convenient scapegoat if the investigation goes in an unpopular direction. On the other hand, collaboration with the ICC may invite political attack on a state's leadership for ceding sovereignty to international institutions.[13] Diplomatic interests vary as well, as some states may seek to stay in the ICC's good graces, either to alleviate pressure from allies, civil society, and members of the ASP, or to use it as a tool to hold rival states accountable for human rights abuses.[14] Other states may choose to keep the ICC at arms-length so as not to legitimize its interventions into complex conflicts.[15] Lastly, though convenient to rely on a hard-boiled view of state decision-making, many policymakers are motivated by a genuine interest in the principles of justice espoused by the Rome Statute.[16]

In pursuit of these varied interests, states deploy a range of actions towards the ICC, sometimes in contradictory ways. This Article surveys the strategies that states use to influence actors within the ICC, finds that states often choose to constructively engage with the Court and OTP

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[10] Rome Statute of the International Criminal Court [hereinafter Rome Statute], *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

[11] *See, e.g.*, *Statement on Behalf of the United States of America* (Dec. 8, 2017), *available at* http://www.justsecurity.org/wp-content/uploads/2017/12/united-states-statement-international-criminal-court-icc-afghanistan-december-2017.pdf ("[W]e have not consented to the ICC's evaluation of our accountability efforts.").

[12] *See infra* Part III.A.

[13] *See, e.g.*, Samuel Osborne, *Theresa May speech: Tory conference erupts in applause as PM attacks 'activist left wing human rights* lawyers', INDEP. (Oct. 5, 2016), *available at* https://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html (decrying the Iraq Historic Allegations Team's investigation into conduct by U.K. soldiers in Iraq); *see also infra* Part IV.B.

[14] *See infra* Parts III.B, IV.A.

[15] *See infra* Part VII.

[16] *See* Rome Statute, *supra* note 10, at pmbl.

whether or not they share the ICC's objectives, and seeks to identify the advantages and disadvantages of various forms of engagement. Lastly, this Article explores a trend in which states seeking to undermine an ICC preliminary examination or investigation have chosen to do so through forms of constructive engagement, as opposed to total repudiation.

The actions states take to exert influence over the ICC can be understood on a continuum from cooperation to repudiation. There are five categories of strategies along this continuum: self-referral, partnership, litigation, extrajudicial engagement, and repudiation. On the most cooperative end, states such as Uganda and Ukraine have self-referred their conflicts to the Prosecutor prior to any ICC involvement, granting the OTP the authority to investigate the situation.[17] Meanwhile, states pursuing a partnership approach, including Colombia and the U.K., have worked closely with the OTP after it opened a preliminary examination to develop domestic accountability mechanisms that satisfy the Court's standards of justice.[18] Primarily after an investigation opens, a set of litigation tools are available under the Rome Statute to states choosing to contest proceedings. States may file motions through the Court's formal mechanisms, perhaps even allowing defendants to stand trial as Kenya did, or use proxies to litigate key issues on their behalf, as in the cases of Israel and Sudan.[19] Extrajudicial engagement takes various forms at each stage of ICC involvement, from working behind the scenes with the OTP to steer a preliminary examination in a favorable direction to using diplomatic tools to hem in an investigation.[20] Indeed, some states, such as the U.S. under the Obama administration, have relied almost entirely on extrajudicial tools in lieu of more public forms of engagement.[21] Lastly, a handful of states such as Russia, Sudan, and the U.S. under the Trump administration have responded to ICC scrutiny with total repudiation, denouncing and disrupting the Court's inquiries.[22] The purposes of repudiation strategies are to strongarm the OTP away from investigation and cripple the OTP's ability to prosecute by closing off sources of evidence.[23]

It is important to note that states may not discretely operate within one bucket of strategies along the continuum. Instead, states often deploy a package of strategies, potentially in contradictory ways, such as

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[17] *See infra* Part III.
[18] *See infra* Part IV.
[19] *See infra* Part V.
[20] *See infra* Part VI.
[21] *Id.*
[22] *See infra* Part VII.
[23] *Id.*

publicly rejecting the Court's authority while privately sharing information with the OTP. Additionally, a state's posture towards the ICC may shift over time, responding to priorities of new leadership or procedural progression of a situation through the ICC system. This Article documents the strategies states use to influence the ICC across the continuum and analyzes the efficacy of different forms of engagement. Actions by all states implicated by both preliminary examinations and investigations informed these findings. The Article focuses on instances over the first twenty years of the ICC's operation that best demonstrate the scope, advantages, and disadvantages of various types of engagement.

II. Background: International Criminal Court Structure and Functions

In operation since 2002, the ICC was established by the Rome Statute to investigate and try individuals charged with grave crimes under international law: genocide, war crimes, crimes against humanity, and the crime of aggression.[24] States become parties to the ICC by ratifying the Rome Statute; in doing so, they obtain membership and a vote in the Assembly of States Parties (ASP), the Court's governing body.[25] The ASP convenes annually to handle management, oversight, and legislation of the ICC.[26] Meanwhile, four organizational branches comprise the ICC:

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[24] The crime of aggression came within the Court's jurisdiction in January 2017 after the 30th state, Palestine, ratified the amendments setting forth the definition and scope of the crime. *See* Rome Statute, *supra* note 10, at arts. 5–8; Press Release, ICC, *State of Palestine becomes the thirtieth state to ratify the Kampala amendments on the crime of aggression* (June 28, 2016), *available at* https://www.icc-cpi.int/test-new-master/Pages/pr-new.aspx?name=pr1225 (last visited Nov. 1, 2021).

[25] Currently, 123 states have ratified the Rome Statute. The U.S., Russia, and China are not ICC parties. *See* Rome Statute, *supra* note 10, at art. 112; ICC-ASP, *The States Parties to the Rome Statute*, *available at* https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 1, 2021).

[26] In furtherance of its governance of the ICC, the ASP convenes Working Groups to meet with Court officials and civil society and also recently commissioned an Independent Expert Review, which announced recommendations to improve the ICC system in September 2020. For more on the ASP system, *see* Coalition for the International Criminal Court, *Assembly of States Parties*, *available at* https://www.coalitionfortheicc.org/assembly-states-parties#:~:text=The%20Bureau%20has%20two%20working,Hague%20Working%20Group%20(HWG).&text=The%20ASP%20has%20a%20permanent,is%20located%20in%20The%20Hague (last visited Nov. 1, 2021); *see also* Douglas Guilfoyle, *The International Criminal Court Independent Expert Review: questions of*

the Presidency, the Judicial Chambers, the Office of the Prosecutor (OTP), and the Registry.[27] The ICC's component branches are entitled to independence from the ASP in the domains of prosecutorial and judicial decision-making, but the ASP exerts significant control over these bodies by, for example, electing the Prosecutor and managing the Court's budget.[28] The Chambers and OTP are the focus of the analysis in this paper, as the Presidency and Registry primarily carry out administrative duties.

A situation can only come before the Court through one of three methods: referral by a state party, referral by the Security Council, or initiation by the Prosecutor on the basis of *proprio motu* powers.[29] States parties and the Prosecutor can only initiate proceedings involving crimes committed on the territory of a state party or by nationals of a state party, though non-party states can choose to accept the Court's jurisdiction over a particular situation on an ad hoc basis through Article 12(3).[30] The Security Council can refer any situation to the Court via Chapter VII resolution, regardless of the party status of those involved.[31]

There are two distinct phases of ICC involvement: the preliminary examination and the investigation. The OTP uses the preliminary examination phase to determine "whether a situation meets the legal criteria established by the Rome Statute" to warrant an investigation.[32] The relevant factors the Prosecutor must consider are set forth in Article 53(1): jurisdiction, admissibility, and the interests of justice.[33] If the requirements are met, the Prosecutor must move forward with an

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accountability and culture, EJIL:TALK! (Oct. 7, 2020), *available at* https://www.ejiltalk.org/the-international-criminal-court-independent-expert-review-questions-of-accountability-and-culture/#:~:text=The%20Independent%20Expert%20Review%20of,reported%20on%2030%20September%202020.&text=Nonetheless%2C%20it%20appears%20a%20scrupulously,Court's%20operations%20and%20internal%20problems (last visited Nov. 1, 2021); GROUP OF INDEPENDENT EXPERTS, *supra* note 9.

[27] Rome Statute, *supra* note 10, at art. 34.

[28] Discomfort with the ICC's dual existence as an independent judicial entity and as an international organization subject to ASP control figured prominently in the recent Independent Expert Review recommendations. *See* Guilfoyle, *supra* note 26.

[29] Rome Statute, *supra* note 10, at art. 13; BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 191 (4th ed. 2020).

[30] Rome Statute, *supra* note 10, at art. 12.

[31] *Id.* at art. 13.

[32] *Preliminary Examinations*, ICC (n.d.), *available at* https://www.icc-cpi.int/pages/pe.aspx (last visited Nov. 1, 2021).

[33] Rome Statute, *supra* note 10, at art. 53(1).

investigation (pending judicial authorization if the investigation is initiated using the Prosecutor's *proprio motu* powers).[34] At the investigation stage, the Prosecutor is empowered to conduct a comprehensive inquiry into the relevant allegations for purposes of bringing cases to trial against individual defendants or groups of defendants.[35]

As an additional check on the Prosecutor's discretion, the Rome Statute allows states and individuals to formally contest the jurisdiction or admissibility of a case. Under Article 19, either accused individuals or states which have jurisdiction over a situation can submit a challenge at any point prior to the commencement of trial.[36] The case or cases challenged must satisfy temporal, subject matter, and nationality/territorial jurisdiction.[37] The question of admissibility involves an examination of whether the state is willing and able to prosecute the case or cases in question, and whether the case or cases are of sufficient gravity.[38]

The following analysis digs deeper into Article 19 and other methods by which states contest proceedings. It is sufficient at this stage to bear in mind the distinctions between the OTP conducting a preliminary examination, opening an investigation, and commencing individual trials, as the phase of ICC involvement affects the strategies states use to influence that involvement.

III. Self-Referral

As described above, parties to the Rome Statute may communicate to the Prosecutor an intent to refer a situation concerning their own territory to the ICC, and non-party states may refer situations concerning their territory to the ICC by submitting an Article 12(3) declaration accepting the Court's jurisdiction.[39] States deploy these self-referral strategies when they identify an opportunity to benefit from the OTP's

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[34] *Id.*

[35] VAN SCHAACK & SLYE, *supra* note 29, at 190.

[36] States may submit this challenge after the Prosecutor has requested an investigation or after individual charges have been filed, at which point individuals may also submit a challenge. Art. 19(5) requires the challenge to be submitted "at the earliest opportunity." Barring exceptional circumstances, only one challenge may be filed, and states and individuals lose the right to challenge admissibility once the trial begins. *See* Rome Statute, *supra* note 10, at art. 19.

[37] *See* VAN SCHAACK & SLYE, *supra* note 29, at 195–96.

[38] Rome Statute, *supra* note 10, at art. 17.

[39] Rome Statute, *supra* note 10, at arts. 12–14.

power as a prosecutorial mechanism and the Court's status as an arbiter of international disputes.

A. STATES USE SELF-REFERRAL TO LEVERAGE THE COURT'S RESOURCES AND CONTROL OPTICS

The first instance of self-referral in the ICC's history arose in December 2003 when the government of Uganda referred the "situation concerning the Lord's Resistance Army (LRA)" to the ICC.[40] Uganda struggled unsuccessfully to defeat the LRA for nearly two decades and viewed self-referral as a means "to intimidate these thugs [the LRA], to show that they were sought by many more" by bringing international resources to bear on the issue.[41] Ugandan President Yoweri Museveni explained that the "involvement of the ICC in hunting Kony is very important, mainly because it enables us to deal with Khartoum. Khartoum is fully aware of the consequences of dealing with somebody under the ICC's indictment . . . we need the ICC's assistance to get the Sudanese government to cooperate with us."[42] Additionally, the government was facing scrutiny into the conduct of its Ugandan government forces (the UPDF) in the fight against the LRA, whose actions had triggered diplomatic conflict with the Democratic Republic of the Congo (DRC).[43] Thus, the Ugandan government used the referral to portray itself as aligned in pursuing justice against the LRA. Uganda also expected that the ICC would only investigate conduct by the LRA, maintaining that the Prosecutor need not consider UPDF actions because

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[40] Press Release, ICC-OTP, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44 (Jan. 29, 2004) *available at* https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc&ln=en (last visited Oct. 31, 2021).

[41] Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. OF INT'L L. 941, 949 (2011) (quoting from interview with a government minister, Kampala Oct. 2008) (internal quotation marks omitted).

[42] IRIN, *Interview with President Yoweri Museveni*, NEW HUMANITARIAN (June 9, 2005), *available at* https://www.thenewhumanitarian.org/report/54853/uganda-interview-president-yoweri-museveni (last visited Oct. 31, 2021).

[43] The DRC brought claims before the International Court of Justice that Uganda violated international law through the actions of the UPDF in eastern DRC. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 1–2, (Dec. 19).

"[i]f there are atrocities committed [by Ugandan government forces], we punish them ourselves."[44]

The strategy to weaponize the ICC against the LRA while heading off scrutiny into the UPDF has largely succeeded. The OTP has appeared partial towards the Ugandan government dating back to the opening announcement of the referral, a 2004 press conference which Prosecutor Moreno-Ocampo conducted jointly with President Museveni.[45] In 2005, Prosecutor Moreno-Ocampo announced the issuance of arrest warrants against five LRA leaders, including Joseph Kony, while declining to issue warrants against any members of the Ugandan government, because their alleged crimes did not satisfy the gravity requirement.[46] When asked why he had seemingly given the UPDF a pass for serious allegations of war crimes and crimes against humanity, Moreno-Ocampo reportedly exclaimed "if you want to support the LRA, fine!" [47] This reflects the extent to which the OTP internalized and projected outwards the perception that scrutinizing conduct by Ugandan government forces meant siding with the LRA. The OTP's benevolence towards Uganda has largely continued to the present. For instance, though then-Prosecutor Fatou Bensouda reiterated in 2015 that "*all* sides . . . would be investigated," her office never issued warrants against UPDF actors.[48] More recently, in her 2020 Preliminary Examinations Report, the Prosecutor announced her finding that the Kasese murders committed by

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[44] IRIN, *supra* note 42; *see* Nouwen & Werner, *supra* note 41, at 950.

[45] *See* Kevin Jon Heller, *Poor ICC Outreach – Uganda Edition*, OPINIOJURIS (Sept. 22, 2015), *available at* http://opiniojuris.org/2015/09/22/poor-icc-outreach-uganda-edition/ (last visited Oct. 29, 2021); Mark Kersten, *Why the ICC Won't Prosecute Museveni*, JUSTICE IN CONFLICT (Mar. 19, 2015), *available at* https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/ (last visited Oct. 29, 2021).

[46] ICC-OTP, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants* (Oct. 14, 2005), *available at* https://www.icc-cpi.int/NR/rdonlyres/AF169689-AFC9-41B9-8A3E-222F07DA42AD/143834/LMO_20051014_English1.pdf (last visited Oct. 29, 2021).

[47] Adam Branch, *What the ICC Review Conference Can't Fix*, AFRICAN ARGUMENTS (Mar. 11, 2010), *available at* https://africanarguments.org/2010/03/what-the-icc-review-conference-cant-fix/ (last visited Oct. 30, 2021); *see* Nouwen & Werner, *supra* note 41, at 952.

[48] ICC-OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA Crimes* (Feb. 27, 2015), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug (last visited Oct. 30, 2021); *see Situation in Uganda*, *available at* https://www.icc-cpi.int/uganda.

Ugandan security forces in 2016 did not contain all the necessary elements of any of the Rome Statute's core crimes.[49]

B. EVEN NON-PARTY STATES INVITE ICC SCRUTINY TO PROCURE FAVORABLE DETERMINATIONS

In the years since Uganda's self-referral, a handful of states have followed suit with their own self-referrals. Ukraine, as a non-party to the Rome Statute, filed two Article 12(3) declarations accepting ICC jurisdiction.[50] The first declaration, authorizing ICC scrutiny into conduct from November 2013 to February 2014, was motivated by a change of administration: the Ukrainian parliament ousted President Yanukovych and accepted ICC jurisdiction over crimes committed under his watch.[51] The second declaration, broadly accepting ICC jurisdiction over all crimes committed in Ukraine from February 2014 onwards, sought assistance from the ICC to address war crimes committed by its adversaries in the ongoing conflict against Russia and Russian-backed separatists.[52] In December 2020, the Prosecutor announced that she would seek authorization to open an investigation in Ukraine.[53] While the investigation will take shape over the coming years, Ukraine already began to benefit from the OTP's involvement during the preliminary examination phase. For example, the Prosecutor announced in her 2016 Preliminary Examinations Report that the situation between Russia and Ukraine amounted to an international armed conflict,[54] bolstering Ukraine's broader international legal strategy at the time to contest Russian intervention.[55] Ukraine extensively cooperated with the Prosecutor in the leadup to this determination, who noted in the same report that she "received a large volume of information . . . from the

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[49] PE Report 2020, *supra* note 3, at 13.

[50] *See Preliminary Examination: Ukraine*, ICC (n.d.), *available at* https://www.icc-cpi.int/Ukraine (last visited Oct. 30, 2021).

[51] PE Report 2020, *supra* note 3, at 68–69.

[52] *Id.*

[53] *Id.* at 72.

[54] *Report on Preliminary Examination Activities (2016)* 35, ICC-OTP (Nov. 14, 2016) [hereinafter PE Report 2016], *available at* https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (last visited Oct. 30, 2021).

[55] *See, e.g.*, Beth Van Schaack, *Ukraine v. Russia: Before the International Court of* Justice, JUST SECURITY (Feb. 2, 2017), *available at* https://www.justsecurity.org/37167/ukraine-v-russia-international-court-justice/ (last visited Oct. 26, 2021) (describing Ukraine's efforts to press claims against Russia in various international courts).

Ukrainian government" over the course of her inquiry.[56] The Ugandan and Ukrainian situations demonstrate that self-referral and ad hoc acceptance of ICC jurisdiction offer upside for states parties and non-parties alike hoping to leverage the power of the ICC as both a prosecutorial body and an arbiter of international disputes. There is obviously risk that the OTP ends up focusing on actions by the referring government, but Uganda's experience suggests this risk may be mitigated by the goodwill and influence that self-referral generates.

Indeed, the use of self-referral to obtain favorable international legal determinations has only grown since Ukraine's referral. Palestinian leadership lodged an Article 12(3) declaration accepting ICC jurisdiction over its territory in 2015, leading to the contentious finding by the OTP that there is basis to proceed with investigation into alleged crimes committed in Palestine, including those committed by Israeli forces.[57] The OTP then sought a determination from the Pre-Trial Chamber to clarify the permissible territorial bounds of a potential investigation, forcing the Court to make a decision as to the scope of Palestine's right to accept the Court's jurisdiction.[58] The Court held that, while it could not resolve the broader question of Palestinian statehood, it did have the power to determine that Palestine had acceded to the Rome Statute through proper procedures and therefore the ICC could exercise jurisdiction on Palestinian territory.[59] This result, conferring legitimacy to Palestine's efforts to exercise diplomatic autonomy, has set a precedent that others in similar positions in the future could look to as an avenue to bolster their claim to sovereignty.

IV. Partnership

Though the chief purpose of a preliminary examination is to assess whether a situation warrants investigation, the OTP has acknowledged

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[56] PE Report 2016, *supra* note 54, at 40.

[57] *See Situation in the State of Palestine*, ICC (Jan. 2018), *available at* https://www.icc-cpi.int/Palestine (last visited Oct. 26, 2021).

[58] *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*, ICC-OTP (Dec. 20, 2019), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine (last visited Oct. 26, 2021).

[59] Press Release, ICC, *ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine*, ICC-CPI-202100205-PR1566 (Feb. 5, 2021), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1566 (last visited Oct. 26, 2021).

that "a significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes."[60] This latter objective is known as positive complementarity, where the OTP leverages the ICC's status as a complementary court to support national proceedings and falls back on ICC investigation if domestic efforts falter.[61] The leverage applies in both directions, however, because states use the OTP's constraints, such as its unwillingness to spread resources thin across too many situations and its preference to not antagonize states parties, to avoid investigation on the basis of positive complementarity.[62] State decision-makers usually adopt partnership strategies with at least one of two objectives in mind: bolstering the justice process when transitioning out of a conflict, and, more cynically, clearing a minimally satisfactory threshold of 'justice' to avoid ICC scrutiny into a particular incident. The partnership route may appeal to states parties confronted with preliminary examinations who want to stay in the good graces of the ASP, as partnership can prevent the OTP from opening a *proprio motu* investigation without drawing the condemnation that refusing to cooperate may bring.

A. STATES USE PARTNERSHIP STRATEGIES TO SUPPORT TRANSITIONAL JUSTICE EFFORTS

States transitioning out of conflict have benefitted from the partnership approach by striking a delicate balance: using the threat of ICC investigation as a bargaining chip in peace negotiations, while relying on progress in peace negotiations to deter actual ICC investigation. In the case of Colombia, the OTP opened a preliminary examination in 2004 into crimes arising out of the conflict between the Colombian government, paramilitary forces, and rebel groups.[63]

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[60] ICC-OTP, *Policy Paper on Preliminary Examinations*, ICC (Nov. 2013), *available at* https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (last visited Oct. 26, 2021).

[61] Fidelma Donlon, *Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal's Evidence in the Srebrenica Trials Before the Bosnian War Crimes Chamber*, *in* 2 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 920, 920 (Carsten Stahn & Mohamed M. ElZeidy eds., 2011).

[62] *See infra* Part IV.B.

[63] *See Preliminary Examination: Colombia*, ICC (n.d.), *available at* https://www.icc-cpi.int/Colombia (last visited Oct. 26, 2021).

Colombia, a state party, cooperated from the beginning, but the Prosecutor had to contend with preexisting influences prior to the OTP's first official visit in 2007.[64] For example, Colombia had already begun working with the Inter-American Commission of Human Rights,[65] Colombia's 2005 Justice and Peace Law had promised alternative sentencing to rebels who laid down their arms,[66] and interested parties such as the U.S. played an active role in the resolution of the conflict.[67] Additionally, some have faulted Prosecutor Moreno-Ocampo for targeting African states while treating Western states leniently.[68]

These factors combined to give Colombia leverage over an OTP that was hoping to avoid being boxed out entirely. The Prosecutor did not advance certain concerns as aggressively as he could have, such as President Uribe's repeated denial of the "false positive" killings, where government forces murdered vulnerable civilians to inflate body count statistics under the guise of attacking rebels.[69] Nonetheless, during his first visit to Colombia in 2007, the Prosecutor asserted some authority by

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[64] Rene Urueña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT'L L. 104, 112 (2017).

[65] *Id.* at 105.

[66] Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES (June 23, 2005), *available at* https://www.nytimes.com/2005/06/23/world/americas/new-colombia-law-grants-concessions-to-paramilitaries.html (last visited Oct. 28, 2021).

[67] *See* Patrick Markey, *Colombia extradites 14 militia bosses to U.S*, REUTERS (May 13, 2008), *available at* https://www.reuters.com/article/us-colombia-paramilitaries/colombia-extradites-14-militia-bosses-to-u-s-idUSN1336592420080513 (last visited Oct. 28, 2021) (In 2008, Columbia extradited fourteen paramilitary leaders to the U.S. on drug charges); Urueña, *supra* note 64, at 115.

[68] Prosecutor Moreno-Ocampo seemed to lay off situations like Colombia where the U.S. was playing an active role. A Bush administration official told the *Wall Street Journal* in 2006 that Moreno-Ocampo "seems to be going to great lengths to avoid stirring up the ire of the United States" in his prosecutorial decisions. Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J. (June 14, 2006), *available at* https://www.wsj.com/articles/SB115024503087679549 (last visited Oct. 30, 2021); Mary Kimani, *Pursuit of justice or Western Plot?*, AFR. RENEWAL (Oct. 2009), *available at* https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot (last visited Oct. 31, 2021); M. Cherif Bassiouni et. al., *Invited Experts on Africa Question*, ICC FORUM, *available at* https://iccforum.com/africa (last visited Oct. 31, 2021).

[69] *Pressure Point: The ICC's Impact on National Justice*, HUM. RTS. WATCH (May 3, 2018), *available at* hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and#_ftn5 (last visited Oct. 30, 2021).

criticizing the use of amnesties and urging the Colombian government to focus on holding accountable paramilitary leadership instead of low-level soldiers.[70] Thus, partnership and, with it, negotiation in the spirit of positive complementarity began.

Colombia spent the ensuing decade straddling two sets of negotiations: peace settlements with opposing forces and justice commitments with the ICC. President Uribe's successor, Juan Manuel Santos, gave a speech at the 2010 Assembly of States Parties expressing the tension between these two obligations.[71] He touted Colombia's commitment to an "ambitious process of transitional justice" while highlighting that Colombia has endured tremendous suffering, so as to underscore the "desire for peace of millions of Colombians."[72] For its part, Colombia appointed a former ICC advisor to oversee the development of its Justice and Peace Law framework,[73] and it hosted conferences throughout the 2010s between the OTP, Colombian officials, and civil society leaders to discuss topics like complementarity.[74] These conferences helped foster good will between the OTP and Colombia, and they also sharpened Colombian leaders' understanding of the ICC, strengthening their ability to navigate its bureaucracy.[75] Meanwhile, the OTP encouraged Colombia to improve on numerous sticking points: lack of investigations into the false positive killings, lack of prosecution for higher-level officials, and allowance of suspended sentencing for those committing the most serious crimes.[76]

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[70] Urueña, *supra* note 64, at 112.

[71] Juan Manuel Santos, *Remarks at the Ninth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court* at 2–3 (Dec. 6, 2010), *available at* https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/7C8AF684-63F9-42CF-811D-FF8662D31C84/0/CPIFINAL2Ingl%c3%a9s.pdf.

[72] *Id.*

[73] Edward Fox, *Spanish judge to advise OAS mission in Colombia*, COLOM. REP. (Mar. 25, 2011), *available at* https://colombiareports.com/spanish-judge-to-advise-oas-mission-in-colombia/ (last visited Oct. 30, 2021).

[74] Urueña, *supra* note 64, at 116.

[75] *Id.*

[76] *See, e.g.*, PE Report 2016, *supra* note 54, at 56; *Report on Preliminary Examination Activities (2018)* 37, ICC-OTP (Dec. 5, 2018) [hereinafter PE Report 2018], *available at* https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf (last visited Oct. 30, 2021).

Colombia pursued multiple peace frameworks over the next decade, culminating in the Final Peace Agreement of 2016.[77] The OTP ultimately compromised on the issue of sentencing to enable this agreement, with Deputy Prosecutor James Stewart declaring in a speech in Bogota that governments have "wide [sentencing] discretion" as long as penal sanctions serve the goals of "public condemnation of the criminal conduct, recognition of the victims' suffering, and deterrence of further criminal conduct."[78] Thus, the ICC has allowed Colombia to proceed with its Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, or JEP) system, which contemplates reduced sentences or house arrest for defendants who participate in truth-telling and provide reparations to victims and the community.[79] The OTP's 2020 Preliminary Examination Report concluded that Colombia had satisfactorily responded to the OTP's priorities, and the OTP shifted towards establishing benchmarks to guide domestic proceedings, rather than pursuing an investigation.[80] This approval came in spite of complaints by the OTP that Colombia did not fully cooperate, withholding information about its inquiries into the false positive killings.[81]

From a state perspective, Colombia's experience reflects the advantages of partnership with the ICC in the context of a complicated transitional justice process. Though the Colombian government incurred some costs from partnership, Colombia was able to secure compromises from the OTP on issues like alternative sentencing central to peace negotiations.[82] Colombia tailored aspects of its peace and justice processes to alleviate the Prosecutor's concerns, inquiring more seriously into false positive killings[83] and demonstrating an intention to hold higher

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[77] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC-EP, Nov. 24, 2016, *available at* https://www.peaceagreements.org/viewmasterdocument/1845.

[78] James Stewart, *Speech at the ICC Bogota, Colombia Conference: Transitional Justice in Colombia and the Role of the International Criminal Court* at 10 (May 13, 2015), *available at* https://www.icc-cpi.int/sites/default/files/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

[79] *See* Luke Moffett, *Between Punishment and Mercy – Alternative Sanctions and the Special Jurisdiction for Peace*, JUST. IN CONFLICT (Apr. 17, 2019), *available at* https://justiceinconflict.org/2019/04/17/between-punishment-and-mercy-alternative-sanctions-and-the-special-jurisdiction-for-peace/ (last visited Oct. 30, 2021).

[80] PE Report 2020, *supra* note 3, at 38–39

[81] PE Report 2015, *supra* note 4, at 36–39.

[82] Stewart, *supra* note 78, at 10.

[83] PE Report 2020, *supra* note 3, at 33–36.

level military officials accountable for crimes.[84] As a result of this commitment, the OTP closed its preliminary examination in 2021 without seeking investigation.[85]

B. STATES PURSUE PARTNERSHIP TO STAVE OFF ICC INVESTIGATION INTO SPECIFIC INCIDENTS

Outside of the context of a complicated transitional justice process like Colombia's, states have also utilized partnership strategies to head off ICC investigation into more isolated situations. For example, the U.K. succeeded at deterring ICC investigation through positive complementarity, albeit after a lengthy preliminary examination.[86] The OTP has twice sought to review detainee abuse by U.K. military personnel in Iraq, opening a preliminary examination from 2005 to 2006 and again from 2014 to 2020.[87] In the first instance, Prosecutor Moreno-Ocampo praised the U.K.'s investigative efforts and reportedly opted not to press the issue so as not to draw backlash from the U.S. and U.K.[88] Prosecutor Bensouda reopened the examination in 2014 after receiving new information.[89] In the interim, the U.K. had established the Iraq Historic Allegations Team (IHAT) to conduct its own investigation, in addition to a handful of independent inquiries into isolated incidents.[90]

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[84] *Id.* at 30–31.

[85] Press Release, ICC-OTP, *ICC Prosecutor, Mr Karim A.A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice*, ICC-CPI-20211028-PR1623 (Oct. 28, 2021), *available at* https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia.

[86] *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last visited Oct. 30, 2021).

[87] *Preliminary Examination: Iraq/UK*, ICC (2020), *available at* https://www.icc-cpi.int/Iraq.

[88] *See* DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 87–90 (2014).

[89] *Prosecutor of the International Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq*, ICC-OTP (May 13, 2014), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014 (last visited Oct. 29, 2021).

[90] *Situation in Iraq/UK: Final Report* 56–85, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf.

IHAT processed 3,600 allegations from 2010-2017, producing a single guilty plea.[91] Along the way, the U.K. invested £60 million into IHAT, with members of the government admitting that preventing an ICC investigation was a driving factor of its creation.[92] The U.K. ultimately dismantled IHAT after a lawyer prominently involved in bringing allegations before the commission was found guilty of professional misconduct for fraudulently soliciting claims implicating 200 servicemen.[93] The remaining allegations–1,291 in total–were then transferred to a military police unit,[94] where they dwindled to a close without a single prosecution.[95] Nonetheless, on December 9, 2020, the Prosecutor announced that she would end the OTP's preliminary examination without seeking investigation.[96] She expressed disappointment that IHAT and subsequent investigations did not yield many prosecutions but explained that she could not sufficiently substantiate allegations that the U.K. had shielded perpetrators from justice.[97] Thus, she closed her examination on the basis that the U.K.'s investigation could not be proven to be inactive or disingenuous, setting a low bar.[98]

The experience of the U.K. reflects the reality that the OTP is resource-strapped and feels pressure to narrow its caseload after years of unresolved preliminary examinations. By pursuing a partnership strategy, the U.K. government maintained control over potential accountability efforts. It will be telling to see how the OTP handles partnership attempts in other states with similar prosecutorial records moving forward, as the OTP will be wary of signaling a double standard

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[91] PE Report 2018, *supra* note 76, at 51.

[92] *See* Thomas Obel Hansen, *Complementarity (in)action in the UK?*, EJIL: TALK! (Dec. 7, 2018), *available at* https://www.ejiltalk.org/complementarity-inaction-in-the-uk/ (last visited Oct. 30, 2021).

[93] *See* Peter Walker, *Iraq war claims unit to be shut down, says UK defense secretary*, GUARDIAN (Feb. 10, 2017), *available at* https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary (last visited Oct. 30, 2021).

[94] *Situation in Iraq/UK: Final Report*, *supra* note 90, at 67.

[95] Press Release, Ben Wallace, Sec'y of State for Def., *Closure of Service Policy Legacy Investigations* (Oct. 18, 2021), *available at* https://questions-statements.parliament.uk/written-statements/detail/2021-10-18/hcws323.

[96] *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last visited Oct. 30, 2021).

[97] *Id.*

[98] *Id.*

when dealing with powerful ICC supporters like the U.K. compared with other nations.

C. NEVERTHELESS, PARTNERSHIP ENTAILS SIGNIFICANT COSTS AND MAY BACKFIRE ENTIRELY

Though positive complementarity has allowed Colombia and the U.K. to maintain significant control over their justice processes, partnership is not without its costs, and certain factors affect its likelihood of success. State experiences have revealed two significant downsides: domestic political costs associated with ceding control of a situation to the OTP, and the risk that the approach fails altogether, resulting in ICC investigation. In terms of political costs, while Colombia was able to use its peace negotiations to force the OTP into compromise, the OTP also exerted leverage on Colombia that complicated peace negotiations with FARC leaders, particularly with respect to the issue of alternative sentencing.[99] In the U.K., conservatives publicly decried the IHAT process as a "witch-hunt."[100] This sentiment inspired a push for increased legal protections for British armed forces personnel, which could potentially raise greater obstacles to accountability in the future.[101]

In addition to political costs, there is no guarantee that the approach will deter investigation. The Court will deny admissibility challenges when states conduct domestic inquiries that are insufficiently genuine or robust.[102] Indeed, even states that work hand-in-hand with the Prosecutor to build out domestic processes may fail if they cannot satisfactorily commit to the approach. In 2010, the OTP opened a preliminary examination into the conflict between Boko Haram and Nigerian security forces, among others, and the Prosecutor announced findings of crimes

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[99] *See* Urueña, *supra* note 64, at 118.

[100] Press Ass'n, *British Government and Army Accused of Covering Up War Crimes*, GUARDIAN (Nov. 17, 2019), *available at* https://www.theguardian.com/law/2019/nov/17/british-government-army-accused-covering-up-war-crimes-afghanistan-iraq (last visited Oct. 31, 2021).

[101] *See* Nadia O'Mara, *U.K. Proposes to Limit Accountability for Violations by Armed Forces*, JUST SECURITY (Jan. 30, 2020), *available at* https://www.justsecurity.org/68346/u-k-proposes-to-limit-accountability-for-violations-by-armed-forces/ (last visited Oct. 31, 2021).

[102] *See, e.g.*, Prosecutor v. Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

against humanity committed by Boko Haram in 2013.[103] Nigeria tried to resolve the situation through a partnership approach, and the OTP noted, "since 2013, the Office has sought to encourage relevant and genuine domestic proceedings."[104] Nonetheless, Prosecutor Bensouda announced in December 2020 that she would seek investigation in spite of "the priority given by my office in supporting the Nigerian authorities in investigating and prosecuting the crimes domestically," because the domestic investigations focused on low-level perpetrators and insufficiently held government forces accountable.[105]

Comparing the successes of the partnership approach in Colombia and the U.K. to failures in Nigeria and elsewhere, several factors emerge to predict whether partnership is viable to a state facing a preliminary examination. The OTP fully supported Colombia's efforts because Colombia worked closely with the OTP to provide information on domestic proceedings and tailor these proceedings to address areas of concern.[106] Additionally, Colombian efforts to resolve its conflict were supported by civil society and other states, pressuring the OTP to accept them.[107] Meanwhile, the OTP deferred to the U.K., a powerful ally, even though IHAT did not produce notable prosecutions, seemingly because, in part, the U.K. invested a significant amount of money into IHAT, issued a number of statements about investigating systemic crimes, and provided necessary information to the OTP.[108] Lastly, the OTP has sought investigations in states such as Nigeria where the governments did not seem to have the political will or meaningful investigations necessary to prosecute the crimes domestically.

Though no two cases are the same, it seems the Prosecutor will be more deferential to domestic investigations where countries communicate transparently with the OTP, invest significant resources into investigations, ostensibly take a good faith approach to hold high-level actors accountable, are influential parties to the Rome Statute, or are undergoing a complex transition out of conflict that has the support

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[103] *See Situation in Nigeria: Article 5 Report*, ¶¶ 4, 128, ICC-OTP (Aug. 5, 2013), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=NGA-05-08-2013 (last visited Oct. 31, 2021).

[104] PE Report 2020, *supra* note 3, at 66.

[105] *See Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Nigeria*, ICC-OTP (Dec. 11, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement (last visited Oct. 31, 2021).

[106] *See supra* Part IV.A.

[107] *Id.*

[108] *See supra* Part IV.B.

of domestic civil society and the international community. On the other hand, the OTP will push for an ICC investigation when the national proceedings only target low-level or rival perpetrators, lack transparency and independence, seem to have been established to shield people from accountability, or when the situation was referred to the OTP by Security Council resolution. In short, partnership requires substantial commitment by states to ward off the ICC, though states may still use partnership as a delay tactic even if it fails to prevent investigation.

V. Litigation

Even when their objectives lie in tension with the Prosecutor's, states have participated in litigation to try to exploit weaknesses in the OTP as a prosecutorial mechanism. As described, Article 19 offers states the opportunity to make jurisdictional and admissibility challenges.[109] Other motions states and individuals make include requests for more time,[110] requests for certain trial accommodations,[111] evidentiary challenges,[112] and appeals on the final decision or other decisions throughout the trial,[113] including interlocutory appeals.[114] These tools are primarily available to states once a situation reaches the investigation phase, though rare circumstances might give rise to litigation prior to the opening of an investigation.[115] States have contested investigations through litigation by challenging admissibility prior to the commencement of trials, challenging cases against individual defendants, and using proxies to litigate on their behalf.[116]

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[109] Rome Statute, *supra* note 10, at art. 19; *see supra* Part II.

[110] ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 101.

[111] *Id.* at Rule 134 *quater.*

[112] *Id.* at Rules 63–64.

[113] Rome State, *supra* note 10, at arts. 81–82.

[114] *Id.* art. 82; Håkan Friman, *Interlocutory Appeals in the Early Practice of the International Criminal Court*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 553, 554–55 (Carston Stahn & Göran Sluiter eds., 2009).

[115] *See, e.g.*, PE Report 2020, *supra* note 3, at 57–58 (requesting a ruling to resolve which territory fell within the ICC's jurisdiction prior to the opening of an investigation).

[116] *See* ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 101; *infra* Part V.C.

A. STATES CHALLENGE ADMISSIBILITY TO BAR ICC INVOLVEMENT AND DELAY INVESTIGATIONS

The simplest benefit of challenging admissibility is the possibility of rendering a particular case or entire situation inadmissible before the Court. In June 2011, the ICC issued arrest warrants against Libyan head of state Muammar Gaddafi, his son Saif Gaddafi, and brother-in-law Abdullah al-Senussi.[117] Soon after, rebel forces killed Muammar Gaddafi and formed a new government, which then filed an Article 19(2) application challenging the admissibility of both the Saif Gaddafi and Abdullah al-Senussi cases, preferring to deal with the defendants domestically.[118] With respect to al-Senussi, the Court sided with Libya, finding that the Libyan government was satisfactorily investigating al-Senussi for the same conduct and rejecting an appeal by al-Senussi himself to keep the case in the ICC.[119] Thus, the Libyan government rendered the al-Senussi proceedings inadmissible through direct litigation.

However, the same challenge failed in the case of Saif Gaddafi. The Rome Statute only allows states to challenge admissibility once, so a losing challenge sacrifices the opportunity to contest admissibility moving forward.[120] Still, states may be willing to take this risk because the ICC's institutional weaknesses reduce the cost of negative judgments. To delay execution of the warrants, Libya had deployed a series of formal challenges: in January 2012, a confidential request under Article 94(1) to postpone their obligation to surrender the defendants;[121] in March 2012, a request for postponement under Article 95 in light of an intention

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[117] Situation in The Libyan Arab Jamahiriya, ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, ¶ 4 (June 27, 2011).

[118] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (May 1, 2012).

[119] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Decision on the admissibility of the case against Abdullah Al-Senussi ¶ 311 (Oct. 11, 2013).

[120] Rome Statute, *supra* note 10, art. 19(4).

[121] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Report of the Registrar on Libya's Observations Regarding the Arrest of Saif Al-Islam Gaddafi (Jan. 23, 2012); Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Notification and Request by the Government of Libya in Response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi" ¶ 1 (Mar. 22, 2012).

to challenge admissibility;[122] in May 2012, an Article 19(2)(b) admissibility challenge to the Gaddafi and al-Senussi cases,[123] denied by the Court with respect to Gaddafi in May 2013;[124] and in June 2013, an appeal of the Gaddafi denial,[125] which the Court rejected in May 2014.[126] Thus, through formal challenges, the Libyan government bought itself several years in which it could credibly refuse to surrender Gaddafi without drawing the ire of the Security Council (and, perhaps, without having to admit it had little control over the terms of Gaddafi's custody).[127] The Appeals Court's final decision in May 2014 coincided with the escalation of the Second Libyan Civil War,[128] and Gaddafi was ultimately released from prison as part of an amnesty agreement in defiance of the ICC's orders.[129]

The Libyan government's split experience in the al-Senussi and Gaddafi cases reflects why states may perceive little risk in directly challenging admissibility. The challenge succeeded outright in one

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[122] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Notification and Request by the Government of Libya in Response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi" ¶ 1 (Mar. 22, 2012).

[123] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute ¶ 1 (May 1, 2012).

[124] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi ¶¶ 219-20 (May 31, 2013).

[125] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, The Government of Libya's Appeal Against Pre-Trial Chamber I's *'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi'* (June 7, 2013).

[126] Prosecutor v. Saif al-Islam Gaddafi and Abdulla al-Senussi, ICC-01/11-01/11, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case Against Saif Al-Islam Gaddafi" ¶ 215 (May 21, 2014).

[127] The Tripoli-based government did not have custody of Gaddafi but nonetheless sentenced him to death over video trial in 2015. *Libya trial: Gaddafi son sentenced to death over war crimes*, BBC (July 28, 2015), *available at* https://www.bbc.com/news/world-africa-33688391 (last visited Nov. 2, 2021).

[128] *See Libya: Final ICC Ruling on Gaddafi*, HUMAN RIGHTS WATCH (May 21, 2014), *available at* https://www.hrw.org/news/2014/05/21/libya-final-icc-ruling-gaddafi (noting that the ICC's rejection of Libya's appeal came amid destabilizing violence spreading from Benghazi to Tripoli).

[129] Mayesha Alam, *Saif Gaddafi's Release and the Challenge for International Criminal Justice*, JUST SECURITY (June 27, 2017), *available at* https://www.justsecurity.org/42598/saif-gaddafis-release-challenge-international-criminal-justice/ (last visited Nov. 18, 2021).

instance, while buying Libya significant time in the other. When the challenge in Saif Gaddafi's case failed, Libya simply ignored its obligation to surrender him. The Court issued findings of noncompliance against Libya to the Security Council,[130] but amidst such a complex and rapidly evolving conflict, the Security Council declined to assist the OTP's efforts and the Libyan government faced no real consequences for noncompliance.[131] It may be tempting to label Libya's experience as an exception because of the influence of Security Council politics, but it is hardly uncommon for a situation under ICC scrutiny to also be highly politicized within the international community in a way that jeopardizes the Court's enforcement power.[132]

B. STATES LITIGATE INDIVIDUAL TRIALS TO FORCE THE OTP TO PRODUCE DURABLE CASES

Some states feel a greater obligation to nominally comply with the ICC and allow defendants to appear before the Court. In December 2010, Prosecutor Moreno-Ocampo announced he would seek summonses against the so-called "Ocampo Six," six Kenyan suspects connected to crimes against humanity committed during Kenya's 2007–2008 election crisis.[133] Facing pressure from civil society and the international community to address the violence, the Kenyan government formally litigated the cases in the ICC system, while subverting the proceedings through various forms of sabotage.[134] Kenya delayed the commencement of individual trials by filing an admissibility challenge in 2011, which the

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[130] Prosecutor v. Saif al-Islam Gaddafi, ICC-01/11-01/11, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council (Dec. 11, 2014).

[131] *See* BOSCO, *supra* note 88, at 168–172.

[132] *See infra* Part V.C (analyzing the situations involving Israel and Sudan).

[133] A summons functions as a less compulsory alternative to an arrest warrant when the Prosecutor believes a suspect will voluntarily appear in response to allegations and wishes to avoid an unnecessary escalation of hostilities. Issuing summonses in the Kenya cases therefore projected a façade of cooperation over the situation. Press Release, ICC-OTP, *Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity*, ICC-OTP-20101215-PR615 (Dec. 15, 2010), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr615 (last visited Nov. 2, 2021).

[134] *See* Lawrence Helfer & Anne Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT'L CRIM. L. REV. 1, (Feb. 19, 2017) (summarizing Kenya's strategy).

Court rejected.[135] Once individual trials began, the government of Kenya then waged an egregious witness tampering campaign, harassed OTP staff, and used domestic bureaucracy to hamstring the investigations.[136] The defendants and government continued to file formal motions challenging aspects of the Prosecutor's cases, forcing the Prosecutor to produce the necessary bases for continuing the trials, all the while witnesses disappeared or refused to testify.[137] The obstructive efforts "had a severe adverse impact" on the Prosecutor's cases,[138] and all charges against the Ocampo Six were dismissed or withdrawn.[139]

As the Kenya experience demonstrates, states facing pressure to not renege on obligations to the ICC may pair direct litigation with extrajudicial tactics to influence the outcomes of investigations. Litigation allows states to maintain at least a veneer of cooperation and, crucially, forces the Court to process the cases towards resolution. This approach enables states to exploit the weakness of the ICC's safeguards against noncooperation. The Prosecutor pushed back by filing for an Article 87(7) referral to the ASP for noncompliance against the government of Kenya[140] and seeking charges against three additional individuals for obstruction of justice under Article 70 (one surrendered to

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[135] Prosecutor v. Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

[136] Prosecutor v. Muthaura and Kenyatta, ICC-01/09-02/11, Public redacted version of "Prosecution Submission Regarding the Government of Kenya's Cooperation" 9–21 (Sept. 19, 2012).

[137] *See, e.g.*, *Statement on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case*, ICC-OTP (Dec. 5, 2014), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=Stmt-05-12-2014 (last visited Nov. 2, 2021).

[138] *Id.*

[139] Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Case Information Sheet (Mar. 13, 2015) (noting Pre-Trial Chamber declined to confirm charges against Ali, charges against Muthaura were withdrawn in March 2013, and charges against Kenyatta were withdrawn in December 2014); Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Case Information Sheet (Apr. 2016) (noting Pre-Trial Chamber declined to confirm charges against Kosgey, and Trial Chamber terminated charges against Ruto and Sang in April 2016).

[140] Press Release, ICC-OTP, *ICC Trial Chamber V(B) refers Non-Cooperation of the Kenyan Government to the Assembly of States Parties to the Rome Statute* (Sept. 19, 2016), *available at* https://www.icc-cpi.int/news/icc-trial-chamber-vb-refers-non-cooperation-kenyan-government-assembly-states-parties-rome.

ICC custody in November 2020).[141] The referral has not led to any serious repercussions.

It is risky to have defendants stand trial, and the OTP is hopefully able to draw from prior experiences to build more durable cases in the future. Nonetheless, the results from the first two decades of ICC litigation are undeniably friendly to defendants. A 2019 report studied the thirty-five arrest warrants issued by the Court and found the following: three led to convictions under the Rome Statute's core crimes (in addition to some convictions for lesser offenses), eight resulted in charges not being confirmed, being withdrawn, or being vacated due to lack of evidence, four ended in acquittal, while most of the remainder have been thwarted by an inability to execute the warrants.[142] Direct litigation has allowed certain states to delay trials for years, disrupt the investigation efforts, and obtain favorable outcomes, while avoiding ramifications for noncompliance.

C. STATES ALSO USE PROXY AND SATELLITE LITIGATION TO CONTEST PROCEEDINGS INDIRECTLY

Though Israel informally cooperated in the early years of the Prosecutor's preliminary examination in Palestine,[143] the Israeli government opted to not directly litigate the Prosecutor's request for a territorial determination.[144] Instead, the Israeli government mobilized a campaign of proxy litigants: entities submitting amicus briefs on Israel's behalf included seven Rome Statute states parties, numerous academic institutions and associations (some of which had ties to the Israeli and

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[141] Press Release, ICC-OTP, *Situation in Kenya: Paul Gicheru surrenders for allegedly corruptly influencing ICC witnesses*, ICC-CPI-20201102-PR1540 (Nov. 2, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1540 (last visited Nov. 1, 2021).

[142] Tjitske Lingsma, *Welcome to the ICC "Facts and Figures"*, JUST. INFO. (May 27, 2019), *available at* https://www.justiceinfo.net/en/tribunals/icc/41532-welcome-to-the-icc-facts-and-figures.html (last visited Nov. 1, 2021).

[143] *See infra* Part VI.E.

[144] Israel publicly released a memo in response to the territorial determination request. *See* Press Release, State of Israel Office of the Att'y Gen., *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"* (Dec. 20, 2019), *available at* https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf (last visited Nov. 1, 2021).

U.S. governments[145]), scholars and former government officials with expertise on international law issues, and a Victims of Palestinian Terror group.[146]

It remains unclear how successful the proxy approach can be. Prior to Israel's attempt, Myanmar had used proxies to submit arguments contesting the Court's decision to open an investigation, but the Court held that this was an inappropriate place for amici submissions and that Myanmar should raise procedural objections in its own name.[147] The Court granted most of the requests to file in Israel's case, however, and seemed to give due weight to their arguments in reaching its decision.[148] Still, the Court ultimately held against Israel while referencing Israel's non-participation reprovingly.[149]

A second way to indirectly contest proceedings is to trigger satellite litigation. Former Sudanese President Omar al-Bashir's travel after the Chambers issued an arrest warrant against him forced the OTP to ask the

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[145] At least three have been connected to the U.S. or Israeli government: ECLJ (whose Chief Counsel is Trump attorney Jay Sekulow, who has also submitted briefing in the Afghanistan situation), the Israel Law Center/Shurat Hadin (leaks picked up by Palestinian media suggest Shurat Hadin has worked directly with the Mossad), and UKFLI (collaborated with Israel's Ministry of Foreign Affairs on past issues). *Id.* (noting submissions from ECLJ, Shurat Hadin, and UK Lawyers for Israel); *ACLJ'S Jay Sekulow Will Appear Before International Criminal Court This Week*, PRWEB (Dec. 1, 2019), *available at* https://www.prweb.com/releases/acljs_jay_sekulow_will_appear_before_international_criminal_court_this_week_defending_the_rights_of_u_s_soldiers/prweb16757327.htm (last visited Nov. 1, 2021); Asa Winstanley, *Israeli "law center" Shurat Hadin admits Mossad ties*, ELECTRONIC INTIFADA (Nov. 16, 2017), *available at* https://electronicintifada.net/blogs/asa-winstanley/israeli-law-center-shurat-hadin-admits-mossad-ties (last visited Nov. 1, 2021); Hilary Aked, *What is UK Lawyers for Israel's relationship to the Israeli government?*, MONDOWEISS (Mar. 12, 2019), *available at* https://mondoweiss.net/2019/03/lawyers-relationship-government/ (last visited Nov. 1, 2021).

[146] For a list of amicus submissions, see Situation in the State of Palestine, ICC-01/18, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence 2–3 (Feb. 20, 2020).

[147] Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision on requests for leave to submit amicus curiae observations ¶ 16 (Nov. 14, 2019).

[148] *See, e.g.*, Situation in the State of Palestine, ICC-01/18, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' ¶ 57 (Feb. 5, 2021).

[149] *Id.* at ¶¶ 29–30, 112.

Court to refer several states, including Uganda,[150] Djibouti,[151] South Africa,[152] and Jordan,[153] to the Security Council and ASP for declining to execute the warrant.[154] The process of making these noncooperation findings provided the noncompliant states, alongside interested amici, with the opportunity to raise head of state immunity arguments before the Court on al-Bashir's behalf.[155] Though the Court repeatedly struck down the immunity arguments, its inconsistent reasoning sparked debate in the international community and led South Africa to attempt to withdraw from the Court rather than execute arrest warrants that would lead to "regime change."[156] Thus, Sudan's experience reveals the potential for

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[150] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-267, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute 9 (July 11, 2016).

[151] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute 10 (July 11, 2016).

[152] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir 53 (July 6, 2017).

[153] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-309, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir 21 (Dec. 11, 2017).

[154] *See* Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), *available at* https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads- of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/ (last visited Jan. 16, 2022); Dapo Akande, *The Immunity of Heads of State of Nonparties in the Early Years of the ICC*, 112 AM. SOC'Y INT'L L. 172, 172–3 (2018).

[155] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal 11–14 (May 6, 2019) (noting submissions by Jordan and a large number of amici).

[156] *See* Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), *available at* https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads- of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/ (last visited Jan. 16, 2022); Dapo Akande, *The Immunity of Heads of State of Nonparties in the Early Years of the ICC*, 112 AM. SOC'Y INT'L L. 172, 172–3 (2018); *South Africa's decision to leave*

states to politicize and delegitimize aspects of the ICC's involvement through satellite litigation.

VI. Extrajudicial Engagement

Whether or not states adopt any of the above strategies, they may also seek to influence preliminary examinations and investigations by applying extrajudicial leverage. Extrajudicial actions include diplomacy in the ASP system, diplomacy in the Security Council system, interactions with the Court or Prosecutor behind the scenes, and assistance to the OTP in other investigations. Non-party states in particular have relied on these strategies in the preliminary examination phase, sometimes as a precursor to repudiation.[157]

A. STATE DIPLOMACY IN THE ASP INFLUENCES THE COURT'S DIRECTION

States exert diplomatic pressure within the ASP system to push for favorable outcomes at both the preliminary examination and investigation stages. For example, shortly after the Prosecutor signaled interest in investigating situations in Afghanistan, Palestine, and Colombia, eleven influential ICC parties, including the U.K., reportedly threatened to curtail the ICC's funding.[158] Over the next few years, while partnering with the Prosecutor's preliminary examination into U.K. conduct in Iraq, the U.K. government urged the OTP to adopt a "closure strategy" towards open-ended examinations and investigations and called on the OTP to accord greater respect to domestic investigations.[159] In December 2020, the OTP controversially shut down its U.K./Iraq inquiry

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ICC ruled 'invalid', BBC (Feb. 22, 2017), *available at* https://www.bbc.com/news/world-africa-39050408 (last visited Sept. 24, 2021).

[157] *See infra* Parts VI.C–E.

[158] *See* Elizabeth Evenson & Jonathan O'Donohue, *States shouldn't use ICC budget to interfere with its work*, AMNESTY INT'L (Nov. 23, 2016), *available at* https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/ (last visited Dec. 19, 2021).

[159] Andrew Murdoch, *UK statement to ICC Assembly of States Parties 17th session* (Dec. 5, 2018), https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session#:~:text=The%20United%20Kingdom%20is%20determined,Syria%2C%20Iraq%2C%20and%20Burma; Eduardo Reyes, *UK puts pressure on Hague court over 'lawfare'*, L. GAZETTE (Dec. 12, 2019), *available at* https://www.lawgazette.co.uk/news/uk-puts-pressure-on-hague-court-over-lawfare/5102467.article (last visited Oct. 23, 2021).

without seeking investigation, notwithstanding evidence that eligible crimes had been committed.[160] While it is impossible to gauge the impact of an individual piece of diplomatic pressure on the decision to drop the inquiry, human rights organizations have criticized the U.K.'s use of funding leverage to influence the OTP.[161]

Similarly, alongside its litigation efforts, Kenya attempted to work through the ASP system to alter the procedures of the ICC. The government of Kenya unsuccessfully lobbied the ASP to pass Rome Statute amendments enhancing head of state immunity, though it managed to pass a Rules of Procedure and Evidence amendment excusing leaders subject to summonses from personally appearing before the Court when doing so would conflict with their public duties.[162] There are clearly advantages to engaging actors within the ICC, either as an ASP member or by leveraging ASP allies.[163] While ASP members have more direct influence, non-parties like the United States routinely attend the Assembly as observers.[164] Of course, as the comparative experiences of the U.K. and Kenya suggest, the impact of diplomatic strategies may hinge on factors such as the state's leverage in the international community and influence as an ICC funder.

B. STATES LOBBY THE SECURITY COUNCIL FOR ARTICLE 16 DEFERRALS

In addition to leveraging relationships within the ASP, individual states and regional organizations have at times lobbied the Security Council for a deferral of an ICC investigation. Rome Statute Article 16

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[160] *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom*, ICC-OTP (Dec. 9, 2020), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last visited Oct. 23, 2021).

[161] *United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses*, HUM. RTS. WATCH (Dec. 10, 2020), *available at* https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses (last visited Oct. 23, 2021).

[162] *See* Helfer & Showalter, *supra* note 134, at 29–32.

[163] Other opportunities to influence the ICC through the ASP include participation in its Working Groups and direction of commissions such as the recent Independent Expert Review. *See supra* Part II; GROUP OF INDEPENDENT EXPERTS, *supra* note 9.

[164] *E.g.*, David Clarke, *U.S. to attend Hague court meeting as observer*, REUTERS (Nov. 16, 2009), *available at* https://www.reuters.com/article/us-usa-icc/u-s-to-attend-hague-court-meeting-as-observer-idUSTRE5AF30A20091116 (last visited Oct. 23, 2021).

permits the Security Council to initiate a twelve-month deferral of an ICC investigation via Chapter VII resolution.[165] The African Union lobbied for a deferral of the Sudan investigation, but the Security Council demurred, leading the African Union to unsuccessfully advocate for an amendment to Article 16 placing deferral power into the hands of the UN General Assembly when the Security Council "fails to act."[166] Kenya launched three separate campaigns for an Article 16 deferral into its situation in 2011, 2013, and 2015, backed by the African Union.[167] The Security Council again chose not to issue a deferral, but the efforts helped Kenya politicize the situation by garnering support for its stance that Western states were using the ICC to infringe on Kenya's sovereignty.[168] Thus, though the Security Council has never exercised its Article 16 powers, campaigning for a deferral can still serve a rhetorical and political purpose.

C. STATES REACH OUT PRIVATELY TO THE OTP TO EXERT INFLUENCE BEHIND THE SCENES

Beyond public diplomacy, states also seek to alter the focus of inquiries through informal contact with ICC actors. While cooperative states naturally work with the Prosecutor, it is striking that states not intending to participate in formal litigation may also reach out to the OTP, typically during the preliminary examination phase to discourage or delay investigation. In the early years of the preliminary examination in Georgia, the Russian government allowed the OTP to visit Moscow, submitted twenty-eight volumes of evidence of crimes committed by Georgians, and facilitated the submission of complaints by South

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[165] States have sought these in the past, but none have been granted. *See, e.g.*, UN Department of Public Information, *Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining* (Nov. 15, 2013), *available at* https://www.un.org/press/en/2013/sc11176.doc.htm (last visited Nov. 18, 2021).

[166] *See* African Union, *Decision on the Implementation of the Decisions on the International Criminal Court*, Doc. EX.CL/639(XVIII), Assembly/AU/Doc.334(XVI) 7 (Jan. 31, 2011), *available at* https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf (last visited Nov. 18, 2021).

[167] Helfer & Showalter, *supra* note 134, at 11–18.

[168] *Id.* at 17.

Ossetians concerning Georgian violence.[169] Through cooperation, Russia perhaps intended to direct the focus of the inquiry towards conduct by Georgians and spread the OTP's resources thin across a broad swath of evidence. The outreach also seemed to make the OTP reluctant to alienate Russia.[170] One OTP official acknowledged that major power influence "loomed large" in the early 2010s, during which time the OTP was hesitant to push for an investigation against Russia.[171] Only once the OTP ramped up involvement in Ukraine and expressed an intention to transition from preliminary examination to investigation in Georgia did Russia shift from informal engagement to hostility.[172] Major powers like Russia are not the only ones who perceive benefits from such forms of outreach; for example, Burundi continued to provide information to the OTP despite publicly announcing noncooperation and withdrawing from the Rome Statute.[173] States evidently use informal outreach to influence the scope of investigations or build a positive relationship with the OTP, even if they do not plan to comply with an eventual investigation.

D. STATES GENERATE GOOD WILL BY SUPPLYING ASSISTANCE IN OTHER DOMAINS

The OTP is receptive to other forms of extrajudicial support as well. The Bush administration treated the ICC with distrust and animosity in its early years of operation.[174] However, the U.S. began to relax its

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[169] Kevin Jon Heller, *Russia's Short-Sighted Approach to the Georgia Investigation*, OPINIOJURIS (Feb. 13, 2016), *available at* http://opiniojuris.org/2016/02/13/russias-short-sighted-approach-to-the-icc/ (last visited Nov 1, 2021); BOSCO, *supra* note 88, at 160.

[170] Contemporaneous OTP reports spoke optimistically of Russia's domestic investigative efforts despite a lack of prosecutions. PE Report 2015, *supra* note 4, at 58.

[171] BOSCO, *supra* note 88, at 174.

[172] *See supra* Part VII.A.

[173] *Report on Preliminary Examination Activities (2017)* 63, 67, ICC-OTP (Dec. 4, 2017) [hereinafter PE Report 2017], *available at* https://www.icc-cpi.int/itemsDocuments/2017- PE-rep/2017-otp-rep-PE_ENG.pdf (last visited Nov. 1, 2021).

[174] For example, the U.S. refused to formally engage with the Court, held up UNSC resolutions until it secured ICC immunity for peacekeepers, and negotiated a web of art. 98 agreements preventing other states from supporting the Court in situations concerning the U.S. *UN Peacekeepers exempted from war crimes prosecution for another year*, UN NEWS (June 12, 2003), *available at* https://news.un.org/en/story/2003/06/71102-un-peacekeepers-exempted-war-crimes-prosecution-another-

posture in President Bush's second term, allowing the Security Council to refer the situation in Sudan to the ICC in 2005 by abstaining from the vote.[175] Under President Obama, the U.S. improved relations further by providing various forms of support to the ICC: the U.S. attended the ASP as an observer for the first time in 2009,[176] voted in favor of the Security Council's referral of the situation in Libya to the ICC in 2011,[177] and helped to apprehend ICC fugitives,[178] assistance which the Prosecutor deemed "significant."[179]

These interactions engendered good will and a constructive working relationship between the Obama administration and the ICC. When Prosecutor Bensouda notified U.S. officials in early 2013 that she was reviewing evidence of detainee abuse by U.S. personnel in Afghanistan, the U.S. discreetly sent a delegation of officials to meet with Deputy Prosecutor James Stewart to persuade the OTP "not to publish the allegations."[180] In her ensuing 2013 Preliminary Examinations Report, Prosecutor Bensouda conspicuously used the passive voice without naming the U.S. in the section detailing crimes committed by "international forces," noting that "[i]t has been alleged that, between 2002 and 2006, some of the detainees captured in Afghanistan were subjected to interrogation techniques which may constitute torture or inhumane treatment."[181] The Prosecutor ultimately outlined the

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year#:~:text=Currently%2C%20members%20of%20UN%-20peacekeeping,adopted%20unanimously%20a%20year%20ago (last visited Nov. 3, 2021); Coal. for the Int'l Crim. Ct., *US Bilateral Immunity or So-called Article 98 Agreements*, GLOB. POL'Y F. (Apr. 18, 2003), *available at* https://archive.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm (last visited Nov. 3, 2021).

[175] *See* S.C. Res. 1593 (Mar. 31, 2005).

[176] Clarke, *supra* note 164.

[177] *See* S.C. Res. 1970 (Feb. 26, 2011).

[178] Fred Ojambo, *U.S. Hands Over Lord's Resistance Army Leader to Ugandan Forces*, BLOOMBERG (Jan. 14, 2015), *available at* https://www.bloomberg.com/news/articles/2015-01-14/u-s-hands-over-lord-s-resistance-army-leader-to-ugandan-forces (last visited Oct. 28, 2021).

[179] Alissa de Carbonnel, *ICC calls on supporters to rally if Trump withdraws backing*, REUTERS (Jan. 26, 2017), *available at* https://www.reuters.com/article/us-icc-usa/icc-calls-on-supporters-to-rally-if-trump-withdraws-backing-idUSKBN15A2U9 (last visited Oct. 28, 2021).

[180] David Bosco, *Is the ICC Investigating Crimes by U.S. Forces in Afghanistan*, FOREIGN POL'Y (May 15, 2014), *available at* https://foreignpolicy.com/2014/05/15/is-the-icc-investigating-crimes-by-u-s-forces-in-afghanistan/ (last visited Oct. 28, 2021).

[181] *Report on Preliminary Examination Activities (2013)* 13, ICC-OTP (Nov. 25, 2013) [hereinafter PE Report 2013], *available at* https://www.icc-

allegations against the U.S. in her 2014 Preliminary Examinations Report, but she did so by citing public documents from the U.S. Senate Armed Service Committee's inquiry;[182] in other words, the secret was out, so the U.S. could not blame the Prosecutor for reputational harm associated with the allegations. The experience of the Obama administration suggests a potential willingness by the OTP to work to accommodate the interests of states–even non-parties–who lend valuable support to the OTP's efforts across other investigations, though such accommodation may not always be possible.

E. NON-PARTY STATES RELYING ON EXTRAJUDICIAL ENGAGEMENT FACE MINIMAL RISKS

In the early years of the Palestinian preliminary examination, Israel facilitated a visit from OTP staff to Israel and Palestine, submitted evidence to the OTP of crimes by Hamas and other pro-Palestine armed groups, contested allegations against the Israel Defense Forces, and provided information on Israel's domestic inquiries.[183] The Prosecutor nonetheless concluded in 2019 that there was a basis to proceed with an investigation in Palestine.[184] In response to Prosecutor's push for an investigation, hardline pro-Israel advocates have argued that Israel's policy of engagement failed,[185] but it is unclear how the Israeli government is worse off for its efforts. During Israel's five years of contact, the Prosecutor consistently declined to investigate alleged Israeli crimes in the Gaza flotilla raid, despite a referral of the situation to the

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cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF (last visited Oct. 31, 2021).

[182] *Report on Preliminary Examination Activities (2014)* 22, ICC-OTP (Dec. 2, 2014) [hereinafter PE Report 2014], *available at* https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf (last visited Oct. 31, 2021).

[183] *See* PE Report 2015, *supra* note 4, at 17; PE Report 2018, *supra* note 76, at 65; *Report on Preliminary Examination Activities (2019)* 57, ICC-OTP (Dec. 5, 2019) [hereinafter PE Report 2019], *available at* https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf (last visited Oct. 31, 2021).

[184] *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*, *supra* note 58.

[185] *See, e.g.*, Caroline Glick, *A five-step plan to fight the ICC*, JEWISH NEWS SYNDICATE, *available at* https://www.jns.org/opinion/a-5-step-plan-to-fight-the-icc/ (last visited Nov. 1, 2021).

Court by the Comoros.[186] Meanwhile, repeated interaction allowed Israel to form a deeper understanding of the inner workings of the ICC and compelled the OTP to expend resources examining conduct by actors like Hamas.[187] Though the OTP ultimately decided to seek an investigation, Israel presumably managed the above without providing any information that the OTP could not otherwise access and retained the flexibility to adopt a hardline stance when the OTP pushed for an investigation. One could argue that Israel legitimized the OTP's eventual push for an investigation by not repudiating the OTP from the start, but it is difficult to see how that cost will materialize.

The examples of non-party states like Russia, the U.S., and Israel, who each quickly transitioned from informal engagement to total repudiation of the ICC,[188] illustrate why states objecting to a preliminary examination may be willing to engage with the Prosecutor. Through engagement, states can spend years attempting to delay and redirect the focus of an investigation while straining the OTP's resources. States may then retreat to the hostile posture that they otherwise would have adopted as soon as the OTP pushes for an investigation.

VII. Repudiation

Some states choose to abandon any pretense of constructive engagement and instead repudiate the ICC, seeking to delegitimize and derail its investigations. To understand the tradeoffs of the repudiation approach, it is necessary to first outline the broad range of actions beneath the umbrella of repudiation. After surveying the tools available to those choosing to repudiate the Court, it is then possible to analyze the advantages and drawbacks of this approach for states in different diplomatic positions.

A. STATES DRAW FROM A BROAD SET OF OPTIONS TO REPUDIATE THE ICC

The harbinger of a transition to repudiation is typically a public denouncement of the ICC's claim of jurisdiction. As described, Russia

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[186] *See Notice of Prosecutor's Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019*, ICC-OTP (Dec. 2, 2019), *available at* https://www.icc-cpi.int/CourtRecords/CR2019_07298.PDF (last visited Nov. 1, 2021).

[187] *See* PE Report 2020, *supra* note 3, at 56.

[188] *See infra* Part VII.

communicated extensively with the OTP in the early years of the Georgian investigation.[189] However, the Russian government soured on the ICC after its unfavorable determinations in Ukraine and potential to become involved in Syria, as the Foreign Ministry began issuing statements in 2015 calling the ICC's perspective "far from reality" and accusing it of "taking the aggressor's side."[190] By the end of 2016, days after the OTP determined that the situation in Ukraine amounted to an international armed conflict,[191] Russia withdrew its signature from the Rome Statute (largely a symbolic gesture, as Russia never actually ratified the treaty), claiming that the ICC was "ineffective and one-sided" and expressing solidarity with movements within the African Union to abandon the Court.[192] In addition to attacking the ICC's fairness and efficacy, states may refuse to allow the OTP to access the region under investigation and may restrict access from other civil society and aid organizations to substantiate their verbal attacks on the Court with more tangible stakes.[193]

Despite not formally engaging with the ICC, states hoping to oppose the proceedings may also seek to enhance the credibility of their rhetoric by publicly releasing legal arguments rebutting the ICC's position. Israel, for example, responded to the Prosecutor's request for a territorial ruling in Palestine by releasing a thirty-four-page memo contesting ICC jurisdiction.[194] Similarly, a month after the ICC announced a preliminary examination in the Philippines, President Duterte publicly released a brief

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[189] *See supra* Part VI.C; BOSCO, *supra* note 88, at 160.

[190] *ICC Prosecutor Visits Georgia*, U.N. ASSOC. OF GEORGIA (Oct. 15, 2015), *available at* https://old.civil.ge/eng/article.php?id=28657 (last visited Nov. 1, 2021); Ministry of Foreign Affairs of the Russian Federation, *Briefing by Foreign Ministry Spokesperson Maria Zakharova* (Jan. 29, 2016), *available at* https://www.mid.ru/en/press_service/spokesman/briefings/-/asset_publisher/D2wHaWMCU6Od/content/id/2039123#7 (last visited Nov. 1, 2021).

[191] PE Report 2016, *supra* note 54, at 35.

[192] Ministry of Foreign Affairs of the Russian Federation, *Statement by the Russian Foreign Ministry* (Nov. 16, 2016), *available at* https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Nov. 1, 2021).

[193] Sudan expelled a dozen aid organizations from Darfur after arrest warrants were issued against Sudanese government officials. *Sudan Expels Aid Groups in Response to Warrant*, NBC NEWS (Mar. 3, 2009, 3:23PM) *available at* https://www.nbcnews.com/id/wbna29492637 (last visited Nov. 1, 2021); BOSCO, *supra* note 88, at 155.

[194] State of Israel Office of the Att'y Gen., *supra* note 144.

setting forth his basis for opposing the ICC's exercise of jurisdiction.[195] While such documents do not carry the same weight in Court as a formal submission, proxies may raise the same arguments on a state's behalf.[196]

States have also tried to incite movements to withdraw from the ICC. Burundi and the Philippines both withdrew their signatures after the OTP opened preliminary examinations into their countries,[197] while South Africa and Kenya lobbied the African Union for mass withdrawal.[198] As mentioned, Russia expressed solidarity with these other movements through its symbolic withdrawal.[199] Mass withdrawal has failed to materialize to date, however, as Burundi and the Philippines are the only states parties who followed through on threats to withdraw.[200]

Sudan, meanwhile, undermined the ICC's legitimacy by flouting its arrest warrants. Sudanese head of state Omar al-Bashir traveled widely to

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[195] *Statement of the President of the Republic of the Philippines on the Jurisdiction of the International Criminal Court* (Mar. 13, 2018), *available at* https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal/ (last visited Sept. 27, 2021).

[196] ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, Rule 103; *see supra* Part V.C.

[197] *Report on Preliminary Examination*: *Burundi*, ICC-OTP (Jan. 17, 2021), *available at* https://www.icc-cpi.int/Burundi (last visited Nov. 1, 2021); *Report on Preliminary Examination*: *The Philippines*, ICC-OTP (Jan. 1, 2021), *available at* https://www.icc-cpi.int/Philippines (last visited Nov.1, 2021).

[198] Heidi Vogt, *Kenyan Parliament Votes to Withdraw from International Criminal Court,* WALL ST. J. (Sept. 5, 2013), *available at* https://www.wsj.com/articles/kenyan-parliament-votes-to-withdraw-from-international-criminal-court-1378413586 (last visited Nov. 1, 2021); *African Union Backs mass withdrawal from ICC*, BBC (Feb. 1, 2017), *available at* https://www.bbc.com/news/world-africa-38826073 (last visited Nov. 1, 2021).

[199] Ministry of Foreign Affairs of the Russian Federation, *Statement by the Russian Foreign Ministry* (Nov. 16, 2016), *available at* https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Oct. 28, 2021).

[200] Gambia and South Africa both announced decisions to withdraw from the ICC but ultimately rescinded these decisions before withdrawal took effect. Elise Keppler, *Gambia Rejoins ICC*, HUM. RTS. WATCH (Feb. 17, 2017), *available at* https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc (last visited Oct. 30, 2021); *South Africa revokes ICC withdrawal after court ruling*, BBC (Mar. 8, 2017), *available at* https://www.bbc.com/news/world-africa-39204035#:~:text=South%20Africa%20has%20revoked%20its,ICC%20pursued%20%22regime%20change%22 (last visited Oct. 30, 2021); *see Report on Preliminary Examination*: *Burundi*, ICC-OTP (Jan. 17, 2021), *available at* https://www.icc-cpi.int/Burundi (last visited Nov. 1, 2021); *Report on Preliminary Examination*: *The Philippines*, ICC-OTP (Jan. 1, 2021), *available at* https://www.icc-cpi.int/Philippines (last visited Nov.1, 2021).

ICC states in spite of the warrant out for his arrest, even participating in a 2009 Arab League summit that had UN Secretary-General Ban Ki-moon in attendance.[201] The African Union decided its member states were not obligated to enforce the warrants, leading to the aforementioned litigation between the OTP and states that refused to enforce the warrants on the basis of head of state immunity.[202] States like South Africa then began to consider withdrawal over the immunity issue.[203] The OTP's main recourse to al-Bashir's defiance was to plead for assistance to a Security Council that had cooled considerably on supporting the ICC by 2014.[204] The Sudan investigation grinded to such a halt that the OTP had to issue an ignominious clarification that it "has not fully suspended investigations into the alleged crimes committed in Darfur" but admitted "with its finite resources and heavy case-load, it is difficult for the Office to fully commit to active investigations of the crimes in Darfur."[205] Evidently, Sudan's approach was successful for a time at demoralizing the OTP and impeding its investigation.

States repudiating the ICC have also taken more direct measures to hamstring the ICC's ability to conduct an investigation. One such tactic is to provide amnesty for targets of investigations. Grants of domestic amnesty do not have any bearing on the OTP's authority to prosecute an individual,[206] but it can create domestic legal obligations that deter actors from cooperating with the Court. For example, the Court repeatedly struck down Saif Gaddafi's arguments that his amnesty rendered his case inadmissible, but the amnesty ostensibly prevents local actors from assisting the ICC in his extradition, and he remains at large.[207]

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[201] BOSCO, *supra* note 88, at 156.

[202] *Id.* at 151; *see supra* Part V.C.

[203] *South Africa to withdraw from war crimes court*, BBC (Oct. 21, 2016), *available at* https://www.bbc.com/news/world-africa-37724724?ocid=socialflow_twitter (last visited Oct. 29, 2021).

[204] *See, e.g.*, *Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), *available at* https://www.bbc.com/news/world-middle-east-27514256.

[205] *Twenty-First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 7, ICC-OTP (2015), *available at* https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Dafur_%20Sudan.pdf (last visited Oct. 29, 2021).

[206] *See* Press Release, ICC-OTP, *Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC*, ICC-CPI-20200309-PR1518 (Mar. 9, 2020), *available* https://www.icc-cpi.int/news/saif-al-islam-gaddafi-case-icc-appeals-chamber-confirms-case-admissible-icc#:~:text=Today%2C%209%20March%202020%2C%20the,the%20admissibility%20of%20this%20case.

[207] *Id.*

Similarly, leaders of states have relied on head of state immunity arguments to resist arrest warrants.[208]

In a controversial campaign to hamper the Court's ability to conduct future investigations, the U.S. negotiated a series of bilateral immunity agreements in the early years of the ICC to take advantage of Rome Statute Article 98,[209] which prohibits the Court from requesting assistance from a state in violation of its obligations to another state under international law.[210] Importantly, Article 98 agreements do not actually prevent the ICC from having jurisdiction over a case.[211] Therefore, these agreements cannot be used to legally preclude the ICC from opening an investigation, though they might prevent states from helping the OTP gather evidence.[212] Dozens of agreements remain in place barring countries from providing assistance to the Court in investigations implicating the U.S.[213]

Finally, a particularly harsh measure a few states have taken to repudiate the ICC is the use of sanctions. As discussed, the U.S. developed a tentative working relationship with the ICC under President Obama, albeit navigating tensions over the OTP's involvement in Afghanistan.[214] When the OTP intensified inquiries into the situations in Afghanistan and Palestine, the Trump administration pivoted towards repudiation, issuing a June 2020 executive order applying sanctions against those who assist ICC investigations as well as agents and the

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[208] *See supra* Part V.C (describing proxy litigation regarding al-Bashir's claim to head of state immunity); *Statement of the President of the Republic of the Philippines on the Jurisdiction of the International Criminal Court* (Mar. 13, 2018), *available at* https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal/ (last visited Sept. 27, 2021) ("Moreover, the ICC cannot subject the President of the Philippines to any investigation during his tenure following the doctrine of the immunity from suit of the President while in office.").

[209] BOSCO, *supra* note 88, at 73–74.

[210] Rome Statute, *supra* note 10, at art. 98.

[211] *See* Situation in the Republic of Afghanistan, ICC-02/17-7-Conf-Exp, Request for authorisation of an investigation pursuant to article 15, 27 n.47 (Nov. 20, 2017), *available at* https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF (last visited Oct. 27, 2021) (regarding the OTP's interpretation of the relationship between SOFAs and ICC jurisdiction).

[212] *Id.*

[213] *International Criminal Court – Article 98 Agreements Research Guide*, GEO. L. LIBR. (Oct. 23, 2018), *available at* https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099 (last visited Oct. 27, 2021).

[214] *See supra* Part VI.D.

family members of agents acting on behalf of the ICC.[215] Israeli Prime Minister Netanyahu called for citizens of other democracies to pressure their governments into sanctioning the ICC as well.[216] Still, the extreme measure of sanctioning the ICC's institutional actors is uncommon, has been widely condemned,[217] and has potential to backfire.[218] States have also tried to sanction other states directly, as Sudan threatened Kenya with trade and economic sanctions after the Kenyan High Court issued arrest warrants against al-Bashir in compliance with the ICC.[219]

B. STATES USE REPUDIATION TO BENEFIT FROM WEAK ENFORCEMENT AND DELEGITIMIZATION

Having outlined the range of repudiation tactics available to states, it is possible to analyze their strengths and weaknesses. Before digging into specifics, it is worth noting that one overarching appeal of the repudiation approach stems from its nature as a blunt instrument: many of these brash tactics yield gratifying short-term benefits, like making repudiating leaders appear tough in front of constituents. The costs, on the other hand, may not always be as immediate or as plainly visible.

The simplest advantage of the antagonistic approach is that the ICC relies on states to enforce its authority, and so powerful repudiators may face very few consequences for noncooperation. If the repudiating state is party to the Rome Statute, the Court can make a referral for noncooperation to the ASP, or if the investigation was opened upon direction of the Security Council, the OTP can criticize the state's noncooperation in its reports to the Security Council.[220] In either instance, a hostile state may be able to use its diplomatic position to

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[215] Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

[216] *See* Oliver Holmes, *Netanyahu calls for sanctions over ICC war crimes investigation*, GUARDIAN (Jan. 21, 2020), *available at* https://www.theguardian.com/world/2020/jan/21/netanyahu-calls-for-sanctions-over-icc-war-crimes-investigation-israel (last visited Oct. 27, 2021).

[217] *See Scores of countries back ICC in face of US sanctions,* AL JAZEERA (June 24, 2020), *available at* https://www.aljazeera.com/news/2020/06/scores-countries-icc-face- sanctions-200624025450554.html (last visited Oct. 27, 2021).

[218] *See infra* Part VII.C (discussing states' responses to U.S. sanctions).

[219] Luis Moreno-Ocampo, *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)* 5 (Dec. 15, 2011), *available at* https://www.icc-cpi.int/NR/rdonlyres/726561CB-7FB5-46BC-9E68-C03279343001/284124/20111215ProsecutorsstatementtoUNSConDarfur1.pdf (last visited Oct. 27, 2021).

[220] Rome Statute, *supra* note 10, at art. 87.

overcome whatever pressure the international community might apply. Indeed, the government of Sudan was able to spurn ICC authority for over a decade because its power within the African Union and Arab League insulated it from the ICC's reach.[221] Noncompliance became even more viable after Russia, China, and the U.S. pivoted away from the ICC in the late 2010s,[222] making Security Council referral unlikely in new territories and reducing pressure to comply in existing situations.

A more abstract advantage to repudiating the ICC is the preservation of objections to its authority. The OTP has justified investigations using theories of international law rejected by some states: against non-party states such as the U.S. acting on the territory of a state party;[223] against non-party states such as Myanmar for conduct that flows into the territory of a state party;[224] where territorial bounds are contested, as in Palestine;[225] and against heads of state like al-Bashir.[226] Thus, states may seek to avoid conferring legitimacy upon the ICC in situations predicated on theories of jurisdiction that they oppose. The legitimacy issue also extends to smaller international law determinations made over the course of ICC involvement: Russia's symbolic withdrawal came two days after the OTP's finding that the conflict in Crimea amounted to an international

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[221] *See supra* Part VII.A.

[222] *See, e.g.*, *Russia and China Veto UN Move to Refer Syria to ICC*, BBC (May 22, 2014), *available at* https://www.bbc.com/news/world-middle-east-27514256; Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

[223] Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan ¶¶ 4, 79 (Mar. 5, 2020).

[224] Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute of the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ¶ 62 (Nov. 14, 2019); *see* Tanushree Nigam, *Basis and Implications of the ICC's Ruling Against Myanmar*, PUBLIC INT'L L. & POL'Y GROUP (Dec. 22, 2019), https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar (last visited Jan. 16, 2022);

[225] *See supra* Part V.C; Press Release, ICC, *ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine*, ICC-CPI-202100205-PR1566 (Feb. 5, 2021), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1566 (last visited Oct. 26, 2021).

[226] Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal 26–27 (May 6, 2019); *see supra* Part V.C.

armed conflict with Russia as an occupying force.[227] Similarly, many believe the Trump administration's hardline stance came as much in response to the request for a territorial determination in Palestine as in response to the ICC's investigation in Afghanistan.[228] For these and other reasons, a handful of states have settled into a scorched-earth posture of repudiation towards the ICC.

C. STATES CHOOSING REPUDIATION POTENTIALLY FACE SIGNIFICANT COSTS

Notwithstanding the advantages of a hostile posture, this Article has identified numerous instances of states with adverse objectives to the OTP choosing to engage with the Court in some fashion.[229] Indeed, an entirely antagonistic approach sacrifices certain leverage points. To assess the costs of repudiation, it is important to keep in mind that considerations depend on a state's position. Some states may take a hardline stance to the ICC as a matter of regime survival, because its investigations implicate crimes by their leadership.[230] Such states are in a more desperate position than major powers,[231] who may take a hardline stance not because there is serious threat of the OTP bringing their citizens before the Court without their consent, but because its investigations interfere with their foreign policy objectives or impose reputational harms.

Some states may look to al-Bashir's fifteen years of ICC resistance as an example favoring total repudiation, but it is important not to overlook the implications of this policy. The government of Sudan, having committed heinous crimes, became a pariah state ostracized by

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[227] *See* PE Report 2016, *supra* note 54, at 35; *Statement by the Russian Foreign Ministry*, RUSS. MINISTRY OF FOREIGN AFF., (Nov. 16, 2016), *available at* https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (last visited Oct. 30, 2021).

[228] *See* Ward, *supra* note 2.

[229] *See supra* Part VI; *see, e.g.*, *ICC prosecutor suspends probe into Philippines drugs war*, REUTERS (Nov. 19, 2021), *available at* https://www.reuters.com/world/asia-pacific/icc-prosecutor-suspends-probe-into-philippines-drugs-war-2021-11-19/ (last visited Dec. 20, 2021) (reporting that OTP suspended its Philippines investigation after receiving an Article 18 deferral request from Philippines in November 2021, two years after Philippines withdrew from the ICC).

[230] Sudan, for example. *See supra* Part VII.A.

[231] *See supra* Part VII.A (discussing repudiation of the ICC by Russia and the U.S.).

international institutions,[232] though, admittedly, it was able to rely on its power in the AU and Arab League to stave off the ICC's enforcement efforts for several years.[233] Many smaller states do not have the regional influence necessary to replicate the longevity of the al-Bashir regime as an enemy of the international community. A state potentially facing ICC investigation that has not squandered all goodwill in the international sphere may prefer a more moderate course, even if it does not want to formally engage with the Court, to prevent hostility with one international institution from compounding across others. Still, as long as dictators remain in power who have committed human rights abuses for which there is no just resolution short of regime change, one would realistically expect a subset of pariah states to continue to repudiate the ICC.

As for the second batch of states–major powers with foreign policy objectives and reputational interests implicated by the ICC–a posture of hostility is not a given, and it may relinquish a fair amount of leverage. The sanctions regime of the United States, for example, simultaneously emboldened the ICC and locked the ICC into its course of action. Sixty-seven countries, including Canada and the U.K., issued a joint statement in support of the ICC and in condemnation of the Trump administration's sanctions;[234] such an extreme posture by the U.S. evidently brought about its own reputational harms. Additionally, the OTP faced steep audience costs if it wanted to search for a compromise in the Afghanistan situation. To succumb to U.S. sanctions would have sent the message that any state hoping to deter an investigation should start by sanctioning ICC

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[232] For example, Sudan is heavily indebted to the IMF, World Bank, and African Development Bank. Sanctions by the international community against the al-Bashir regime prevented Sudan from receiving debt forgiveness, which in turn prevented Sudan from accessing additional funds. *See U.S. move is first step on Sudan's long road to get debt relief*, REUTERS (Dec. 14, 2020), *available at* https://www.reuters.com/article/sudan-usa-imf-int/u-s-move-is-first-step-on-sudans-long-road-to-get-debt-relief-imf-idUSKBN28O2PQ (last visited Oct. 30, 2021).

[233] *See supra* Part VII.A; BOSCO, *supra* note 88, at 157–159.

[234] *See Scores of countries back ICC in face of US sanctions*, *supra* note 217; ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT 57 (Apr. 2021), *available at* https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf ("Numerous interlocutors . . . told us that the net effect [of sanctions] was to prompt numerous states, including many that had been expressing concerns about the Court's performance and the need for reform, to rally in defense of the Court.").

officials.[235] Lastly, forcing allies into the awkward position of defending the Court in defiance of the U.S. can only serve to erode the strength the U.S. derives from its multilateral relationships over the long term.[236]

Moving beyond the U.S. government's particular experience, the possible risks of repudiation are perhaps best understood in light of the advantages of other forms of engagement along the cooperation continuum. The self-referral experiences of Uganda and Ukraine reflect that the OTP responds kindly to collaboration, working with those it perceives to be allies of its investigations.[237] Similarly, the U.K.'s partnership efforts suggest that the OTP prefers not to spar with major powers when it can avoid doing so, but hostile tactics close off the OTP's options to avoid escalation.[238] Additionally, Kenya and Libya's litigation strategies expose the unfortunate reality that the OTP has at times struggled to impose its authority upon unwilling states, even those who participate in the Court's formal procedures.[239] Finally, the U.S. government's own experience during the Obama administration reveals that a state can develop a relationship with the ICC through extrajudicial, informal channels of influence that can potentially be leveraged to reduce certain threats from the ICC, including reputational harms.[240] While many states deploy a package of strategies across the continuum depending on their situation, a commitment to repudiation tactics may come at the cost of the flexibility inherent in less confrontational postures.[241] A handful of regimes have opted for the convenience and

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[235] *See* Press Release, ICC-OTP, *International Criminal Court Condemns US Economic Sanctions*, ICC-CPI-20200902-PR1535 (Sept. 2, 2020), *available at* https://www.icc-cpi.int/news/international-criminal-court-condemns-us-economic-sanctions (stating that the sanctions are "another attempt to interfere with the Court's judicial and prosecutorial independence" and assuring that the "Court continues to stand firmly by its personnel and its mission of fighting impunity").

[236] *See* ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT, *supra* note 234, at 54–55. ("[T]he United States' relationship with the ICC is both affected by, and is a part of, its wider approach to multilateral engagement and other international organization. The great majority of U.S. friends and allies . . . are Rome Statute parties and are committed to the realization of the Court's mission.").

[237] *See supra* Part III.

[238] *See supra* Part IV.

[239] *See supra* Part V.A.

[240] *See supra* Part VI.C.

[241] *See* ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC: 2021 REPORT, *supra* note 234, at 57 ("U.S. attacks on the Court . . . have come at significant cost to the U.S. reputation and to this country's ability to be an effective voice on issues of importance to it").

disruptive effect of repudiation tactics, and some have found success doing so. Still, for the reasons above, states with objectives in tension with the ICC often prefer various forms of constructive engagement with the Court and the Prosecutor over total repudiation.

VIII. Conclusion

The actions that states take to influence the ICC can be understood on a continuum from cooperation to repudiation. Analysis of these strategies across five categories on the continuum (self-referral, partnership, litigation, extrajudicial engagement, and repudiation) reveals certain contextual factors that shape states' postures toward the Court. This analysis in turn helps explain why states might choose to consistently rely on one specific category of action, deploy a package of strategies across the continuum in outwardly incongruous ways, or alter course dramatically over the life cycle of ICC involvement.

States hoping to leverage OTP involvement may self-refer a situation before it has drawn ICC scrutiny. Uganda and Ukraine utilized self-referral and ad hoc acceptance of the ICC's jurisdiction to bring OTP pressure to bear on rival actors, amplify positive perceptions of their roles in the conflict, and obtain favorable international legal determination.[242] Meanwhile, other states hoping to preserve their standing in the ASP have found success partnering with the OTP to develop domestic justice mechanisms at the preliminary examination stage. Partnership with the OTP under the principle of positive complementarity can serve the twin aims of benefitting from ICC support in a transitional justice setting, as Colombia found, and staving off ICC investigation, as in the case of the U.K.[243] However, partnership requires substantial commitment, skilled bargaining, and a willingness to compromise on the OTP's priorities. Otherwise, the partnership may founder and trigger investigation, as it did for Nigeria.[244] As a situation transitions into the investigation phase, the experiences of Kenya and Libya reveal that direct litigation can offer significant upside, such as getting cases dismissed on grounds of inadmissibility or insufficient evidence.[245] The risks inherent in litigation are mitigated both by the Court's struggles with enforcement and by the ability for hostile states to litigate by proxy, as demonstrated by Israel and Sudan.[246]

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[242] *See supra* Part III.
[243] *See supra* Part IV.
[244] *Id.*
[245] *See supra* Part V.
[246] *Id.*

An array of extrajudicial actions is also available to states at every stage of ICC involvement. While most states use extrajudicial tactics in some form, such as the U.K. leveraging its power in the ASP, it is particularly noteworthy that non-party states with serious objections to ICC involvement, including Russia, Israel, and the U.S., have relied on extensive extrajudicial engagement to try to exert influence over the Court and the OTP.[247] Still, these states and others have at times turned to strategies of repudiation, seeking to derail ICC involvement. Repudiation offers apparent advantages in thwarting investigations, but comes with significant costs, including the potential sacrifice of the benefits of other strategies along the cooperation continuum.[248]

Though the foregoing analysis necessarily brought to light some of the ICC's weaknesses, it is a testament to the ICC's institutional strength that an overwhelming majority of states remain committed to the Rome Statute and broadly cooperate with the Court's efforts. State support has provided the OTP with the necessary backing to seek to hold powerful states accountable for grave violations of international criminal law, an experiment which will test the Court's durability in the coming years. As states recalibrate their strategies at this transitional moment, they should glean from the first two decades of the Court's existence that engagement with a multilateral institution like the ICC is never risk-free, but that nuanced forms of constructive engagement may significantly advance states' individual interests, as well as the interests of global justice.

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[247] *See supra* Part VI.

[248] *See supra* Part VII.

PROFESSOR PATRICIA HASSETT PIONEER IN INTERNATIONAL AND COMPARATIVE LAW, TECHNOLOGY AND LAW, AND THE LEGAL PROFESSION

Elizabeth A. Stawicki, JD*

This article provides an in-depth profile of an overlooked pioneer who was among the first women law professors at Syracuse University and who forged new paths in international and comparative law, technology and law, and women in the legal profession—Patricia Hassett. It begins with her roots in Elmira, N.Y., and goes on to detail her career as a woman of "firsts" in starting as the first female Chemung County attorney to being among the first women law faculty at Syracuse University. The article then goes on to explain her prescient thinking in using electronic data to improve the administration of justice not only in the U.S., but also abroad, most notably in the U.K., where she also became a barrister.

INTRODUCTION

It was a great honor to receive the inaugural Patricia Hassett Legal Fellowship at Syracuse University, and so I wanted to learn more about this pioneer—her career as an attorney, academic, and her teaching philosophy. Unfortunately, she passed away in July 2009 so I could not interview her, but through her writing, research, and the people who knew her, I came to learn that Professor Hassett was an overlooked trailblazer whose prescient thinking served as the basis for national and international trends in law and technology.

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I. GROWING UP IN ELMIRA, NY

Patricia Hassett grew up in Elmira, New York, with her three siblings. Her father and grandfather were prominent business and civic leaders in Elmira.[1] "They were businessmen who happened to be lawyers," said Hassett's sister, Karen Meyer. "They got their law degrees to help run their businesses." Hassett's grandfather insisted that all his children, boys and girls alike, go to college, according to Meyer. At the beginning of the 20th century, it was unusual for women to pursue higher education. But the imperative to attend college was passed down to the next generation and it was taken for granted that Patricia and her siblings would pursue Bachelors' degrees and even beyond.[2] Hassett majored in philosophy at Elmira College. She did not place well there so she decided to take the legal entrance exam and discovered that if philosophy was not a good fit, the law was. She excelled on the entrance exam and decided to pursue law at Syracuse University. Hassett would later tell the *Elmira Star-Gazette* on June 23, 1966, that while some of her family and friends tried to "steer her away from the law field," her father did not. "He always told me that I could do anything I wanted, with his blessing, if I could give him a reasonable basis for my action," she said.[3]

Having a reasonable basis for action would be a concept that she would later employ to improve the administration of the legal system.

II. SYRACUSE UNIVERSITY COLLEGE OF LAW AND BREAKING GROUND

A. TRAILBLAZER FOR WOMEN IN THE LEGAL PROFESSION

Hassett was the only woman in the class of Syracuse University College of Law in 1963. That year, women made up only 4% of first year law students in the United States.[4] Hassett worked on the Law Review and graduated in 1966 only to find that law firms in the area did not want

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[1] *J. John Hassett Jr. Dies at 53; City Business, Civic Leader*, Elmira Star-Gazette, July 29, 1965.

[2] Virtual Interview with Karen Meyer (May 31, 2022).

[3] Peggy Gallagher, *Woman Assistant DA Will Be "Just One of the Club"*, ELMIRA STAR-GAZETTE (June 23, 1966).

[4] By 1973, the percentage of women entering law school had risen to 20%; in 2021, that percentage was 55.3%, *Women in the Legal Profession*, American Bar Association Profile of the Legal Profession (Feb 8, 2023), *available at* https://www.abalegalprofile.com/women.php#anchor3.

to hire her. "She did apply to some firms in Elmira, but they weren't interested," said Meyer. "None of the firms had a female on their staff–female partner, female associate."[5] But the local county attorney's office did hire Hassett, and she served as the first woman assistant district attorney in Chemung County. She was a prosecutor but also enjoyed appellate work, arguing before the New York Court of Appeals in Albany. Yet obtaining the position did not mean she received the respect that should have gone with the position. In her 1966 interview with the *Elmira Star-Gazette*, she recounted calling the state Court of Appeals for a document. She identified herself on the call as, "Patricia Hassett, Assistant District Attorney of Chemung County." The clerk replied: "I doubt it."[6]

B. THE CALLS TO TEACH

After a few years in government, Hassett felt called to teach. She found similarities between appellate work and teaching—preparing presentations and being flexible enough to field questions.[7] To obtain a teaching position, Hassett felt she needed to pursue a Master of Laws degree from Harvard, which she completed. Soon after, the Dean of West Virginia's College of Law called her "out of the blue" and offered her an assistant professor position. She accepted, and in 1973, she became the first woman law professor at West Virginia University College of Law.[8]

During the 1960s and early 1970s, a wave of activism in the women's rights movement was underway.[9] Laws were catching up as well, particularly in higher education. Patterned after the Civil Rights

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[5] Virtual Interview with Karen Meyer (May 31, 2022).

[6] Peggy Gallagher, *Woman Assistant DA Will Be "Just One of the Club"*, ELMIRA STAR-GAZETTE (June 23, 1966).

[7] Mickey Maher, *Interview with Professor Patricia Hassett*, The Judge, College of Law, Syracuse University, Vol. 16, no. 1 (Jan. 19, 1981).

[8] E-mail from Jennie L. James, Assistant Dean for Development, West Virginia University College of Law to Elizabeth A. Stawicki, Esq., Patricia Hassett Legal Fellow, Syracuse University (May 26, 2022).

[9] The Women's Rights Movement in the United States began with a convention at the Wesleyan Chapel in Seneca Falls, N.Y. (about 60 miles from Hassett's home in Elmira, N.Y.) on July 19-20, 1848. One hundred attendees signed the "Declaration of Sentiments," a document drafted primarily by Elizabeth Cady Stanton. Stanton patterned the Declaration of Sentiments after the Declaration of Independence with some notable additions. For example, The Declaration of Sentiments read, "We hold these truths to be self-evident; that all men and women are created equal..." Women's Rights National Historical Park, N.Y., (Feb. 8, 2023), *available at* https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm.

Act of 1964,[10] Congress enacted Title IX of the Education Amendments of 1972, which specifically barred gender discrimination in education programs that receive federal funding.[11] Title IX is generally associated with equality in athletics, but the law is much broader in scope; It specifically bars sex discrimination in higher education, including employment.[12] Following two years at the West Virginia University College of Law, Hassett accepted a visiting teaching position at her alma mater, Syracuse University, with the idea that if it went well, she would stay on. It did. While some publications have reported that Hassett was the first woman law professor at Syracuse University, she was among the first four women who started in 1974.[13] Hassett's colleague at the College of Law, Professor Daan Braveman, said teaching at Syracuse could not have been easy for her at the time. The College of Law was a male-dominated organization from the student body to the faculty. In addition, most of her colleagues had known her as a student, not a peer. "And then she's teaching there with people who were her professors,"

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[10] Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, "[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[11] "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a).

[12] "Although civil rights laws in the 1960s barred discrimination in employment, it was not until Title IX of the Education Amendments of 1972 that these protections were extended to students and faculty by prohibiting discrimination on the basis of sex in education programs and activities receiving any federal financial assistance," *Gender Issues: Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX*, U.S. Government Accountability Office (July 22, 2004), (Feb 8, 2023), *available at* https://www.gao.gov/products/gao-04-639.

[13] Judith Younger was nominated for the Deanship in February 1974 and appointed to that position effective July 1974. In addition to Patricia Hassett, Syracuse University College of Law appointed three other women to faculty positions effective September 1974: Judith Koffler (assistant professor), Lois R. Goodman (assistant professor), and Barbara Rowan (adjunct professor), E-mail from Vanessa St.Oegger-Menn University Archivist, Special Collections Research Center, Syracuse University to Elizabeth A. Stawicki, Esq., Patricia Hassett Legal Fellow, Syracuse University (June 7, 2022).

Braveman said. "It's really an awkward thing. She handled it quite well; she was very devoted to the students."[14]

Devotion to students was important to Hassett. Her sister said Hassett's teaching philosophy was to respect her students as she guided them through the law. Hassett did not believe in browbeating them or demonstrating how much more intelligent she was. Nonetheless she still had higher standards for them. Meyer said her sister viewed them not only as students, but also as soon-to-be lawyers who would be advising clients on profoundly important matters. "Patricia would say, 'you're sending them out into the world to deal with other people's lives, and they need to be prepared and to do a proper job,'" said Meyer.[15] By 1978, as an Associate Professor, Hassett was already a reporter for the Standards for Discovery and Standards for Joinder and Severance of the American Bar Association project to revise its standards for criminal justice.[16]

Over the years, the Syracuse University College of Law became Hassett's second home. She valued and collected information, so much so, that her colleagues described her office as stacked floor to ceiling with papers and boxes. She had additional bookcases installed; she even subdivided her office to make a kind of a mini library for herself. In a 1981 interview with the law school newspaper, Hassett said she closely followed her father's advice, "waste not, want not," a quote she proudly displayed in her office on a polished block of anthracite coal. The coal, like the quote, the article said, "had special meaning as it reminds her of her father, who began operating his own coal business at age sixteen, the proceeds of which financed his own Harvard Law education and supported the family for many years."[17] With the advent of the Internet in the late 1980s and 1990s, Hassett's penchant for collecting would expand beyond books and papers to electronic data.

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[14] Virtual Interview with Daan Braveman, Sr. Higher Education Counsel, Harter, Secrest and Emery; and President Emeritus, Nazareth College (Apr. 30, 2022).

[15] Virtual Interview with Karen Meyer (May 31, 2022).

[16] American Bar Association, *Joinder and Severance*, (Aug. 9, 1978), (Feb. 8, 2023), *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/joinder-severance-2nd-ed.pdf.

[17] Mickey Maher, *Interview with Professor Patricia Hassett*, The Judge, College of Law, Syracuse University, Vol. 16, no. 1 (Jan. 19, 1981).

C. HASSETT'S INTEREST IN ELECTRONIC DATA AND IMPROVING JUSTICE

Syracuse University College of Law Electronic Services Librarian Robert Weiner Jr. remembers Hassett wanting to learn and always curious, particularly about data collection and the law.[18] Weiner says Hassett was a regular at the library's training sessions on new legal databases and research, which he said was unusual for law school professors at the time. "That was really the interesting thing about Patricia, because way back, when I first started, a lot of the faculty who had been around for a while didn't want to hear about the databases," said Weiner.[19]

And further, Hassett thought about using electronic data as a basis to determine how judges were applying the law, according to Gary Kelder, Syracuse University Professor of Law. "What Patricia wanted to know was, how are sentences being meted out and the same thing with bail determinations." Kelder said during the 1980's and 1990's, there was a large push for law school faculty to engage in interdisciplinary research and to reform criminal sentencing.[20]

"On the federal level, we created these federal sentencing guidelines, which now everybody likes to criticize. But the point was, the effort was made to eliminate disparities, the amount of time that you had to spend incarcerated shouldn't depend on where you got convicted, or who your judge was, etc. so let's create an even playing field and Patricia was a forerunner for a lot of that with her research."[21]

In 1986, Hassett spent much of the year conducting comparative research on repeat criminal offenders in England, the U.S., and China.[22]

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[18] Hassett organized conferences on data gathering research and was co-founder of the French American Conference on Law and Artificial Intelligence. Robert J. Weiner Jr., Electronic Services Librarian, Syracuse University, also participated in the group. One of the organization's conferences was canceled because of 9/11 but papers as part of that conference were published in the Syracuse Law Review.

[19] Virtual Interview with Robert J. Weiner Jr., Electronic Services Librarian, Syracuse University (April 13, 2022).

[20] Hassett was also a reporter for the American Bar Association Standing Committee on Criminal Justice, Syndicus, Vol. 25, No. 1, Fall 1982.

[21] Interview with Gary T. Kelder, Professor, Syracuse University College of Law, in Syracuse, N.Y. (April 21, 2022).

[22] The research was funded by the Syracuse University Senate Research and Equipment Fund and the College of Law Center for Interdisciplinary Studies, Syndicus, Vol. 26, No. 3, Spring 1986.

III. HASSETT IN LONDON

A. SYRACUSE COLLEGE OF LAW EXPERIMENT

In 1989, Syracuse University was looking at the possibility of teaching law at the undergraduate level and decided to try out the project in the undergraduate program in London.[23] "The program was not carried back to Syracuse....[but] I made a lot of contacts all over England who were doing exciting work in legal education," Hassett said.[24] Hassett also began to co-lead the London program, a summer externship program where Syracuse law students spend seven weeks in London working at law firms and government agencies.[25] One of the key parts of the job is to "play matchmaker" to pair British legal mentors with Syracuse law students. Hassett took it as a personal challenge to find the right slot for students and she was good at it. As a first-year law student, James Bergeron learned Constitutional Law from Hassett, but he later went on to co-lead the London externship program with her for several years. When he arrived in London, he was taken aback at how comfortable and well-connected she was in the U.K. Bergeron is now Political Advisor to Commander, NATO Allied Maritime Command in Northwood U.K.

"Patricia was inside the British mind. She knew how to operate within the British legal system. She was never misunderstood. My sense is she dramatically escalated the reach of the Syracuse program during those years."[26]

Hassett was in London when sweeping U.K. legal reforms were underway following an Act of Parliament known as the *Courts and Legal Services Act of 1990*.[27] Towards the end of Margaret Thatcher's time as Prime Minister in 1989, the government minister of legal affairs proposed

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[23] *Syracuse Yankee in Queen Elizabeth's Court*, Syndicus, Vol. 31, No. 2, Spring 1992.

[24] *Id.*

[25] For a description of the *LondonEx* program (Feb. 8, 2023), *available at* http://law.syr.edu/academics/clinical-experiential/externships/law-in-london/.

[26] Virtual Interview with James H. Bergeron, Political Advisor to Commander, NATO Allied Maritime Command in Northwood, U.K. (June 30, 2022).

[27] In a detailed historical context of the *Courts and Legal Services Act of 1990*, scholar Michael Zander wrote that the British Government's exercise in reforming the legal profession represented "one of the most extraordinary and fascinating episodes in the long history of the profession," *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 Int'l Law. 753 (1990),(Feb. 8, 2023), *available at* https://www.jstor.org/stable/40706452.

to eliminate the separation between the roles of barristers and solicitors.[28] In 1991, Hassett was an International Visiting Fellow at the Institute of Advanced Legal Studies in London. At the end of that fellowship, the Lord Chancellor's Advisory Committee on Legal Education and Conduct recruited Hassett to serve as a member of the Secretariat, advising on the education and professional conduct of persons providing legal services.[29] Hassett was "called" to the Bar of England and Wales in 1992 and made a barrister and became a member of the professional organization for barristers, the General Council of the Bar, and her Inn (Inner Temple).[30]

B. USING EXPERT SYSTEMS TO IMPROVE BAIL DECISIONS

Syracuse University College of Law Professor Christian Day said just like in the U.S., Hassett brought her passion for judicial equity to England where she became involved in criminal justice and aspects of bail reform at a time when similar cases were resulting in very different judicial decisions. "She was very interested in making certain that burglars were pretty much treated the same way in London as they were in Manchester." he said.[31]

Her research was attracting international attention.[32] Hassett wrote, "In England, an accused has a statutory right to release pending trial unless there are substantial grounds for believing that the accused will flee, commit another offence, or interfere with witnesses."[33] The

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[28] Maimon Schwarzchild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 Conn. J. Int'l L. 185 (1994).

[29] Hassett was a member of the Secretariat of the Lord Chancellor's Advisory Committee on Legal Education and Conduct in 1992-1993, (Feb. 8, 2023), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235677/0811.pdf.

[30] Hassett donated many of the books that she brought back from England, as well as her barrister's wig to Syracuse University's College of Law Library.

[31] Telephone Interview with Christian C. Day, Professor, Syracuse University College of Law (June 1, 2022).

[32] While in the U.K., Hassett presented papers about law and artificial intelligence, which included, "*Problems in Selecting Effective Computer Technology for Use in the Bail Stage of the Criminal Justice System*" at the 2nd annual conference on Law, Computer and Artificial Intelligence, which was held at the University of Exeter in Exeter, England. While in Exeter, Hassett also moderated program sessions on the admissibility of evidence from computers.

[33] Patricia Hassett, *Can Expert System Technology Contribute to Improved Bail Decisions?* International Journal of Law and Information Technology, Vol. 1, No. 2 (1993). "Offence" is the British spelling for "offense."

problem, according to Hassett, was a vague standard, which had no objective and valid criteria for meeting the standard and decision-makers were not required to explain their rationales.[34] Hassett wrote that the decision to detain an accused was often made in less than five minutes and may appear in the courtroom to be trivial. But the decision to detain "is never trivial to the accused who inevitably suffers a variety of adverse consequences," she wrote.[35] One of the most troubling consequences, Hassett found, was a high correlation between pre-trial detention and the likelihood of conviction.[36]

To that end, she envisioned an "expert system" to help judges make more consistent bail decisions to reduce unjustified detentions.[37] An expert system is a form of computer software, which attempts to use computer technology to mimic complex human thinking processes.[38] She and a colleague, Nigel Payne, created a prototype where the "assistant would provide a common set of consistently applied rules with the goal of having "like cases" treated alike."[39] Syracuse University Teaching Professor and Director of the Law Library, Jan Fleckenstein said it's important to remember this was 30 plus years ago.

Even the algorithms that we think of today, for good or ill, were not really developed in the era in which she was working on this, demonstrating at a theoretical level, how a well written program of questions could inject more fairness and less human bias into, for

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[34] "[B]ail decision-makers are left to construct personal views based upon various blends of custom, anecdote, experience and idiosyncrasy; these personal views are rarely open to scrutiny. Not surprisingly, a case seen by one decision maker as meeting the 'substantial grounds to believe' standard may strike another judge differently." *Id.* at 152.

[35] These consequences include: loss of personal liberty and separation from family and friends. *Id.* at 146.

[36] These factors included: an incentive to plead guilty, difficulty in helping to prepare a defense, and the "taint of custody." Patricia Hassett, *Can Expert System Technology Contribute to Improved Bail Decisions?* International Journal of Law and Information Technology, Vol. 1, No. 2 (1993).

[37] *Id.* at 146.

[38] Patricia Hassett, *Can Expert System Technology Contribute to Improved Bail Decisions?* International Journal of Law and Information Technology, Vol. 1, No. 2 (1993).

[39] Patricia Hassett., *A Prototype Expert System for Making Bail Recommendations*, 7th BILETA Conference Information Technology and Legal Education: Towards 2000, British and Irish Legal Education Technology Association, British and Irish Legal Education Technology Association (1992).

example, an intake process for a client or in interactions between court personnel and a criminal defendant.[40]

Nonetheless, while Hassett saw potential in using expert systems in law, she also advised caution, that such a system would need much field testing, that the implications of a role for computer technology in judicial decision[s] remains an open and vital question. "It need[s] careful exploration, Hassett wrote, before computers are endorsed for judicial tasks, particularly tasks involving a potential deprivation of personal freedom or the exercise of judicial discretion."[41]

Hassett would later serve as a consultant to the Research and Planning Unit of the London Home Office as part of the *Bail Process Project*, a package of measures that the British Government announced in 1992 to improve "quality, accuracy, and timeliness of the information" judges received to assess whether an accused would offend while out on bail.[42] Hassett authored one of the sections of a major research report for Department Ministers, Parliament, and the public that explored magistrates' views on the information they needed and how they would use it.[43]

C. BRINGING THE WORLD TO SYRACUSE UNIVERSITY

Hassett's international contacts brought world-class conferences on artificial intelligence and law to Syracuse. Her contacts included the head of the French Government's Laboratory for Artificial Intelligence and the Law, Dr. Danielle Bourcier, with whom Hassett would collaborate in years to come.[44] In 1997, Hassett co-hosted a conference

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[40] Virtual Interview with Jan Fleckenstein, Teaching Professor & Director of the Law Library, Syracuse University (May 27, 2022).

[41] Patricia Hassett, *Can Expert System Technology Contribute to Improved Bail Decisions?* International Journal of Law and Information Technology, Vol. 1, No. 2 (1993).

[42] *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project*, Home Office Research Study 184, Home Office Research and Statistics Directorate, London (1998). The Research and Statistics Directorate serves Department Ministers, Parliament, and the public through research, development, and statistics. "Information from the sources informs policy development and the management of programmes; their dissemination improves wider public understanding of matters of Home Office Concern."

[43] *Id.*

[44] Patricia Hassett, Danièle Bourcier, and Christophe Roquilly, *Law and Artificial Intelligence: A Revolution in Legal Knowledge in* Droit et Intelligence artificielle: Une Révolution de la Connaissance Juridique 17 (2000). Patricia Hassett and Danièle Bourcier, *Systèmes experts français et américains: Technologies de*

at Syracuse University with the Universite de Paris 1 (Pantheon Sorbonne) to introduce practical applications of artificial intelligence to members of the legal profession.[45] What was unique about the conference was that while artificial intelligence meetings usually consisted of computer experts talking to other computer experts, this conference also conducted tutorials and demonstrations that showed attorneys how they could apply a legal expert system to their practices.[46]

The following year, Hassett co-chaired, and the College of Law co-sponsored, the French American Conference on Law and Artificial Intelligence in Paris. The conference goal was to bridge the gap between lawyers and developers of legal expert systems, and contrast how legal and cultural differences between the French civil law system and how the American common law system impact intelligent computer systems and legal services.[47] In 2001, Hassett was again back in England to co-lead the Syracuse University College of Law summer program in London. She also organized the French American Conference on Law and Artificial Intelligence to take place later that year but was canceled due to the September 11th attacks.[48]

D. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE

At the same time, Hassett became interested in the work of the Transactional Records Access Clearinghouse (TRAC), an interdisciplinary research center at Syracuse University, which used the Freedom of Information Act to gather federal government data.[49] Linda Roberge, Syracuse University School of Management Research Professor and senior research fellow at TRAC worked with Hassett and led her through the applications of TRAC's TRACFED Data Warehouse, which collected federal data including data on federal judges. And while

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l'information et spécificités culturelles in Droit et Intelligence artificielle: Une Révolution de la Connaissance Juridique 210 (2000).

[45] *Conference Bridges the Gap Between Lawyers and Builders of Legal Expert Systems*, Syndicus, Spring 1997.

[46] *Id.*

[47] Syndicus, Summer 1998.

[48] Although the conference did not take place, the participants contributed their prepared papers, which were later published in the Syracuse Law Review. Danièle Bourcier, Harold Burstyn, Patricia Hassett, and Christophe Roquilly, *Introduction to the Symposium on Technology and Legal Practice*, 52 Syracuse L. Rev. 979 (2002).

[49] Transactional Records Access Clearinghouse, Syracuse University, (Feb. 8, 2023), *available at* https://trac.syr.edu.

Hassett did not get into the nitty gritty of data analysis, Roberge said, Hassett was thinking about how it could help lawyers better understand the specific court systems in which they were practicing.

"I think she was just a very innovative thinker. I certainly had not met many other lawyers that, I hate the phrase, were, 'thinking outside of the box.' She was willing to just imagine things that other people just weren't capable of."[50]

An article Roberge and Hassett published in 2002, said that to be a successful lawyer in a particular case, one needs to know how that specific court operates and the individual judges in it. Lawyers who work in a specific court system regularly can have an advantage because they know how individual judges have operated in the past. They may be able to answer the question, "Do cases really move more slowly through Judge Smith's court?" One can only know that with actual data.[51] For attorneys and other legal researchers, this sounds like today's litigation data analytics, which now exists on legal databases as a tool for practitioners to understand, among other things, how quickly a case moves through a particular judge's court.

Hassett retired with professor emerita status. According to the Dedication in 2006, Hassett had plans to retire to San Diego, but it was not to be. Hassett died at age 68 on July 10, 2009.

Elizabeth A. Stawicki, JD
Patricia Hassett Legal Fellow

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[50] Virtual Interview with Linda Roberge, Research Professor, Martin J. Whitman School of Management, Syracuse University (Mar. 16, 2022).

[51] Patricia Hassett and Linda Roberge, *A Review of TRACFED: Lawyers Strike Gold Mining Government Data* (Feb. 8, 2023), *available at* https://www.llrx.com/2002/10/features-a-review-of-tracfed-lawyers-strike-gold-mining-government-data/.