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EDITOR'S NOTE

Every year, the *ILSA Journal of International & Comparative Law (ILSA Journal)* attends the International Law Weekend (ILW) conference, which is hosted annually by the American Branch of the International Law Association (ABILA) at Fordham University School of Law. Despite worldwide restrictions and challenges faced throughout the COVID-19 pandemic, ABILA proudly hosted its first-ever virtual ILW conference with the assistance of Arbitration Place. The conference had 1940 registrants and included the first International Law Trivia Night. ILW is well-attended by diplomats, prestigious scholars, students, attorneys, and members from governmental and non-governmental sectors. The theme for ILW 2020, “International Law in Challenging Times,” engaged the audience with compelling arguments about challenges we face today around the world, putting forth potential resolutions to those challenges and discussing an array of relevant issues in international law.

This Issue is entirely concentrated on ILW and is best known as the International Practitioner’s Notebook (IPN). Because *ILSA Journal* is responsible for publishing the IPN, we have the opportunity to both network with and solicit articles from the esteemed panelists and moderators for our publication. The *Journal* would like to thank those who coordinated ILW, and especially Ms. Leila Sadat from ABILA, Ms. Tessa Walker from ILSA, and Mr. Norman Greene, for all of their assistance with access to authors. The *Journal* is also very appreciative and thankful for the panelists and authors who contributed to this Issue. The *Journal* is confident that these exceptional pieces chosen for publication best reflect ILW and the 2020 overall theme.

Additionally, I want to thank the entire Executive Board of the *ILSA Journal*—especially Ally Moore—for all of their hard work during ILW, the Editorial Board for their editorial assistance, and the Senior and Junior Staff Members for their dedication to the *Journal*. It has been a complete honor to lead this respected *Journal* and work with you all. Thank you to my family and friends for all of your support this year.

Finally, the *Journal* is proud to welcome the elected 2021–22 Executive and Editorial Board. I know that Volume 28 will continue the tradition of producing high-quality publications and will be a testament to their hard work, dedication, and professionalism.

Michaela “Lucky” Roselli
Editor-in-Chief, 2020–21



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***ERGA OMNES PARTES* BEFORE THE INTERNATIONAL COURT OF JUSTICE: FROM STANDING TO JUDGMENT ON THE MERITS**

Nawi Ukabiala, Duncan Pickard & Alyssa Yamamoto *

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In its landmark order on provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (*The Gambia v. Myanmar*), the International Court of Justice (ICJ, or the Court) held that The Gambia had *prima facie* standing before the Court based solely on the *erga omnes partes* nature of the obligations it sought to enforce.¹ Citing its advisory opinion in *Reservations to the Genocide Convention*, the Court reasoned:

[A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That

* The authors are associates at Debevoise & Plimpton LLP. The views expressed herein are the authors' personal views and should not be attributed to their firm or its clients.

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gam. v. Myan.*), Order, 2020 I.C.J. 1, ¶ 31 (Jan. 23).

common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.²

The Court first recognized *erga omnes* obligations in *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) (Barcelona Traction)*, when it explained that there are two categories of obligations under public international law: “obligations of a State towards the international community as a whole,” and “those arising *vis-à-vis* another State.”³ For the former, the Court explained that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁴ According to the Court, such obligations include the prohibitions on aggression and genocide, as well as the obligation to respect “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”⁵

The Court later recognized the related concept of obligations *erga omnes partes*—obligations that a State owes to a group of other States with a common interest, such as other State parties to a multilateral convention.⁶ In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Belgium v. Senegal)*, the Court held that the State parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have a “common interest” in ensuring compliance with certain obligations under the convention, and as such, obligations “are owed by any State party to all the other States parties to the Convention.”⁷ The International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts similarly recognize both obligations “owed to a group of States” and “owed to the international community as a whole.”⁸

Before The Gambia’s case against Myanmar, the Court had never considered an application alleging violations of obligations *erga omnes*

2. *Id.* ¶ 41.

3. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Judgment (Second Phase), 1970 I.C.J. 3, ¶ 33 (Feb. 5).

4. *Id.*

5. *Id.* ¶ 34; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

6. *Belg. v. Spain*, 1970 I.C.J., ¶ 33.

7. *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment, 2012 I.C.J., ¶ 68 (July 20).

8. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 29 (2001), *reprinted in* [2001] 2 Y.B. Int’l L. Comm’n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

partes by a State that did not assert any special interest in the dispute.⁹ The closest it had previously come to doing so was in *Belgium v. Senegal*, where the Court found no need to address Belgium's asserted special interest since "any State party to the Convention [against Torture] may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . ."¹⁰ Otherwise, it reasoned, "[i]f a special interest were required [to bring a claim], in many cases no State would be in the position to make such a claim."¹¹ The ICJ confirmed this position in *The Gambia v. Myanmar*.¹² Although the ICJ only found standing on a *prima facie* basis, the order may open the door to increasing claims asserting violations of treaty-based obligations, despite the lack of a factual nexus between the applicant and the respondent with respect to the legal controversy.¹³

The Court's order in *The Gambia v. Myanmar* may create opportunities for judicial intervention by the ICJ, even where other forms of international intervention are elusive.¹⁴ For example, international efforts to hold the Assad regime accountable for atrocities in the Syrian civil war have been unsuccessful thus far.¹⁵ However, in September 2020, the Netherlands announced that it had sent a diplomatic note to Syria stating its intention to hold the government of President Bashar al-Assad "responsible under international law for gross human rights violations and torture in particular" under the CAT.¹⁶ The note requested that Syria enter into negotiations—a prerequisite for bringing a case before the ICJ under the CAT.¹⁷ In announcing the decision, Dutch foreign minister, Stef Blok, stated that "[t]he

9. See Order (Request for Indication of Provisional Measures), *Gam. v. Myan.*, 2020 I.C.J., ¶ 40.

10. *Belg. v. Sen.*, 2012 I.C.J., ¶ 69.

11. *Id.*

12. Order (Request for Indication of Provisional Measures), *Gam. v. Myan.*, 2020 I.C.J., ¶ 40.

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (*The Gam. v. Myan.*), Summary, 2020 I.C.J. 1 (Jan. 23).

14. *Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice*, HUM. RTS. WATCH (Dec. 5, 2019), https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court#_Why_has_Gambia.

15. Balkees Jarrah, *The Netherlands' Action Against Syria: A New Path to Justice*, HUM. RTS. WATCH (Sept. 22, 2020), <https://www.hrw.org/news/2020/09/22/netherlands-action-against-syria-new-path-justice>; See also Ido Vock, *Assad on Trial*, NEWSTATESMAN (Jan. 27, 2021), <https://www.newstatesman.com/world/middle-east/2021/01/assad-trial>.

16. *The Netherlands Holds Syria Responsible for Gross Human Rights Violations*, GOV. OF THE NETH. (Sept. 18, 2020), <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations>.

17. *Id.*

evidence is overwhelming” of the “horrific crimes” the Assad regime has committed.¹⁸

Nevertheless, even in cases where the evidence appears to be compelling, claims based solely on *erga omnes partes* standing are likely to present the applicant with particular evidentiary challenges.¹⁹ The types of legal controversies that are likely to inspire claims based on *erga omnes partes* standing will often feature allegations of violations that are both widespread and difficult to prove.²⁰ Moreover, the lack of a factual nexus between the applicant and the legal controversy may pose serious limitations on the applicant’s access to evidence.²¹ This article explores the following issues in the context of proceedings before the ICJ based on *erga omnes partes* standing: (i) strategic considerations concerning the initiation of proceedings; (ii) the types of legal standards that may be applicable in merits proceedings; and (iii) opportunities and challenges with respect to marshaling evidence.

I. STRATEGIC CONSIDERATIONS BEFORE INSTITUTING PROCEEDINGS

When deciding whether to initiate proceedings based on *erga omnes partes* standing and initiate proceedings before the Court, States must consider the potential ICJ case in the context of the larger strategy for resolving the dispute at hand.²² An ICJ order and judgment can play an influential role in addressing gross violations of international human rights conventions by increasing or maintaining public attention, providing leverage for diplomatic negotiations, or authoritatively settling disputed factual issues.²³ However, the initiation of contentious proceedings implicates a host of diplomatic considerations; it may complicate the applicant’s relationship with the respondent creating the potential for diplomatic or economic retaliation, and could even frustrate attempts to

18. *Id.*

19. See Priya Pillai, *ICJ Order on Provisional Measures: The Gambia v. Myanmar*, OPINIOJURIS (Jan. 24, 2020), <https://opiniojuris.org/2020/01/24/icj-order-on-provisional-measures-the-gambia-v-myanmar/>.

20. See, e.g., Gino Naldi, *Crimes against Humanity and Int’l Courts*, 36 IELR 49–53 (2020).

21. Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. OF INT’L L. 883, 894–95 (2010).

22. Christina L. Davis & Julia C. Morse, *Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice*, 62 INT’L STUD. Q. 709, 711 (2018).

23. Jefferi Hamzah Sendut, *An Explainer on The Gambia v. Myanmar at the International Court of Justice*, MEDIUM (May 16, 2020), https://medium.com/@jhs_/an-explainer-on-the-gambia-v-myanmar-at-the-international-court-of-justice-7834529da19c (last visited Jan. 21, 2020).

resolve the legal controversy by diplomatic means.²⁴ Moreover, pursuit of an ICJ case also requires significant resources and access to sufficient evidence.²⁵ Would-be applicants might have to weigh these considerations, the gravity of the situation, and the availability of other forms of intervention in deciding whether to proceed.

If a State elects to institute ICJ proceedings based on *erga omnes partes* standing, a key strategic question is whether to bring suit alone or as part of a group of States.²⁶ Since the case would presumably seek to enforce community values based on their status as such, proceedings featuring multiple applicants could offer strategic advantages.²⁷ Joint applications by multiple States, or an application by one State on behalf of a group of States, could help demonstrate the strong collective interest in attaining accountability, increasing pressure to resolve the legal controversy.²⁸ States have long built coalitions before approaching international adjudication²⁹—from the joint application of France, Italy, Japan, and the United Kingdom (with intervention from Poland) in the *S.S. Wimbledon* case against Germany in 1922 before the Permanent Court of International Justice,³⁰ to The Gambia's application against Myanmar in 2019 on behalf of the fifty-seven Member States of the Organization of Islamic Cooperation.³¹ Working together can also allow applicants to share resources, better withstand

24. Davis & Morse, *supra* note 22, at 709–10, 720; see Priya Pillai, *On the Anvil: The Netherlands v. Syrian Arab Republic at the International Court of Justice*, OPINIOJURIS, (Sept. 29, 2020), opiniojuris.org/2020/09/29/on-the-anvil-the-netherlands-v-syrian-arab-republic-at-the-international-court-of-justice/.

25. Davis & Morse, *supra* note 22, at 710, 714; *Q&A: The International Court of Justice & the Genocide of the Rohingya*, GLOB. JUST. CTR. (July 2019), https://globaljusticecenter.net/files/20190716_BurmaICJ_QandA_Factsheet_FINAL3.pdf; Pillai, *supra* note 24.

26. See Bruno Gelinas-Faucher, *Time for Canada to intervene as World Court tackles the Rohingya crisis*, POL'Y OPTIONS POLITIQUES (May 15, 2020), <https://policyoptions.irpp.org/magazines/may-2020/time-for-canada-to-intervene-as-world-court-tackles-the-rohingya-crisis/>.

27. See *id.*

28. See *id.*

29. See generally *S.S. Wimbledon* (U.K. et al. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 15 (Aug. 17); see generally Application Instituting Proceedings & Request for Indication of Provisional Measures, Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), 2019 I.C.J. 1, ¶ 21 (Nov. 11) [hereinafter Application Instituting Proceedings].

30. U.K. et al. v. Ger., 1923 P.C.I.J. at 15.

31. Application Instituting Proceedings, Gam. v. Myan., 2019 I.C.J., ¶ 21; Stephanie van den Berg, *Gambia files Rohingya genocide case against Myanmar at World Court: justice minister*, REUTERS (Nov. 11, 2019), <https://www.reuters.com/article/us-myanmar-rohingya-world-court/gambia-files-rohingya-genocide-case-against-myanmar-at-world-court-justice-minister-idUSKBN1XL18S>.

diplomatic backlash, and assume complementary roles in managing a broader strategy.³²

On the other hand, joint proceedings can complicate decision-making and present coordination challenges.³³ Nevertheless, a sole applicant might not be able to prevent other States from participating in the case, either through intervention under Articles 62 or 63 of the ICJ Statute³⁴ or a separate application that the Court could join to the first application, as it did in the *North Sea Continental Shelf* and *South West Africa* cases.³⁵ For example, the Maldives, the Netherlands, and Canada have expressed interest in intervening in *The Gambia v. Myanmar*, to show further “support of the Rohingya people,”³⁶ “assist with the complex legal issues that are expected to arise,” and “pay special attention to crimes related to sexual and gender-based violence, including rape.”³⁷

II. LEGAL STANDARDS ON THE MERITS

Erga omnes partes treaty obligations are generally of heightened importance; they reflect core values of the State parties, who often elect to codify them because they reflect core values of the international community as a whole.³⁸ Indeed, all *jus cogens* norms give rise to *erga omnes* obligations.³⁹ All of the *erga omnes* obligations that the ICJ first recognized in *Barcelona Traction* are *jus cogens* obligations that are codified in multilateral treaties today, which presumably give rise to obligations *erga*

32. See Gelinas-Faucher, *supra* note 26.

33. See *id.*

34. Statute of the International Court of Justice, Oct. 24, 1945, ch. III, arts. 62–63, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute].

35. See *North Sea Continental Shelf Cases* (Den./Ger. Ger./Neth.), Order, 1968 I.C.J. 9, 10 (Apr. 26); see also *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.), Order, 1961 I.C.J. 13, 338 (May 20).

36. *The Republic of Maldives to File Declaration of Intervention in Support of the Rohingya People, at the International Court of Justice* MINISTRY FOREIGN AFF., (Feb. 25, 2020), <https://www.foreign.gov.mv/index.php/en/mediacentre/news/5483-the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people,-at-the-international-court-of-justice>.

37. *Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice*, GOV'T NETHERLANDS (Sept. 2, 2020), <https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice>.

38. Int'l Law Comm'n, *Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/74/10 at 142 (2019).

39. *Id.* at 145.

omnes partes.⁴⁰ Accordingly, allegations that a State has breached *erga omnes partes* obligations will often be the type of serious allegations for which heightened standards of proof are required.⁴¹ By way of example, we consider here the legal standards for proving genocide under the Genocide Convention and torture under the CAT, both of which the ICJ is likely to consider obligations *erga omnes partes*.⁴²

The ICJ has set a high standard for meeting the scienter requirement of the Genocide Convention, which defines genocide as any of the acts enumerated in Article II “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁴³ The Court held in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)* (the *Bosnian Genocide* case):

[I]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.⁴⁴

At the oral argument on provisional measures in *The Gambia v. Myanmar*, counsel for Myanmar went so far as to argue that the existence of an alternative purpose for the alleged conduct—in that case, purported counterterrorism objectives—could preclude a finding of the requisite

40. Belg. v. Spain, 1970 I.C.J. ¶ 33. (“Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”). *Id.*; see, e.g., G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Dec. 10, 1984) (*emphasis added*) [hereinafter Convention Against Torture]; see also G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 1(1) (Dec. 16, 1966); G.A. Res. 666 U.N.T.S. 195, International Convention on the Elimination of All Forms of Racial Discrimination, (Dec. 21, 1965); see also G.A. Res. 260 A (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948) [hereinafter Genocide Convention]; U.N. Charter, art. 2, ¶ 7; see also G.A. Res. 212 U.N.T.S. 17, Slavery Convention (Sept. 25, 1926).

41. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. v. Serb.)*, Judgment, 2007 I.C.J. 43, ¶ 187 (Feb. 26) (*emphasis added*); Convention Against Torture, *supra* note 40, arts. 5, 7.

42. Bosn. v. Serb., 2007 I.C.J., ¶ 187; Convention Against Torture, *supra* note 40, arts. 5, 7.

43. Genocide Convention, *supra* note 40, art. II.

44. Bosn. v. Serb., 2007 I.C.J. ¶ 187 (*emphasis added*). But see, e.g., Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*, 5 GENOCIDE STUD. & PREVENTION 238, 245 (2010) (arguing that, properly construed, the scienter requirement under the Genocide Convention is one of knowledge).

intent.⁴⁵ Proof, whether direct or by inference, of the requisite intent may require extensive fact-finding.⁴⁶ When analyzing whether there is sufficient evidence, often circumstantial, the ICJ appears to show a preference for fact gathering conducted by United Nations (UN) bodies,⁴⁷ as discussed further in Section III. B. below.

Claims under the CAT may also require applicants to meet high legal standards that require extensive factual support to satisfy.⁴⁸ CAT defines torture as an act “by which severe pain or suffering . . . is intentionally inflicted” for enumerated purposes by or “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁴⁹ The ICJ has not yet interpreted this standard.⁵⁰ *Belgium v. Senegal*, the sole CAT case before the ICJ, did not seek to hold Senegal responsible for acts of torture, but rather for its failure to prosecute or extradite former Chadian president Hissène Habré for acts of torture that he committed.⁵¹ But based on the plain terms of the CAT, the jurisprudence of the Committee Against Torture—the Geneva-based treaty body charged with monitoring compliance with CAT—and the jurisprudence of international criminal tribunals, the Court is likely to require specific intent.⁵²

State attribution is another inquiry that may present challenging legal standards in the context of proving violations of obligations *erga omnes partes*.⁵³ In order to establish conduct attributable to a State under international law, the alleged act or omission must either be committed by an organ, person, or entity acting under the authority, instruction, direction, or

45. Order (Request for Indication of Provisional Measures), *Gam. v. Myan.*, 2020 I.C.J. ¶ 47; Kerstin Bree Carlson & Line Engbo Gissel, *Why the Gambia's plea for the Rohingya matters for international justice*, CONVERSATION (Jan. 14, 2009), <https://theconversation.com/why-the-gambias-plea-for-the-rohingya-matters-for-international-justice-129365>. (“Should the Court agree that there is ample support for an alternative explanation, then it cannot but conclude that the application has no reasonable chance of success on the merits. Not a 50 per cent chance. Not a 25 per cent chance. No chance.”). *Id.*

46. See Hum. Rts. Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, Office of the High Comm'r on Human Rights, p. 14, ¶ 45 U.N. Doc. A/HRC/42/CRP.5 (Sept. 16, 2018).

47. ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 239 (2016 ed.).

48. Convention Against Torture, *supra* note 40, art. 7.

49. *Id.* art. 1.

50. See generally *Belg. v. Sen.*, 2012 I.C.J., ¶ 73.

51. See generally *id.* ¶ 73; see also Convention Against Torture, *supra* note 40, arts. 6–7.

52. See Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture under International and Domestic Law*, 52 VA. J. INT'L L. 791, 827 (2012).

53. James Crawford (Special Rapporteur), *First Rep. on State Responsibility*, ¶ 155, U.N. Doc. A/CN.4/490 (1998).

control of the State—whether formal or *de facto*—or acknowledged and adopted by the State as its own conduct.⁵⁴ Allegations concerning *erga omnes partes* obligations, such as allegations of genocide and torture, will often be susceptible to attribution defenses.⁵⁵ For example, in the *Bosnian Genocide* case, even though the Court did find sufficient evidence of specific intent to commit genocide, it was unable to attribute the conduct of the Army of Republika Srpska to Serbia.⁵⁶ The Court, nevertheless, found that Serbia had violated its obligation to prevent the Srebrenica massacre under Article 1.⁵⁷ As with the Genocide Convention, *erga omnes partes* claims under CAT may also entail attribution issues.⁵⁸ Building a link between allegations of torture and public officials will also raise complex issues not just of law, but also of fact,⁵⁹ to which we now turn.

III. MARSHALLING EVIDENCE

The types of legal controversies that are likely to inspire efforts to secure ICJ intervention by unaffected States will often feature widespread violations of *erga omnes partes* obligations, requiring extensive fact development.⁶⁰ For example, reports indicate that more than 14,000 detainees have been killed “due to torture” at the hands of the Assad regime between March 2011 and September 2020.⁶¹ Similarly, reports indicate that Myanmar’s security forces killed at least 6700 Rohingya between late August and late September 2017 and have uprooted approximately one million Rohingya Muslims who are now left as stateless refugees sheltering in neighboring Bangladesh.⁶²

54. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, ¶ 76, U.N. Doc. A/56/10 (2001).

55. *Id.*

56. *Bosn. v. Serb.*, 2007 I.C.J., ¶ 394.

57. *Id.* ¶ 438.

58. *Id.* ¶ 380–81.

59. *Id.* ¶ 65.

60. Bird, *supra* note 21, at 889.

61. *Death Toll Due to Torture*, SYRIAN NETWORK FOR HUM. RTS. (Dec. 1, 2020) <https://sn4hr.org/blog/2020/12/01/death-toll-due-to-torture/> (cited in Anne Barnard, *Inside Syria's Secret Torture Prisons*, N.Y. TIMES (May 11, 2019), <https://www.nytimes.com/2019/05/11/world/middleeast/syria-torture-prisons.html>).

62. Hannah Beech et al., *'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, N.Y. TIMES, <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html> (last updated Dec. 4, 2020).

Accordingly, The Gambia's 2020 memorial spans over 500 pages with more than 5000 annexed pages of supporting materials.⁶³

Applicants basing themselves solely on *erga omnes partes* standing will often face particular challenges in securing access to the evidence necessary to build their case⁶⁴ because the alleged violations will not directly affect the applicant or its nationals and are likely to have occurred within the respondent State's territory.⁶⁵ Of course, this difficulty is not necessarily unique to cases involving *erga omnes partes* standing.⁶⁶ As Judge Owada observed in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (*Oil Platforms*), there is often an "inherent asymmetry that comes into the process of discharging the burden of proof."⁶⁷ That asymmetry featured in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (the *Croatian Genocide* case), where the Court ultimately dismissed Croatia's claim that Serbia was "best placed . . . to provide explanations of acts which are claimed to have taken place in a territory over which Serbia exercised exclusive control."⁶⁸ However, the Court may afford an applicant alleging violations of *erga omnes partes* obligations within the exclusive territorial control of the respondent "a more liberal recourse to inferences of fact and circumstantial evidence" as it did in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (*Corfu Channel*).⁶⁹

Attempts by a respondent to destroy evidence or otherwise impede the applicant's access to information can exacerbate the inherent asymmetry.⁷⁰ Indeed, the risks of evidentiary obstruction may be higher in cases alleging breaches of *erga omnes partes* obligations due to the seriousness of such allegations and the intense international scrutiny they will often inspire.⁷¹ For example, the preservation of evidence has been the basis of two provisional measure requests by The Gambia in *Gambia v. Myanmar*.⁷² Below we discuss the implications that the asymmetry in access to information likely to

63. *Gambia files Memorial with ICJ Over Myanmar*, POINT (Oct. 26, 2020), <https://thepoint.gm/africa/gambia/headlines/gambia-files-memorial-with-icj-over-myanmar>.

64. Pillai, *supra* note 19.

65. Bird, *supra* note 21, at 887.

66. *Id.*

67. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. REP. 161, 306 (Nov. 6), ¶¶ 46–47 (J. Owada, concurring).

68. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 170 (Feb. 3).

69. *Corfu Channel (U.K. & N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. 4, at 18 (Apr. 9).

70. Order (Request for Indication of Provisional Measures), *Gam. v. Myan.*, 2020 I.C.J., ¶ 5.

71. *Id.*

72. *Id.*

attend cases based on *erga omnes partes* standing may have for the different types of evidence that typically feature in ICJ proceedings.

A. Documentary Evidence

Documentary evidence has been described as “the most common and certainly the most important type of evidence in litigation before the ICJ.”⁷³ Applicants in cases based on *erga omnes partes* standing will often face challenges in marshaling documentary evidence for the reasons set forth above.⁷⁴ As the Court has observed in *Croatia v. Serbia* and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, while:

[T]he burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.⁷⁵

The authenticity, provenance, and reliability of documentary evidence will often be a source of contention.⁷⁶ The Court’s general approach is to liberally admit evidence and then address concerns as to credibility in determining what weight to give that evidence.⁷⁷ The use of audiovisual evidence in the *Bosnian Genocide* case illustrates the Court’s approach.⁷⁸ In that case, Bosnia sought to admit a video purporting to show the execution of six Bosnian Muslims.⁷⁹ Although the Court admitted the video recording, it did not expressly serve as the basis of its conclusions.⁸⁰

73. RIDDELL & PLANT, *supra* note 47, at 231.

74. *See generally id.*

75. *Croat. v. Serb.*, 2015 I.C.J., ¶ 173; *Pulp Mills on River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 163 (Apr. 20).

76. *Bosn. v. Serb.*, 2007 I.C.J., ¶¶ 221–22.

77. *Id.* ¶¶ 221–23.

78. *Id.* ¶ 289.

79. Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Application for Limited Re-opening of Bosnia and Kosovo Components of Prosecution Case, ¶ 38 (Int’l Trib. for the Prosecution of Pers. Responsible for Serious Violations of Int’l Humanitarian L. Committed in Terr. of Former Yugoslavia since 1991 Dec. 13, 2005) (finding the video of insufficient probative value to warrant admission as the basis of a re-opened case).

80. *Bosn. v. Serb.*, 2007 I.C.J., ¶¶ 289, 389.

B. Third-Party Reporting

Beyond their role as custodians of documentary evidence, third parties, including UN bodies and non-governmental organizations (NGOs), will often play a key role in reporting on events relevant to disputes brought on the basis of *erga omnes partes* standing.⁸¹

1. UN Fact-Finding

The ICJ has relied extensively on reporting from UN agencies, including country missions and reports of special rapporteurs.⁸² Commentators have observed that the Court has “attached considerable probative value to reports compiled and communicated by UN agencies” in complex, fact-intensive legal controversies.⁸³ For instance, in *Bosnian Genocide*, the Court relied on reports by the UN Secretary-General and a Commission of Experts that the Secretary-General had appointed.⁸⁴ In assessing the evidentiary value, the Court expressly considered the following factors:

(1) [T]he source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).⁸⁵

The Court reaffirmed these factors in the *Croatian Genocide* case and concluded that a report by a UN Special Rapporteur appointed by the Commission on Human Rights deserved “evidential weight . . . by reason both of the independent status of its author, and of the fact that it was prepared

81. See Mads Andenas & Thomas Weatherall, *International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal) judgment of 20 July 2012*, 62 INT'L COMPAR. L.Q. 753, 754, 762, 765 (2013); see also Radio Free Asia, *Lawyer: Genocide Case Against Myanmar Based on 'Compelling' Evidence*, VOICE AM. (Nov. 22, 2019), <https://www.voanews.com/east-asia-pacific/lawyer-genocide-case-against-myanmar-based-compelling-evidence>.

82. Q&A: *The Gambia v. Myanmar (Rohingya Genocide at the International Court of Justice)*, GLOB. JUST. CTR. 3 (May 2020), https://globaljusticecenter.net/files/20200115_BurmaICJ_QandA.pdf.

83. *Bosn. v. Serb.*, 2007 I.C.J., ¶¶ 228–30; *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 60, 182 (Dec. 19); RIDDELL & PLANT, *supra* note 47, at 237–39.

84. *Bosn. v. Serb.*, 2007 I.C.J., ¶ 211.

85. *Id.* ¶ 227.

at the request of organs of the United Nations, for purposes of the exercise of their functions.”⁸⁶ Similarly, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (*Armed Activities*), the Court explained that it would “take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.”⁸⁷

The Court’s willingness to afford evidentiary weight to UN reports suggests that applicants in cases based on *erga omnes partes* standing will find themselves on firm footing when relying on fact-finding that UN bodies have conducted.⁸⁸ Indeed, in its provisional measures order in *The Gambia v. Myanmar*, the Court relied on the evidence collected to date by the UN Independent International Fact-Finding Mission on Myanmar (succeeded by the UN Independent Investigative Mechanism for Myanmar (IIMM)).⁸⁹ The Human Rights Council established IIMM “to collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar,” in order to facilitate future judicial proceedings.⁹⁰ If the Netherlands ultimately brings a case against Syria, it will likely similarly benefit from the work of the International, Impartial and Independent Mechanism, which, like the IIMM, operates under a UN mandate to collect, preserve, and analyze evidence.⁹¹ Of course, the Court’s reliance on UN reporting has its limits.⁹² While the IIMM found “reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State” based on hostile policies towards the Rohingya, denial of their citizenship and ethnic identity, hate speech,

86. *Croat. v. Serb.*, 2015 I.C.J., ¶ 459.

87. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J., ¶ 205.

88. *See Order (Request for Indication of Provisional Measures)*, *Gam. v. Myan.*, 2020 I.C.J., ¶¶ 10, 22, 37–38.

89. *See id.*; *Independent International Fact-Finding Mission on Myanmar*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> (last visited Jan. 22, 2021); *What is the Independent Investigative Mechanism for Myanmar?*, U.N., <https://iimm.un.org/what-is-the-independent-investigative-mechanism-for-myanmar/> (last visited Jan. 22, 2021).

90. Human Rights Council Res. 39/2, U.N. Doc. A/HRC/RES/39/2, at 1–2, 5 (Sept. 27, 2018).

91. G. A. Res. 71/248, International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶ 4 (Jan. 11, 2017).

92. *See generally Order (Request for Indication of Provisional Measures)*, *Gam. v. Myan.*, 2020 I.C.J., ¶ 66.

condoned living conditions, and impunity to date, the Court will ultimately draw its own legal conclusion of the intent requirement on the merits.⁹³

2. NGO Fact-Finding

In addition to UN fact-finding, many NGOs collect data from victims and other sources that may prove invaluable for States alleging breaches of *erga omnes partes* obligations.⁹⁴ However, the Court has afforded less evidentiary weight to NGO reports than UN reports.⁹⁵ In *Armed Activities*, the Court declined to credit a factual finding from a report by International Crisis Group, declaring that it “does not constitute reliable evidence.”⁹⁶ Still, each NGO report or document will be assessed by the Court individually.⁹⁷ In the *Croatian Genocide* case, for instance, the Court duly considered a report from Human Rights Watch, albeit not regarding it “as conclusive proof of the facts alleged.”⁹⁸

More recently, innovations in data security and metadata have improved the reliability of digital information collected by NGOs.⁹⁹ However, these new tools introduce a range of evidentiary issues, including issues concerning the reliability of third-party custodians and their methods, electronic evidence, and confidential testimony.¹⁰⁰

C. Witness Evidence

Where there is access to witnesses, witness testimony may be of particular value to an applicant seeking to overcome the asymmetrical access to documentary evidence, which is likely to feature in the context of

93. Human Rights Council, Rep. of the Indep. Int’l Fact-Finding Mission on Myan., ¶¶ 1, 14–15, 90, U.N. Doc. A/HRC/42/50 (2019); Order (Request for Indication of Provisional Measures), *Gam. v. Myan.*, 2020 I.C.J., ¶ 66.

94. See Compilation of International Norms and Standards Relating to Disability, UNITED NATIONS, <https://www.un.org/esa/socdev/enable/discom104.htm> (last visited Jan. 29, 2021).

95. See RIDDELL & PLANT, *supra* note 47, at 248–49.

96. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J., ¶¶ 73, 129.

97. See *Croat. v. Serb.*, 2015 I.C.J., ¶ 458.

98. *Id.*

99. Philip Alston & Colin Gillespie, *Global Human Rights Monitoring, New Technologies, and the Politics of Information*, 23 EUR. J. INT’L L. 1089, 1092, 1112–14, 1122 (2012).

100. Nikita Mehandru & Alexa Koenig, *Open Source Evidence and the International Criminal Court*, HARV. HUM. RTS. J. (Apr. 15, 2019), <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/>.

proceedings based on *erga omnes partes* standing.¹⁰¹ In *Qatar v. United Arab Emirates*, Qatar submitted over 100 witness statements from Qatari nationals affected by the United Arab Emirate's measures.¹⁰² An applicant basing itself on *erga omnes partes* standing may face greater challenges in securing witness testimony because the legal controversy will not directly concern the applicant's nationals, and nationals of the respondent may fear that giving witness evidence will expose them to reprisals.¹⁰³ The Court may order protective measures to facilitate the provision of witness testimony, such as the use of pseudonyms and redactions to public documents to obscure potentially identifying information.¹⁰⁴

Although "neither its Statute nor its Rules lay down any specific requirements concerning the admissibility of statements which are presented by the parties in the course of contentious proceedings" and the "Court leaves the parties free to determine the form in which they present evidence," it will weigh all evidence, including witness testimony, according to its credibility.¹⁰⁵ The Court treats written witness statements "with caution," taking into account their form and the circumstances in which they were made.¹⁰⁶ In looking at the circumstances in which the statements are made, the Court considers factors such as "whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events."¹⁰⁷ In the *Croatian Genocide* case, the Court gave no weight to unsigned witness statements and noted "difficulties" with certain statements that "fail to mention the circumstances in which they were given or were only made several years after the events to which they refer."¹⁰⁸ The Court has given "special value"

101. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Memorial of Qatar, vols. VII, XI, XII (Apr. 25, 2019).

102. *See id.*

103. *Croat. v. Serb.*, 2015 I.C.J., ¶ 43.

104. *Id.* ¶ 33; *see also* Kubo Mačák, *Article 43, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1215, 1275 (2019).

105. *Croat. v. Serb.*, 2015 I.C.J., ¶ 196.

106. *Id.* ¶ 196.

107. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, Judgment, 2007 I.C.J. 659, ¶ 244 (Oct. 8).

108. *Croat. v. Serb.*, 2015 I.C.J., ¶ 199.

to witness “evidence which is contemporaneous with the period concerned.”¹⁰⁹ It has also discounted hearsay evidence.¹¹⁰

D. *Proceedings of Other Adjudicatory Bodies*

Evidence presented to and the findings of national courts and other international courts can serve as a resource to applicants in ICJ proceedings seeking to overcome the evidentiary challenges associated with *erga omnes partes* standing.¹¹¹

The evolution of *erga omnes partes* standing before the ICJ coincides with the rise of the exercise of universal jurisdiction by national courts as a means of addressing impunity for violation of core values of the international community.¹¹² For example, the Burmese Rohingya Organisation UK initiated a case in Argentina against Myanmar’s top military and civilian leaders, alleging the commission of atrocity crimes against the Rohingya in Myanmar.¹¹³ More recently, prosecutors in Koblenz, Germany, brought criminal charges of torture against two former senior officials of the Assad regime currently living in Germany.¹¹⁴ Seventeen alleged victims of the defendants, formerly detained at the al-Khatib prison in Damascus, gave testimony in that trial in fall 2020.¹¹⁵

The Court’s jurisprudence demonstrates a willingness to consider evidence presented before national courts and the findings of other international courts.¹¹⁶ For example, in the *Croatian Genocide* case, the Court considered the statements of witnesses given in the national courts of Bosnia and Serbia “without, however, being regarded as conclusive proof of the facts alleged.”¹¹⁷ The Court also appeared to give substantial weight to

109. *Nicar. v. Hond.*, 2007 I.C.J., ¶ 244.

110. *See* *Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U. S.*), Judgment, 1986 I.C.J. 14, ¶ 68 (June 27).

111. RIDDELL & PLANT, *supra* note 47, at 236.

112. *See Argentinean Courts Urged to Prosecute Senior Myanmar Military and Government Officials for The Rohingya Genocide*, BURMESE ROHINGYA ORGANISATION U.K. (Nov. 13, 2019), <https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide>.

113. *Id.*

114. *See First Criminal Trial Worldwide on Torture in Syria Before a German Court*, EUR. CTR. FOR CONST. AND HUM. RTS., <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/#:~:text=The%20first%20trial%20worldwide%20on,apparatus%2C%20for%20crimes%20against%20humanity> (last visited Feb. 17, 2021).

115. *Id.*

116. *See generally* *Croat. v. Serb.*, 2015 I.C.J., ¶ 170.

117. *Id.* ¶ 459.

evidence presented to, and the findings of, the International Criminal Tribunal for the former Yugoslavia.¹¹⁸

Proceedings before national courts have also emerged as a means to secure evidence to support *erga omnes partes* claims before the ICJ.¹¹⁹ In June 2020, The Gambia initiated proceedings in the United States, invoking United States statute 28 U.S.C. § 1782, which provides an avenue for obtaining evidence to aid ongoing judicial proceedings.¹²⁰ In particular, The Gambia sought to compel Facebook to provide data on “suspended or terminated” accounts of Myanmar officials, likely in an effort to demonstrate genocidal intent.¹²¹ The matter remains pending before the District of Columbia District Court.¹²²

E. Judicial Intervention

The ICJ Statute affords the Court extensive powers for obtaining evidence that could be of particular value in a case based on *erga omnes partes* standing in which the applicant has limited access to evidence of events that occurred within the respondent’s territory.¹²³ For instance, Article 49 permits the Court to “call upon the agents to produce any document or to supply any explanations;”¹²⁴ Article 50 authorizes the Court to “entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry [*sic*] or giving an expert opinion;”¹²⁵ Article 34(2) permits the Court to “request of public international organizations information relevant to cases before it;”¹²⁶ and Article 44(2) provides for the possibility of full-Court site visits to “procure evidence on the spot.”¹²⁷ In *Oil Platforms*, Judge Owada opined that in cases featuring an asymmetry in access to evidence, the Court should engage in a:

118. *Id.* ¶ 76.

119. *See, e.g.*, Application for Order to Take Discovery Pursuant to 28 U.S.C 1782, In re: Application Pursuant to 28 U.S.C 1782 et al. v. Facebook, Inc., No. 1:20MC00036 (D.D.C. filed 2020).

120. *Id.*; 28 U.S.C. § 1782.

121. Memorandum of Law in Support of the Republic of Gambia’s Application for Order to Take Discovery Pursuant to 28 U.S.C. 1782 at 16, *In re: Application Pursuant to 28 U.S.C 1782 et al. v. Facebook, Inc.*, No. 1:20MC00036 (D.D.C. filed 2020).

122. *See* Application Pursuant to 28 U.S.C. 1782 v. Facebook, Inc., No. 1:20-mc-00036 (D.D.C. filed June 8, 2020).

123. I.C.J Statute, *supra* note 34, art. 44.

124. *Id.* art. 49.

125. *Id.* art. 50.

126. *Id.* art. 34, ¶ 2.

127. *Id.* art. 44.

[M]ore in-depth examination of this difficult problem of ascertaining the facts of the case, if necessary *proprio motu*, through various powers and procedural means available to the Court under its Statute and the Rules of Court, including those relating to the questions of the burden of proof and the standard of proof, in the concrete context of the present case.¹²⁸

However, the ICJ has rarely invoked these statutory powers.¹²⁹ It has sought an expert opinion *proprio motu* only once, in the *Corfu Channel* case.¹³⁰ The only site visit under Article 66 took place in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, when Slovakia invited the Court to “visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence.”¹³¹

One commentator opines that the ICJ has taken a generally “reactive role” with respect to evidence gathering, despite possessing broad evidentiary powers under the Statute of the Court.¹³² However, if ICJ practice evolves to feature increased cases based on standing *erga omnes partes*, increased pressure on the Court to be more proactive in exercising its evidentiary powers may also be on the horizon.

IV. CONCLUSION

The evolution of *erga omnes partes* standing before the ICJ brings welcome opportunities for the greater enforcement of community values and could serve as a valuable tool in achieving accountability and redressing human rights violations. However, standing is only the first step. The pursuit of merits judgments in specific cases will require careful consideration of case strategy, the legal standards that will apply during merits proceedings, and the marshaling of evidence to meet the applicant’s burden of proof.

128. Iran v. U.S., 2003 I.C.J., ¶ 52.

129. See, e.g., U.K. & N. Ir. v. Alb., 1949 I.C.J., at 9.

130. *Id.*

131. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 10 (Sept. 25).

132. JAMES GERARD DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 73–126 (2016).

INEQUALITY, COVID-19, AND HUMAN RIGHTS: WHOSE LIVES MATTER?

Barbara Stark*

“You don’t have to be an epidemiologist to realize that infectious diseases make their own preferential option for the poor—they afflict them more, and worse.”

—Paul Farmer¹

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1. Ariel Levy, *Ophelia Dahl’s National Health Service*, THE NEW YORKER, Dec. 11, 2017. [Farmer and his partners] were particularly taken with the Peruvian philosopher and priest Gustavo Gutiérrez’s conception of a ‘preferential option for the poor.’ Because God favors the poor and the powerless, Gutiérrez argued, Christianity should focus on the injustices visited upon the destitute. To [Farmer and his partners], it seemed clear that this doctrine applied to health care, too.

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I. INTRODUCTION

The coronavirus was called a “rich man’s disease” when it first appeared in some countries, brought by travelers returning from business trips in China, ski vacations in the Rockies, and studies in Europe.² It did not remain confined to the better neighborhoods for long. As Part I of this Article shows, the poor, everywhere, are more likely to get sick and more likely to die when they do.³ In many countries, they are also more likely to starve.⁴ As researchers noted in March, “[a]s the coronavirus spreads across the globe, it appears to be setting off a devastating feedback loop with another of the gravest forces of our time: economic inequality.”⁵

Part II explains why this is a matter of human rights.⁶ The ongoing deprivation of basic rights to healthcare and an adequate standard of living

2. Shashank Bengali et al., *How Coronavirus—a “Rich Man’s Disease” Infected the Poor*, L.A. TIMES (May 8, 2020), <https://www.latimes.com/world-nation/story/2020-05-08/how-the-coronavirus-began-as-a-disease-of-the-rich>.

3. Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>; see David Segal, *What Happened to the Great American Logistics Machine?*, N.Y. TIMES, May 24, 2020, at B1 (noting that “the coronavirus is offering a real-time demonstration of how to hopscotch the globe, with ease and speed.”).

4. Abdi Latif Dahir, *‘Instead of Coronavirus, the Hunger Will Kill Us.’ A Global Food Crisis Looms.*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/22/world/africa/coronavirus-hunger-crisis.html>.

5. Fisher & Bubola, *supra* note 3.

6. For purposes of this Article, human rights include: G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR]; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2106 (XX), Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter CERD]; G.A. Res. 34/180, Convention on the Elimination of All Form of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW]; G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

are major factors.⁷ As this Part demonstrates, however, the extreme vulnerability of the poor is grounded in earlier violations of human rights, including state-sanctioned segregation in the American south in the 1950s and what one author has called “the darker side of American hegemony,” referring to the United States’ role in the violent overthrow of leftist regimes during the Cold War.⁸

Part III argues that the current crises demand a broader, deeper, and more authentic commitment to human rights. This Part draws on vulnerability theory,⁹ abolition theory,¹⁰ and a new theory of ‘intercountry’ human rights¹¹ to support this expanded commitment and proposes two concrete legal reforms to realize it. First, it proposes that the United States fulfil its early promise to promote human rights. Second, it proposes that the United States assure certain human rights for specific groups which otherwise would have no claim against it.¹²

In short, we are living in a world of “obscene” economic inequality,¹³ in which some lives matter, and others do not. The United States has played a major role in creating this world, in part by violating the human rights of

7. Bengali et al., *supra* note 2; U.N. Secretary-General, *Policy Brief: COVID-19 and People on the Move* (June 2020), <https://unsdg.un.org/sites/default/files/2020-06/SG-Policy-Brief-on-People-on-the-Move.pdf> [hereinafter *Policy Brief*].

8. Vincent Bevins, *The ‘Liberal World Order’ Was Built With Blood*, N.Y. TIMES (May 29, 2020) <https://www.nytimes.com/2020/05/29/opinion/sunday/united-states-cold-war.html>.

9. See, e.g., VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds. 2013). Professor Fineman established the Vulnerability and the Law Initiative at Emory University in 2008. It is based on the idea that vulnerability is “universal and constant, inherent in the human condition” and that focusing on vulnerability “suggests a critique of dominant modes of thinking about inequality.” Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 1, 11 (2008) [hereinafter *Equality in the Human Condition*].

10. Pattrisse Cullors, *Abolition, and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019).

11. See Barbara Stark, *Toward a Theory of Intercountry Human Rights: Global Capitalism and the Rise and Fall of Intercountry Adoption*, 95 IND. L. J. 1365, 1391–95 (2020) (setting out a theory of intercountry human rights in the context of intercountry adoption).

12. This is hardly a radical idea. A strong form is seen in the early requirement that Member States ratify the European Convention on Human Rights before admission to the Council of Europe, and the more recent Treaty of Lisbon (2009), under which the Charter of Fundamental Rights of the EU became binding on EU Member States. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 2889 U.N.T.S. 222. A weaker, or more limited, version can be seen in the Banjul Charter. African (Banjul) Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (which requires that children can be adopted from Member States only by individuals in other Member States, or in states that are a party to the Convention on the Rights of the Child).

13. The characterization is in Philip Alston, *Extreme Inequality as the Antithesis of Human Rights*, OPENGLOBALRIGHTS (Aug. 27, 2015), <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/> [hereinafter *Extreme Inequality*].

Black Americans, immigrants, and asylum-seekers. This Article argues that the United States should take responsibility for these violations and suggests how it may begin.

II. COVID-19 TARGETS THE POOR

A. *Inequality Going into the Pandemic*

The world's richest 1%, those with over \$1 million in assets minus debts, own 44% of the world's wealth; 56.6 % of the world's population have less than \$10,000 in assets and own less than 2% of the world's wealth.¹⁴ According to Oxfam, the concentration of wealth is getting more extreme.¹⁵ In 2009, 380 billionaires owned what the bottom 50% of the global population owned; in 2018, only twenty-six billionaires owned what the bottom 50% owned.¹⁶ As Thomas Piketty has shown, birth predicts wealth as certainly as it did during the Gilded Age.¹⁷

Income is also deeply skewed.¹⁸ The top 1% earned more than 20% of global income in 2018, up from 16% in 1980.¹⁹ The post-World War II trend toward greater equality of incomes was reversed during the roughly thirty years from 1980–2013.²⁰ During this period the richest 1% in the United States saw their average real income increase from \$469,403 adjusted for inflation, to \$1,260,508 and their share of national income double, from 10% to 21%.²¹ The top .1% saw their average real income increase from \$1,597,080, adjusted for inflation, to \$6,087,113 and their share of national income almost tripled, from 3.4 to 10.3%.²² In the United States, those in the bottom quintile, in contrast, saw an increase of only 9% during roughly the same period, during which they increased their average work hours by 72%.²³

14. *Global Inequality Facts*, INEQUALITY, <https://inequality.org/facts/global-inequality/> (last visited Jan. 11, 2021) (citing Credit Suisse Research Institute, GLOBAL WEALTH REPORT 2020, Oct. 2020).

15. *Id.*

16. *Id.*; see *World's Billionaires List: The Richest in 2020*, FORBES, <https://www.forbes.com/billionaires/#a97200b251c7> (last updated Mar. 18, 2020) (noting that 51% of the billionaires are poorer than they were in 2019, because of the virus).

17. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 408–09, 421 (Arthur Goldhammer trans., 2014).

18. *Global Inequality Facts*, *supra* note 14.

19. *Id.*

20. Joseph Stiglitz, *Inequality and Economic Growth*, 86 POL. Q. 134, 134 (2015); see also DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 95–99 (2015) (describing the same trend).

21. Stiglitz, *supra* note 20, at 135.

22. *Id.* at 134–35.

23. *Id.*

In the first three years after the Great Recession, 91% of the gains in income went to the top 1%.²⁴

This inequality is a product of the neoliberalism that emerged in the late 1970s and became hegemonic after the end of the Cold War in 1989. As Robert Howse put it, “the old struggle between [the] right and [t]he left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus.”²⁵ Neoliberalism was grounded in the conviction that free markets, unrestrained by irrational humans and free of onerous regulations, were our best collective hope.²⁶ It promised that global capitalism would improve human well-being where badly managed, often corrupt, social welfare schemes had failed.²⁷

But the extreme wealth at the top never “trickled down.”²⁸ Instead, the American housing bubble burst in 2007 and markets panicked, triggering the Great Recession.²⁹ The United States economy constituted such a large proportion of the global economy that when it sank, it took the rest of the world with it.³⁰ In addition, the United States had already exported its neoliberal philosophy.³¹ The Great Recession spread like wildfire because neoliberal globalization had already eliminated the protections that might have slowed it.³² Those in low-income states were especially vulnerable.³³ They were immediately hit by the collapse in global demand.³⁴ Remittances—which have always dwarfed foreign aid—from the United States and Europe fell.³⁵

This matters here for three reasons. First, neoliberalism required that states slash social safety nets, privatize once-public functions (like maintaining clinics and prisons), and reduce or eliminate environmental,

24. *Id.* at 136.

25. Robert Howse, *The End of the Globalization Debate*, 121 HARV. L. REV. 1528, 1529 (2008) (book review).

26. DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYAK, FRIEDMAN AND THE BIRTH OF NEOLIBERAL POLITICS* 2 (2012); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 37 (2005).

27. *See generally* Stiglitz, *supra* note 20, at 134.

28. KOTZ, *supra* note 20, at 98. Harvey argues that the real goal of neoliberalism was to restore wealth to the top 1% of the population. HARVEY, *supra* note 26, at 15–18 (drawing on the analyses of data by Gérard Duménil and Dominique Lévy, charting the “extraordinary concentrations of wealth and power emerging all over the place.”).

29. *See* JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 21–24 (2010) [hereinafter *FREEFALL*].

30. *Id.*

31. *Id.*

32. *Id.*

33. *See generally id.*

34. *FREEFALL*, *supra* note 29.

35. *Id.* at 24. *See* note 68, *infra*.

financial, and health and safety regulations.³⁶ These policies were referred to as “structural adjustment” when imposed by the International Monetary Fund in the global south,³⁷ or “austerity” when imposed by richer lenders on poorer borrowers in the global north.³⁸ This meant that the world’s poor had already lost the protections—including government health and welfare services, decent-paying government jobs (with benefits), and health and safety regulations—that might have helped them avoid or survive COVID-19 by the time it hit. Second, thirty years of neoliberalism had eliminated state agencies, the government workers who ran them, and the infrastructure that supported them. Third, but equally important, the *idea* that it was the state’s responsibility to assure the well-being of its people, or that it even had that capacity, was a dim memory for many, and unimaginable for some.³⁹

B. *How the Poor Are Affected*

Low socioeconomic status has joined old age and pre-existing health conditions as major risk factors resulting in death for those who become infected.⁴⁰ This section focuses on two groups, Black Americans and those who the United Nations (UN) refers to as “people on the move”—migrants, refugees, and internally displaced persons (IDP).⁴¹ Members of both groups are disproportionately likely to get sick, and more likely to die if they do. According to the Chinese Centers for Disease Control and Prevention, because health disparities have grown along with the gap between the rich and the poor, those at the bottom are also more likely to have chronic conditions.⁴² COVID-19 is roughly twice as deadly for them.⁴³

1. Black Americans

In 2019, the median family wealth for a white family was \$188,200, eight times that of a Black family, \$24,100.⁴⁴ This meant that a typical white

36. JONES, *supra* note 26, at 16, 242–49.

37. HARVEY, *supra* note 26, at 37–38 (describing the Washington Consensus).

38. *Id.* at 100.

39. See WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 221(2015) (noting that neoliberalism rejects the idea that humanity can “craft and steer its existence or even to secure its future.”).

40. Fisher & Bubola, *supra* note 3.

41. Policy Brief, *supra* note 7 (aggregating migrant, refugees, and internally displaced persons (IDP)).

42. Fisher & Bubola, *supra* note 3.

43. *Id.*

44. Rachel Siegel, *Wealth Gaps Between Black and White Families Persisted Even at the Height of the Economic Expansion*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/business/2020/09/28/wealth-gap-fed/>.

family had \$50,600 to draw on in an emergency, while a typical Black family had \$14,400.⁴⁵ As noted by a Federal Reserve staff researcher, “[t]hese gaps in savings are particularly relevant in light of the COVID-19 pandemic and associated job losses . . . [suggesting] large disparities in families’ ability to weather the pandemic.”⁴⁶ Black Americans are also more likely to be unemployed and less likely to receive unemployment insurance.⁴⁷

Black Americans account for more than half of those who have tested positive and 72% of virus-related deaths in Chicago, even though they comprise slightly less than a third of the population.⁴⁸ Similar disparities have been reported in Michigan, Louisiana, North Carolina, and South Carolina.⁴⁹ As of April 2020, officials in many states hit hard by the virus—including California and New York—had not made statewide information about race available⁵⁰ and “fewer than a dozen states” had published such information.⁵¹ In May, the nonpartisan APM Research Lab released an analysis of data from forty states and the District of Columbia, which found that Black Americans were more than twice as likely as whites, Latinos, or Asian Americans to die from the virus.⁵² Under pressure from Congress, the Trump administration finally required the states to include race and ethnicity data in June.⁵³ But as of December 16, 2020, the Center for Disease Control and Prevention (CDC) reported that such data was only available for 50% of the cases.⁵⁴

Experts attribute these disparities to long-standing inequalities that have left Black Americans less likely to have health insurance, less likely to be referred for virus testing when they do seek medical care, and more likely to

45. *Id.*

46. *Id.*

47. *Id.*; see Eli Rosenberg & Andrew Van Dam, *Economic Gap Between Black, White Americans May Help Explain Protests*, WASH. POST, June 2, 2020, at A21.

48. John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

49. *Id.* (Minnesota is the only state mentioned in the Article in which the percentage of Blacks infected roughly corresponds to their percentage of the state’s population).

50. *Id.*

51. Aletha Maybank, Opinion, *The Pandemic’s Missing Data*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/opinion/coronavirus-blacks.html>.

52. APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Jan. 7, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>; see Editors, *Too Many Black American are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/> (noting that the “pandemic exposed a glaring health gap caused by systemic racism.”).

53. Sheryl Gay Stolberg, *‘Pandemic Within a Pandemic’: Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html>.

54. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#demographics> (last visited Jan. 15, 2021).

live in segregated neighborhoods that lack job opportunities (requiring long commutes on public transportation), affordable housing, and grocery stores with healthy food.⁵⁵ Low-income Black Americans do not have enough private space to maintain the recommended six feet apart required by “social distancing.”⁵⁶ Such rules do not take their circumstances into account, or give them any possibility of complying. Black Americans also suffer disproportionately because they experience high levels of stress from multiple sources, such as exposure to toxins, lack of sleep, and racial discrimination, which can accelerate aging.⁵⁷

The decline of unions and the rise of part-time work has left people with fewer workplace protections. Unlike white collar workers, many of whom can telecommute, Black Americans disproportionately work in sectors in which it is not an option.⁵⁸ Nor, in general, do they have paid leave. In the United States, 90% of those with incomes in the top quarter have paid sick leave, in contrast to only 47% in the bottom quarter.⁵⁹

Black Americans are also more likely to work in the meat packing plants and nursing homes and to be incarcerated in the prisons,⁶⁰ that have become hot spots throughout the United States.⁶¹ They are the bulk of the workers deemed “essential,” i.e., excluded from lock down orders. This includes

55. Eligon et al., *supra* note 48.

56. Jason DeParle, *The Coronavirus Class Divide: Space and Privacy*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/12/us/politics/coronavirus-poverty-privacy.html>.

57. Eligon et al., *supra* note 48.

58. Heather Long et al., *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/>; Michael Gee, *Why Aren't Black Employees Getting More White-Collar Jobs?*, HARV. BUS. REV. (Feb. 28, 2018), <https://hbr.org/2018/02/why-arent-black-employees-getting-more-white-collar-jobs>.

59. Elise Gould, *Lack of Paid Sick Days and Large Numbers of Uninsured Increase Risks of Spreading the Coronavirus*, ECON. POL'Y INST. (Feb. 28, 2020, 5:20 PM), <https://www.epi.org/blog/lack-of-paid-sick-days-and-large-numbers-of-uninsured-increase-risks-of-spreading-the-coronavirus/>.

60. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2018) (documenting mass incarceration of Black men); see Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>; Adam Liptak, *Supreme Court Refuses to Stop Order to Move Inmates from Virus-Ravaged Prison*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/supreme-court-virus-inmates.html> (noting that the U.S. Supreme Court denied a request by the Trump administration to block a trial court ruling that ordered federal prison officials to protect 800 older or medically vulnerable inmates).

61. See Rosenberg & Van Dam, *supra* note 47 (noting that Black Americans are overrepresented in these jobs); Stephen Speranza et al., Opinion, *'You're on Your Own,' Essential Workers are Being Told*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/osha-coronavirus.html> (quoting a former official of the Department of Labor's enforcement arm, the Occupational Safety and Health Administration (OSHA), who says that OSHA has basically told employers and their workers, “[y]ou're on your own.”).

healthcare workers, grocery and pharmacy workers, delivery people, farmworkers, and sanitation workers.⁶² As a critical care doctor in Boston observed, “C[OVID]-19 has become a disease of the vulnerable.”⁶³ Black Americans have been “bearing the brunt of three crises—police violence, crushing unemployment and the deadliest infectious disease threat in a century—that has laid bare longstanding injustice.”⁶⁴

2. People on the Move

Migrants, who typically perform the low-wage work that citizens do not want, are at tremendous risk and often beyond the ambit of workplace regulation or health care coverage.⁶⁵ Along with the tourists and business travelers who carried the virus across borders, the International Labor Organization estimates that almost 200 million migrant workers travel from state to state for farm work, and other seasonal and low wage work.⁶⁶

An additional 760 million workers travel internally, from one region of their home countries to another, including forty million internal migrants within India.⁶⁷ Before the virus, these workers were respected for the remittances they sent back to their communities.⁶⁸ Now they are often viewed as pariahs, suspected of carrying the virus.

Migrants are, in fact, disproportionately affected. In New York, for example, as rates were declining elsewhere in the state during the last two weeks of May, rural Sullivan County had the highest positive test rate and the most new cases per capita. This was mostly attributed to migrant farm workers, who often live in dormitories with shared bathrooms and dining areas.⁶⁹ Governments often exacerbate the vulnerability of people on the move. In Singapore, migrant workers were not included in the plan to contain

62. Gene B. Sperling, Opinion, *Martin Luther King Jr. Predicted this Moment*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/opinion/sunday/essential-workers-wages-covid.html>.

63. Daniela J. Lamas, Opinion, *The Country is Reopening. My Patients are Still Suffering.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/sunday/coronavirus-nursing-homes.html>.

64. Stolberg, *supra* note 53.

65. Hannah Beech, *Coronavirus Finds Fuel in a World of Migrants*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/10/world/asia/coronavirus-migrants.html>.

66. *Id.*

67. *Id.*

68. *Id.* FREEFALL, *supra* note 29. As the UN Secretary-General noted in June, “[T]he loss of income from COVID-19 is likely to lead to a colossal \$109 billion drop in remittances. That’s the equivalent of nearly three-quarters of all official development assistance that is no longer being sent back home to the 800 million people who depend on it.” *UN chief underlines need to protect refugees and migrants in COVID-19 pandemic*, UN NEWS (June 3, 2020), <https://news.un.org/en/story/2020/06/1065322>. See note 35, *supra*.

69. *Id.*

the virus, which included free testing and treatment of residents.⁷⁰ Singapore initially seemed to have the virus under control. But the number of cases doubled to 8000 by April 20, 2020 because of new infections in the government-built dormitories, in which up to twenty migrants shared a “stifling” room.⁷¹ By December, data showed that 152,000 foreign workers, or 47%, had been infected.⁷² Infections have dropped to near zero, but the workers are still basically quarantined. They have been told that restrictions will gradually be eased in 2021.⁷³

In the United States, the CDC issued an Order Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists on March 20, 2020.⁷⁴ The United States Department of Homeland Security (DHS) deported 10,000 people, denying them entry at the border, within roughly two months.⁷⁵ These migrants, many infected by the coronavirus, were sent to countries already overwhelmed—not only by the virus, but by poverty and corruption as well.⁷⁶

As Chris Boian, a spokesperson for the UN Refugee Agency noted, “[the pandemic] may warrant extraordinary measures at borders, [but] expulsion of asylum seekers resulting in refoulement should not be among them.”⁷⁷ According to the UN Network on Migration, states in many regions have similarly closed their borders and suspended procedures for asylum-seekers.⁷⁸ The Network reiterated the UN Secretary-General’s call to grant

70. Hannah Beech, *Singapore Seemed to Have Coronavirus Under Control, Until Cases Doubled*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/20/world/asia/coronavirus-singapore.html>.

71. *Id.*

72. Andreas Illmer, *COVID-19: Singapore migrant worker infections were three times higher*, BBC NEWS (Dec. 16, 2020), <https://www.bbc.com/news/world-asia-55314862>.

73. *Id.*

74. Junteng Zheng, *Pandemic, Emergency Power, and Implications on the Right to Seek Asylum*, 24 AM. SOC’Y INT’L L. (May 28, 2020) <https://www.asil.org/insights/volume/24/issue/13/pandemic-emergency-power-and-implications-right-see-asylum>; see Nina Lakhani, *US using coronavirus pandemic to unlawfully expel asylum seekers, says UN*, GUARDIAN (Apr. 17, 2020) (noting that the “unprecedented U.S. policy authorizing the summary expulsion of migrants and asylum seekers violates international law.”).

75. Zheng, *supra* note 74.

76. The Editorial Board, Opinion, *Why Is the United States Exporting Coronavirus?*, N.Y. TIMES, (June 18, 2020) <https://www.nytimes.com/2020/06/18/opinion/trump-immigration-covid19-deportations.html>.

77. Lakhani, *supra* note 74.

78. UN Network on Migration Official Statement on the SG’s Policy Guidance: *The COVID-19 Pandemic is an Opportunity to Reimagine Human Mobility*, UN NETWORK ON MIGRATION (June 3, 2020), <https://migrationnetwork.un.org/un-network-migration-official-statement-sgs-policy-guidance-covid-19-pandemic-opportunity-reimagine>.

temporary residence to migrants and impose a moratorium on deportations.⁷⁹ But global migration from poor countries to wealthier ones has been blocked by border closings, lockdowns, the reduction of global transportation, and suspended asylum programs.⁸⁰ According to Gillian Triggs, assistant high commissioner for protection at the UN Refugee Agency, most governments have temporarily shut down their asylum programs.⁸¹

III. HUMAN RIGHTS AND THE PANDEMIC

Human rights protect people from COVID-19 and other infectious diseases by requiring their states to assure that they enjoy the “highest attainable standard of physical and mental health,”⁸² and an “adequate standard of living”⁸³ so they can resist infection; by assuring the provision of appropriate personal protective equipment (PPE), especially for essential workers;⁸⁴ by assuring enough living space and workspace to maintain social distancing; by providing adequate testing and contact tracing; and by assuring effective care for those infected.

We know that these human rights save lives and enable countries to cope with the virus because they have done so in the other wealthy democracies.⁸⁵ The universal health care available for decades in other developed states meant that the infrastructure for testing, isolation, and treatment was already in place. Their governments quickly assumed responsibility. South Korea, recalling the lessons of Middle East Respiratory Syndrome (MERS), immediately began coordinating the production of PPE. But Black Americans and people on the move, described in Part I, cannot claim their human rights. The following two sections explain why.

79. Press Release, Network on Migration, Forced Returns of Migrants Must be Suspended in Times of COVID-19, U.N. Press Release SC/6997 (May 13, 2020).

80. Kirk Semple, *As World Comes to Halt Amid Pandemic, So Do Migrants*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/04/world/americas/coronavirus-migrants.html>.

81. *Id.* (noting that only about thirty states of the 120 that have closed their borders allow asylum seekers to file claims).

82. ICESCR, *supra* note 6, arts. 6, 12.

83. *Id.* art. 11.

84. *Id.* art. 7(b) (“safe and healthy work conditions”).

85. See Michelle Goldberg, Opinion, *America is Too Broken To Fight the Coronavirus*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/opinion/us-coronavirus-trump.html> (noting that “[n]o other developed country is doing as badly as the United States.”).

A. Racism and America's Rejection of Human Rights

Although the United States had been among the earliest proponents of international human rights,⁸⁶ it soon abandoned the project. Its rejection of international human rights was led in the 1950s by southern conservatives in Congress.⁸⁷ They insisted that international human rights violated states' rights.⁸⁸ What they meant was that the law's prohibitions against racial discrimination would bar still-legal segregation in the South. They were right.

An excerpt from the debate in the United States Senate Foreign Relations Subcommittee on the Genocide Convention sets out their concerns:

... If there is to be a succession of treaties from the United Nations dealing with domestic questions, *are we ready to surrender the power of the States over such matters to the Federal Government?*
... The report of the Civil Rights Committee appointed by the President ... in two places refers to the added power which may be given to Congress in the field of civil rights if the human-rights treaty is ratified and approved.⁸⁹

Congress was not "ready to surrender the power of the states over [civil rights] to the Federal Government"—and certainly not to the United Nations. Senator Bricker of Ohio proposed an amendment to the Constitution, which would require Congressional legislation before any treaty could become law in the United States.⁹⁰ As Louis Henkin noted, this would have made all treaties non-self-executing.⁹¹ The Bricker Amendment was narrowly defeated by "vigorous lobbying by the Eisenhower Administration and its concomitant undertaking ... not to adhere to human rights treaties."⁹²

86. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 9 (2001).

87. Natalie H. Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 311 (1988).

88. *Id.* at 313, 315, 323.

89. *The Genocide Convention, Hearings Before A Subcomm. of the S. Comm. Sess. 208* (1950) (statement of Carl B. Rix, Vice Chairman of Special Comm. on Peace and Law Through United Nations of the American Bar Association).

90. Kaufman & Whiteman, *supra* note 87, at 309, 310, 313–316, 324.

91. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker* (editorial comments), 89 AM. J. INT'L L. 341, 348 (1995).

92. LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 964–65 (1973).

The executive branch was more worried about the international reaction to domestic racism.⁹³ The Soviets distributed photographs of the police attacking civil rights marchers, with fire hoses and German shepherds, throughout the Third World.⁹⁴ People in the newly independent states were appalled. Desegregation became a Cold War imperative, as the United States noted in its amicus brief in *Brown v. Board of Education*.⁹⁵

Nor was America receptive to economic rights in the 1950s. Economic rights were viewed as both dangerous—a deceptively benign form of communism that would subvert and destroy American initiative—and demeaning, “handouts” inimical to self-respect. The rhetoric of opportunity, the get-rich-quick promise of the American Dream, made economic rights seem superfluous. America was the richest country in the world.

White Americans did not need economic rights because they were *already* the beneficiaries of massive, generous government spending programs. The G.I. Bill assured white American men who had served in World War II re-entry into civilian life. “No other New Deal initiative had as great an impact on changing the country. Aimed at reintegrating sixteen million veterans, it reached eight of ten men born during the 1920s.”⁹⁶ Between 1944 and 1971, \$95 billion was invested in the “model welfare system” it created.⁹⁷ More than 200,000 used the G.I. Bill’s access to capital to buy farms and start businesses.⁹⁸ Five million veterans were able to get mortgages for new houses in the suburbs. It was a phenomenal success for white Americans.

While the G.I. Bill was technically available to Black veterans, it was administered locally. In the south, “95 percent of Black veterans used their higher education benefits” in segregated colleges.⁹⁹ None of these schools were research universities and fewer than 5% were accredited by the American Association of University Professors (AAUP).¹⁰⁰ Although Blacks comprised 25% of the population in the south, white schools outnumbered

93. Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES (July 17, 1994), <https://www.nytimes.com/1994/07/17/arts/photography-view-remembering-the-faces-in-the-civil-rights-struggle.html>.

94. *Id.*

95. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988); see Brief for American Civil Liberties Union et al., *Brown v. Board of Education* (Brown I) 347 U.S. 483 (1954) (No. 08) (explaining that, “Soviet spokesmen [are using the] undeniable existence of racial discrimination [as] propaganda warfare.”).

96. Ira Katznelson, *When Is Affirmative Action Fair? On Grievous Harms and Public Remedies*, 73 SOC. RSCH. 541, 566 (2006).

97. *Id.*

98. *Id.*

99. *Id.* at 553.

100. *Id.* at 554.

Black schools by more than five to one.¹⁰¹ Many of the Black schools were small with fewer than 250 students.¹⁰² Twenty-thousand Black applicants were denied admission because there was no room for them.¹⁰³ Fannie Mae mortgage loans, similarly, made it possible for white families to buy a house in the suburbs. Black families were explicitly excluded from the new suburbs by residential red-lining. As Ira Katznelson has shown, “there was . . . no greater instrument for widening an already huge racial gap in postwar America than the G.I. Bill.”¹⁰⁴

Many in the Civil Rights Movement understood that economic rights were necessary for racial equality. Martin Luther King, Jr., drafted an “economic and social Bill of Rights,” which included “the right . . . to a decent job . . . the right to a minimum income . . . [and] the right to an adequate education.”¹⁰⁵ Internationalists and progressives urged the United States to recognize the full range of human rights set out in the Universal Declaration. They were persecuted by Senator Joseph McCarthy and his followers.¹⁰⁶ The United States did not ratify the Civil Covenant and the Race Convention until the early 1990s, when the Cold War was over. Even then, the ratifications had caveats that assured the treaties would have no effect. The southern segregationists had prevailed. The United States is the only industrialized democracy that is still not a party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.¹⁰⁷

B. *The United States Campaign Against Communism in Latin America*

The people on the move described in Part I, at least those seeking to stay in the United States or to seek asylum here, cannot claim their human rights because the United States will not allow them to do so. These deportations are especially egregious because of the United States’ historical support of

101. Katznelson, *supra* note 96, at 553.

102. *Id.* at 554.

103. *Id.*

104. *Id.* at 553.

105. Martin Luther King, Jr., *Economic & Social Bill of Rights*, (Feb. 6, 1968), <https://www.crmvet.org/docs/68ebr.htm>.

106. See, e.g., Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES MAG. (Nov. 11, 2014), <https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html> (describing the F.B.I.’s smear campaign against Martin Luther King Jr.); see generally RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM* (1972).

107. See G.A. Res. 217 (III) A, *supra* note 6; see also ICESCR, *supra* note 6; ICCPR, *supra* note 6; CERD, *supra* note 6; CEDAW, *supra* note 6; CRC, *supra* note 6; UN Human Rights Office of the High Commissioner, *Status of Ratifications Interactive Dashboard*, OHCHR, <https://indicators.ohchr.org> (last visited Sept. 29, 2020).

right-wing authoritarian regimes in Latin America, which forced immigrants to flee to the United States from a violent, corrupt, and impoverished region. In a new book, *The Jakarta Method: Washington's Anticommunism Crusade and the Mass Murder Program That Shaped Our World*,¹⁰⁸ Vincent Bevins draws on recently declassified government documents to describe the role of the United States in the Indonesian Army's "annihilation" of the Communist Party.¹⁰⁹ "Jakarta," he shows, became a code word in Brazil and Chile.

Testimony before Brazil's Truth Commission after the fall of its right-wing dictatorship established that the "Jakarta Operation" there referred to the mass murder of communists.¹¹⁰ Graffiti with the message "Jakarta is coming," or simply "Yakarta," appeared throughout the region. It meant "anti-communist mass murder and the state-organized extermination of civilians who opposed . . . capitalist authoritarian regimes loyal to the United States. . . . [Jakarta] would be employed far and wide in Latin America over the two decades that followed."¹¹¹ The United States' efforts to undermine communist regimes in Latin America also included what the International Court of Justice (ICJ) held was America's illegal use of force against Nicaragua in *Nicaragua v. United States*,¹¹² as well as its role in the overthrow of the democratically elected President of Chile, Salvador Allende, and its support for General Augusto Pinochet, the dictator who replaced him.¹¹³

108. See generally VINCENT BEVINS, *THE JAKARTA METHOD: WASHINGTON'S ANTICOMMUNISM CRUSADE AND THE MASS MURDER PROGRAM THAT SHAPED OUR WORLD* (Hatchett Book Group) (2020) [hereinafter JAKARTA METHOD].

109. *Id.* at 139–40, 156–57; Vincent Bevins, *How 'Jakarta' Became the Codeword for U.S.-Backed Mass Killing*, N.Y. REV. BOOKS (May 18, 2020), https://www.nybooks.com/daily/2020/05/18/how-jakarta-became-the-codeword-for-us-backed-mass-killing/?lp_txn_id=1039785 (stating that, "Operation Annihilation" was the Indonesian Army's name for the campaign in which "between five hundred thousand and one million people were slaughtered, and one million more were herded into concentration camps." While conceding that, "The prime responsibility for the massacres and the concentration camps lies with the Indonesian military," Bevins insists that, "The United States was part and parcel of the operation at every stage.").

110. *Id.* at 193–94.

111. *Id.* at 199–200.

112. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶¶ 9, 15, 25, 26(g) (June 27).

113. JAKARTA METHOD, *supra* note 108, at 200–01, 203; see generally Frederic L. Kirgis, *Possible Indictment of Pinochet in the United States*, 51 AM. SOC'Y INT'L L. (Mar. 13, 2000) <https://www.asil.org/insights/volume/5/issue/3/possible-indictment-pinochet-united-states>; *Support SOA Watch*, SOAW (Jan. 1, 2021) <https://soaw.org/support-soa-watch-today> ("The SOA Watch staff collective is spread across continents, working with allies and compass throughout the Americas on everything from reports documenting the impacts of US trained, funded and supported state officials; to organizing virtual spaces for popular education.").

IV. TOWARD A MORE AUTHENTIC COMMITMENT TO HUMAN RIGHTS

This Part begins with two theories that support the more vigorous approach to human rights that the current crises demand. It then proposes a new theory, intercountry human rights, intended to globalize human rights through *ad hoc* arrangements between states. It concludes by proposing two concrete legal reforms for the United States.

A. Theories to Support More Robust Human Rights

Vulnerability theory and reparations theory are both familiar to international lawyers. These recent iterations differ from the traditional international lawyers' understanding in ways that support the deeper commitment to human rights needed now.

1. Vulnerability Theory

The core insight of vulnerability theory is that “vulnerability is . . . inherent in the human condition”; we are all vulnerable in different ways and at different times in our lives.¹¹⁴ As a corollary, the notion that only some groups are “vulnerable” is “not only misleading and inaccurate, it is also pernicious” because it suggests that other groups are not.¹¹⁵ Under vulnerability theory, in contrast, the state has an affirmative obligation to recognize and address the multiple vulnerabilities of its people.¹¹⁶

Although the term “vulnerability theory” was coined in the twenty-first century, human vulnerability has been addressed in human rights law since the Universal Declaration of Human Rights in 1948.¹¹⁷ Article 6, for example, recognizes everyone’s “right to recognition everywhere as a person before the law.”¹¹⁸ Article 22 recognizes the right to social security and the right to the “realization . . . of economic, social and cultural rights indispensable for his dignity.”¹¹⁹ Article 23.3 recognizes that “everyone who works has the right to . . . [remuneration] . . . ensuring for himself and his

114. *Equality in the Human Condition*, *supra* note 9, at 1.

115. *Id.* at 3; Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 16 (Martha Albertson Fineman & Anna Grear eds. 2013).

116. *Equality in the Human Condition*, *supra* note 9, at 20–21.

117. See generally G.A. Res. 217 (III) A, *supra* note 6; Robert Andorno, *Is Vulnerability the Foundation of Human Rights*, in HUMAN DIGNITY OF THE VULNERABLE IN THE AGE OF RIGHTS: INTERDISCIPLINARY PERSPECTIVES 257, 258 (Aniceto Masferrer & Emilio Garcia-Sanchez eds., 2016) [hereinafter *Vulnerability the Foundation of Human Rights*].

118. G.A. Res. 217 (III) A, *supra* note 6, art. 6.

119. *Id.* art. 22.

family existence worthy of human dignity,”¹²⁰ and Article 25 recognizes that if a person *cannot* work; because of unemployment, sickness, disability, old age or other reason; he still has a right to security.¹²¹ These rights and others, including the rights to an adequate standard of living,¹²² to be free from hunger,¹²³ and the right to the “highest attainable standard of physical and mental health”¹²⁴ are spelled out in detail in the legally binding Economic Covenant.¹²⁵ Additional rights, recognizing the specific vulnerabilities of women and children, are set out in the Women’s Convention and the CRC.¹²⁶

Vulnerability theory extends the scope of those for whom the state is responsible. Under the human rights treaties, the state is responsible only for the specific parties, and in the specific contexts, set out in the treaties. The treaties, moreover, are binding only on ratifying parties, and even then, only to the extent accepted by the state. Under vulnerability theory, in contrast, vulnerability is universal.

2. Abolition Theory

Reparations have a long history in international law. They are due whenever a state is in breach of a legal obligation. They may take the form of compensation, restitution, apology, or other form of satisfaction. In *The Alabama Arbitration*, for example, Great Britain paid the United States \$15,500,000 for its breach of neutrality during the American Civil War.¹²⁷

Under recent iterations of reparations theory propounded by the Black Lives Matter movement, however, reparations have been explicitly linked to the abolition of the original harm upon which the reparations are based.¹²⁸ As Patrisse Cullors describes it, this enables those seeking to eliminate destructive institutions to situate the harm in a social and political context.¹²⁹

120. *Id.* art. 23, ¶ 3.

121. *Id.* art. 25.

122. ICESCR, *supra* note 6, art. 11, ¶ 1.

123. *Id.*

124. *Id.* art. 12.

125. *See generally* ICESCR, *supra* note 6.

126. *See, e.g.,* CEDAW, *supra* note 6, arts. 5–6 (requiring state to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children” and “to suppress all forms of traffic in women and exploitation of prostitution of women” *Id.*); CRC, *supra* note 6, arts. 7, ¶ 1, 24, ¶ 2 (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” *Id.* art. 7, ¶ 1. As well as “To diminish infant and child mortality[.]” *Id.* art. 24, ¶ 2(a)).

127. MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776–1939* 131–33 (2010).

128. *See, e.g.,* Cullors, *supra* note 10, at 1686; Roberts, *supra* note 60, at 30.

129. Cullors, *supra* note 10, at 1687.

She offers a graphic example.¹³⁰ Her brother, a 6'2" Black man weighing almost three hundred pounds, was discharged from prison with a diagnosis of mental illness, but his family was not informed.¹³¹ They were terrified when he started to hallucinate and did not know where he was.¹³² They called for the Psychiatric Emergency Team, which arrived and promptly called the police.¹³³ Her brother dropped to his knees, hands in the air, "plead[ing] with the officers for his life."¹³⁴ Cullors was able to persuade the officers to leave, and her brother eventually agreed to go to the hospital. As Cullors concludes, "[a]bolition means not having the police as first responders to mental and emotional health crises."¹³⁵ Rather, she suggests, "[a]bolition fights to ensure that all families have access to adequate and quality health services."¹³⁶

Those seeking to abolish prisons, for example, may seek reparations for mass incarceration even as they work toward its abolition. The key is to avoid measures that perpetuate that which is to be eradicated, rather than dismantle or diminish it. As Angel Sanchez explains, "I understand this [Essay] may not be abolitionist enough for some . . . [but] after serving over a decade in prison . . . I yearn to . . . alleviate the inhumane treatment of the imprisoned . . . I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it."¹³⁷

Framing reparations for human rights violations as a measure taken toward the abolition of such violations, similarly, is important for symbolic and educational reasons. But it is also important to apply those reparations to the remediation of the actual harm caused by the violations and to the prevention of future violations. The ICJ found that the United States had an obligation to pay reparations in *The Nicaragua Case*, for example.¹³⁸ But Nicaragua later abandoned its claim, presumably in response to United States pressure to do so in exchange for foreign aid.¹³⁹ If the United States wanted to repair its relationship with Nicaragua, and the region, it might have instead accepted responsibility for its earlier violations, and framed the same exchange not only as reparations but as a commitment to the abolition of the illegal use of force.

130. *Id.* at 1689.

131. *Id.*

132. *Id.*

133. *Id.*

134. Cullors, *supra* note 10, at 1689.

135. *Id.*

136. *Id.*

137. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

138. MARK WESTON JANIS ET AL., INTERNATIONAL LAW 804 (6th ed. 2020).

139. *Id.* at 805.

3. A Theory of Intercountry Human Rights

Intercountry human rights would effectively merge the participating states into a single functioning unit for purposes of assuring specific, agreed-upon human rights. The legal mechanism for accomplishing this could be a simple protocol to a pre-existing treaty to which they were both parties, such as a friendship, commerce, and navigation treaty (FCN) treaty or, if there were more than two states, the relevant human rights treaty.

The terms of the agreements would vary according to the interests, needs, histories, and geographies of their state parties. There are several reasons states might accede to such treaties, and more broadly, embrace the notion of intercountry human rights, as set out below. These treaties would find support in vulnerability theory, abolition theory, and the growing recognition that human rights violations, like viruses, ignore political borders in a globalized world.

A strong version of intercountry human rights would be a multilateral treaty or protocol in which states recognize that all activities involving international law would be subject to international human rights law.¹⁴⁰ Disputes would be resolved by the ICJ. In other words, if an activity involved goods, services, or persons of more than one state, or any form of international commerce or investment, human rights would have to be assured at every step of the process, for everyone involved. Rich countries, for example, could not corner the market on a COVID-19 vaccine because it would violate the right to health of those unable to afford it.¹⁴¹ A person ordering shoes from China would know that workers' rights were protected in the factories in which they were made, and that toxic by-products of industrialization were not lowering the life expectancy of the people who lived in the region. A strong version of intercountry human rights, in short, would eliminate the "siloeing" of human rights documented and deplored by Alston.¹⁴²

Intercountry human rights are not an alternative to *international* human rights, understood as the UN-centered system, but an addition. It would draw

140. See ICESCR, *supra* note 6; ICCPR, *supra* note 6; CERD, *supra* note 6; CEDAW, *supra* note 6; CRC, *supra* note 6.

141. See, e.g., Megan Twohey et al., *With First Dibs on Vaccines, Rich Countries Have 'Cleared the Shelves'*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/15/us/coronavirus-vaccine-doses-reserved.html?searchResultPosition=2>; Matt Apuzzo & Selam Gebrekidan, *For COVID-19 Vaccines, Some are Rich and too Poor*, N.Y. TIMES, <https://www.nytimes.com/2020/12/28/world/africa/covid-19-vaccines-south-africa.html?searchResultPosition=1> (last updated Dec. 30, 2020).

142. *Extreme Inequality*, *supra* note 13; Philip Alston, *Universal Basic Income*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 377, 379 (Katherine Young ed. 2019).

on developments in that system, such as recent research showing that state reporting to human rights treaty bodies is linked to better rights practices.¹⁴³

There is no need for any theoretical justification for the mechanism proposed here; it is simply an agreement between, or among, consenting states. There is no encroachment on state sovereignty. Rather, like any other international agreement, it is a voluntary surrender of *some* sovereignty, in recognition of a greater common good.

B. Legal Reforms for the United States

This section suggests how the United States could apply the theories set out above. These are merely sketches, set out for purposes of illustration, but they are intended to serve as sketches for actual, concrete proposals. While vulnerability theory and abolition theory apply to both Black Americans and people on the move, the focus in the first subsection, below, is on Black Americans. Intercountry human rights could apply, in theory, to *all* people on the move. Here, more specifically, the theory is considered in the context of those harmed by the United States' anti-communism campaigns in Latin America and to those deported there during the pandemic.

1. Fulfil America's Early Promise

The United States can begin by revoking its prior declarations that the ICCPR and the Race Convention were "non-self-executing."¹⁴⁴ It can then join the other industrialized democracies by ratifying the remaining major human rights treaties without stipulating that they will have no legal effect.¹⁴⁵

This may seem overly ambitious, especially in view of our historical antipathy to human rights. But there are three reasons why these measures, which the other industrialized democracies adopted decades ago, may finally be within reach. First, our historical antipathy to human rights was deeply grounded in a virulent form of racism that growing numbers of Americans, especially young Americans, now find repugnant.¹⁴⁶ Americans in every

143. Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1, 1 (2020).

144. See, e.g., Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 98, 98–99 (2011).

145. *Id.*

146. See, e.g., Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> (noting that "in recent weeks, American voters' support for Black Lives Matter increased almost as much as it had in the preceding two years"). *Id.*; Astead W. Herndon & Dionne Searcey, *How Trump and the Black Lives Matter Movement Changed White Voters' Minds*, N.Y. TIMES, <https://www.nytimes.com/2020/06/27/us/politics/trump-biden-protests-polling.html> (last updated July 3, 2020).

state demonstrated against the murder of George Floyd and other Black Americans by the police this year.¹⁴⁷ These murders, and the Black Lives Matter movement, have produced a “seismic shift” in American views on racism.¹⁴⁸ Along with the pandemic, and its economic costs, “[i]deas that would have been considered too liberal for most Democrats a few months ago are now being proposed by Republicans.”¹⁴⁹

Second, “human rights” have become part of mainstream discourse, in part thanks to Bernie Sanders.¹⁵⁰ As then President-elect Joe Biden noted in a speech on December 10, 2020, Human Rights Day, he is receptive:

This year, amid a pandemic and global protests, we are reminded of how much work remains to be done to root out the systemic inequities that continue to cut short lives and imperil livelihoods. And as we work . . . to advance human rights globally, we must also recognize that our task begins at home. Every American — regardless of race, ethnicity, zip code, religion, sex, sexual orientation, gender identity, or disability — should be free to flourish in a society that values and defends equal justice for all. We must lead by the power of our example.¹⁵¹

Third, the idea that it is the state’s responsibility to assure the well-being of its people, and that the state is in fact capable of doing so, has been rehabilitated.¹⁵² Nobel-prize winning economist Paul Krugman recently cited Ronald Reagan: “the most terrifying words in English are ‘I’m from

147. See, e.g., Damien Cave, Livia Albeck-Ripka, & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html> (Protesters throughout the world took to the streets in solidarity).

148. Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>.

149. Perry Bacon Jr., *The Pandemic Has Pushed Biden To The Left. How Far Will He Go?*, FIVETHIRTYEIGHT (May 21, 2010), <https://fivethirtyeight.com/features/the-pandemic-has-pushed-biden-to-the-left-how-far-will-he-go/>.

150. Sydney Ember, *Bernie Sanders Went to Canada, and a Dream of ‘Medicare for All’ Flourished*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/us/politics/bernie-sanders-health-care.html>.

151. Press Release, Joe Biden, Biden-Harris Transition, Statement by President-elect Joe Biden on Human Rights Day (Dec. 10, 2020) (on file at <https://buildbackbetter.gov/press-releases/statement-by-president-elect-joe-biden-on-human-rights-day>).

152. See BROWN, *supra* note 39, at 131; *Government’s Responsibility for Public Health*, MINNESOTA DEPT. HEALTH, <https://www.health.state.mn.us/communities/practice/resources/chsadmin/mnsystem-responsibility.html> (last visited Jan. 28, 2021).

the government, and I'm here to help.”¹⁵³ But *this* year, Krugman continues, “the government was there to help – and help it did.”¹⁵⁴

This is not to suggest that racism is not an ongoing—and deadly—nightmare in this country.¹⁵⁵ Or that even Americans who believe that health care is a human right are ready to recognize federally-funded, equal education as a human right.¹⁵⁶ Or that seventy-one million people did not vote for Donald Trump.¹⁵⁷ But COVID-19, and its ongoing economic fallout, seems to have taught us something about our own vulnerability.¹⁵⁸

2. Intercountry Human Rights

Intercountry human rights, applied in this context, could require the United States to take responsibility for its historical support of repressive regimes in Latin America, as well as its more recent illegal deportations of 10,000 immigrants to the region, many already infected with the virus. One approach might be to establish a joint commission with the affected states to determine reparations.

President Biden might be particularly well-prepared for such a project. As his longtime friend, Senator Tom Carper of Delaware, recently observed, “[Biden] believes that we—the U.S.— are the root cause of much of the violence and crime and lack of opportunity in . . . Central America.”¹⁵⁹

153. Paul Krugman, Opinion, *2020 Was the Year Reaganism Died*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/opinion/reagan-economy-covid.html>; Paul Krugman – Facts, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2008/krugman/facts/> (last visited Jan. 28, 2021); see Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html>.

154. Krugman, *supra* note 153.

155. See, e.g., *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last updated Feb. 16, 2021).

156. See, e.g., *Equality of Educational Opportunity*, STAN. ENCYC. PHIL. (May 31, 21017), <https://plato.stanford.edu/entries/equal-ed-opportunity/>; see generally Mary Gerisch, *Health Care as a Human Right*, A.B.A., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/ (last visited Jan. 28, 2021).

157. Margaret Renkl, Opinion, *71 Million People Voted for Trump. They're Not Going Anywhere*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/opinion/trump-biden-nation-divided.html>.

158. Roberts, *supra* note 60 (As Dorothy Roberts reminds us, quoting Angela Y. Davis, “You have to act as if it were possible to radically transform the world. And you have to do it all the time.”).

159. Christian Paz, *The Biden Doctrine Begins with Latin America*, ATLANTIC (Oct. 26, 2020), <https://www.theatlantic.com/international/archive/2020/10/joe-biden-foreign-policy-latin-america/616841/>.

Carper is certain that Biden would “make sure we do a better job.”¹⁶⁰ Biden believes that “we have a moral responsibility, having created havoc in [Central and South America].”¹⁶¹ Foreign aid, of course, is not the same as recognizing a legal obligation to support human rights in a foreign country. But it could be a beginning.

V. CONCLUSION

This Article has explained why COVID-19 targets the poor and why this is a matter of human rights. It has argued that the current crises demand a deeper, more authentic commitment to human rights and drawn on vulnerability theory, abolition theory, and a new theory of ‘intercountry’ human rights to support this commitment. Finally, it has proposed two legal reforms to realize it.

We are living in a world of staggering economic inequality, in which some lives matter and others do not. America has played a significant role in creating this world, in part by violating the human rights of Black Americans and “people on the move.” This Article has argued that America should take responsibility for these violations and suggested how we might begin.

160. *Id.* (On March 15, 2020, Biden said he would impose a moratorium of deportation of immigrants for the first hundred days of his administration, after which deportations would be limited to people convicted of felonies); Melissa Gomez, *Biden Commits to Moratorium on Deportations of Immigrants*, L.A. TIMES (Mar. 15, 2020), <https://www.latimes.com/politics/story/2020-03-15/joe-biden-bernie-sanders-deportations-coronavirus-healthcare>.

161. Paz, *supra* note 159.



INTERNATIONAL ENERGY LAW AND THE PARIS AGREEMENT IN THE AFTERMATH OF THE COVID-19 PANDEMIC: CHALLENGES AND POSSIBILITIES

Carolina Arlota*

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I. INTRODUCTION

This essay is based on my presentation at the 2020 International Law Weekend, organized by the American Branch of the International Law Association (ABILA).¹ As such, this essay is not intended to be an exhaustive survey, but rather an overview of the main issues of interest. In addition, this work specifically discusses potential upcoming progress regarding international climate policies and potential setbacks.² Therefore,

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1. This essay is based on the author’s presentation titled *The Paris Agreement on Climate Change in the Aftermath of the Pandemic: Challenges and Possibilities*, which was presented on October 23, 2020 at the “COVID-19 and Climate Change: A Setback or Strengthening the Resolve to Move Forward?” panel.

2. Molly Bergen & Helen Mountford, *6 Signs of Progress Since the Adoption of the Paris Agreement*, WORLD RES. INST. (Dec. 8, 2020), <https://www.wri.org/blog/2020/12/paris-agreement-progress-climate-action>.

this essay advances current knowledge on international energy law and fosters its academic autonomy.

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic.³ At the time, not much was known about the virus.⁴ Stringent measures imposing social distancing and closing all non-essential businesses were implemented around the globe in a joint effort to contain the virus, buying time for scientists, hospitals and medical workers to prepare.⁵ Against this background, an economic crisis started to develop based on a drop in oil prices, due to the price war between Russia and Saudi Arabia.⁶ This economic crisis and the draining of financial resources made the pandemic more severe.⁷ At the same time, comparisons between the pandemic and the climate crisis began to occur, with few paying attention to the urgency and stringency of the measures to be taken.⁸ The pandemic and climate crisis are also connected from a policy perspective because pollution, such as greenhouse gases (GHGs), adversely impacts the immune and respiratory systems, making individuals more vulnerable to the COVID-19 virus.⁹

3. Tedros Adhanom, Director General, Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020).

4. James Gallagher, *Coronavirus: What we still don't know about Covid-19*, BBC (Mar. 29, 2020), <https://www.bbc.com/news/health-52006988>.

5. See generally *Policy Responses to COVID-19*, IMF, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19> (last visited Jan. 14, 2021) (providing a compiled list of all of the stringent policies that have been implemented in response to COVID-19, such as social distancing and business closure).

6. *An unprecedented global health and economic crisis*, INT'L ENERGY AGENCY, <https://www.iea.org/topics/covid-19> (last visited on Jan. 11, 2021) (contending that global oil and gas markets were facing an unprecedented situation of collapsing demand with an already abundant supply that continues to increase because of the pandemic as well); Clifford Krauss & Stanley Reed, *Oil Prices Dive as Saudi Arabia Takes Aim at Russian Production*, N.Y. TIMES (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/business/saudi-arabia-oil-prices.html>.

7. REBECCA ENGBRESTEN, THE IMPACT OF CORONAVIRUS (COVID-19) AND THE GLOBAL OIL PRICE SHOCK ON THE FISCAL POSITION OF OIL-EXPORTING DEVELOPING COUNTRIES, OECD (Sept. 30, 2020), https://read.oecd-ilibrary.org/view/?ref=136_136801-aw9nps8afk&title=The-impact-of-Coronavirus-COVID-19-and-the-global-oil-price-shock-on-the-fiscal-position-of-oil-exporting-developing-countries.

8. Owen Jones, *Why Don't We Treat Climate Crisis with the Same Urgency as Coronavirus*, GUARDIAN (Mar. 5, 2020), <https://www.theguardian.com/commentisfree/2020/mar/05/governments-coronavirus-urgent-climate-crisis>. There were exceptions early on. While coronavirus is “understandably treated as an imminent danger, the climate crisis is still presented as an abstraction whose consequences are decades away. Unlike an illness, it is harder to visualize how climate breakdown will affect us each as individuals,” and society as a whole. *Id.* at 2.

9. JASON A. SCHWARTZ, INST. POL'Y INTEGRITY, WEAKING OUR DEFENSES: HOW THE TRUMP ADMINISTRATION'S DEREGULATORY PUSH HAS EXACERBATED THE COVID-19 PANDEMIC, 4-6

This essay focuses on the challenges that arose due to the pandemic and how policy makers may take advantage of the economic and health crises to rapidly advance a greener economy.¹⁰ Steering a transition from fossil fuels to non-carbon-based sources should be an important consideration after the COVID-19 pandemic, along with the pressing concerns of justice also triggered by the pandemic.¹¹ In this regard, this essay discusses the main treaties on international energy law.¹² These treaties are aligned with international commitments, most prominently the United Nations Sustainable Development Goals (SDG).¹³ Sustainable Development Goal 13 promotes the need for immediate and effective climate action (SDG 13).¹⁴ This is relevant as the synergistic nature of climate threats has not been fully assessed, and the outcomes are likely to be worse than the sum of the independent parts.¹⁵

On its own, the COVID-19 pandemic is unlikely to meaningfully reduce carbon emissions.¹⁶ The International Energy Agency (IEA) warns that, unless investments are made in “cleaner and more resilient energy infrastructure[s]”, total emissions may rebound, as has happened after previous economic crashes, to higher levels than before the crisis.¹⁷ Recent

(July 2020), https://policyintegrity.org/files/publications/Weakening_Our_Defenses_Covid_Deregulation_Report.pdf; Ingmar Schumacher, *Perspectives on the Economics of the Environment in the Shadow of Coronavirus*, 76 ENV'T. RES. ECON. 465, 465 (2020); Jerry A. Nathanson, *Air Pollution, Major Air Pollutants: Greenhouse Gases*, ENCYC. BRITANNICA, <https://www.britannica.com/science/air-pollution> (last updated Oct. 19, 2020).

10. OECD, MAKING THE GREEN RECOVERY WORK FOR JOBS, INCOME, AND GROWTH 2 (2020).

11. KARL NIETVELT ET AL., S&P GLOBAL, THE ENERGY TRANSITION AND COVID-19: A PIVOTAL MOMENT FOR CLIMATE POLICIES AND ENERGY COMPANIES (2020).

12. Paris Agreement art. 1, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/ [hereinafter Paris Agreement]; Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

13. *Goal 13: Take urgent action to combat climate change and its impacts*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Jan. 15, 2021).

14. *Id.*

15. See O. Hoegh-Guldberg et al., *The Human Imperative of Stabilizing Global Climate Change at 1.5°C*, 365 SCI. 1, 1 (2019), <https://science.sciencemag.org/content/365/6459/eaaw6974>.

16. Piers M. Foster et al., *Current and Future Global Climate Impacts Resulting from COVID-19*, 10 NATURE CLIMATE CHANGE 913, 913 (2020), <https://www.nature.com/articles/s41558-020-0883-0> (emphasizing that, in the absence of long-term system-wide decarbonization of economies, major shifts in behavior are insufficient to achieve anything but modest reductions); see also Carolina Arlota, *The United States Climate Change Policies and COVID-19: Poisoning the Cure*, PACE L. REV. (forthcoming 2021).

17. GLOBAL ENERGY REVIEW 2020: THE IMPACTS OF THE COVID-19 CRISIS ON GLOBAL ENERGY DEMAND AND CO₂ EMISSIONS, INT'L ENERGY AGENCY (2020), <https://www.iea.org/reports/global-energy-review-2020>.

empirical studies show that the immediate climate effects of pandemic-related restrictions are close to negligible, and lasting effects, if any, will be dependent upon the recovery strategy that is adopted in the medium-term.¹⁸ Furthermore, carbon dioxide emissions are expected to quickly rebound.¹⁹

According to a recent report by the United Nations Environment Programme, carbon dioxide (CO₂) emissions will decrease in 2020.²⁰ Nonetheless, the “[r]esulting atmospheric concentrations of major GHGs (CO₂, methane (CH₄) and nitrous oxide (N₂O)) continued to increase in both 2019 and 2020.”²¹ To stabilize global warming, continuous reductions in emissions are required to achieve net-zero CO₂.²² Once such net-zero GHGs emissions are achieved, the planet will first experience a peak and only later will a decline in global warming occur.²³

In such a scenario, the need for the reduction of both carbon emissions and GHGs is extremely pressing.²⁴ There is an international set of treaties targeting such reductions.²⁵ For example, the United Nations Framework Convention on Climate Change (UNFCCC)²⁶ and its corollary, the Paris Agreement on Climate Change,²⁷ have the reduction of carbon emissions and GHGs as their main objectives.²⁸ In 2015, the Twenty-First Conference of

18. Corinne Le Quéré et al., *Temporary Reduction in Daily CO₂ Emissions during the COVID-19 forced Confinement*, 10 NATURE CLIMATE CHANGE 647, 647 (2020), <https://www.nature.com/articles/s41558-020-0797-x>.

19. *Id.* at 650.

20. U.N. Env’t Programme, Emissions Gap Report 2020: Exec. Summary, U.N. Doc. DEW/2310/NA, at 5 (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34438/EGR20ESE.pdf?sequence=8> [hereinafter Emissions Gap Report 2020].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 7.

25. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2; Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol]; Montreal Protocol on Substances that Deplete the Ozone Layer art. 1, Sep. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

26. United Nations Framework Convention on Climate Change art. 2, Sept. 5, 1992, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107 [hereinafter United Nations Framework]. The UNFCCC entered into force on March 21, 1994. The scientific consensus regarding the existence of climate change was a paramount consideration during UNFCCC negotiations. John Houghton, *Science and International Environmental Policy: The Intergovernmental Panel on Climate Change*, in ENV’T. L., THE ECONOMY AND SUSTAINABLE DEVELOPMENT 355–57 (Richard Revesz et al. eds., 2001).

27. See Paris Agreement, *supra* note 12, art. 2. The Paris Agreement, with its goal of reducing GHGs, was negotiated following the legal framework of the UNFCCC, a treaty with 196 state parties to which the Senate gave its advice and consent in 1992. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 435 (2019).

28. See Paris Agreement, *supra* note 12; see also United Nations Framework, *supra* note 26.

the Parties of the UNFCCC enacted the Paris Agreement,²⁹ an agreement that specifically aims to contain the rising global average temperature to well below 2°C above pre-industrial levels, while advancing efforts to cap the temperature increase to 1.5°C above pre-industrial levels.³⁰

The main international obligations of the parties to the Paris Agreement are their financial contributions to the Green Climate Fund³¹ and the fulfillment of each country's "nationally determined contributions."³² As the language of the treaty conveys, both are voluntarily established commitments determined by each country, exclusively.³³ Under international law, the Paris Agreement is unequivocally a treaty; as such, it requires signatories to comply with its terms.³⁴

II. THE IMPACT OF COVID-19 FOR INTERNATIONAL ENERGY LAW AND THE PARIS AGREEMENT ON CLIMATE CHANGE

This part discusses the consequences of the COVID-19 pandemic for international energy law and, more specifically, for the Paris Agreement. This part is based on the assumption that conflicts in international energy law, including climate policy, do not primarily occur because of the absence

29. See Paris Agreement, *supra* note 12. For an overview about the Paris Agreement, *see, e.g., The Paris Agreement, Summary*, CLIMATE FOCUS 1, 1 (Dec. 28, 2015), <https://www.climatefocus.com/sites/default/files/20151228%20COP%2021%20briefing%20FIN.pdf>; *see also* Houghton, *supra* note 26, at 355–57.

30. See Paris Agreement, *supra* note 12. Article 2 of the Paris Agreement states the following:

(1) This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change. *Id.* art. 2.

31. Paris Agreement, *supra* note 12, art. 9 ("Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention. Other Parties are encouraged to provide or continue to provide such support voluntarily."). *Id.*; *About GCF*, GREEN CLIMATE FUND, <https://www.greenclimate.fund/about> (last visited Jan. 28, 2021).

32. Paris Agreement, *supra* note 12, art. 4, ¶ 2. ("Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."). *Id.*

33. According to articles 4 and 9 of the Paris Agreement. See Paris Agreement, *supra* note 12, arts. 4, ¶ 2, 9, ¶ 1.

34. According to international law, all written international agreements governed by international law are referred to as "treaties." Vienna Convention, *supra* note 12, art. 2., ¶ 1(a); *see also* BARRY E. CARTER ET AL., INTERNATIONAL LAW 932 (7th ed. 2018).

of scientific facts or objective truth; instead, such disagreements are more likely to be motivated by conflicting “priorities, interests, and normative assumptions that create a number of subjective truths.”³⁵ This increases transaction costs for parties to reach an international energy law agreement.³⁶ Moreover, energy security planning is such a “complex and dynamic [process] that it is [very] difficult to unify perspectives,” even in a single country.³⁷ Examples abound³⁸—for instance, the so-called flip-flop of the United States’ position on the Paris Agreement is a major illustration of domestic tensions and politics being determinative of global outcomes.³⁹

Accordingly, any international agreement on climate change has to reconcile inherent tensions between domestic and international politics.⁴⁰ Those treaties also have to consider the different levels of countries’ growth and industrialization on a global scale.⁴¹ This part turns to two specific international principles contained in the Paris Agreement that may contribute to global action to combat the pandemic as well as to foster a greener economy.⁴² These principles are sustainable development and common but differentiated responsibilities.⁴³ This part concludes by examining the

35. Benjamin K. Sovacool & Marilyn Brown, *Deconstructing Facts and Frames in Energy Research: Maxims for Evaluating Contentious Problems*, 86 ENERGY POL’Y 36, 36–37 (2015).

36. *Id.* at 38.

37. See Benjamin K. Sovacool & Harry Saunders, *Competing Policy Packages and the Complexity of Energy Security*, 67 ENERGY 641, 641 (2014), emphasizing that,

The result is that important interdependencies and interconnections are sometimes missed, laying a faulty foundation that can give rise to more intractable energy problems down the road. The policymaker in India who seeks to improve access to electricity to mitigate the health damage caused by indoor combustion of firewood for cooking becomes an advocate of coal-fired power plants. A local problem is solved and a national dilemma is born.

38. Sovacool & Brown, *supra* note 35, at 38; Mark Cooper, *Governing the global climate commons: The political economy of state and local action, after the U.S. flip-flop on the Paris Agreement*, 118 ENERGY POL’Y 440, 440 (2018).

39. Cooper, *supra* note 38, at 440.

40. See generally Sovacool & Saunders, *supra* note 37, at 641.

41. *Id.*

42. Paris Agreement, *supra* note 12, at 1; *Climate & SDGS Synergy Conference*, U.N. DEP’T OF ECON. & SOC. AFFAIRS, <https://sdgs.un.org/events/climate-and-sdgs-synergy-conference-7569> (last visited Jan. 15, 2021); *Climate Action*, U.N., <https://www.un.org/sustainabledevelopment/climate-action/> (last visited Jan. 15, 2021).

43. Paris Agreement, *supra* note 12, at 1.

specific impact of the pandemic on international negotiations at the future Conference of the Parties (COP).⁴⁴

A. Sustainable Development

Sustainable development, with preliminary notions that date back to 1945, was conceptualized with more precision at the United Nations Conference on the Human Environment, in 1972.⁴⁵ However, this concept was not used until the 1980s, when the Brundtland Commission Report defined it as “development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁶ Later on, the Rio Declaration on Environment and Development framed it in a quite anthropocentric fashion, stating in Principle 1 that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁴⁷ World governments adopted sustainable development as the development paradigm in 1992, at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil.⁴⁸

As the concept of sustainable development has been significantly debated—with many questioning its legal force and whether it has some other normative value, even one of a non-legal or quasi-legal character⁴⁹—the dimensions considered in the Paris Agreement are open to debate.⁵⁰ There

44. *The Ambition*, CLIMATE AMBITION SUMMIT 2020, <https://www.climateambitionsummit2020.org/index.php#programme> (last visited Jan. 15, 2021) [hereinafter *The Ambition*]; *Climate Ambition Summit 2020*, IISD (Dec. 12, 2020), <https://sdg.iisd.org/events/5th-anniversary-of-the-paris-agreement/#:~:text=The%20Climate%20Ambition%20Summit%202020,Agreement%20and%20the%20multilateral%20process>.

45. U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/Rev.1, at 3 (June 5, 1972); *Promote Sustainable Development*, UNITED NATIONS, <https://www.un.org/en/sections/what-we-do/promote-sustainable-development/> (last visited Jan. 26, 2020); see also Bimal N. Patel & Ranita Nagar, *Introduction*, in *SUSTAINABLE DEVELOPMENT AND INDIA: CONVERGENCE OF LAW, ECONOMICS, SCIENCE, AND POLITICS* 1–10 (Bimal N. Patel & Ranita Nagar eds., 2018).

46. U.N. Secretary-General, *Our Common Future: Report of the World Commission on Environment and Development, From One Earth to Another*, pt. 1, § 3, ¶ 27, § 4, ¶ 81, U.N. Doc A/42/427 (Aug. 4, 1987); see also EDITH BROWN WEISS ET AL., *INTERNATIONAL LAW FOR THE ENVIRONMENT* 26, 184 (2016); Patel & Nagar, *supra* note 45, at 1.

47. Stephen Hammer & Stéphane Hallegatte, *Planning for the economic recovery from COVID-19: A sustainability checklist for policymakers*, WORLD BANK BLOGS (Apr. 14, 2020), <https://blogs.worldbank.org/climatechange/planning-economic-recovery-covid-19-coronavirus-sustainability-checklist-policymakers>.

48. *Id.*

49. Riccardo Pavoni & Dario Piselli, *The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation*, 13 VEREDAS DO DIREITO, BELO HORIZANTE 13, 15 (2016).

50. *Id.*; see generally Paris Agreement, *supra* note 12.

is, however, some consensus in interpreting sustainable development in that it requires analysis of the interplay between economic growth, social development, and environmental protection.⁵¹ In the aftermath of the pandemic, the emphasis on social development—including access to medical care, clean energy, education, and a healthy environment—will become crucial.⁵²

B. Common but Differentiated Responsibilities

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC), referring specifically to different responsibilities allocated among countries,⁵³ has been controversial since its inception in the UNFCCC.⁵⁴ The principle appears, more recently, in the Paris Agreement.⁵⁵ According to this principle, responsibility for both current and historical emissions need to be considered.⁵⁶ The evidence is unambiguous: from 1850 to 2011, the developed world contributed 79% of GHG emissions.⁵⁷

As developing states have had a far lower impact on the current concentration of GHGs and the overall threshold on carbon saturation,⁵⁸ developed countries must provide climate financing to less developed

51. *Social Development for Sustainable Development*, UNITED NATIONS, <https://www.un.org/development/desa/dspd/2030agenda-sdgs.html> (last visited Jan. 30, 2021).

52. Hammer & Hallegatte, *supra* note 47.

53. United Nations Framework, *supra* note 26, art. 3, ¶ 1. (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”). *Id.*

54. David Freestone, *The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 99, 103 (Cinnamon P. Carlarne et al. eds., 2016) (explaining the differentiated treatment established under articles 4 and 12 of the UNFCCC, as Annex I parties encompass “all the developed states and states with economies in transition . . . [namely] . . . the members of the former Soviet Union[.]” while Annex II includes all the developed states which are expected to financially contribute. Developing countries are defined as non-Annex I in the Convention). *Id.*; see also United Nations Framework, *supra* note 26.

55. Paris Agreement, *supra* note 12, art. 2, ¶ 2. (“This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”). *Id.* arts. 2, 9.

56. Daniel Bodansky et al., *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1, 11 (2008).

57. Jonah Busch, *Climate Change and Development in Three Charts*, CTR. FOR GLOB. DEV. (Aug. 18, 2015), <https://www.cgdev.org/blog/climate-change-and-development-three-charts>.

58. Ting Wei et al., *Developed and Developing World Contributions to Climate System Change Based on Carbon Dioxide, Methane and Nitrous Oxide Emissions*, 33 ADVANCES IN ATMOSPHERIC SCI. 632, 632 (2016); Bodansky et al., *supra* note 56, at 11 (noting article 3 of the UNFCCC refers to “respective capabilities,” which means that capacity to pay is relevant along historical responsibility). *Id.*

countries, as determined by international treaties.⁵⁹ Importantly, energy justice also fosters institutional action, which may minimize the impact of the so-called “curse” of natural resources for developing countries.⁶⁰ Institutional action, under the terms of the UNFCCC and the Paris Agreement, requires developed countries to take the lead in reducing emissions.⁶¹ The necessity of this leadership has been proven even more relevant in light of the pandemic and the economic crisis that has ensued.⁶² Likewise, the need to transfer funding and technology increased during the pandemic.⁶³ This exacerbates the international obligation of developed countries to not only invest in their own greener recovery, but also to steer efforts for such greener scenarios in developing nations.⁶⁴ This is why the legal framework of the Paris Agreement calls for financial contributions to the Green Climate Fund, which was established by the Conference of the Parties in 2010 (under the UNFCCC, and as part of the Convention’s financial mechanism).⁶⁵ More specifically, the Green Climate Fund aims to advance adaptation to the impact of climate change and reduce GHG emissions in the developing world.⁶⁶ Importantly, recent research contends that overreliance on technological innovation has jeopardized a significant reduction of GHG emissions at the expense of countries located in the Global South, as well as those more vulnerable populations in the future, globally.⁶⁷ Accordingly, more actions from developed countries are needed quickly.

59. Paris Agreement, *supra* note 12, art. 9; *see also* United Nations Framework, *supra* note 26, art. 3, ¶ 1.

60. Paris Agreement, *supra* note 12, art. 11; Stewart M. Patrick, *Why Natural Resources Are a Curse on Developing Countries and How to Fix It*, ATLANTIC (Apr. 30, 2012) <https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>.

61. *See, e.g.*, United Nations Framework, *supra* note 26, arts. 3–4; Paris Agreement, *supra* note 12, art. 4.

62. U.N. GAOR, 31st Spec. Sess., 2nd Plen Mtg. U.N. Doc GA/12293 (Dec. 3, 2020).

63. *Id.*

64. *Id.*

65. The Green Climate Fund technically aims to finance equal amounts to mitigation as well as to adaptation initiatives under the UNFCCC. Its first mobilization dates back to 2014, and since the Paris Agreement (2015), the Fund has played an important role in advancing the objectives established in the Paris Agreement on Climate Change. *Overview, GREEN CLIMATE FUND*, <https://www.greenclimate.fund/about> (last visited Jan. 20, 2021); Paris Agreement, *supra* note 12, art. 9.

66. The Green Climate Fund focuses on the needs of those who are “highly vulnerable to the effects of climate change,” specifically in Least Developed Countries (LDCs), Small Island Developing States (SIDs), and African States. *Overview, supra* note 65.

67. Lancaster University, *Why relying on new technology won’t save the planet*, SCI. DAILY (APR. 20, 2020), <https://www.sciencedaily.com/releases/2020/04/200420125510.htm>.

Each novel promise not only competes with existing ideas, but also downplays any sense of urgency, enabling the repeated deferral of political deadlines for climate

C. *The Climate Ambition Summit: 2020*

The United Nations, France, and the United Kingdom, in partnership with Chile and Italy, jointly hosted the Climate Ambition Summit on December 12, 2020.⁶⁸ This virtual meeting gathered representatives of most Member States, indigenous peoples, civil society, non-governmental organizations, and other key actors in preparation for the next Conference of the Parties—COP 26, which was postponed to November 2021, due to the pandemic.⁶⁹ The goal was to discuss the implementation of “new and [more] ambitious commitments under the three pillars of the Paris Agreement: mitigation, adaptation and finance commitments.”⁷⁰

On the eve of the Climate Ambition Summit, the European Union reiterated its earlier commitment to reduce its GHG emissions by at least 55%, having the net carbon emissions measured in 1990 as its baseline.⁷¹ The increasing number of countries committing to net-zero emissions goals by 2050 is “the most significant and encouraging development in terms of climate policy in 2020.”⁷² Top polluters, such as the European Union, Japan, and China (committing to achieve net-neutrality by 2050 and 2060, respectively) have already explicitly embraced such goals, whereas in the United States, the Biden-Harris administration has already signaled its intention to follow suit.⁷³ Therefore, the pandemic has contributed to overall cooperation among different countries and an overall willingness for developed world nations to engage in more ambitious climate goals.⁷⁴ For developing nations, it is too early to make a judgment call.

action and undermining societal commitment to meaningful responses . . . but such promises can feed systemic 'moral corruption', in which current elites are enabled to pursue self-serving pathways, while passing off risk onto vulnerable people in the future and in the global South. *Id.*

68. *The Ambition*, *supra* note 44.

69. *Id.*; Press Release, United Nations Climate Change, COP-26 Postponed, UN Climate Press Release (Apr. 1, 2020); Press Release, U.K. Gov., New Dates Agreed for COP26 United Nations Climate Change Conference (May 28, 2020).

70. *The Ambition*, *supra* note 44.

71. Monika Pronczuk, *E.U. Agrees to Slash Carbon Emissions by 2030*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/world/europe/eu-climate-emissions.html> (discussing the new pledges of the European Union, who increased its original commitment in reducing net carbon emissions in at least 55% from its levels measured in 1990). The article also informs that this stringent target positions the European Union in the forefront of global climate fighting and strategically sets the bloc on its path to carbon neutrality by 2050. *Id.*; *Live: Climate Ambition Summit*, U.N. NEWS (Dec. 12, 2020), <https://news.un.org/en/story/2020/12/1079862>.

72. Emissions Gap Report 2020, *supra* note 20, at 7.

73. *Id.* at 7.

74. *Id.* at 4–5.

III. THE MAIN CHALLENGES REGARDING INTERNATIONAL ENERGY LAW AND THE FULFILLMENT OF THE PARIS AGREEMENT'S GOALS

This part focuses on the main challenges that policy makers will face in the field of international energy law as they aim to fulfill the goals of the Paris Agreement, namely, to limit the global increase in mean temperature to well below 2°C (35.6°F) compared to pre-industrial levels.⁷⁵

First, the pandemic is likely to increase emissions of GHGs, unless countries actively engage in investing in a greener economy.⁷⁶ The decline in green energy investments provoked by the pandemic may also contribute to a spike in carbon emissions.⁷⁷ The flexibilization of the enforcement concerning environmental regulations may also contribute to increased emissions.⁷⁸ Pandemic-related cleaning and disinfecting activities are also expected to have a negative environmental impact.⁷⁹

Second, the Biden-Harris administration is committed to fostering energy transition from fossil fuels to a greener economy but faces significant challenges with current policies.⁸⁰ Specifically, the Biden-Harris administration will have to undo numerous anti-climate policies implemented by the Trump administration.⁸¹ Key among them is the United States' withdrawal from the Paris Agreement, which occurred on November 4, 2020.⁸² The Paris Agreement is considered a historic breakthrough, as it

75. Paris Agreement, *supra* note 12, art. 2.

76. Emissions Gap Report 2020, *supra* note 20, at 6 (discussing the need for more stringent NDCs as well as specific policies to reduce GHGs emissions such as investments on research and the support for zero emissions). *Id.*

77. Kenneth T. Gillingham et al., *The Short-run and Long-run effects of COVID-19 on Energy and the Environment*, 4 JOULE 1337, 1338–1341 (2020).

78. Emissions Gap Report 2020, *supra* note 20, at 13; U.S. Env'tl. Prot. Agency, Memorandum on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.

79. Mandred Lenzen et al., *Global Socio-Economic Losses and Environmental Gains from the Coronavirus Pandemic*, 15 PLOS ONE (July 9, 2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0235654>.

80. *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDENHARRIS, <https://joebiden.com/climate-plan/> (last visited Jan. 20, 2021); Tyler Clevenger & Dan Lashof, *7 Ways the Biden Administration Can Reverse Climate Rollbacks*, WORLD RES. INST. (Jan. 19, 2021), <https://www.wri.org/blog/2021/01/7-ways-biden-administration-can-reverse-climate-rollbacks>.

81. Clevenger & Lashof, *supra* note 80.

82. Art. 28 of the Paris Agreement, which determines the withdrawal procedure, does not authorize notice of withdrawal within the first three years that the Agreement has entered into force. Paris Agreement, *supra* note 12, art. 28. The United States served notice of the withdrawal on the first date possible under the Paris Agreement. Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES, <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> (last updated Jan. 20, 2021).

marked the end of a decade long stalemate over the full integration of the United States and developing economies into the climate regime.⁸³

In such a context, the Biden-Harris administration deserves praise for advocating that the United States rejoin the Paris Agreement on its first day in office.⁸⁴ The Biden-Harris administration will have to address the ongoing economic, environmental, and health crises that were aggravated by the COVID-19 pandemic and the policy choices made by the Trump administration.⁸⁵ The attacks by President Trump on science, which are routinely referred to as a “war on science,” have undermined significant environmental protections and ultimately jeopardized the health and quality of life of the United States population.⁸⁶ Importantly, those with less financial resources have suffered the most.⁸⁷

Third, there is significant uncertainty concerning the level of United States engagement and leadership on urgent climate matters.⁸⁸ Despite reiterated commitments of the Biden-Harris administration, including the previously referenced rejoining of the United States to the Paris Agreement and the appointment of John Kerry as a special envoy for climate,⁸⁹ how effectively the new administration implements its climate goals remains to be seen.⁹⁰ Moreover, the world’s response to the United States as it is

83. Meinhard Doelle, *Assessment of Strengths and Weaknesses*, in THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 387, 400 (Daniel Klein et al. eds., 2017).

84. The President-elect tweeted that his administration will rejoin the Paris Agreement. *See Joe Biden vows to rejoin the Paris climate deal on first day of office if elected*, CARBON BRIEF (Nov. 11, 2020), <https://www.carbonbrief.org/daily-brief/joe-biden-vows-to-rejoin-the-paris-climate-deal-on-first-day-of-office-if-elected> [hereinafter *Rejoin Paris climate deal*].

85. *Impact of COVID-19 on people’s livelihoods, their health and our food systems*, WHO (Oct. 13, 2020), <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems>; Clevenger & Lashof, *supra* note 80.

86. Carolina Arlota, *How President Trump’s War on Science Undermines Cost-Benefit Analysis of Climate Policies*, 50 ENV’T L. REP. 10999, 11007–14 (2020).

87. *Id.*; Carmin Chappel, *Climate change in the US will hurt poor people the most, according to a bombshell federal report*, CNBC, <https://www.cnn.com/2018/11/26/climate-change-will-hurt-poor-people-the-most-federal-report.html> (last updated Nov. 26, 2018).

88. Carolyn Beeler, *Top US leadership is ‘missing ingredient’ in climate change action*, WORLD (Sept. 18, 2019), <https://www.pri.org/stories/2019-09-18/top-us-leadership-missing-ingredient-climate-change-action>.

89. *Rejoin Paris climate deal*, *supra* note 84; Lisa Friedman, *With John Kerry Pick, Biden selects a ‘Climate Envoy’ With Stature*, N.Y. TIMES, <https://www.nytimes.com/2020/11/23/climate/john-kerry-climate-change.html> (last updated Dec. 11, 2020) (emphasizing that the special climate envoy is a new cabinet-level position to be created under President-elect Biden’s presidency).

90. *See generally* Thomas Hale and Nathan Hultman, *‘All in’ Climate Diplomacy: How a Biden-Harris Administration can Leverage City, State, Business, and Community Climate Action*, BROOKINGS (Nov. 20, 2020), <https://www.brookings.edu/research/all-in-climate-diplomacy-how-a-biden-harris-administration-can-leverage-city-state-business-and-community-climate-action/> (discussing the administration’s various implementation strategies and what will be needed in order to successfully implement those strategies).

reclaiming its leadership on climate policies is unclear.⁹¹ After all, United States leadership in international matters has been jeopardized under President Trump due to his unpredictability and his agenda to undo all significant agreements made by his predecessor, President Obama.⁹² In the field of international energy law alone (and in addition to the country's withdrawal from the Paris Agreement), the United States denunciation of the Joint Comprehensive Plan of Action (or the "Iran deal"),⁹³ the Trans-Pacific Partnership,⁹⁴ and the Intermediate-Range Nuclear Forces Treaty⁹⁵ all serve as evidence of how the Trump administration decided in a rush and with little consideration for the international community as a whole.

Fourth, many countries have relinquished the opportunity brought by the pandemic to build a more environmentally conscious economy.⁹⁶ An

91. Lara Lázaro-Touza, *Biden-Harris Administration and Climate Change: Good News, Caveats and Warnings*, ELCANO ROYAL INST. (last updated Jan. 22, 2021), http://www.realinstitutoelcano.org/wps/portal/riecano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari9-2021-lazaro-biden-harris-administration-and-climate+change-good+news-caveats-and-warnings.

92. Press Release, Emmanuel Macron, Angela Merkel, and Paolo Gentiloni, Paris Agreement Cannot be Renegotiated (June 1, 2017) (on file with Ministère de L'Europe et des Affaires Étrangères). In a joint statement, French President Emmanuel Macron, German Chancellor Angela Merkel, and then Italian Prime Minister Paolo Gentiloni were vocal in stating that President Trump's decision was against ongoing progress and that the Agreement was solid and not open to renegotiation. Such leaders jointly declared: "We deem the momentum generated in Paris in December 2015 irreversible and we firmly believe that the Paris Agreement cannot be renegotiated, since it is a vital instrument for our planet, societies and economies." *Id.*; see Juliet Eilperin & Darla Cameron, *How Trump is Rolling Back Obama's Legacy*, WASH. POST (last updated Jan. 20, 2018), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/>; see also Carolina Arlota, *Does the United States' Withdrawal From the Paris Agreement Pass the Cost-Benefit Analysis Test?*, 41 U. PA. J. INT'L L. 881, 881 (2020) (criticizing the United States' climate policies under the Trump administration and its reduced leadership after its decision to withdraw from the Paris Agreement while continuing in the UNFCCC).

93. See Remarks on the Joint Comprehensive Plan of Action to Prevent Iran From Obtaining a Nuclear Weapon and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 2, (May 8, 2018).

94. Memorandum of Withdrawal of the U.S. from the Trans-Pacific Partnership Negotiations and Agreement, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 23, 2017).

95. The Trump administration withdrew from this agreement with Russia, despite its previous praise for the treaty, which was signed by President Reagan. See C. Todd Lopez, *U.S. Withdraws From Intermediate-Range Nuclear Forces Treaty*, U.S. DEPT. DEF. (Aug. 2, 2019), <https://www.defense.gov/Explore/News/Article/Article/1924779/us-withdraws-from-intermediate-range-nuclear-forces-treaty/>. For a limited justification of the withdrawal, see Remarks in an Exchange with Reporters in Elko, Nevada, 2018 DAILY COMP. PRES. DOC. 3–4 (Oct. 20, 2018); see also Daryl Kimball & Kingston Reif, *The Intermediate-Range Nuclear Forces Treaty at a Glance*, ARMS CONTROL ASS'N., <https://www.armscontrol.org/factsheets/INFtreaty> (last reviewed Aug. 2019).

96. See OECD, GREEN BUDGETING AND TAX POLICY TOOLS TO SUPPORT A GREEN RECOVERY 1, 2–3 (2020), <http://www.oecd.org/coronavirus/policy-responses/green-budgeting-and-tax-policy-tools-to-support-a-green-recovery-bd02ea23/> (discussing what countries plan to do but have yet to do, in order to build a more environmentally conscious economy).

example of such an economy would be one based on the social cost of carbon.⁹⁷ Recent research by Princeton University advised the implementation of carbon pricing (whether as taxes or emissions trading) aimed at reducing the adverse impacts of climate change as economies “build back better.”⁹⁸ According to this research, the pandemic could be an opportunity to improve sustainability and maximize well-being around the globe as countries recover.⁹⁹ Therefore, international energy law policies aiming to implement the goals established by the Paris Agreement should be based on mitigation, as the World Bank has defined mitigation action as “the best insurance against an uncertain future.”¹⁰⁰ Mitigation, therefore, is the only way to effectively reduce carbon emissions.¹⁰¹

In such a context, leading emitters of GHGs, such as China, the United States, Japan, and India face difficult policy choices, as their emissions are based on large scale utilization of fossil fuels to produce energy for industry and transportation sectors.¹⁰² These countries’ emissions are considered more difficult to abate, as significant investments and technological innovation are required to achieve meaningful reductions.¹⁰³ Mitigation technologies, such as carbon capture and storage (CCS), are a feasible alternative for the reduction in the emission of CO₂, particularly in the energy sector.¹⁰⁴ Nonetheless, cost remains a significant challenge for CCS implementation.¹⁰⁵

97. See *id.* at 10–12.

98. Kian Mintz-Woo et al., *Carbon Pricing and COVID-19*, CLIMATE POL’Y. 1, 2 (Nov. 15, 2020), <https://www.tandfonline.com/doi/full/10.1080/14693062.2020.1831432?scroll=top&needAccess=true>.

99. *Id.* at 7.

100. WORLD BANK, TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED 1, 2 (2012), <http://documents.worldbank.org/curated/en/865571468149107611/pdf/NonAsciiFileName0.pdf>.

101. See *id.* at 25.

102. *Each Country’s Share of CO₂ Emissions*, UNION CONCERNED SCIENTISTS, <https://www.ucsusa.org/resources/each-country-s-share-co2-emissions> (last updated Aug. 12, 2020); Melissa Denchak, *Fossil Fuels: The Dirty Facts*, NAT. RES. DEF. COUNCIL (Jun. 8, 2018), <https://www.nrdc.org/stories/fossil-fuels-dirty-facts>. The concept of “hard to abate emissions” is defined by the Energy Transition Commission (ETC). See *Mission Possible: Reaching Net-Zero Carbon Emissions from Harder-to-Abate Sectors by Mid-Century*, ENERGY TRANSITIONS COMM’N (Nov. 2018), http://www.energy-transitions.org/sites/default/files/ETC_MissionPossible_FullReport.pdf [hereinafter *Reaching Net-Zero Carbon Emissions*]. Such “harder-to-abate” emissions comprise those of sectors in heavy industry (in particular cement, steel and chemicals) and heavy-duty transport (heavy-duty road transport, shipping and aviation). *Id.* at 11. These sectors currently account for 10Gt (30%) of total global CO₂ emissions. *Id.* at 11.

103. *Reaching Net-Zero Carbon Emissions*, *supra* note 102, at 75.

104. *The Global Status of CCS: 2017*, GLOBAL CCS INST. 43 (2017), <https://www.globalccsinstitute.com/wp-content/uploads/2018/12/2017-Global-Status-Report.pdf>.

105. See *id.* at 19.

Accordingly, investments in mitigation efforts need to include a diverse portfolio of financing sources, including a combination of public funds, carbon market finance, and concessional financing.¹⁰⁶ Moreover, financing a greener economy is likely to be a challenge on its own, due to the resources spent during the pandemic as well as the need for economic relief to those who lost their jobs.¹⁰⁷ A recent study by the Guardian revealed that countries are pouring money into the fossil fuel economy to reduce the economic impact of the pandemic, including its severe recession.¹⁰⁸ Therefore, the pandemic increased the competition for funding.¹⁰⁹

Such competition is also likely to have an adverse impact on renewables.¹¹⁰ On the one hand, as countries commit to more stringent targets under the Paris Agreement, renewable resources are expected to rise again.¹¹¹ This is relevant as renewables require investment on research and dissemination as well as implementation.¹¹² On the other hand, major obstacles regarding renewable energy sources remain, such as affordability and the need for grid updates.¹¹³

Fluctuation of energy supply prices also increased the competition for credit.¹¹⁴ Oil hit record low prices in March 2020, stranding financial

106. Sujata Gupta et. al., *Cross-cutting Investment and Finance Issues*, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE 1207, 1227 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_chapter16.pdf.

107. See Fiona Harvey, *Revealed: Covid recovery plans threaten global climate hopes*, GUARDIAN (Nov. 9, 2020), <https://www.theguardian.com/environment/2020/nov/09/revealed-covid-recovery-plans-threaten-global-climate-hopes>.

108. *Id.*

109. *See id.*

110. *See id.*

111. Kieran Mulvaney, *Climate change report card: These countries are reaching targets*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.co.uk/environment-and-conservation/2019/09/climate-change-report-card-these-countries-are-reaching> (last updated Nov. 5, 2020); *Global Energy Review 2020, The Impacts of the COVID-19 Crisis on Global Energy Demand and CO2 Emissions*, INT'L ENERGY AGENCY (Apr. 2020), <https://www.iea.org/reports/global-energy-review-2020/renewables>.

112. Kesavan Sprinivasan & Srinivas Guarazada, *Investing in a more suitable world during COVID-19 recovery*, WORLD BANK BLOGS (June 24, 2020), <https://blogs.worldbank.org/governance/investing-more-sustainable-world-during-covid-19-recovery>; U.S. DEP'T ENERGY, RENEWABLE ENERGY INTEGRATION (2021).

113. *Easy to Say, Difficult to Achieve: Experts Discuss Forging a Fair, Green Economy*, IISD (Aug. 22, 2019), <https://sdg.iisd.org/news/easy-to-say-difficult-to-achieve-experts-discuss-forging-a-fair-green-economy/>; Aaron Larson, *Electric Transmission Grid Problems and Solutions*, POWER (Aug. 3, 2020), <https://www.powermag.com/electric-transmission-grid-problems-and-solutions/>.

114. *See* ICIS Editorial, *Coronavirus Impact on Energy Markets*, INDEP. COMMODITY INTELLIGENCE SERV., <https://www.icis.com/explore/resources/news/2020/03/19/10482507/topic-page-coronavirus-impact-on-energy-markets> (last updated Nov. 13, 2020).

resources.¹¹⁵ With such diversified demand, funding to investments is changing¹¹⁶ while the need for significant greener investments is increasing under international treaties, as previously discussed.¹¹⁷ Furthermore, there are increasing concerns regarding environmental protection and climate change, both internationally¹¹⁸ and in the United States.¹¹⁹ This may lead to progress. However, as of today, all of the challenges discussed are relevant.¹²⁰ The manner in which countries decide to address these challenges will be determinative of the future of the Paris Agreement and the fulfillment of its goals.¹²¹ The task is tremendously difficult, and the pandemic may have aggravated it.¹²² There are no definitive answers for now, as matters are still in flux.

115. *An Unprecedented Global Health and Economic Crisis*, *supra* note 6; KEVIN L. CAMP ET AL., U.S. BUREAU STAT., FROM THE BARREL TO THE PUMP: THE IMPACT OF THE COVID-19 PANDEMIC ON PRICES FOR PETROLEUM PRODUCTS (2020), <https://www.bls.gov/opub/mlr/2020/article/from-the-barrel-to-the-pump.htm>.

116. This issue is of increased importance, as the European Investment Bank announced that it will stop funding fossil fuels projects after 2021. Emanuela Barbiroglio, *European Investment Bank will Stop Financing New Fossil Fuels Projects*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/emanuelabarbiroglio/2019/11/15/european-investment-bank-will-stop-financing-new-fossil-fuels-projects/#42cedd5b9253>.

117. Kyoto Protocol, *supra* note 25; Montreal Protocol, *supra* note 25.

118. See also Stephen Castle, *U.K. to Halt Subsidies for Fossil Fuel Projects Abroad*, N.Y. TIMES, <https://www.nytimes.com/2020/12/11/world/europe/UK-fossil-fuel-subsidies.html> (last updated Dec. 14, 2020) (highlighting that the Organization for Economic Cooperation and Development and the International Energy Agency have urged countries to reduce or cut government subsidies for fossil fuels).

119. Jeanna Smialek, *Fed Joins Climate Network, to Applause from the Left*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/business/economy/fed-climate-network.html?action=click&module=Latest&pgtype=Homepage> (noting that the Federal Reserve board in Washington “voted unanimously to become a member of the Network of Central Banks and Supervisors for Greening the Financial System” and that the Fed began participating in the group more than a year ago, but “Republicans have eyed warily” the Fed’s formal membership while Democrats have been fighting for it).

120. Stephen Leahy, *Most countries aren't hitting 2030 climate goals, and everyone will pay the price*, NAT’L GEOGRAPHIC (Nov. 5, 2019), <https://www.nationalgeographic.com/science/2019/11/nations-miss-paris-targets-climate-driven-weather-events-cost-billions/>.

121. *Id.*

122. Amy Lieberman, *Despite pandemic slowdown, climate change continues to worsen*, DEVEX (Sept. 10, 2020), <https://www.devex.com/news/despite-pandemic-slowdown-climate-change-continues-to-worsen-98053>.

IV. CONCLUSION

As we move forward, the disruption to our long standing way of life will fade away.¹²³ The main challenge moving forward is to learn the lesson on the importance of cooperation among countries, among scientists, and civil society sectors.¹²⁴ The pandemic was a significant reminder that international order exists to advance the protection of the human dignity.¹²⁵ In addition, the role and necessity of governmental regulation was clearly evidenced by the pandemic, because of different factors such as the necessity of a national mandate on masks, the issuance of ban on international travels, and coordination of resources to secure research and effective vaccination.¹²⁶

[W]hen we get past this crisis—which we will—we will face a choice. We can go back to the world as it was before or deal decisively with those issues that make us all unnecessarily vulnerable to crises . . . The recovery from the COVID-19 crisis must lead to a different economy. Everything we do during and after this crisis must be with a strong focus on building more equal, inclusive and sustainable economies and societies that are more resilient in the face of pandemics, climate change and the many other global challenges we face.¹²⁷

In the aftermath of the COVID-19 pandemic and its related economic crisis, it remains to be seen if foreign leaders will use the disruption caused by such crises to steer a greener economy.¹²⁸ Let's hope countries do their homework and engage in specific policies effectively considering the social

123. See, e.g., Press Release, UN Secretary-General, 'We are Only as Strong as the Weakest,' Secretary-General Stresses, at Launch of Economic Report on COVID-19 Pandemic, U.N. Press Release SG/SM/20029 (Mar. 31, 2020), <https://www.un.org/press/en/2020/sgsm20029.doc.htm> [hereinafter Economic Report on COVID-19].

124. *Id.*

125. Human Rights Dimensions of COVID-19 Response, Human Rts. Watch (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>; Patricia Park, International Law for Energy and the Environment 26 (2013) (discussing the main goal of international law, in general).

126. REGULATORY QUALITY AND COVID-19: THE USE OF REGULATORY MANAGEMENT TOOLS IN A TIME OF CRISIS (2020), https://read.oecd-ilibrary.org/view/?ref=136_136858-iv4xb9i639&title=Regulatory-quality-and-COVID-19-The-use-of-regulatory-management-tools-in-a-time-of-crisis; RESPONSES TO COVID-19 IN THE UNITED STATES, <https://www.loc.gov/law/help/covid-19-responses/us.php> (last updated Dec. 30, 2020).

127. Economic Report on COVID-19, *supra* note 123.

128. Megan Rowling, *World leaders urged to learn from pandemic in adapting to climate change*, REUTERS, <https://www.reuters.com/article/climate-change-coronavirus-politics/world-leaders-urged-to-learn-from-pandemic-in-adapting-to-climate-change-idUSL8N2JX4Y6> (last updated Jan. 22, 2021).

cost of carbon and the divestment from fossil fuels, while being more attentive to climate justice.¹²⁹ The Paris Agreement has instruments to steer such policies.¹³⁰ The open-ended question is if countries are fully committed to such Agreement. Therefore, the next five years are of particular interest for the Paris Agreement on Climate Change and more broadly, International Energy Law.¹³¹

129. Janice Ng, *The Social Cost of CalPERS' Carbon Investments: \$41.73 Billion in 2018*, FOSSIL FREE CAL. (July 16, 2020), <https://fossilfreeca.org/2020/07/16/calpers-portfolio-contributes-to-societys-costs-from-carbon-emissions/>.

130. See generally Paris Agreement, *supra* note 12.

131. *Paris Climate Agreement Q&A*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <https://www.c2es.org/content/paris-climate-agreement-qa/> (last visited Jan. 29, 2021).

THE BIDEN (ENERGY) DOCTRINE

Frédéric Gilles Sourgens*

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On its face, predicting the Biden administration's international energy policy would appear simple: look up the policy of the Obama administration. Repeat. Done. There is, of course, more than a little truth to such an understanding of the Biden administration. President Biden is himself an alumnus of the Obama administration with significant input on the foreign policy and energy policy decisions from the Obama administration. Many of the people who will be tasked with implementing the Biden administration's international energy policy will themselves also be alumni and alumnae of the Obama administration. Surely, then there will be more than a little overlap between where the Obama administration left off and the Biden administration will begin.

But one should tread cautiously in assuming that a Biden administration will simply pick up where the Obama administration left off. There are three important factors to consider. The first is the simple passage of time. The passage of time is a particularly dramatic factor for international energy policy due to the climate change clock. Current estimates suggest that climate tipping points will be reached by 2030.¹ These estimates may well be overly optimistic. Four years of relative domestic and international inaction therefore leaves the Biden administration with a qualitatively different starting position

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1. UNITED NATIONS, EMISSIONS GAP REPORT 2019 46 (2019).

than a Clinton administration would have encountered. As such, the Biden administration cannot simply use the Obama playbook. The runway to doomsday has now been shortened by approximately one-third.

The second factor is economic. The COVID-19 pandemic has left the world in a state of severe economic distress. It has killed more than 2.3 million people worldwide.² It has shut down countries and continents. In the process, it has severely tested existing supply lines and thrown global markets into chaos. One might thus analogize that the world finds itself closer to 2008 economically than 2016. The important caveat being that massive government resources—in the trillions of dollars—have already been marshaled to hold at bay the worst consequences of the COVID-19 pandemic.³ These resources, therefore, look to be potentially unavailable to combat climate change.

The third factor is personal. President Biden by all accounts is far more of a moderate on global energy policy than many Obama administration alumni and possibly President Obama himself. President Biden is in many ways an institutionalist and traditionalist—dare one say a “small-c conservative.” He would thus be less inclined towards radical and fast change than the prior administration would have been.

Where does that leave the Biden administration? As this Essay will explore, it requires the Biden administration to respond to a worsening energy trilemma at the time of increased geopolitical tensions that add further challenges to this trilemma. The Biden administration hopes to resolve this trilemma with an integrated vision of “building back better.”⁴ This vision of “building back better” hopes to respond to each of the prongs of the energy trilemma, while keeping an eye on geopolitical, energy-related tensions.⁵

The Biden administration finds itself in a bind in resolving this energy trilemma. As we shall see, the Biden administration’s approach to international economic governance is small-c conservative. This small-c conservatism is ultimately incompatible with taking the build back better program to a global scale. Such a program can only be realized to the extent the Biden administration invests greater political and diplomatic capital in free trade agreements and building a deeper international economic order to support energy transition.

2. *Covid-19 Coronavirus Pandemic*, WORLDOMETERS, <https://www.worldometers.info/coronavirus/> (last updated Feb. 27, 2021).

3. INT’L MONETARY FUND, A YEAR LIKE NO OTHER: IMF ANNUAL REPORT 2020 5 (2020).

4. *The Biden Plan to Build a Modern Sustainable Infrastructure and An Equitable Clean Energy Future*, BIDENHARRIS, <https://joebiden.com/clean-energy/> (last visited Jan. 15, 2021) [hereinafter *Biden Build*].

5. *The Biden Plan to Secure Environmental Justice and Equitable Economic Activity*, BIDENHARRIS, <https://joebiden.com/environmental-justice-plan/> (last visited Jan. 15, 2021) [hereinafter *Biden Plan*].

I. ENERGY TRILEMMA

This section addresses the underlying challenge energy policy poses on the international stage. It outlines that energy policy traditionally responds to a trilemma of: environmental sustainability, energy equity/affordability, and energy security. This trilemma transcends energy *policy* and in fact, is at the heart of international energy *law*. The section outlines that current circumstances exacerbate the urgency of each of the prongs of the dilemma.

The energy trilemma is reflected already in the core themes struck by then President Biden's transition.⁶ President Biden's central message in his victory speech was that "I believe it's this: Americans have called upon us to marshal the forces of decency, the forces of fairness, to marshal the forces of science and the forces of hope in the great battles of our time."⁷ Relevantly for current purposes, President Biden highlighted the battle to build prosperity.⁸ He also highlighted, "the battle to save our planet by getting climate under control."⁹ President Biden's transition website similarly lists as two of its four priorities "economic recovery" and "climate change."¹⁰ This speech at core thus hits on two of the three prongs of the energy trilemma—environmental sustainability (climate change) and energy equity/affordability (building prosperity).

The third prong of the energy trilemma is about energy security.¹¹ Energy security is about the security of energy supply.¹² This security of supply is threatened in two separate, yet equally important ways. First, it is threatened by external, geopolitical events.¹³ One example of such external, geo-political events includes recent violent tensions between Iran, Saudi Arabia, and the United States.¹⁴ These tensions led to a drone attack on one

6. *Id.*

7. *Read the full text of Joe Biden's speech after historic election*, ABC (Nov. 7, 2020), <https://abcnews.go.com/Politics/read-full-text-joe-bidens-speech-historic-election/story?id=74084462>.

8. *Id.*

9. *Id.*

10. *Priorities*, BIDEN-HARRIS TRANSITION, <https://buildbackbetter.gov/priorities/> (last visited Jan 15, 2021).

11. *World Energy Trilemma Index*, WORLD ENERGY COUNCIL, <https://www.worldenergy.org/transition-toolkit/world-energy-trilemma-index> (last visited Jan. 15, 2021).

12. Daniel Yergin, *Ensuring Energy Security*, 85 FOREIGN AFF. 69, 69–78 (2006).

13. *Oil security: The global oil market remains vulnerable to a wide range of risk factors*, INT'L ENERGY AGENCY (Nov. 27, 2019), <https://www.iea.org/areas-of-work/ensuring-energy-security/oil-security> (last visited Jan. 19, 2021).

14. *See* Ellen R. Wald, *3 Reasons Iran Can't Put a Toll on the Straits of Hormuz*, FORBES (July 8, 2019), <https://www.forbes.com/sites/ellenwald/2019/07/08/3-reasons-iran-cant-put-a-toll-on-the-strait-of-hormuz/?sh=45267cb75ff2> (discussing summer 2019 threats to navigation through the straits); Rockford

of Saudi Arabia's largest oil refining installations, sending shockwaves through energy markets.¹⁵ Further, Iran has threatened one of the most important shipping lanes for global oil supplies, the Straits of Hormuz.¹⁶ Three similarly important areas of tension include: 1) the South China Sea, an area in which the People's Republic of China is currently threatening energy security through unlawful enforcement actions; 2) the Black Sea, an area in which Russia threatens energy security by unlawfully annexed Crimea; and 3) the Baltic Sea, an area of importance for European pipeline access that is seeing increased Russian escalation.¹⁷

Second, energy security also can be impaired for reasons internal to existing energy markets. These markets cannot rely upon technology that is unable to deliver energy when it is needed. One such problem is the so-called intermittent problem of renewable energy (how to deliver energy when the sun does not shine and the wind does not blow).¹⁸ This problem has also arisen in traditional energy markets, with the 2001 rolling California blackouts being one example.¹⁹

These three prongs of the energy trilemma are reflected in a number of international legal regimes. Environmental sustainability and climate change are subject to the United Nations Framework Convention on Climate Change

Weitz, *Explainer: Could Iran Close the Strait of Hormuz*, NAVY TIMES (Jan. 7, 2020), <https://www.navytimes.com/news/your-navy/2020/01/08/explainer-could-iran-close-the-strait-of-hormuz/>; see also *Iran Seizes British Tanker in Strait of Hormuz*, BBC (July 20, 2019), <https://www.bbc.com/news/uk-49053383>; Ben Hubbard et al., *Two Major Saudi Oil Installations Hit by Drone Strike, and U.S. Blames Iran*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/14/world/middleeast/saudi-arabia-refineries-drone-attack.html> (last updated Jan. 15, 2020) (discussing the drone strike on Abqaiq and Khurais); see also *Saudi Arabia Oil Attacks: UN 'Unable to Confirm Iranian Involvement'*, BBC (Dec. 11, 2019), <https://www.bbc.com/news/world-middle-east-50742224> (discussing Iranian disputing responsibility for the drone strike).

15. Hubbard, *supra* note 14.

16. See Wald, *supra* note 14; see also Weitz, *supra* note 14.

17. See *Tensions flare over South China Sea energy reserves*, ARGUS (July 17, 2019), <https://www.argusmedia.com/en/news/1941353-tensions-flare-over-south-china-sea-energy-reserves>; see also Ariel Cohen, *As Russia Closes In On Crimea's Energy Resources, What Is Next For Ukraine?*, FORBES (Feb. 28, 2019), <https://www.forbes.com/sites/arielcohen/2019/02/28/as-russia-closes-in-on-crimeas-energy-resources-what-is-next-for-ukraine/?sh=69b3408929cd>; see also Andrew E. Kramer, *Pipeline Politics: Why Nord Stream 2 Is Back in the Spotlight*, N.Y. TIMES, <https://www.nytimes.com/2020/09/14/world/europe/nord-stream-2-russia-germany.html> (last updated Sept. 16, 2020).

18. Paul Rogers, *California grid operator warned of power shortages as state transitioned to clean energy*, MERCURY NEWS, <https://www.mercurynews.com/2020/08/17/california-blackouts-expose-problems-in-states-transition-to-clean-energy/> (last updated Aug. 17, 2020).

19. *Id.*

and the Paris Agreement concluded under its auspices.²⁰ Questions of energy affordability and equity fall under human rights as well as international economic law consisting broadly of trade and investment law.²¹ Energy security in turn can be improved both by international economic law to address internal energy problems, regimes governing international peace, and security to address geopolitical threats.

Each of these different prongs of the trilemma, in addition, calls on multiple other international legal regimes to the floor. Most centrally, international climate concerns have also raised human rights issues.²² These human rights issues have led domestic courts in the Netherlands to order governments to increase their emission reduction targets.²³ These issues have also made headway in the Inter-American system to focus on the human rights implications of climate change and thus increased pressure to increase climate action.²⁴

At the same time, such human rights concerns also affect energy equity.²⁵ Energy is one of the backbones necessary for economic activity.²⁶ It is essential to deliver healthcare services and education, and thus central to development.²⁷ Moreover, it is central to a host of positive human rights to the point that scholars have posited the existence of a right to electricity.²⁸

As the Biden administration focuses on energy and climate policy, it, therefore, acts not just in one area of international law. Rather, its policies

20. See United Nations Framework Convention on Climate Change art. 2, Sept. 5, 1992, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107; see also Paris Agreement art. 2, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/ [hereinafter Paris Agreement].

21. Apurvaa Pandey, *Energy: A Basic Human Right*, GEOPOLITICAL MONITOR (Apr. 24, 2018), <https://www.geopoliticalmonitor.com/energy-a-basic-human-right/>.

22. See Maria L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, 22 AM. SOC'Y INT'L L. INSIGHTS (May 10, 2018), https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#_edn1; see also *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, CTR. FOR INT'L ENVTL. L. (Dec. 9, 2019), <https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/>.

23. HR 20 December 2019, ECLI:NL:HR:2019:2007.

24. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017) 1, 32.

25. Lars Löfquist, *Is There a Universal Right to Electricity?*, 24 INT'L J. HUM. RTS. 711, 718 (2020).

26. *Id.* at 711.

27. *Id.* at 721.

28. *Id.* at 712.

will have to move across different areas of international law.²⁹ Energy and climate cannot be reduced to a single regime. They are systemic concerns. As this Essay will discuss, the Biden administration is approaching climate and energy from a systemic perspective. Yet, its approach likely lacks the toolkit fully to unlock the energy trilemma. The two main problems for the Biden administration are the lack of a clear vision of how the energy trilemma can be balanced and the thorny nature of any engagement with China—an engagement for which the current Biden team seems not as well equipped as it could have been.³⁰ At the same time, the Biden administration’s approach of “building back better” may well provide the building blocks out of which such a fuller approach could be built.³¹ There thus remains a reason to be cautiously optimistic that the Biden administration will fully embrace its slogan as part of a broader overhaul of the global legal energy infrastructure.

II. BUILDING BACK BETTER

The Biden administration recognizes the need to integrate energy solutions into a response involving the entire government rather than just any one department.³² This commitment is most clearly visible in two contexts. The first is in the programmatic approach to building back better.³³ The second is in the staffing of key positions dealing with international and domestic energy policy.³⁴ Both of these help us to move into focus what the Biden (Energy) Doctrine will likely look like. The first subsection will address each of these in turn and attempt to establish what can be gleaned from them to deduce a Biden (Energy) Doctrine. The second subsection will outline the challenges this doctrine will face both as a matter of policy statements

29. *The Power of America’s Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, BIDENHARRIS, <https://joebiden.com/americanleadership/> (last visited Jan. 15, 2021) [hereinafter *Power of America*].

30. See Alex Gullén, *Biden says his team has ‘no time to waste’*, POLITICO (Dec. 19, 2020), <https://www.politico.com/news/2020/12/19/biden-climate-team-announcement-448717>; see also Rick Gladstone, *Biden to Face Long List of Foreign Challenges, With China No.1*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2020/11/07/world/americas/Biden-foreign-policy.html>.

31. See Jennifer Epstein, *Biden Offers ‘Build Back Better’ Plan to Revive Economy*, BLOOMBERG (July 9, 2020), <https://www.bloomberg.com/news/articles/2020-07-09/biden-offers-build-back-better-approach-to-reviving-economy>.

32. See generally *Biden Build*, *supra* note 4.

33. See generally *Build Back Better: Joe Biden’s Jobs and Economic Recovery Plan for Working Families*, BIDENHARRIS, <https://joebiden.com/build-back-better/> (last visited Jan. 18, 2021) [hereinafter *Build Back Better*].

34. See, e.g., Will Englund et al., *Biden to name Granholm as energy secretary*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/business/2020/12/15/granholm-energy-secretary-biden/>.

made by the Biden administration and as a matter of the geopolitical landscape that the Trump administration has left behind for the Biden administration.

A. *Build Back Better as an Energy Program*

No slogan better captures the Biden administration's aspirations than "build back better."³⁵ This slogan can be translated into four distinct areas of policy action under the Biden administration. The first is a renewed commitment to emissions reduction under the Paris Agreement.³⁶ The second is a renewed commitment to engagement—as opposed to the unilateralism of the Trump administration.³⁷ Circumstances would suggest, however, that the Biden administration will have a more pragmatic approach of incrementalism as opposed to the attempts at concluding framework conventions that drove part of the Obama agenda.³⁸ Third, it is likely that the Biden administration will seek to strengthen development aid and climate finance to support United States energy exports while supporting global greenhouse gas mitigation efforts.³⁹ Finally, the Biden administration is not likely to abandon oil and gas or move to drastic steps such as carbon border adjustments.⁴⁰ Rather, it will likely seek to bring oil and gas companies into the climate process.

1. The Paris Agreement

It is an article of faith for the Biden administration to rejoin the Paris Agreement on January 20, 2021. Rejoining the Paris Agreement means that the United States will continue to participate in the procedural obligations laid out in the Paris Agreement.⁴¹ These procedural obligations chiefly concern reporting and continued negotiation towards open items on the Paris

35. *Build Back Better*, *supra* note 33.

36. See Press Release, Biden Harris Transition, Statement by President-elect Joe Biden on the Five-Year Anniversary of the Paris Agreement (Dec. 12, 2020), <https://buildbackbetter.gov/press-releases/statement-by-president-elect-joe-biden-on-the-five-year-anniversary-of-the-paris-agreement/>.

37. See *Power of America*, *supra* note 29.

38. See Richard A. Kessler, *Pragmatic Biden has political know-how to push green agenda*, RECHARGE, <https://www.rechargenews.com/wind/pragmatic-biden-has-political-know-how-to-push-green-agenda/2-1-907798> (last updated Nov. 9, 2020).

39. See generally *The Biden Plan for Clean Energy Revolution and Environmental Justice*, BIDENHARRIS, <https://joebiden.com/climate-plan/> (last visited Jan. 19, 2021) [hereinafter *Clean Energy Revolution*].

40. See Heidi Vella, *Joe Biden is president-elect: what now for US oil and gas?*, OFFSHORE TECH., <https://www.offshore-technology.com/features/joe-biden-is-president-elect-what-now-for-us-oil-and-gas/> (last updated Dec. 6, 2020).

41. See DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 209–26 (2017).

Agreement agenda.⁴² Importantly, one such item that has yet to lead to broad agreement concerns is carbon markets.⁴³ The United States rejoining the Paris Agreement will, therefore, add important information to global climate efforts and add a voice in favor of resolving important items left open in the Paris Agreement itself.⁴⁴

However, rejoining the Paris Agreement also raises a more fundamental question. What happens to the United States emission reduction contributions under the Paris Agreement? The Paris Agreement does not mandate emission reduction quotas.⁴⁵ Instead, the Paris Agreement leaves it to each Member State to make nationally determined contributions (NDCs), in which each Member State sets out its own emission reduction targets.⁴⁶ The Paris Agreement itself does not make these NDCs binding.⁴⁷ NDCs can become binding as unilateral acts made pursuant to a treaty.⁴⁸

The original United States NDC was such a binding unilateral act.⁴⁹ It was intended to create reliance interests in the States to increase the ambition in their own emission reduction policies—and it did.⁵⁰ But with the Trump administration's withdrawal from the Paris Agreement, the status of the United States NDC has become more problematic.⁵¹

It is likely that the Biden administration will indirectly address this uncertainty.⁵² Many of the United States' Paris Agreement treaty partners

42. *Id.*

43. See Diane Desierto, *COP25 NEGOTIATIONS FAIL: CAN CLIMATE CHANGE LITIGATION, ADJUDICATION, AND/OR ARBITRATION COMPEL STATES TO ACT FASTER TO IMPLEMENT CLIMATE OBLIGATIONS?*, BLOG EUR. J. INT'L L. (Dec. 19, 2019), <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/>.

44. Emma Newburger, *Biden will rejoin the Paris Climate Accord. Here's what happens next*, CNBC, <https://www.cnbc.com/2020/11/20/biden-to-rejoin-paris-climate-accord-heres-what-happens-next.html> (last updated Nov. 20, 2020).

45. See generally Paris Agreement, *supra* note 20, art. 2, ¶ 1(a).

46. *Id.* art. 4, ¶ 2; see also Frédéric G. Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U. J. INT'L L. & POL. 885, 888 (2018).

47. Paris Agreement, *supra* note 20, art. 4, ¶ 11.

48. Sourgens, *supra* note 46, at 893.

49. *Id.* at 894.

50. *Id.* at 935.

51. Press Release, Michael R. Pompeo, Secretary of State, U.S. Department of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019).

52. See David Waskow et al., *How Biden Can Make the US a Global Leader on Climate Action*, WORLD RES. INST. (Nov. 12, 2020), <https://www.wri.org/blog/2020/11/biden-us-leadership-fight-climate-change>.

have increased their own NDCs.⁵³ Most notably, the European Union has announced such a plan.⁵⁴ Therefore, it is likely that the United States will announce an increase in its NDC.⁵⁵

The problem with such an announcement is the manner of its implementation. The first United States NDC was premised upon administrative action, most notably the Clean Power Plan.⁵⁶ As the Biden administration takes office, such new administrative action will require time both to design and shepherd through the United States administrative law notice-and-comment process.⁵⁷ It is likely that the Biden administration will look to energy policy in order to shore up its NDC.⁵⁸ But the exact nature of this action may well be complicated by legislative agendas. This means that there may be a lag between the United States' expression of intention to improve upon its NDC and its ability to actually push climate policies to submit such an updated NDC.

It is noteworthy that this lag time may well present an opportunity. As with the first United States NDC, the United States could use the formulation of its own NDC as a means to coordinate with third states.⁵⁹ The United States NDC, therefore, could become a step towards building a new global energy infrastructure.⁶⁰ If the United States were to use the opportunity in this fashion, it is likely that a second United States NDC would also become legally binding as a unilateral act made pursuant to a treaty. As such, it would tether the United States in a binding fashion to a forming international energy consensus.⁶¹

53. *CAT Climate Target Update Tracker*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/climate-target-update-tracker> (last updated Jan. 22, 2021); *see generally* Paris Agreement, *supra* note 20.

54. *CAT Climate Target Update Tracker United Kingdom*, CLIMATE ACTION TRACKER, (Dec. 12, 2020), <https://climateactiontracker.org/climate-target-update-tracker/united-kingdom/>.

55. *See Clean Energy Revolution*, *supra* note 39.

56. *United States of America First NDC*, U. N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (Mar. 9, 2016), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf>; JAMES E. MCCARTHY ET.AT., CONG. RESEARCH SERV., R44341, EPA'S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS 1 (2017).

57. *See* 5 U.S.C. §553.

58. *See Clean Energy Revolution*, *supra* note 39.

59. Waskow, *supra* note 52.

60. *Id.*

61. *Id.*

2. Renewed Engagement

The NDC process already hints at one of the hallmarks of what to expect from the Biden administration. The Biden administration has vowed to re-engage with the world by means of diplomacy.⁶² It has signaled a sharp turn around vis-à-vis the Trump administration and its brand of unilateralism.⁶³

As the NDC process already indicates, it is likely that this form of engagement will follow the blueprint for the Paris Agreement NDCs. That is, there is likely to be bilateral diplomacy to shore up support for shared energy and climate goals with United States partners.⁶⁴ One of the partners in this respect was Canada, and this remains as such.⁶⁵ Another potential partner includes the European Union.⁶⁶

The most important party for such renewed engagement is China. China and the United States find themselves in critical opposition on security questions that have significant implications for energy security.⁶⁷ The most important difference involves the South China Sea.⁶⁸ China has advanced significant maritime claims—claims which have been decisively rejected by an international law of the sea tribunal.⁶⁹ Despite this loss, China has moved ahead with aggressive enforcement action in the South China Sea due to violation of international law.⁷⁰ Chinese action impairs energy security as China is threatening natural resource exploration in the region with military force.⁷¹ Further, the most significant shipping lanes pass through the South China Sea,⁷² thus impairing freedom of navigation and global supply chains.

62. David Sanger, *The End of 'America First': How Biden Says He Will Re-engage With the World*, N.Y. TIMES, <https://www.nytimes.com/2020/11/09/us/politics/biden-foreign-policy.html> (last updated Nov. 30, 2020).

63. *Id.*

64. ERIK BRATTBERG, *REINVENTING TRANSATLANTIC RELATIONS ON CLIMATE, DEMOCRACY, AND TECHNOLOGY I* (Carnegie Endowment for Int'l Peace) 1st ed. (2020).

65. Kathiann M. Kowalski, *How U.S.-Canada collaboration could boost both countries' climate responses*, ENERGY NEWS NETWORK (Mar. 27, 2019), <https://energynews.us/2019/03/27/midwest/how-u-s-canada-collaboration-could-boost-both-countries-climate-responses/>.

66. Brattberg, *supra* note 64 at 1.

67. Wu Xinbo, *U.S. Security Policy in Asia: Implications for China—U.S. Relations*, 22 ISEAS Yusof Ishak Inst. 479, 480 (2000).

68. Pompeo, *supra* note 51.

69. Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257, 264 (2020).

70. *Id.* at 267.

71. Lirong Wang, *Sea lanes and Chinese National Energy Security*, 73 J. COASTAL RSCH. 572, 574 (2015).

72. *See How Much Trade Transits the South China Sea?*, CHINAPOWER, <https://chinapower.csis.org/much-trade-transits-south-china-sea/> (last updated Jan. 25, 2021).

The renewed engagement with China and other potential partners on energy and climate policy is likely to be bilateral and informal. That is, the Biden administration is unlikely to attempt the grand bargain route of a Trans-Pacific Partnership (TPP).⁷³ This TPP was one of the most important documents to create a multilateral framework for deep-seated engagement on energy trade and infrastructure, among other goals.

Had it been ratified, the TPP would have been one of the greatest United States foreign policy successes in the region. Any multilateral treaty requires compromise and is in many ways imperfect. But the rules laid out in the TPP would have provided a strong framework for cooperation on energy questions.⁷⁴ It would have allowed the United States to engage China in a multilateral framework that would have combined energy and trade-related issues in a comprehensive manner.⁷⁵

But the lesson from the TPP is that such agreements make for bad politics.⁷⁶ It is not likely that such an agreement could be ratified as a treaty or concluded as a Congressional-Executive Agreement.⁷⁷ Such far-reaching policy proposals are unlikely to receive needed support from both the progressive left and populist right. Consequently, diplomatic engagement with partners is likely to increase. But, it is highly likely to be bilateral rather than broadly multilateral. And it is more likely to be informal rather than take the form of treaties requiring Congressional approval.

3. Climate Finance and Development Aid

The Biden administration is committed to a program of energy infrastructure investment.⁷⁸ This commitment is most visible in its domestic agenda.⁷⁹ “Build back better” is one of the key Biden campaign slogans.⁸⁰ This slogan highlights a commitment to energy infrastructure investment in

73. James McBride et al., *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/what-trans-pacific-partnership-tpp> (last updated Feb. 1, 2021).

74. Michael Levi, *What the TPP Means for LNG*, COUNCIL ON FOREIGN REL. (Nov. 17, 2015), <https://www.cfr.org/blog/what-tpp-means-lng>.

75. See Mireya Solis, *The Containment Fallacy: China and the TPP*, BROOKINGS (May 24, 2013), <https://www.brookings.edu/blog/up-front/2013/05/24/the-containment-fallacy-china-and-the-tpp/>.

76. See Frédéric G. Sourgens, *Supernational Law*, 50 VAND. J. TRANSNAT'L L. 155, 158 (2017).

77. Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1353–54 (2008) (discussing NAFTA and other free trade agreements).

78. *Biden Build*, *supra* note 4.

79. Exec. Order No. 13990, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021).

80. *Id.*

the United States domestically.⁸¹ This commitment is more likely to succeed with Democratic legislative majorities in the U.S. House of Representatives and the U.S. Senate.

The Biden administration's commitment to energy infrastructure investments does not end at the water's edge. One of the main problems for climate action is that many states lack the means to overhaul existing energy infrastructure.⁸² This means that climate action can only be successful if states contribute significant funds to climate finance.⁸³

The Paris Agreement already contains a commitment for a climate finance mechanism.⁸⁴ The original goal was to raise \$100 billion per year in climate finance funding.⁸⁵ This goal still falls significantly short of the necessary resources to meet Paris' goals. Ultimately, this goal, in turn, will have to be increased.⁸⁶

The Biden administration will likely increase its efforts in providing climate finance to support energy infrastructure development abroad.⁸⁷ Importantly, such climate finance does not require the direct use of U.S. taxpayer dollars to build powerplants overseas.⁸⁸ Rather, climate finance relies on governments to provide guarantees for loans and assistance in arranging commercial and multilateral financing for projects.⁸⁹ Such financing can take the form of investment insurance.⁹⁰ Such action is more likely to be politically acceptable yet still supportive of infrastructure development overseas.

81. *Biden Build*, *supra* note 4.

82. DILIP AHUJA & MARIKA TATSUTANI, *THE WORLD ACADEMY OF SCIENCES, SUSTAINABLE ENERGY FOR DEVELOPING COUNTRIES* 5, 9, 35 (2008).

83. *Changing the Finance, Financing the Change*, U.N. ENV'T PROGRAMME, <https://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-finance> (last visited Jan. 22, 2021).

84. Paris Agreement, *supra* note 20, art. 9.

85. Jorge Gastelumendi & Inka Gnittke, *Climate Finance (Article 9)*, in *THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY* 239, 241 (Daniel Klein et al. eds., 2017).

86. See generally Chrysa Alexandraki, *COP 24 and Climate Finance: A Stepping Stone or a Blurred Line?*, EJILTALK! (Jan. 23, 2019), <https://www.ejiltalk.org/cop-24-and-climate-finance-a-stepping-stone-or-a-blurred-line/>.

87. See Baysa Naran et al., *The Biden Administration's potential impact on climate finance*, CLIMATE POL'Y INITIATIVE (Jan. 5, 2021), <https://www.climatepolicyinitiative.org/the-biden-administrations-potential-impact-on-climate-finance/>.

88. See RICHARD K. LATTANZIO, CONG. RSCH. SERV., IF10763, *PARIS AGREEMENT: U.S. CLIMATE FINANCE COMMITMENTS* (2019) (discussing the different forms of international financial assistance).

89. See generally *id.* (detailing the manners in which the U.S. provides climate finance).

90. *Id.*

One of the reasons states offer certain forms of climate finance is because they can further serve as export finance.⁹¹ That is, climate finance can assist U.S. businesses in building and operating foreign energy projects.⁹² This means that such foreign infrastructure has a beneficial economic impact on the United States climate finance, which is likely an avenue of significant United States engagement.⁹³

On the other hand, it is not particularly likely that the United States will enter into free trade agreements in the short term.⁹⁴ The Biden administration has already announced its intention to focus on domestic economic investment and growth instead.⁹⁵ This means that the Biden administration will likely not expand market access systemically or otherwise expand trade and investment protections to support energy infrastructure overhaul. At the same time, there is no indication that the United States will exit existing U.S. free trade agreements or investment protection treaties.⁹⁶ The Biden administration is, therefore, likely to increase support for building back better abroad. It will do so through informal financing mechanisms and under the protection of existing bilateral and multilateral treaties. It is not likely to retool how it would assist in such financing and investment completely.

4. Fossil Fuels

The Biden administration has not indicated an all-out effort to dismantle the oil and gas industry. On the domestic front, the Biden administration has instead attempted to follow a balancing act between environmental and energy interests. This balancing act is most visible in the Biden campaign's stance on hydraulic fracturing.⁹⁷ The Biden campaign has announced its intention not to permit hydraulic fracturing on public lands.⁹⁸ It has expressly rejected

91. See Igor Shishlov, *G20 Governments Must Urgently Align Their Export Credits With The Paris Agreement*, iD4D (Sept. 14, 2020), <https://ideas4development.org/en/paris-agreement-role-of-export-credits/> (for a discussion of export finance in energy).

92. See *Climate Finance*, WORLD RES. INST., <https://www.wri.org/our-work/project/climate-finance/climate-finance-and-private-sector> (last visited Jan. 23, 2020).

93. See generally *id.*

94. See generally Tatiana L. Palermo, *The future of free trade*, GEOPOLITICAL INTELLIGENCE SERV. (Oct. 23, 2020), <https://www.gisreportsonline.com/the-future-of-free-trade,economy,3340.html>.

95. See Nick Allen, *Joe Biden says 'no trade deals' until he has invested in America first*, TELEGRAPH (Dec. 3, 2020), <https://www.telegraph.co.uk/news/2020/12/02/joe-biden-says-no-trade-deals-has-invested-america-first/>.

96. See generally Palermo, *supra* note 94.

97. Vicky B. Varela, *What's Next for Fracking Under Biden?*, COUNCIL ON FOREIGN REL. (Dec. 18, 2020), <https://www.cfr.org/in-brief/whats-next-fracking-under-biden>.

98. *Id.*

banning the process on private land.⁹⁹ Further, it is unclear whether the Biden administration will not grandfather in existing producers on public lands.¹⁰⁰ This means that the ban would only apply to new oil and gas developments on public lands.¹⁰¹

This suggests that the Biden administration will also follow an international policy that will be, on the whole, supportive of the oil and gas industry.¹⁰² Thus, it is likely that the United States will continue to support natural gas-fired powerplants worldwide and protect global natural gas infrastructure.¹⁰³ (Having come full circle, the United States recently sent an aircraft carrier to Vietnam at the request of the Vietnamese government due to Chinese threats against Vietnamese leased offshore gas projects.¹⁰⁴ The Biden administration will likely continue such “freedom of navigation” diplomacy in the region, thus protecting oil and gas industry interests in the region.)

It is unlikely that the United States would drastically alter other elements of the international energy system. The Biden administration looks poised to work with oil and gas as part of the energy mix.¹⁰⁵ It is more likely that the Biden administration would work with foreign partners on tailpipe and smokestack technology standards.

B. *Dramatis Personae*

Policy programs are only successful to the extent that they are competently implemented. Therefore, it is important not just to look at policy programs. The lead actors asked to implement these programs are just as important. This section will focus on a few of the leading Biden administration nominees that have been announced to date and assess their impact on global energy policy.

99. *Id.*

100. *Id.*

101. *Id.*

102. Varela, *supra* note 97.

103. *Id.*

104. See Reuters Staff, *U.S. says completes second aircraft carrier visit to Viet.*, REUTERS (Mar. 11, 2020), <https://www.reuters.com/article/us-vietnam-usa/u-s-says-completes-second-aircraft-carrier-visit-to-vietnam-idUSKBN20Y0F3>.

105. Timothy Puko, *Biden's Plan to Shift Energy Policy Faces Headwinds*, WALL ST. J. (Nov. 10, 2020), <https://www.wsj.com/articles/bidens-plan-to-shift-energy-policy-faces-headwinds-11605016802>.

1. Lead Actors

The three most important persons for the Biden program are Antony Blinken, John Kerry, and Gina McCarthy. Antony Blinken (Blinken) is President Biden's nominee to serve as Secretary of State.¹⁰⁶ President Biden has nominated John Kerry (Kerry) as special envoy for climate matter.¹⁰⁷ Lastly, President Biden has called upon Gina McCarthy (McCarthy) to serve as White House coordinator on climate matters.¹⁰⁸ Each of these individuals is likely to have a direct impact on the implementation of the energy policy program outlined in the previous section.

Antony Blinken is a longstanding U.S. diplomat.¹⁰⁹ Blinken first entered government service in 1993 as the Special Assistant to the Assistant Secretary of State for European and Canadian Affairs.¹¹⁰ Blinken has since held national security positions and State Department positions in the Clinton and Obama administrations.¹¹¹ Blinken has expressed strong support for increasing NDC ambition and has called for meetings with major emitters to do so.¹¹² Blinken is known as a strong internationalist.¹¹³ He is committed to multilateralist solutions to foreign policy problems.¹¹⁴ Blinken has significant European experience, having attended a high school in France, and is known as a devotee of French culture.¹¹⁵ Further, he is known as a supporter of robust

106. See *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/administration/cabinet/> (last visited Jan. 30, 2021); Lara Jakes et al., *Biden Chooses Antony Blinken, Defender of Global Alliances, as Secretary of State*, N.Y. TIMES, <https://www.nytimes.com/2020/11/22/us/politics/biden-antony-blinken-secretary-of-state.html> (last updated Dec. 2, 2020).

107. *The Cabinet*, *supra* note 106; Lisa Friedman, *With John Kerry Pick, Biden Selects a 'Climate Envoy' With Stature*, N.Y. TIMES, <https://www.nytimes.com/2020/11/23/climate/john-kerry-climate-change.html> (last visited Dec. 11, 2020).

108. Lisa Friedman, *Biden to Name Gina McCarthy, Former E.P.A. Chief, as White House Climate Coordinator*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/climate/gina-mccarthy-biden-climate.html>.

109. *Deputy Secretary State*, U.S. DEP'T OF ST., <https://2009-2017.state.gov/r/pa/ei/biog/236057.html> (last visited Jan. 22, 2021).

110. *Id.*

111. *Id.*

112. Tony Walker, *From 'America first' to 'America together': who is Antony Blinken, Biden's pick for secretary of state?*, CONVERSATION (Nov. 25, 2020), <https://theconversation.com/from-america-first-to-america-together-who-is-antony-blinken-bidens-pick-for-secretary-of-state-150739>.

113. David M. Herszenhorn & Rym Momtaz, *9 things to know about Antony Blinken, the next US secretary of state*, POLITICO (Nov. 23, 2020), <https://www.politico.eu/article/nine-things-to-think-about-antony-blinken/>.

114. *Id.*

115. *Id.*

United States involvement in global security threats, including by military force.¹¹⁶

John Kerry's role as special envoy is similarly significant. The role is a cabinet-level position.¹¹⁷ Kerry previously served as Secretary of State in the Obama administration.¹¹⁸ In fact, the Paris Agreement was concluded during Kerry's tenure as Secretary of State.¹¹⁹ Similar to Blinken, Kerry has significant European leanings and is known as a Francophile.¹²⁰ Prior to service as Secretary of State, Kerry served as a U.S. Senator.¹²¹ Thus, he brings strong political experience and instincts mixed together with foreign policy experience and weight.

Gina McCarthy will serve as the head of the White House Office of Domestic Climate Policy.¹²² In this position, McCarthy will also have significant influence over energy and climate questions within the White House.¹²³ McCarthy is a former Environmental Protection Agency (EPA) Administrator.¹²⁴ McCarthy was one of the authors of the Clean Power Plan.¹²⁵ This plan was at the heart of the first United States NDC. Thus, McCarthy brings significant expertise from the domestic regulatory perspective to climate affairs.¹²⁶ This expertise is particularly important as Kerry and McCarthy are said to be friends with a history of working together in formulating U.S. climate policy by combining regulatory and foreign policy experience.¹²⁷

116. *Id.*

117. Kate Sullivan, *Biden prioritizes climate crisis by naming John Kerry special envoy*, CNN, <https://www.cnn.com/2020/11/23/politics/john-kerry-biden-climate-envoy/index.html> (last updated Nov. 24, 2020).

118. *Id.*

119. *Id.*

120. AFP, *John Kerry Given France's Highest Honour*, LOCAL (Dec. 11, 2016), <https://www.thelocal.fr/20161211/john-kerry-given-frances-highest-honour>.

121. *John Kerry*, BALLOTPEDIA, https://ballotpedia.org/John_Kerry (last visited Jan. 27, 2021).

122. Juliet Eilperin & Brady Dennis, *Biden Picks Former EPA Chief as White House Climate Czar*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/climate-environment/2020/12/15/gina-mccarthy-climate-change-czar-biden/>.

123. *Id.*

124. *Id.*

125. Coral Davenport & Lisa Friedman, *Biden's Twin Climate Chiefs, McCarthy and Kerry, Face a Monumental Task*, N.Y. TIMES, <https://www.nytimes.com/2020/12/16/climate/gina-mccarthy-john-kerry-climate-adviser.html> (last updated Dec. 21, 2020).

126. *Id.*

127. *Id.*

2. Supporting Actors

Four further positions are of particular importance as the Biden team tries to tackle the global energy trilemma. These positions are the EPA administrator, the U.S. Trade Representative, the Secretary of Defense, and the National Security Advisor.¹²⁸ The expertise here follows the same footsteps as the main actors as that they have significant prior experience in their respective resorts.¹²⁹

President Biden chose Michael Regan as his appointee for EPA administrator.¹³⁰ Mr. Regan has significant experience as a regulator.¹³¹ Mr. Regan's past work has been in air quality regulation.¹³² Thus, he brings expertise in emissions regulations and climate matters to bear and therefore assists the Kerry-McCarthy team with the implementation of climate policies.¹³³

President Biden named Katherine Tai as his nominee for U.S. Trade Representative.¹³⁴ The U.S. Trade Representative is charged with the negotiation of U.S. trade agreements and sets U.S. trade policy.¹³⁵ Katherine Tai is a China expert and Mandarin speaker.¹³⁶ She is expected to continue a tough line on China in trade questions.¹³⁷

On questions of energy security, the Biden administration national security team will have an outsized importance. The main players in the national security team are the Secretary of Defense and National Security

128. See generally NAT'L SECURITY AGENCY, <https://www.nsa.gov> (last visited Jan. 30, 2021); see also Secretary of Defense Lloyd J. Austin III, U.S. DEP'T DEF., <https://www.defense.gov/Our-Story/Meet-the-Team/Secretary-of-Defense/> (last visited Jan. 30, 2021); see also OFF. OF THE U.S. REP., <https://ustr.gov> (last visited Jan. 30, 2021); see also U.S. ENV'T PROT. AGENCY, <https://www.epa.gov> (last visited Jan. 30, 2021).

129. See NAT'L SECURITY AGENCY, *supra* note 128; see also Secretary of Defense Lloyd J. Austin III, *supra* note 128; see also OFF. OF THE U.S. REP., *supra* note 128.

130. See *The Cabinet*, *supra* note 106; Jeff Tollefson, *Biden's pick to head US environment agency heartens scientists*, NATURE (Dec. 18, 2020), <https://www.nature.com/articles/d41586-020-03621-6>.

131. See Tollefson, *supra* note 130.

132. *Id.*

133. *Id.*

134. See *The Cabinet*, *supra* note 106; Yen Nee Lee, *Biden's pick for top U.S. trade official will continue tough line on China, says ex-Trump official*, CNBC (Dec. 18, 2020), <https://www.cnbc.com/2020/12/18/bidens-ustr-pick-katherine-tai-will-be-tough-on-china-ex-trump-official.html>.

135. See Lee, *supra* note 134.

136. *Id.*

137. *Id.*

advisor.¹³⁸ President Biden has announced that he will nominate General Lloyd J. Austin III as Secretary of Defense.¹³⁹ Austin is a former head of U.S. Central Command.¹⁴⁰ His experience lies predominantly in the Middle East, not with China or Russia.¹⁴¹ Joe Biden finally chose Jake Sullivan as his National Security Advisor.¹⁴² Sullivan, a Clinton State Department veteran and later National Security Advisor to then-Vice President Biden, is known as one of the architects of the Iran Nuclear Deal.¹⁴³

C. *The Biden Energy Doctrine*

The Obama foreign policy doctrine famously was “don’t do stupid shit.”¹⁴⁴ It sought to limit foreign military entanglements in Syria, much to the dismay of many of the administration’s own veterans.¹⁴⁵ At the same time, the Obama administration had a desire to “go big.”¹⁴⁶ Efforts such as the TPP were key multilateral efforts that materially shifted U.S. foreign policy east with a focus on Asia.¹⁴⁷ This Asian focus was accompanied by an attempt to cement this foreign policy in super-regional agreements that would achieve grand policy objectives in one fell swoop.¹⁴⁸

The Biden administration looks to follow a related but different mantra. What emerges from both the policy proposals and cast of characters is a focus on “if it ain’t broke, don’t fix it.” As this discussion has shown so far, the Biden administration does not appear poised to propose any significant

138. See generally NAT’L SECURITY AGENCY, *supra* note 128; see generally *Secretary of Defense Lloyd J. Austin III*, *supra* note 128.

139. See *The Cabinet*, *supra* note 106; Lara Seligman et al., *Biden picks retired general Lloyd Austin to run Pentagon*, POLITICO, <https://www.politico.com/news/2020/12/07/lloyd-austin-biden-secretary-defense-frontrunner-contender-443479> (last updated Dec. 7, 2020).

140. See *The Cabinet*, *supra* note 106; Seligman, *supra* note 139.

141. Michael E. O’Hanlon et al., *Around the halls: Brookings experts on defense react to the nomination of Gen. Lloyd Austin*, BROOKINGS (Dec. 10, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/12/10/around-the-halls-brookings-experts-on-defense-react-to-the-nomination-of-gen-lloyd-austin/>.

142. Natasha Bertrand, *The inexorable rise of Jake Sullivan*, POLITICO (Nov. 27, 2020), <https://www.politico.com/news/2020/11/27/jake-sullivan-biden-national-security-440814>.

143. *Id.*

144. Michael T. Klare, *Why Hillary Clinton Is Wrong About Obama’s Foreign Policy*, NATION (Sept. 3, 2014), <https://www.thenation.com/article/archive/why-hillary-clinton-wrong-about-obamas-foreign-policy/>.

145. *Id.*

146. See, e.g., McBride et al., *supra* note 73.

147. See *id.*

148. See generally *id.*

multilateral free trade agreements, such as the TPP, that might be able to alter energy supply chains globally.¹⁴⁹ Additionally, the Biden administration does not appear to be able to invest significant funds abroad to support energy infrastructure transformations directly. Finally, the Biden administration does not appear to depart from existing energy security paradigms significantly.

This approach appears fundamentally consistent with the people staffed at the top. The Biden team is highly competent. But it is also fundamentally conservative with a little *c*. That is, it has a strong belief in the status quo and in fact, seems poised to return to it rather than to build a new paradigm. This, therefore, suggests a mentality to keep with existing approaches.

On its face, it is difficult to reconcile “if it ain’t broke, don’t fix it” with “build back better.” The “better” more than implies that existing structures are fundamentally flawed. Therefore, the idea is to improve infrastructure, improve living conditions, build more equitable energy systems, and more equitable economies.

In the end, the two slogans do remain fundamentally consistent with each other. The Biden administration fundamentally believes in existing international legal processes. The administration does not wish to change the status because it believes that these processes are, in fact, able to deliver an incrementally better economic and energy infrastructure.

In sum, one should expect the Biden administration to support energy security, energy equity, and environmental sustainability within the strictures of the Paris Agreement and classic U.S. foreign policy. One should not expect a fundamental departure legally, even as the Biden administration will attempt to use these existing mechanisms to different ends—namely, to strengthen renewable energy projects in the United States and support the construction of such projects globally.

III. THE CHALLENGE AHEAD

The Biden administration’s approach presents several challenges for energy policy going forward. Some of these challenges are premised in personnel. Others are premised in a structural under-ambition to resolve the problems posed by the energy trilemma. This section will briefly address each of these challenges in turn.

A. *The Asia Problem*

One of the key problems apparent in the senior team assembled by President Biden has been its regional focus. Antony Blinken and John Kerry

149. See Palermo, *supra* note 94.

are first and foremost European experts.¹⁵⁰ Their focus in diplomacy and personal experience has focused on the European continent.¹⁵¹

At the same time, much of the expertise of the Biden administration on the national security side is focused on the Middle East.¹⁵² General Austin has significant experience as head of Central Command.¹⁵³ Jack Sullivan, on the other hand, is best known for his work on the Iran Nuclear Deal.¹⁵⁴ Their expertise thus is focused, in particular, on one of the last theaters of United States engagement—the Middle East.¹⁵⁵

Today's global energy challenges are not European. Nor do they have their roots in the Middle East. These challenges have a significant Asian component. The most important player in global energy systems—outside of the United States—is China.¹⁵⁶ Without China, it is unlikely that climate change can be halted.¹⁵⁷ Without China, it is very difficult for the majority of Asia to live with energy security because China has aggressive enforcement in the South China Sea.¹⁵⁸ The South China Sea, of course, is both important as a focal point for global shipping lanes and as a source of significant natural gas reserves in the region.¹⁵⁹

The Biden administration's team is not attuned to the challenges of this region. The leading China expert in the administration is the U.S. Trade Representative Tai.¹⁶⁰ But statements by the Biden administration have indicated that new free trade agreements are not a priority.¹⁶¹ Consequently, the skillset of the U.S. Trade Representative will not be a direct asset in handling the difficult relationship with China and the rest of Asia.

This is not to say that the Biden administration will not be able to overcome these challenges. It is, however, an interesting reversal of the Obama administration's shift to Asia. As personnel implements policy, this

150. See generally Herszenhorn & Momtaz, *supra* note 113; see, e.g., AFP, *supra* note 120.

151. See generally Herszenhorn & Momtaz, *supra* note 113; see, e.g., AFP, *supra* note 120.

152. See generally *Power of America*, *supra* note 29.

153. Seligman et al., *supra* note 139.

154. See generally Bertrand, *supra* note 142.

155. See generally *Power of America*, *supra* note 29.

156. See Brye Butler Steeves & Helton Ricardo Ouriques, *Energy Security: China and the United States and the Divergence in Renewable Energy*, 38 CONTEXTO INTERNACIONAL 643, 643, 658 (2016).

157. See *id.* at 658.

158. Desierto, *supra* note 69.

159. *South China Sea - what you need to know*, DEUTSCHE WELLE, (Aug. 11, 2017), <https://www.dw.com/en/south-china-sea-what-you-need-to-know/a-40054470>.

160. Lee, *supra* note 134.

161. Allen, *supra* note 95.

personnel seems less able to implement Asian policy as efficiently as one might have hoped. Thus, there are significant challenges ahead.

B. *The Trilemma Problem*

The Biden administration faces a more deep-seated problem with its energy approach in another regard. The Biden doctrine of “if ain’t broke, don’t fix it” works at the margins. It is unlikely to solve many of the systemic problems underlying energy transition. That is, the Biden administration has significant ambition, but the tools it intends to use are not up to the task.

The key problem the Biden administration will face is to achieve both domestic and global buy in for a significant ramp up in climate action. Climate action increases energy costs.¹⁶² Increased energy costs disproportionately impact people with less means.¹⁶³ So, as a whole, it is likely that people will protest against such climate action.¹⁶⁴ Such protests in France, in fact, derailed French carbon taxation plans.¹⁶⁵ On the international side, it is similarly difficult to convince States to increase climate ambition without an incentive of increased development. And this increased development hinges in large part on economic growth that typically comes with increased free trade.

The Biden administration thus must find a tool to increase energy equity domestically and globally. The domestic tool to address this problem appears to be governmental energy infrastructure investment. If sufficiently ambitious, this tool might go a long way to address the underlying equity problem. But this is only half the battle; the same equity concern is replicated internationally. There thus needs to be a significant increase in global investment in energy infrastructure. Such investment only makes sense with a ramp-up and potential overhaul of free trade agreements. That is, it seems impossible to solve environmental sustainability and climate change without also addressing the broader international economic order.

162. Joel Jaeger & Devashree Saha, *10 Charts Show the Economic Benefits of US Climate Action*, WORLD RES. INST. (July 28, 2020), <https://www.wri.org/blog/2020/07/economic-benefits-climate-action-us>.

163. See, e.g., Ariel Drehobl, *Low-Income Households Pay More for Energy, but Efficiency Can Help*, U.S. NEWS (Sept. 30, 2021), <https://www.usnews.com/news/healthiest-communities/articles/2020-09-30/poor-households-pay-more-for-energy-but-efficiency-can-help>.

164. See Somini Sengupta, *Protesting Climate Change, Young People Take to Streets in a Global Strike*, N.Y. TIMES, <https://www.nytimes.com/2019/09/20/climate/global-climate-strike.htm> (last updated Sept. 21, 2019).

165. Bate Felix, *France’s Macron learns the hard way: green taxes carry political risks*, REUTERS (Dec. 2, 2018), <https://www.reuters.com/article/us-climate-change-france-protests/frances-macron-learns-the-hard-way-green-taxes-carry-political-risks-idUSKBN1O10AQ>.

The Biden administration further does not seem to have a clear plan to address energy security. Currently, Chinese activity in the South China Seas negatively affects energy security for the reasons outlined above. However, China is also a key state in building an environmental coalition sufficient to halt and turn back climate change.¹⁶⁶ Here, energy security and environmental sustainability appear at loggerheads with each other. The Biden administration appears to be focused on climate policy. But this focus is always a hostage of security concerns. So far, the Biden administration has not developed a plan for how to address this tension.

In other words, part of the problem of “if it ain’t broke, don’t fix it” is that the Biden administration appears to be too pragmatic to achieve its own climate ends. A greater focus on the “build back better” prong of its approach would likely require a deeper investment in international economic law by the United States. It requires a commitment to grow energy infrastructures globally. But such a commitment is only realistic if the Biden administration changes its priorities on free trade agreements. To build back better, and to meet climate change, is trade policy. It is not just environmental or foreign policy. This reality so far appears to be missing from the Biden administration’s overall more cautious approach.

166. See Steeves & Ouriques, *supra* note 156, at 658.

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