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ABOUT THE JOURNAL

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we foster a community of like-minded students who are passionately engaged in learning and debate about the critical issues of our time.



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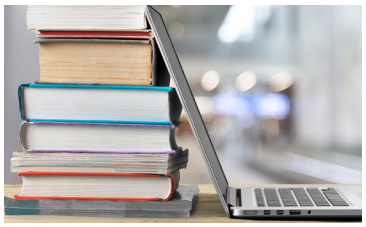
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BEHIND THE COVER



This photo courtesy of Scripps College shows the Bowling Green on the Scripps College campus in the afternoon.

LETTER FROM THE EDITORS

Dear Readers,

We present the latest issue of the Claremont Journal of Law and Public Policy with a deep sense of gratitude and reflection. This edition marks our final as Editors-in-Chief, and it has been an absolute honor to shape the Journal over the past three years. We both joined CJLPP during our first year on campus, drawn to its mission of elevating student voices at the intersection of law and public policy. This issue continues the Journal's tradition of publishing bold, thoughtful scholarship that speaks to the most pressing issues of our time.

This edition features six pieces, making it our largest issue in recent years. The first three authors examine how law struggles to keep pace with technological change, raising questions about privacy, access, and ownership in the digital age. Chloe Eshagh (SC '28) makes a compelling case for expanding HIPAA and the Omnibus Rule to cover direct-to-consumer genetic testing companies, arguing that current health privacy frameworks leave critical gaps in consumer protection. Next, Jazzmin Duncan (PO '26) explores the tensions between generative AI and intellectual property, examining how the legal system must adapt to safeguard creative rights without stifling innovation. Finally, in exploring shadow libraries like Library Genesis and Anna's Archive, Shixiao Yu (PO '28) sheds light on the tensions surrounding online piracy and the global disparities in access to knowledge.

The last three pieces in this issue speak directly to the challenges of a world whose history and legal frameworks are increasingly entangled. In her piece on Haiti, Priscilla Matthews (PO '28) traces the country's fragility to a long history of foreign intervention and elite consolidation, arguing for legal reforms that center Haitian agency and community-based governance. Meanwhile, Sarah Chianglin (PO '27) examines how selective U.S. engagement with the International Criminal Court weakens global accountability and reinforces a double standard in international law. Victor Hughes Anyomi (PO '28) closes the issue with a bold reimagining of food sovereignty as a legal right, grounded in transnational solidarity and postcolonial critique. Together, these pieces demonstrate how the reconciliation of political history and advancement of new technologies will shape legal discourse for years to come.

We are proud to recognize the outstanding work featured in this issue. After extensive deliberation, we are delighted to announce Victor Hughes Anyomi (PO '28) as the recipient of this edition's Byron Cohen Prize for excellence in research, writing, and analysis, and Graham Robbins (PO '27) as the recipient of the Isaac Cui Prize for excellence in editing and editorial leadership. As we conclude our time with the Journal, we are excited to pass the baton to next year's Editors-in-Chief, Dannhi Nguyen (PO '27) and Graham Robbins (PO '27), who will be joined by Managing Editor Sophia Saunders (SC '26) and Executive Editor Amy Du (PO '28). We have every confidence that this team will uphold the Journal's standards of excellence while continuing to grow its reach and impact.

We extend our heartfelt gratitude to our writers and editors, who dedicated countless hours to help bring this issue to life. Finally, we would also like to thank you, our readers, for picking up this edition and making CJLPP a part of your intellectual journey. Happy reading!

Sincerely,

Ari Srivastava Grace Zheng

Co-Editors-in-Chief

GENES, OWNERSHIP, AND PRIVACY:

WHY HIPAA SHOULD BE EXPANDED TO DIRECT-TO-CONSUMER GENETIC INFORMATION COMPANIES

INTRODUCTION

In early July 2025, Judge Brian C. Walsh of the U.S. Bankruptcy Court for the Eastern District of Missouri ruled that genetic testing company 23andMe's co-founder Anne Wojcicki could purchase the company for $305 million despite multiple lawsuits over the sale due to privacy concerns.[1] Twenty-seven states and the District of Columbia opposed the sale on the grounds that it was not clear whether 23andMe "has the right to sell and transfer to a third-party such intimate customer data without first obtaining the express informed consent of its customers."[2] The ownership transfer raises many privacy concerns for consumers, many of whom sent 23andMe their sensitive genetic data as a fun scientific test. Regarding ownership transfers, the company's privacy statement notifies consumers that their data "may be accessed, sold or transferred as part of that transaction."[3] Genetic testing companies such as 23andMe are not subject to the same privacy laws as conventional healthcare companies are.[4] Specifically, they are not bound by HIPAA regulations that establish federal standards for the disclosure of health-related information.[5] While special committee chair Mark Jensen stated that buyers would be "required to comply with applicable law with respect to the treatment of customer data" under the Hart-Scott-Rodino (HSR) Act by the Federal Trade Commission, following the announcement of the sale, customers still scrambled to find ways to delete or otherwise protect their data.[6]

The specific case of 23andMe is one of many examples of a broader issue of the protection of genetic information owned by direct-to-consumer (DTC) companies. Currently, hegemonic privacy laws do not account for the rise in popularity and use of genetic testing companies.[7] While regulatory laws cannot keep up with the rapid pace of scientific progress, current policies can be amended to accommodate these rapid changes. In this paper, I argue that genetic testing companies such as 23andMe should adopt new privacy policies in line with HIPAA regulations to protect consumers' genetic information in the event of ownership transfers.

Section I of this paper outlines the complications in current genetic privacy legislation. Section II gives an overview of HIPAA and why genetic testing companies do not fall under its legal purview. Section III explains the Genetic Information Nondiscrimination Act and how it relates to concerns about 23andMe's genetic privacy policy. Section IV details the Federal Trade Commission (FTC)'s policies for DTC companies, antitrust concerns, and the inadequacies of genetic privacy law. Section V explains why genetic testing companies should be considered healthcare companies and therefore subject to HIPAA regulations. Finally, Section VI proposes a solution for protecting peoples' privacy in DTC genetic testing companies.

I. COMPLICATIONS IN PRIVACY POLICIES OF GENETIC INFORMATION

Genetic privacy for DTC products begins with the collection of a consumer's DNA sample, which they send to the company's designated sequencing lab without a physician's prescription being required.[8] The lab then prepares the sample for sequencing, transforming it into a digitized DNA file which is more compatible with computational analysis.[9] This file is subsequently aligned with existing reference sequences, enabling the analysis of the consumer's genetic information for insights into ancestry and health.[10] The digital file generated from the consumer's DNA sequence can be shared with external organizations for further research, potentially involving data uses not explicitly communicated to the consumer. This raises significant privacy concerns, particularly as consumers may not fully comprehend the long-term implications of sharing their data.

A. Legal ambiguities and consumer consent

A key issue in the realm of genetic privacy for DTC companies is the lack of clarity surrounding privacy policies. Unlike healthcare providers, DTC companies are not required to comply with the same privacy regulations stipulated by the HIPAA.[11] The absence of clear and enforceable rules leaves consumers vulnerable, as these companies are not bound by the rigorous standards governing their data.[12] Furthermore, many consumers do not read the terms and conditions they agree to before submitting their DNA samples, raising concerns about informed consent.[13]

1 Dietrich Knauth, *California Fails to Stop 23andMe Founder from Re-Acquiring Company*, Reuters, Jul. 7, 2025, https://www.reuters.com/legal/litigation/california-fails-stop-23andme-founder-re-acquiring-company-2025-07-07/.
2 Arizona *ex rel*. Mayes v. 23andMe Holding Co., Adv. No. 25-04035 (Bankr. E.D. Mo. June 9, 2025).
3 *Privacy Statement*, 23andMe, Jul. 11, 2025, https://www.23andme.com/legal/privacy/full-version/.
4 *See generally* Health Insurance Portability and Accountability Act, 3103 U.S.C. §§ Pub. L.104-19 (1996) (hereinafter HIPAA).
5 Elisabeth Nations, *Direct-to Consumer Genetic Testing Companies: Is Genetic Data Adequately Protected in the Absence of HIPPA?*, 5 USC Goulds Bus. Law Dig. (2023), https://lawforbusiness.usc.edu/direct-to-consumer-genetic-testing-companies-is-genetic-data-adequately-protected-in-the-absence-of-hippa/.
6 *23andMe Initiates Voluntary Chapter 11 Process to Maximize Stakeholder Value Through Court-Supervised Sale Process*, 23andMe, Mar. 23, 2025, https://investors.23andme.com/news-releases/news-release-details/23andme-initiates-voluntary-chapter-11-process-maximize.
7 Rachele M. Hendricks-Sturrup & Christine Y. Lu, *Direct-to-Consumer Genetic Testing Data Privacy: Key Concerns and Recommendations Based on Consumer Perspectives*, 9 J. Pers. Med. (2019).
8 *How Is Direct-to-Consumer Genetic Testing Done?*, MedlinePlus, Jun. 21, 2022, https://medlineplus.gov/genetics/understanding/dtcgenetictesting/dtcprocess/.
9 *Id.*
10 *Id.*
11 *See generally* HIPAA, *supra* note 4.
12 Nations, *supra* note 5.
13 Brennan Canuteson, *The Risks of Relying on Direct-to-Consumer Genetic Testing Service Agreements to Protect Genetic Information*, 5 Bus. Entrep. Tax Law Rev. 35 (2021).

DNA, treated as a commercial property by these companies, should demand a higher standard of protection due to its intimate connection to an individual's identity.[14] Unlike other forms of data, genetic information is deeply personal, reflecting a person's biological constitution and familial identity.[15] In the event of a privacy breach, DNA data can be traced back to an individual, even if it is not directly labeled with their name.[16] Legal scholars have proposed the application of intellectual property principles to transactions involving personal genetic data. Donna Gitter, for example, discusses the growing trend of enforcing property rights over genetic data to better control access and use.[17] Additionally, Alexis Juergens and Leslie Francis analyze how trade secret protections are increasingly employed by companies to safeguard proprietary genetic variant information, suggesting an expanding role for intellectual property dogma in this sphere.[18] However, given the sensitive nature of this information, some argue that it should be regarded as more than intellectual property, as it also encompasses sensitive health-related information that could jeopardize personal privacy.[19] The classification of genetic information remains a matter of debate among legal experts, and resolving this issue is crucial to establishing robust protections for individuals' privacy. It is important to expand this debate beyond geneticists and scientists involved in DNA sequencing. Ethicists, social scientists, and representatives of affected communities must also be involved.[20]

Further complicating this issue is the fact that DTC companies retain broad rights to commercialize consumer data without explicit consent.[21] These companies do not "explicitly claim ownership, but they often retain broad rights to commercialize the resulting data."[22] This allows the companies to set their own policies regarding what they do with consumers' data, often without their explicit consent. Overall, the complications of protecting consumers' data stems from the fact that DTC genetic testing companies are held to lower privacy standards than conventional healthcare companies.[23] These DTC companies then write their own privacy policies that allow them to share consumers' information for external research interests to which consumers do not explicitly consent. For example, 23andMe may share consumer data with "commonly owned entities [and] affiliates […] during a change of ownership," as well as with labs conducting research on behalf of 23andMe.[24] This practice raises critical concerns regarding the transparency and adequacy of informed consent, especially as consumers are only given the option to opt in or opt out of participation in unspecified research initiatives.[25] There is no mention in 23andMe's privacy policy of what specific research will be conducted, leaving consumers to either opt in or opt out of research altogether.[26] Many critiques of such privacy policies note that DTC companies are not subject to HIPAA, an act that has assumed the role of a health privacy regulator "because of Congress' failure to enact more sweeping and rigorous health and genetic privacy laws and regulations."[27] Many critics have also argued that the absence of clear and consistent regulations for DTC companies, coupled with these companies' ability to craft their own privacy policies, exacerbates the risks associated with the unauthorized sharing of sensitive genetic information. Some observe that regulatory oversight is "fragmented and insufficient," leaving consumers vulnerable despite exceptional information sensitivity.[28] Scholars emphasize that once genetic data is disclosed, it cannot be "unshared," and point to a patchwork legal framework and argue that this regulatory gap results in privacy violations for both primary consumers and their relatives and calls for comprehensive legal reform.[29] Without a comprehensive legal framework for genetic privacy, these companies may exploit consumer data for purposes beyond what consumers initially intended or understood and thus may not have given their informed consent to.

II. HEALTH INSURANCE PORTABILITY AND ACOUNTABILITY ACT OF 1996 (HIPAA)

HIPAA was enacted to establish national standards aimed at protecting the security and confidentiality of personal medical information.[30] Initially designed to improve access to healthcare, facilitate health insurance portability, and enhance the privacy of medical records, HIPAA has become the cornerstone of health information privacy in the United States.[31]

A. Key protections under HIPAA

HIPAA regulates how healthcare providers collect, store, and disclose medical data, providing individuals with rights over their health information.[32] Specifically, HIPAA grants individuals the right to access their medical records, request corrections to inaccurate information, receive copies of their records, and limit the disclosure of certain data.[33] HIPAA also mandates the implementation of administrative, physical, and electronic safeguards to protect health information from unauthorized access.[34] Healthcare providers, health plans, and healthcare clearinghouses are all required to comply with HIPAA regulations.[35]

B. Current gaps for direct-to-consumer companies

The aforementioned regulations do not include DTC companies that collect and store consumers' personal information.[36] Healthcare providers, regardless of company size, are required to comply with HIPAA regulations in transactions such as referral requests and benefit eligibility inquiries.[37] However, there are some cases in which health information may be disclosed without a pa-

14 Ellen Wright Clayton et al., *The Law of Genetic Privacy: Applications, Implications, and Limitations*, 14 J. Law Biosci. 1, 8 (2019).
15 *Id.*
16 *Id.*
17 Donna M Gitter, *Achieving Genetic Data Privacy Through Enforcement of Property Rights*, 57 UC Davis Law Rev. 131 (2023).
18 Alexis K Juergens & Leslie P Francis, *Protecting Essential Information about Genetic Variants as Trade Secrets: A Problem for Public Policy?*, 5 J. Law Biosci. 682 (2019).
19 *See, e.g.*, Ayesha K Rasheed, *Personal Genetic Testing and the Fourth Amendment*, Univ. Ill. Law Rev. 1249 (2020).
20 Silvia Croydon, *In It Together: Why Writing Our Genetic Future Should Not Be Left to the Scientists Alone*, 8 Voices Bioeth. (2022).
21 Clayton et al., *supra* note 14.
22 *Id.* at 17.
23 *See generally* HIPAA, *supra* note 4.
24 Privacy Statement, *supra* note 3.
25 *Id.*
26 *Id.*
27 Clayton et al., *supra* note 14, at 11.
28 Samuel A Garner & Jiyeon Kim, *The Privacy Risks of Direct-to-Consumer Genetic Testing: A Case Study of 23andMe and Ancestry,* 96 Wash. Univ. Law Rev. 1219 (2019).
29 Karen J Kukla, *Direct to Consumer or Direct to All: Home DNA Tests and Lack of Privacy Regulations in the United States*, 13 IP Theory 31 (2023).
30 Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, U.S. Department of Health and Human Services, Mar. 14, 2025, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html.
31 *Id.*
32 *See generally* HIPAA, *supra* note 4.
33 *Id.*
34 *Id.*
35 *Id.*
36 Nicholas P Terry, *Assessing the Thin Regulation of Consumer-Facing Health Technologies*, 48 J. Law. Med. Ethics 94 (2020).
37 HIPAA, *supra* note 4.

tient's permission, such as the provision of data to other healthcare providers involved in their treatment, or to law enforcement under a subpoena.[38] The U.S. Department of Health and Human Services' Office for Civil Rights is responsible for enforcing HIPAA regulations and investigating alleged violations.[39]

In 2013, HIPAA was revised to strengthen its regulations. The Omnibus Rule "extends HIPAA's requirements to a broader group of businesses that handle and have the capability to access identifiable health data."[40] Additionally, according to the Genetic Information Nondiscrimination Act (GINA) of 2008, health plans cannot use or disclose genetic information for underwriting—the process of sorting people into similar groups basedon how much they should pay for insurance coverage.[41] However, DTC companies are neither subject to the Omnibus Rule nor GINA.[42]

III. GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA)

Currently, GINA is the only federal genetic discrimination protection act. Certain states, such as California, have additional laws that add protection beyond just health insurance.[43] GINA defines genetic information as a term that covers genetic tests (of an individual or their family members), a family history of genetic disease or disorders, and genetic services including clinical research.[44] However, genetic information doesn't include any information about the age or sex of the individual.[45] "Genetic services" as defined by GINA include genetic tests, counseling, and education.[46] Genetic tests include the analysis of human DNA, RNA, chromosomes, proteins, or metabolites to detect genotypes, mutations, and chromosomal changes. Because genetic testing companies such as 23andMe provide services that analyze DNA to look for genotypes and mutations pertaining to ethnic origins, phenotypes, and health predispositions, they are subject to GINA.[47] However, while GINA prevents discrimination based on genetic information, it does not regulate how DTC companies handle, store, and share genetic information outside the scope of discrimination.[48]

IV. FEDERAL TRADE COMMISSION'S REGULATION OF DIRECT-TO-CONSUMER COMPANIES

A. Current role of Federal Trade Commission

While DTC genetic testing companies are not covered by HIPAA, they are regulated by the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), and the Centers for Medicare and Medicaid Services (CMS).[49] Specifically, Section 5 of the FTC Act protects consumers against "unfair or deceptive acts or practices" including marketing, advertising, data privacy, and company transparency.[50] Under the FTC Act, DTC companies must justify their services with scientific evidence.[51] For example, companies that provide health condition predisposition insights, ancestry information, and lifestyle recommendations need to support their claims with evidence to ensure that they are being truthful and not misleading their consumers.[52]

B. Hart-Scott-Rodino Antitrust Improvement Act of 1976

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) promotes transparency and fair competition during business transactions, particularly when it comes to mergers and acquisitions.[53] It requires companies to file detailed pre-merger notifications with the FTC and the Department of Justice (DOJ) for certain large-scale mergers or acquisitions that meet specific financial thresholds.[54] This filing enables the government to review and potentially block transactions that may substantially lessen competition in a given market. This background is important in understanding how DTC companies such as 23andMe are governed under broader business regulations rather than specific health privacy laws. The HSR Act was important during the change of ownership discussions for 23andMe.

The Act ensures that such transactions do not result in anti-competitive behavior or harm to consumers through market consolidation.[55] Additionally, the HSR Act also plays an indirect role in ensuring that consumer privacy is protected during such mergers or acquisitions, as any transfer of customer data must be reviewed within the context of antitrust law.[56] In the case of 23andMe, concerns regarding genetic data privacy must be considered during this process, ensuring the protection of consumers' personal information in the event of an ownership change. For example, if another DTC genetic testing company such as Ancestry were to acquire 23andMe, it would raise antitrust concerns because they could monopolize the DTC genetic testing market without protecting genetic privacy. While the HSR Act focuses on antitrust and competition, it also intersects with consumer privacy protections, which are a growing concern as genetic data becomes more amid an increasing number of mergers and acquisitions in the biotechnology sector.

C. Inadequacies in FTC's role in DTC companies

DTC genetic testing companies lack industry-specific standards. Prior laws alone are not sufficient to cover all of the ways

38 *Id.*
39 Office for Civil Rights, *HIPAA Enforcement*, U.S. Department of Health and Human Services, Jul. 25, 2017, https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/index.html.
40 *HIPAA, the Privacy Rule, and Its Application to Health Research, in Beyond the HIPAA Privacy Rule: Enhancing Privacy*, Improving Health Through Research 153 (Sharyl J. Nass, Laura A. Levit, & Lawrence O. Gostin eds., 2009), https://www.ncbi.nlm.nih.gov/books/NBK9578/pdf/Bookshelf_NBK9578.pdf.
41 U.S. Department of Health and Human Services, *Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules*, 78 Fed. Regist. 5566 (Jan. 25, 2013).
42 *See generally* Clayton et al., *supra* note 14; Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110- 233, 122 Stat. 881 (hereinafter GINA).
43 *See* Jessica D Tenenbaum & Kenneth W Goodman, *Beyond the Genetic Information Nondiscrimination Act: Ethical and Economic Implications of the Exclusion of Disability, Long-Term Care and Life Insurance*, 14 J. Pers. Med. 153, 154 (2017).
44 GINA, *supra* note 42.
45 *Id.*
46 *Id.*
47 *Id.*
48 *See* Carolyn R Chapman et al., *Genetic Discrimination: Emerging Ethical Challenges in the Context of Advancing Technology*, 5 J. Law Biosci. 1 (2019).
49 Ethan Wold, *The Double-Helix Dilemma: Navigating Privacy Pitfalls in Direct-to-Consumer Genetic Testing*, Minn. J. Law Sci. Technol. (2023), https://mjlst.lib.umn.edu/2023/11/07/the-double-helix-dilemma-navigating-privacy-pitfalls-in-direct-to-consumer-genetic-testing/.
50 15 U.S. Code § 45.
51 *Health Products Compliance Guidance*, Fed. Trade Comm' (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf.
52 *Id.*
53 Hart–Scott–Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976).
54 *Id.*
55 *Id.*
56 *Id.*

in which consumers' genetic privacy is placed at risk.

V. HEALTHCARE ENTITIES IN HIPAA AND DIRECT-TO-CONSUMER HEALTH RELATED SERVICES

Many DTC genetic testing companies claim that they are unique from conventional healthcare companies and thus should not be subject to the same regulations. However, many of their services overlap. In an online survey of several DTC genetic testing companies—23andMe, Navigeneics, and deCODEme—43% of respondents sought out additional information about a health condition in their test and 28% discussed their testing results with a healthcare professional, 9% followed up with additional lab testing, and 33% became more aware of their diet, lifestyle, medications, and health regimens after testing.[57]

HIPAA was enacted before DTC genetic testing companies became popular, so even with the Omnibus Rule, it could not have reasonably anticipated the need for related protections. DTC companies rely on user agreements to obtain broad consent which leaves consumers with fewer options to choose how companies use their data.[58] HIPAA-covered entities require individual patient consent, which allows for a more personal experience and more personal security.[59]

VI. PROPOSED SOLUTION FOR GENETIC PRIVACY AND SECURITY

A potential solution to unregulated DTC genetic companies must give consumers ownership of their genetic data, require companies to follow strict transparency policies, and ensure consumers' rights to withdraw their data at any time. Additionally, consumers should be required to give their explicit consent in the event of an ownership transfer or the sharing of data with external companies, including research labs. A critical question amid this debate is whether DTC companies should be included under HIPAA or whether a new, HIPAA-style law should be created specifically for these companies. While creating a new law tailored to genetic testing companies has its advantages, rolling these companies into HIPAA is a preferable solution because it would streamline privacy protections and offer consumers immediate and robust safeguards. This would require amending the scope of covered entities, as defined by 45 CFR § 160.103, to include such companies.[60] Additionally, amendments must be added that expand consumer consent protocols, ensure consumers' rights to withdraw their data, and strengthen anonymization and transparency standards.

HIPAA's established regulatory framework, including the Omnibus Rule, would provide the necessary protections against unauthorized use or disclosure of genetic data, align DTC companies with conventional healthcare entities, and ensure greater consistency across health-related industries. This consistency is necessary to account for the increasing intersection between genetic testing and personal health decisions. While amendments would need to tailor HIPAA to the unique characteristics of genetic testing companies, the regulatory infrastructure is already in place. Incorporating DTC companies under HIPAA would give consumers more control over their genetic data, increase transparency in how companies use and store that data, and ensure that privacy protections are as robust as possible in an evolving healthcare landscape. Recent legislative efforts, such as the Genomic Data Protection Act introduced in the U.S. Senate, underscore growing concern over the privacy risks associated with consumer genetic testing.[61] This bill aims to impose strict consent requirements, limit secondary uses of data, and prohibit the transfer of genomic data to foreign adversaries, reflecting a broader push to bolster federal oversight in this area.

CONCLUSION

Genetic testing is still a relatively new concept in science. With the recent boom in biotechnology and genetics, the technology progresses before the law can catch up and can eventually leave people with issues in protecting their health privacy. By viewing genetics through a healthcare lens, applying HIPAA to DTC companies provides a pathway for protecting people's genetic privacy and increasing trust in customers. Additionally, explicit consent increases transparency in how the company uses data and allows customers to be more in control of their data. In recent events with more bidding on 23andMe, many news articles have come out explaining how to delete your data and keep yourself safe from the company's bankruptcy. Texas Attorney General Ken Paxton explicitly stated consumers can demand deletion of genetic data and saliva samples;[62] MarketWatch warned that data could be used for sensitive purposes likeinsurance or mortgages;[63] and both CNBC and Forbes provided deletion guidance while noting retention limitations.[64] However, this shouldn't be a privacy scare in the first place especially since many consumers may not be completely aware of how to protect their data on their own. Consumers should be able to feel secure that their data won't be sold and misused. As this proposal has shown, there are ways to bridge the gap between healthcare and DTC companies, especially since people already treat those test companies as a framework for investigating their health with their healthcare professionals.

This piece was written by Chloe Eshagh and edited by Ashley Son.

57 David J. Kaufman et al., *Risky Business: Risk Perception and the Use of Medical Services among Customers of DTC Personal Genetic Testing*, 21 J. Genet. Couns. 413 (2012).
58 *See* Hendricks-Sturrup and Lu, *supra* note 7.
59 HIPAA, *supra* note 4.
60 *Id.*

61 Libbie Cante, Elizabeth Brim & Natalie Maas, *U.S. Senate Introduces Genomic Data Protection Act*, Covington & Burling LLP (Mar. 18, 2025), https://www.insideprivacy.com/united-states/u-s-federal-and-state-legislative-initiatives/u-s-senate-introduces-genomic-data-protection-act/.
62 Sam Warren, *Texas Is Suing Genetic-Testing Company 23andMe. Here's What That Means*., Houston Chronicle (Jun. 12, 2025), https://www.houstonchronicle.com/news/houston-texas/trending/article/texas-23andme-lawsuit-20374343.php.
63 Andrew Keshner, *Why You Should Delete Your 23andMe Account. Here's the Worst That Could Happen If Your DNA Data Is Exposed.*, MarketWatch (Mar. 25, 2025), https://www.marketwatch.com/story/why-you-should-delete-your-23andme-account-heres-the-worst-that-could-happen-if-your-dna-data-is-exposed-d33bb25f.
64 Ashley Capoot, *With 23andMe Entering Bankruptcy, Here's How to Delete Your Genetic Data*, CNBC, Mar. 25, 2025, https://www.cnbc.com/2025/03/25/how-to-delete-23andme-genetic-data.html.

REGULATING AI:

A PATH PAVED BY MUSICIANS

INTRODUCTION

Throughout his acclaimed and controversial career, the American musician known as Prince challenged the traditional power structures of the music industry by speaking out against the constraints of conventional label-to-artist contractual relations and vying for more creative and financial control over his work.[1] His public and lengthy legal battle with Warner Music, his label, exemplified the enduring tensions between artists seeking creative autonomy and labels' desire to maintain financial control. Leading up to the 1995 release of his studio album The Gold Experience, Prince detached himself from his Warner Music-owned stage name and changed his name to an unpronounceable symbol. His fans began to refer to him colloquially as either "The Artist Formerly Known as Prince," "Symbol," or "Squiggle."[2] This was a small but symbolic step in the decades-long legal battle between Prince and his label, a battle that illuminates the conflict between creative expression and corporate interests existing amid a landscape of discrimination and other cultural tensions.

The socio-politically transformative capacity of music provides an interesting framework for examining how intellectual property (IP) law can adapt to the challenges presented by artificial intelligence (AI). Debates over artistic rights are a key source of tension between musical artists and their labels, and these debates are similar to ones about authorship and ownership in a new age of AI-written content both in the music industry and beyond it. With AI models now capable of generating lyrics, arrangements, setlists, and vocal tracks that convincingly mimic those generated by humans, IP legal experts and music industry professionals must work together to consider how best to respond.

IP law today fails to adequately protect artists in an ever-evolving digital world. AI poses an additional challenge to this preexisting one, as it threatens to render existing protections obsolete. Old laws and media licensing regulations have struggled to keep up with these technological advancements, and as a result, creative industries must push for the development of IP law.

This paper uses music's technological evolution, particularly with regard to sampling culture, as a case study of how laws can adapt to the threat posed by a new wave of AI-generated content. Analyzing past cases concerning music licensing, reproduction, and ownership—as well as more recent case involving AI and media production—I argue the introduction of AI further complicates the already-muddied IP legal landscape, and I offer existing media regulations as potential frameworks for the future regulation of AI in creative industries. I argue that AI regulations concerning media production must balance the desire for technological innovation with the need for robust protections for humans; establish clear guidelines for the authorship and ownership of AI-generated content; and create flexible frameworks that can adapt to the rapidly evolving technological landscape. By first examining the relationship between IP law and technological disruption, legal experts can begin to develop a nuanced understanding of how IP law can better adapt to AI's evolution.

I. HISTORICAL BACKGROUND: PIRATING AND IP LAW

IP law is intended to balance the protection of creators' rights with the public's ability to access creative works ranging from art to computer programs.[3] An example of this balance is copyright, which "serves the public interest by helping to ensure that creators can earn a fair reward for their work, thus encouraging further creative endeavors."[4] Beginning in the early 1990s, the internet and the introduction of on-demand downloads, file sharing, and other digital subversions of traditional legal boundaries fundamentally disrupted IP law's relatively unchallenged function: protecting intangible assets.[5] Initially robust in regulating physical and analog media such as books, films, and audio recordings, this system soon struggled to handle the increasing number of possibilities for content creation and circulation.

The evolution of digital piracy follows a clear trajectory: floppy disks containing unauthorized content gave way to peer-to-peer (P2P) file sharing on platforms such as Napster in the late 1990s, which then snowballed into more "sophisticated websites and illicit streaming devices" being widely available by the 2010s.[6] This progression continues today with the widespread use of virtual private networks (VPNs) and torrenting sites such as Soap2Day and MyFlixer that circumvent traditional copyright enforcement mechanisms. These digital content sites evade the historically easy-to-follow paper trail and make the process of duplicating creative materials significantly easier. In the span of a few decades, in-groups of artisans with access to vinyl pressing equipment saw themselves outnumbered by the millions of people who now have access to compact disc (CD)-burning tutorials and digital video recorders.

As media reproduction technologies become increasingly accessible, consumers have gained unprecedented control over how media—and music in particular—is copied, shared, and repurposed. Piracy floodgates eroded as sophisticated devices became more widely available, and consumers began to pirate and collage pre-existing songs.[7] The legal system's initial response to these challenges revealed the limitations of existing IP legal frameworks. Several landmark cases established essential precedents that continue to

1 *See* Eamonn Forde, *Record Breaker: A Brief History of Prince's Contractual Controversies*, The Guardian, Aug. 10, 2015, https://www.theguardian.com/music/2015/aug/10/history-prince-contractual-controversy-warner-paisley-park.
2 *Id.*
3 World Intellectual Property Organization, What Is Intellectual Property? (2020), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf.
4 *Id*. at 23.
5 Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 10 Duke Law Technol. Rev. 1, 21 (2011).
6 Manish Jindal, *History of Piracy – How Did It Emerge?*, Bytescare, Sep. 3, 2024, http://bytescare.com/blog/history-of-piracy.
7 *Id.*

influence today's legal debates over AI-generated content in creative industries.

For example, *A&M Records, Inc. v. Napster, Inc.* directly addressed P2P file sharing networks, with the U.S. Court of Appeals for the Ninth Circuit ruling that Napster, a leading P2P application, had committed contributory and vicarious copyright infringement by facilitating unauthorized music sharing.[8] The court rejected Napster's defense of fair use and found that digital content distributors could be held liable for the activities of their users.[9] This judgement critically established that technological platforms—and not only individual users—bore responsibility for compliance with copyright law.[10] Additionally, *MGM Studios, Inc. v. Grokster, Ltd*. extended this principle when the U.S. Supreme Court unanimously ruled in favor of the creation of the "inducement rule," finding that P2P platforms could be held liable for encouraging and allowing copyright infringement to take place, even if they did not have specific knowledge of their users' violations.[11] This case marked a significant expansion of secondary liability in copyright law, demonstrating the legal system's attempt to adapt traditional principles to emerging technologies such as P2P file sharing. *UMG Recordings, Inc. v. MP3.com, Inc.* further restricted digital content reproduction rights when the U.S. District Court for the Southern District of New York ruled that MP3.com's platform, which allowed users to access the MP3 files of CDs they already owned, constituted copyright infringement despite requiring proof of users' CD ownership.[12] The court also rejected the argument that this service merely enabled "space shifting" for legitimately purchased content, highlighting the tension between consumer convenience and copyright protection.[13]

These cases reveal a legal system struggling to balance support for technological innovation with the need to protect creators' rights. While courts generally favored copyright holders, they also faced mounting challenges when attempting to enforce traditional copyright restrictions in an environment in which content reproduction and distribution could occur instantly, globally, and at little to no cost. The resulting legal uncertainty created a gap between formal copyright law and actual creative practices. As technologies advanced, this gap became increasingly large. The tension between technological advancement and legal constraints established the foundation for today's even more complex legal challenge due to the entrance of AI-generated content into media markets. The legal frameworks developed in response to digital piracy—including the Digital Millenium Copyright Act (DMCA) and its safe harbor provisions—now face additional strain.[14]

II. AI: DATA COLLAGING AND LEGAL PRECEDENTS

At its core, AI is a collage-making tool that continuously learns from datasets containing various types of media—including written essays, videos, images, and sounds—as algorithms piece together responses and conclusions based on user requests and behavior. Any response given to a user by an AI platform such as OpenAI's ChatGPT is a literary collage that has pulled from—or, in musical terms, sampled—specific clauses and ideas from the datasets on which a model has been trained. In other terms, AI uses—and potentially pirates—content from miscellaneous online sites to achieve its designed purpose.

When AI systems are trained on copyrighted materials without the explicit permission of their authors, as most currently do, they potentially engage in what copyright law classifies as massive-scale appropriation. Unlike human sampling artists who select specific elements with artistic intent, AI systems indiscriminately absorb vast datasets from which they create derivative works with increasingly opaque sourcing. This opacity is compounded by the fact that creative works' privacy and usage rights are increasingly determined not by traditional legal frameworks but by AI developers' unilaterally defined terms of service and data policies that often provide minimal transparency regarding training data sources or compensation mechanisms for original creators.[15] When considering the implications of AI on IP law, it is important to consider the genres, artists, libraries, and assumptions that many of these models are trained on.

Cases involving sampling—a legally contentious aspect of contemporary music production in which portions of existing sounds are repurposed in new works—in the music industry highlight the sources of rigidity and adaptability in IP law, and they offer valuable insight into understanding how IP law can adapt to AI's data-driven content generation. The landmark case *Grand Upright Music Ltd. V. Warner Bros. Records Inc.* established a zero-tolerance precedent for unauthorized sampling, emphasizing the need to obtain an original creator's approval even for brief samples.[16] The U.S. District Court for the Southern District of New York found that unauthorized sampling constitutes copyright infringement, famously beginning its opinion by stating, "Thou shalt not steal."[17] The court rejected Biz Markie's unauthorized sampling of Gilbert O'Sullivan's "Alone Again (Naturally)" and established that even brief, unaltered samples required licensing.[18] This rigid approach created significant production barriers for hip-hop artists, DJs, and other musicians who relied on sampling as a fundamental creative technique of their era.

Three years later, in 1994, *Campbell v. Acuff-Rose Music, Inc.* presented a striking contrast in legal reasoning.[19] When 2 Live Crew, a rap duo, was sued for copyright infringement over a parody they had created of Roy Orbinson's "Oh, Pretty Woman," the U.S Court of Appeals for the Sixth Circuit ruled in favor of the duo and found that their sample did not violate copyright law.[20] The case established the precedent that transformative works such as parodies could, in some circumstances, qualify as fair use even with intense sampling.[21] Now, experts are struggling to determine whether AI-generated content can be considered a parody of original content as well.

8 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
9 *Id.*
10 *Id.*
11 MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
12 UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350–52 (S.D.N.Y. 2000).
13 *Id.*
14 *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998). (Enacted in 1998, the DMCA implements two international treaties adopted by the World Intellectual Property Organization (WIPO) and introduces provisions to combat online copyright infringement. Primarily designed to implement two 1996 World Intellectual Property Organization (WIPO) treaties, the DMCA addressed several critical issues in digital copyright protection. Most notably, it introduced safe harbor provisions (17 U.S.C. § 512) that shield internet service providers from liability for copyright infringement committed by their users, provided they promptly remove infringing content upon receiving a take-down notice.)
15 *See* Eryk Salvaggio, *Context, Consent, and Control: The Three C's of Data Participation in the Age of AI*, Tech Policy Press (June 12, 2024).
16 Grand Upright Music Ltd. v. Warner Bro's Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991)
17 *Id.*
18 *Id.*
19 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
20 *Id.*
21 *Id.*

The contrast between *Grand Upright Music Ltd.*and *Campbell* highlights a significant evolution in sampling laws: a shift from viewing sampling as inherent theft towards viewing it as a potentially transformative form of creative expression. This evolution mirrors the broader cultural and technological shifts of the 1990s, as digital production tools became more accessible and remix culture gained increasing popularity in artistic communities. The legal system began—albeit inconsistently—to acknowledge that creativity is a process that often builds upon existing works.

The legal distinction between intentionality and artificiality has profound implications for AI-generated content. Human creators such as 2 Live Crew intentionally infused their samples with cultural commentary and clear artistic purpose—elements that algorithms cannot independently replicate. Current AI models lack the ability to discern the type of cultural context and personal experience that constituted fair use in *Campbell* raising questions about whether AI-generated content could ever truly be transformative in the legal sense without significant human intervention.

While these cases established important legal precedents, technological innovations continued to outpace the law's capacity to effectively regulate creative industries and enforce traditional copyright protections. International agreements such as the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty attempted to mitigate this issue by directly addressing "copyright and related rights in the Internet age" via specific provisions regulating digital transmission rights and protecting computer programs and databases.[22] However, this top-down approach proved insufficient against the decentralized nature of digital creative industries and the rapid pace of technological change.

Artists and other industry professionals developed pragmatic alternatives when faced with this gap between legal frameworks and creative realities. Collective management organizations such as the American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. emerged as crucial intermediaries that simplified the licensing process by allowing creators to license works through a single entity rather than requiring the negotiation of several individual agreements. These organizations helped artists navigate increasingly complex copyright landscapes while ensuring they received appropriate compensation.[23] Similarly, Creative Commons licensing offered a flexible alternative to traditional copyright, allowing creators to specify permissible uses of their work with options ranging from "all rights reserved" to various controlled levels of sharing and remixing. These systems emerged specifically because traditional copyright frameworks could not efficiently or effectively handle the increasing volume and speed of digital creative exchange. They also indicate a historical trend in IP law: when formal legal systems fail to accommodate the evolving needs of creatives, stakeholders develop parallel legal structures that better serve their needs. This pattern has critical implications for AI regulation, suggesting that overly rigid legal approach may drive innovation into less regulated spaces. Thus, flexible frameworks that acknowledge the evolving technological realities of creative industries may prove more effective.

22 World Intellectual Property Organization, *WIPO Copyright Treaty (WCT)*, WIPO, https://www.wipo.int/treaties/en/ip/wct/

23 World Intellectual Property Organization, *Collective Management of Copyright and Related Rights*, WIPO, 2d ed. 2009.

III. ORIGINALITY

In copyright law, originality has specific legal significance that directly impacts the evaluation of sampling and AI-generated content. The Supreme Court set this standard in *Feist Publications v. Rural Telephone Service*, establishing that copyright protection requires a "modicum of creativity" and that works must be "independently created" rather than copied.[24] This standard explicitly rejected the "sweat of the brow" doctrine, meaning that effort alone could not confer copyright protection without a meaningful creative contribution.[25]

Regarding music sampling, the question of originality occurs at two levels. First is whether or not the original work meets the creativity threshold, which is almost always the case. Second is whether the new work incorporating samples of the original work demonstrates sufficient originality itself to constitute independent production. AI-generated content adds a new layer of complexity to these questions, as it is debated whether models trained on copyrighted works can meet the "independently created" requirement.

Current legal frameworks rely heavily on originality, as upheld in *Kelly v. Arriba Soft Corp*.[26] In this case, photographer Leslie Kelly sued Arriba Soft Corporation, an internet search engine, for displaying thumbnail images of his copyrighted photographs in its search engine without his authorization.[27] The Ninth Circuit held that Arriba's use of the thumbnails constituted fair use, emphasizing the transformative nature of the use, as the thumbnails served a new purpose: they were a search tool rather than a form of artistic expression.[28] The court also noted that using low-resolution thumbnails minimized any potential economic harm to Kelly, as they would be unlikely to adequately substitute for the original images.[29] Specifically, the court distinguished between different forms of images—thumbnails and full-sized original photos—demonstrating a nuanced approach to digital reproduction.[30] This case offers a direct parallel to exploring AI's impact on IP.

A more recent case from 2020, *Skidmore v. Led Zeppelin*, emphasizes the importance of originality in protecting musical works.[31] The central issue in question was whether certain songs were similar enough to constitute copyright infringement.[32] The Ninth Circuit determined that while there were similarities between two riffs, they were not sufficiently similar to warrant a claim of infringement.[33] Regarding AI-generated works, this case serves as a potential precedent for considering original works repurposed by entities other than the original author.

The recursive nature of AI—where outputs can inform future inputs—creates a dynamic that renders previous legal precedents increasingly ambiguous, demanding a more sophisticated legal framework. Generative AI, in particular, introduced a novel dimension to these debates and blurred the lines between inspiration, reproduction, and originality. For instance, if a large language model (LLM) produced song lyrics based on user prompts, does the user, the LLM developer, or neither hold rights to the output? Is it

24 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–51 (1991)

25 *Id.*

26 Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–22 (9th Cir. 2003).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).

32 *Id.*

33 *Id.*

collectively owned by the creators of the works used to train a given algorithm? Can AI—and other nonhuman entities—have rights themselves? The rise of global digital access only compounded this issue. As WIPO noted, significant issues remained unresolved, particularly regarding ensuring that "musicians and artists receive proper payment when their works can be accessed online anywhere in the world," a problem exemplified by the global nature of digital content distribution and the limitations of existing territorial copyright frameworks.[34]

These ambiguities expose further gaps in current laws, as LLMs trained on copyrighted music or lyrics without an original author's permission may violate Section 1201 of the DMCA, which prohibits the circumvention of technological measures designed to protect copyrighted works.[35] The DMCA and similar copyright laws face new challenges due to AI's ability to generate works that mimic those created by humans. This requires a fundamental reimagining of IP law that moves beyond binary distinctions of authorship and recognizes the complex, multi-layered nature of contemporary content creation. Without such adaptations, copyright laws risk becoming ineffective.

IV. OPEN-SOURCE COLLABORATION

As AI technologies grow more accessible, capable, and autonomous, the lines between AI-generated and human-produced music are blurred, challenging legal frameworks initially crafted to protect human creations. Even modern legislation focusing on digital works has failed to account for the nuances introduced by AI, exposing the limitations of existing copyright law in protecting and categorizing hybrid human-machine creations.

A. Foundational Digital Copyright Acts

The DMCA established a legal framework for protecting digital works by restricting access to pirated content.[36] While the DMCA successfully curtails piracy, its rigid mechanisms, such as takedown notices, have been criticized by artists, scholars, and digital rights advocates for stifling fair use, parody, and remixing—all practices central to modern music production and digital culture. It has also been criticized because it fails to safeguard original creative content from being used as "inspiration" for new works such as remixes or AI-generated variations. Similarly, the 2018 Copyright Modernization Act—more commonly known as the Music Modernization Act (MMA)—was designed to improve financial and legal clarity in the music industry.[37] It is intended to ensure proper credit and compensation for all contributors to a piece of music and to address licensing challenges faced by digital streaming platforms.[38] However, the MMA—like the DMCA—fails to contend with the legal and ethical questions raised by the increasing prevalence of AI-generated content, and music specifically, in creative industries.

Both the DMCA and the MMA reveal a fundamental tension in copyright law: existing legal frameworks struggle to categorize and protect creative works that emerge from hybrid human-AI collaborations. These acts' provisions assume that all creative works emerge from clear, identifiable authorship, a paradigm that is increasingly at odds with AI-generated music that blurs the boundaries between a creator and their tools. This blurred boundary raises questions about credit, ownership, and value distribution that neither the DMCA nor the MMA can fully revolve.

B. Key Court Decisions

The evolving dynamics of human-AI collaboration increasingly intersect with longstanding legal debates over transformative use, authorship, and platform liability. A series of key court decisions illustrates both the legal precedents shaping this terrain and the growing inadequacy of traditional frameworks for addressing the hybridized nature of AI-generated content.

In *Authors Guild v. Google, Inc.* (2015), several courts assessed whether the use of copyrighted material for transformative purposes was permissible, a question relevant to AI models that are trained on data derived from existing copyrighted music.[39] Ultimately, the Second Circuit found that Google's digitization and display of small excerpts of books for search purposes was transformative, did not substitute for the original works, and did not significantly harm the market.[40] While this ruling focused on written material, its reasoning provides a foundational lens through which to view the training of AI models: using existing works to develop new technological tools may, under certain conditions, qualify as fair use. However, this presumes that the outputs serve a fundamentally different purpose than the training data, a presumption that is not always clear with generative AI that mimics original works.

In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith,* the Supreme Court clarified what constituted a transformative use, a key issue for AI systems that remix or reinterpret existing musical pieces.[41] The Court found that Warhol's silkscreen image based on Goldsmith's photograph of Prince was not fair use, citing the commercial nature of the reuse and insufficient transformative content.[42] This decision indicates a tightening of fair use standards, emphasizing that courts must rigorously assess whether or not a new work adds new meaning to an original work, an ambiguous test when applied to generative AI systems that output variations of existing media with unclear degrees of human intervention and creative intent.

BMG Rights Management (U.S.) LLC v. Cox Communications, Inc. concerned digital platforms' liability for hosting content that infringed on a copyright, a growing concern as AI-generated works proliferate.[43] In this case, the Fourth Circuit ruled that Cox Communications could not claim safe harbor under the DMCA because it knowingly failed to terminate repeat infringers.[44] The court's decision signaled that service providers could bear legal responsibility if and when they profit from copyright infringement, and it also indicated that platforms were not merely conduits but also actors responsible for complying with copyright laws.

In a landmark decision concerning AI-generated content, *Thaler v. Perlmutter* affirmed that works created without human authorship cannot not be copyrighted.[45] When Thaler sued the U.S. Copyright Office claiming that copyright law should be interpreted to allow AI systems to be recognized as authors, the District Court for the District of Columbia upheld the Copyright Office's decision

34 World Intellectual Property Organization, *supra* note 3.
35 Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2020).
36 *Id.*
37 Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).
38 *Id.*
39 Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
40 *Id.*
41 Andy Warhol Foundation v. Goldsmith, 143 S. Ct. 1258 (2023).
42 *Id.*
43 BMG Rights Management (U.S.) LLC v. Cox Communications, Inc., 881 F.3d 293 (4th Cir. 2018).
44 *Id.*
45 Thaler v. Perlmutter, No. 1:22-cv-01564 (D.D.C. 2023).

to only recognize human authors, reinforcing the traditional view of authorship.[46] This case presents a clear legal boundary that excludes autonomous AI-generated works from copyright protections. In practice, this means that creators using AI must demonstrate meaningful human contribution to receive copyright protection, although what constitutes human contribution remains unclear.

Existing frameworks such as the DMCA and the MMA cannot answer such complex questions, as they often default to binary distinctions of authorship that fail to recognize the hybrid nature of AI-assisted creative content. Taken together, the aforementioned court decisions demonstrate a legal system grappling with contradictions. Courts reward innovation under the fair use doctrine in some contexts but restrict it when they perceive commercial exploitation or insufficient transformative content. They demand human authorship while technological advancements increasingly defy traditional conceptions of authorship. They impose liability on platforms without offering clear standards for when algorithmic or user-generated actions cross legal lines. The central tension here is that IP law presumes clear boundaries between authors and creative tools, while AI collapses these binaries. Moving forward, legal reforms must explicitly address the gray area of human-AI collaborative authorship. Without such clarity, creators, platforms, and copyright holders will remain mired in uncertainty and the very innovation that copyright law is meant to promote will be stifled.

C. The Question of Human Authorship

Community for Creative Non-Violence v. Reid offers a framework for understanding the question of who owns AI-assisted creations in a "work made for hire" context: the artist, the label, or neither?[47] When CCNV commissioned sculptor James Earl Reid to design a statue portraying homelessness, both CCNV and Reid claimed copyright ownership of the final product titled Third World America.[48] The Supreme Court was tasked with determining whether Reid was an independent contractor or an employee of CCNV, as copyright ownership of works created under a "work made for hire" arrangement depends on this important distinction.[49] The Court ultimately ruled that, because CCNV did not have control over the manner and means of his work, Reid was an independent contractor and was granted copyright ownership of Third World America. This decision established a multifactor test based on common law of agency principles to determine employment status for copyright purposes, significantly influencing how copyright ownership is determined in collaborative creative efforts.

Over a decade later, *Morris v. The Business Journal Publications, Inc.* underscored the challenges of determining authorship when multiple contributors are involved, a scenario that becomes even more complex with AI.[50] In this case, Diane Morris, a journalist, sued The Business Journal Publications, Inc. for using her lists of executive compensation figures without permission.[51] The Second Circuit affirmed the principle established in *Feist Publications, Inc. v. Rural Telephone Service Co.*, holding that while the arrangement of factual data can be copyrighted if it reflects original selection or coordination, the mere presentation of facts without creative input does not meet the threshold for copyright protection.[52]

These early cases established the critical criteria for copyright protection: human authorship, originality, and creative input. Their precedents directly challenge AI's current copyright status, highlighting the requirements of human intentionality and creative selection that AI systems struggle to demonstrate. As authorship becomes increasingly collaborative between humans and AI systems, new frameworks are needed to address the murky intersection of creativity, labor, and machine influence in contemporary music production.

D. Sampling and Remixing

In 2005, *Bridgeport Music, Inc. v. Dimension Films* introduced the "get a license or do not sample" standard, which limits artists' freedom to reuse and remix sounds.[53] Bridgeport Music, the owner of the copyright to a song by Funkadelic, sued Dimension Films over a three-note guitar riff that was sampled with permission in the N.W.A.'s song 100 Miles and Runnin', which was featured in a Dimension Films Movie.[54] The Sixth Circuit held that any unauthorized digital sampling, even if it is brief or unrecognizable, constitutes copyright infringement.[55] The court rejected Dimension Films' de minimis defense, stating that musicians must "get a license or [] not sample."[56] The ruling sparked significant debate in the music industry, as critics argued that it stifled creativity and introduced barriers for artists, particularly in genres such as hip-hop, where sampling is a foundational creative technique. This precedent highlights the tension between traditional copyright protections and the inherently iterative nature of human and AI-generated works, which often synthesize preexisting material without explicit permission or licensing.

E. Creative Labor and Dynamic Authorship

AI's ability to skip various production stages introduces efficiencies to the creative process but challenges the creative interventions that traditionally shaped each stage. AI-generated works risk significantly affecting the results of the process by introducing new creative dynamics that erode the diversity and authenticity that IP law strives to protect. When an artist uses AI to generate melodies, harmonies, or entire arrangement, they are using it both as a tool and a collaborator. While not inherently revolutionary, this approach is worth considering for its potential to expand creative workflows and enable innovation in music production. Procedural industry standards serve as ethical guardrails, promoting fair compensation and respect for creative labor. Balancing these competing interests and reconciling past issues are two of the biggest challenges facing lawmakers and industry leaders today, as they must ensure that AI's beneficial contributions are leveraged without compromising human artists' rights, integrity, and livelihood. The economic implications of this symbiosis are particularly dramatic, creating a potential power redistribution between artists and record labels. By

46 *Id.*
47 Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).
48 *Id.*
49 *Id.*
50 Morris v. The Bus. Journal Publ'ns, Inc., 259 F.3d 1167, 1172–75 (9th Cir. 2001) (ruling that the use of a copyrighted photograph in an online publication without permission was a violation of copyright law, despite the defendant's argument of fair use).
51 *Id.*
52 *Id.*
53 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 797 (6th Cir. 2005). (Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 797, 804–08 (6th Cir. 2005) (holding that the unauthorized sampling of a copyrighted musical composition, even if the sample was a minimal amount, constituted infringement and rejecting the de minimis defense in copyright cases).
54 *Id.*
55 *Id.*
56 *Id.*

democratizing production tools, AI empowers independent creators to experiment and produce music with fewer resources. This democratization, while exciting, introduces legal and financial challenges, such as redefining revenue-sharing models and adjusting royalty frameworks to accommodate AI's contributions.

Aalmuhammed v. Lee (2000) addresses an interesting and related question of joint authorship.[57] Jefri Aalmuhammed, a consultant and advisor on one of Spike Lee's films, claimed that his contributions to the production—including the writing of dialogue and script editing—made him a co-author of the film and entitled him to joint copyright ownership.[58] Lee and Warner Bros. argued that his contributions were merely advisory and did not warrant authorship status.[59] In its decision, the Ninth Circuit ruled in favor of Lee, finding that Aalmuhammed's role was insufficient to establish co-authorship because his contributions were did not constitute significant creative input.[60] This case provides a strong foundation for imagining how artists may be treated as authors when they incorporate AI-generated content in their music. Future IP laws must balance protecting human creativity and acknowledge AI's role without undermining the economic rights of artists whose work is used to train AI models. This will require revisiting the question of authorship to account for varying degrees of human input. The traditional music ecosystem as AI continues to evolve, forcing a reevaluation of how creative value is measured and compensated.

V. PROPOSED FRAMEWORK FOR THE FUTURE

IP law must evolve to reflect the new legal realities of the creative landscape in which there is hybrid authorship between humans and AI systems. The future of copyright law must protect humans' creative labor and facilitate the transformative and innovative uses of AI. Foundational music licensing cases and digital rights laws offer egal scaffolding for such a transition, but they must be reinterpreted and expanded to meet the demands of AI.

A. Reconceptualizing Authorship as a Spectrum

Traditional copyright law hinges on human originality. Yet, in AI-assisted creation, human involvement varies from passive prompting to fine-grained direction. Future IP frameworks should recognize authorship as a spectrum rather than a binary. A potential system could offer a tiered system of protection. Works with substantial human input would receive full copyright; works with moderate human input would receive limited protection on shorter terms or with compulsory licensing; and works with minimal or no human authorship would receive modified public domain or Creative Commons-style access. This approach would build upon *Aalmuhammed v. Lee*, which addressed joint authorship and the weight of creative contributions.[61]

B. Transparency and Attribution Requirements for AI Developers and Data Scientists

AI systems must maintain transparent logs of training data to allow for proper attribution and compensation to original creators, and developers should create standardized compensation mechanisms for creators whose works influence AI-generated content. Regulators could impose transparency requirements as part of an AI system's eligibility for commercial deployment by implementing dataset registries similar to the sample clearance databases used in music licensing. Additionally, creating attribution tokens or metadata trails tied to specific AI outputs would be helpful. Drawing from *Bridgeport Music v. Dimension Films*, where sampling—even in small amounts—required licensing, this framework avoids binary "get a license or do not sample" requirements and instead promotes documented influence with proper compensation for creators throughout the entire line of creative content production.

C. The Fair Use Doctrine and AI-specific Metrics

While *Campbell v. Acuff-Rose Music* affirmed that parody and transformation can constitute fair use even when they are used for commercial purposes, courts have lacked a consistent way to evaluate transformation in machine-generated works.[62] Rather, they must consider several questions to reach nuanced conclusions on a case-by-case basis. Does the AI output merely replicate the original style, or does it also build upon it? Is the purpose of the new content experimental, artistic, derivative, or commercial? How much influence did the borrowed material have on the output? These questions allow courts to differentiate between AI tools used for creative expansion, such as creating a new style of jazz, as opposed to those used solely to mimic and profit from existing work.

D. Collective Licensing Systems and Algorithmic Royalties

The introduction of AI-generated content to the music industry has necessitated the creation of a new and innovative compensation mechanism. AI-specific licensing frameworks must enable creative use while ensuring fair compensation, including blanket licensing for AI training and algorithmic royalty distribution. Mechanical Licensing Collective (MLC) is a model that can be applied to cases involving the use of generative AI, which requires a scalable, inclusive, and automatic compensation system.

E. Regulatory Oversight and Technical Standards

Policies are toothless without enforceable norms, so governance must be grounded in technical feasibility. U.S. regulatory bodies should establish similar standards for transparency, attribution, ethical uses of training data, and fingerprinting technologies. Specifically, industry stakeholders should require content fingerprinting or watermarking for both training data and AI model outputs; mandate interoperable metadata formats for tracking the lineage of AI-generated content; establish third-party audit protocols to verify dataset legality and compensation flows; and empower regulatory bodies such as the Copyright Office and the FTC to oversee compliance and publish transparent reports.

F. Cultural and Educational Infrastructure

Legal reform alone will not shift the music industry's norms. A holistic response must also empower creators with legal literacy and technical fluency. Addressing AI's impact requires cultural and educational initiatives that will prepare creators to work with AI tools while allowing them to understand the legal implications of doing so. The history of sampling culture and related legal cases shows that restrictive approaches such as *Bridgeport Music's* "get a license or do not sample" standard can stifle innovation and disproportionately affect marginalized communities. Thus, education

57 Aalmuhammed v. Lee, 202 F.3d 1227, 1232–35 (Fed. Cir. 2000).
58 *Id.*
59 *Id.*
60 *Id.*
61 Aalmuhammed v. Lee, 202 F.3d 1227, 1232–35 (Fed. Cir. 2000).
62 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

is a key part of an equitable future for IP law.

CONCLUSION

AI represents not only a technological disruption to the music industry, but also a philosophical shift in how we understand creativity, labor, and value. While Prince fought decades ago for more artistic control over his work and his brand, the challenge facing artists today is less about personal ownership and more about grappling with the increasing entanglement of humans and machines. Moving forward, legal experts and industry professionals must reject rigid binaries in favor of flexible and modular systems that protect human creators, reward transparency and cultural stewardship, clarify the role of AI in creative processes, and sustain innovation. By building legal, technical, and cultural infrastructures in tandem, we can create an ecosystem in which human and AI creators can coexist symbiotically rather than competitively.

This piece was written by Jazzmin Duncan and edited by Amy Du.

LOSING THE BATTLE, WINNING THE WAR:

SHADOW LIBRARIES IN CURRENT U.S. LEGAL LANDSCAPES

INTRODUCTION

One of the most prevalent moral dilemmas of the digital age is the question of piracy. As the internet makes countless piracy sites readily available, it has never been easier to illegally access copyrighted books, articles, movies, TV shows, and other forms of copyrighted content. Yet, as accessibility expands, the arguments surrounding piracy have become more complex. For some, piracy is a blatant violation of the law because it prohibits publishers, authors, and other creators from earning the royalties they rightfully deserve. Piracy is a casual, incessant breach of U.S. copyright that shows a flagrant disregard for the rules and legislation that uphold civilized society. For others, piracy is the only way to get the information they need—textbooks, research papers, and literature that would otherwise be out of their reach. Piracy provides a pathway to media that has been censored or otherwise restricted. It also eliminates the economic barriers that stand in the way of equal accessibility to information, allowing those from less privileged backgrounds to gain knowledge, resources, and education.

Shadow libraries such as Sci-Hub, LibGen, Z-library, and Anna's Archive stand on the frontlines of piracy as online databases of publications ranging from fiction novels to research papers. This open-access model allows internet users to freely download the media they compile. Many of these databases include mission statements about the importance of preserving information and making it readily accessible to all people.

There is no quick and easy answer to whether or not piracy is moral. But this battle is not being fought by philosophers or social scientists. The conflict between shadow libraries and publishers usually takes place in courtrooms. Unsurprisingly, these databases face an array of copyright violations, and several have been or are being taken down by lawsuits. Yet the constant courtroom and legislative battles between copyright lawyers and shadow libraries are largely ineffective in addressing the root of the issue—can shadow libraries ever be removed from the internet for good?

In this paper, I analyze the phenomenon of shadow libraries in the current U.S. legislative landscape. I begin by briefly describing the history of both shadow libraries and U.S. copyright, arguing that the unique circumstances that established shadow libraries make them especially resistant to current copyright law. Examples of this resilience are seen both in successful and unsuccessful court cases against shadow libraries, which highlight the vulnerability of U.S. legal jurisdiction against mostly foreign-owned databases. I conclude that current U.S. copyright law is unsuited to handle the size and scale of shadow libraries, and to address the problem of these illegal websites, the U.S. government must first resolve unequal access to information.

I. HISTORY OF THE SHADOW LIBRARY

Shadow libraries originally began as a solution to information inequality and censorship. The first of the larger shadow libraries, Library Genesis, also known as LG or LibGen, was published in 2008 by Russian scientists.[1] Even today, modern shadow libraries are often hosted in foreign territories, particularly Russia. This itself is a consequence of publication censorship during the era of the Union of Soviet Socialist Republics (USSR). Many texts—especially foreign literature—never entered circulation under USSR governance, causing readers to turn to a "black market" of books.[2] Copying and hoarding were especially common during this era, with readers assembling large collections of physical books in a precursor to online personal collections. As law professor Balázs Bodó describes, shadow libraries are "to a degree, a societal experience in Russia, passing through clandestine publication practices under Soviet rule […] and the weak legal infrastructure for copyright (and other law) that allowed a pirate Internet to flourish."[3]

The fact that these shadow libraries were housed online gave them another advantage; they can easily copy each other's source code and databases. In a recurring pattern, shadow libraries enlarge their collection by absorbing the data held by other libraries. As LibGen expanded, it directly integrated the databases of other shadow libraries, such as Library.nu and lib.ru, while also making its entire source code, catalog, and collection publicly accessible. As Bodó describes, "anyone can freely take a copy of LibGen and start distributing text under his or her own terms."[4] Open access essentially meant that because LibGen was continuously copied by other users, even if the site were to be taken down, its code would still exist on the Internet. LibGen could never be truly killed. The cycle of absorbing other shadow libraries' data and providing their own data meant that shadow libraries became incredibly resilient to takedowns. Anna's Archive, the current largest shadow library accessible in the U.S., explicitly encourages and funds "mirror" sites that copy its data.[5] According to Anna's Archive, these mirror sites "solidify the longevity of

1 Balázs Bodó, "The Genesis of Library Genesis: The Birth of a Global Scholarly Shadow Library", in *Shadow Libraries: Access to Educational Materials in Global Higher Education* 25 (2018).
2 *Id.* at 31-32.
3 *Id.* at 29.
4 *Id.* at 27.
5 AnnaArchivist, *Metadata-only mirrors—$100+ per month bounty,* Anna's Archive (Jul. 2024), https://software.annas-archive.li/AnnaArchivist/annas-archive/-/issues/188.

the largest truly open library in human history."[6] Shadow libraries themselves are based on the premise of accessibility and preservation of knowledge, and the fact that they are based on the internet makes it easy for anyone to participate in the cause.

These mirror sites not only increase the survival rate of shadow libraries, but they also serve as decoys. The mirror sites advertise themselves and draw public attention, while the original shadow libraries can operate quietly in the background. LibGen followed this philosophy. Mirror sites could "prioritize public visibility, carry ads to cover costs, but also respond to takedown requests to avoid as much trouble as possible," while LibGen could remain out of the public eye and focus on expanding its own collection.[7] Yet a condition placed upon these mirror sites was that they followed LibGen's moral code of providing accessible information without profiting from users. When another shadow library, E, took LibGen's base code and began charging users to add specific books to its collection, LibGen denounced them in their internal forums.[8] The non-profit based view is not unique to LibGen either—Anna's Archive proclaims that its goal is "making this knowledge and culture available to anyone in the world."[9] Shadow libraries make a point of not gating information behind paywalls, eliminating the monetary barriers that would otherwise bar expensive texts from those who are economically disadvantaged.

Yet, this policy of free open access also has to confront the legal rights and protections held by creators. Copyright law has long existed to protect the rights of authors, artists, and other such creators. The first piece of copyright legislation coincided with the formation of the United States, being enshrined in the Constitution on May 31, 1790.[10] Modeled after Britain's 1710 Statute of Anne, the Copyright Act of 1790 initially provided comparatively sparse protections—books, maps, and charts had a copyright period of fourteen years, which could be renewed if the author was still living. Like the Statute of Anne, the Copyright Act of 1790 prohibited unauthorized reproductions.[11] Over the years, the U.S. would expand the jurisdiction of the Copyright Act of 1790. Some noticeable changes are "requiring copyright owners to include a prescribed notice on every copy distributed to the public" in 1802, "prohibiting copyright protection in United States government publications" in 1895, and expanding the type of works protected by copyright.[12]

The current state of U.S. copyright is based on the Copyright Act of 1976, housed under Title 17 of the United States Code.[13] Other than the Berne Convention, the U.S. is also a party in several other international treaties (e.g., the Universal Copyright Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty, etc.), but for the sake of brevity, this paper will not go into extended detail.[14] And under the Copyright Act of 1976—which prohibits unauthorized reproductions of copyrighted work—shadow libraries, which publish works protected under copyright law, are quite clearly illegal.

Interestingly enough, "legal" shadow libraries that operate within the boundaries of these terms also exist. If an author's copyright period has expired, their works can be legally published for free on the Internet. The first digital library, Project Gutenberg, is one of these legal literature databases.[15] Project Gutenberg is fully legal under U.S. law precisely because it only publishes works that are no longer protected by copyright.[16] Project Gutenberg began in 1971 and remains active today. Similarly, all U.S. government publications can be legally reproduced and published online for free, as will be examined later.

Most shadow libraries do not go out of their way to adhere to copyright, largely due to their history under Russian jurisdiction. One of the major copyright treatises was the Berne Convention for the Protection of Literary and Artistic Works. Drafted in Bern, Switzerland, in 1886, the Berne Convention entitled creators of participating countries to hold copyright in all other participating countries and the countries would give foreign authors the same copyright privileges that they would give to domestic authors.[17] While the U.S. was present at the Berne Convention, it didn't immediately sign it.[18] Instead, in 1891, the International Copyright Act was passed. This act allowed the U.S. to sign bilateral treaties with other countries to afford their authors copyright protection in foreign lands.[19]

The USSR never participated in international or bilateral copyright treaties—and Russia didn't join the Berne Convention until 1995—due to the fact that copyright went against the communist ideology of denouncing private interests.[20] Part of the reason why Russian shadow libraries were so prolific was because of the lack of copyright law surrounding foreign works.[21] Translated works were also not privy to copyright, leading the USSR to publish large numbers of translated works of its own citizens and foreign authors.[22] The direct absence of foreign copyright law—and the lax enforcement of existing legislation—led to shadow libraries such as LibGen and lib.ru to go unchecked in the USSR.[23] While shadow libraries are clearly illegal under U.S. copyright law, for a long period of time they were completely legal in their country of origin. Shadow libraries weren't explicitly created with the purpose of subverting copyright law; the imperfect translation of legislation between U.S. and the USSR means that shadow

6 *Id.*
7 Bodó, *supra* note 1, at 41.
8 Bodó, *supra* note 6, at 40.
9 *Frequently Asked Questions (FAQ)*, Anna's Archive, https://annas-archive.org/faq.
10 *The 18th Century*, Copyright.gov, https://www.copyright.gov/timeline/timeline_18th_century.html.
11 8 Anne, c. 19 (1710), Yale Law School Lillian Goldman Law Library (2008), https://avalon.law.yale.edu/18th_century/anne_1710.asp.
12 Copyright.gov, supra note 21.
13 Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code vii (Dec. 2022).
14 *Id.* at 4.
15 Bodó, *supra* note 1.
16 Michael S. Hart, *Project Gutenberg Mission Statement by Michael Hart*, Project Gutenberg (23 Oct. 2004), http://www.gutenberg.org/wiki/Gutenberg:Project_Gutenberg_Mission_Statement_by_Michael_Hart; *E.g.* Jeffrey Thomas, *Project Gutenberg Digital Library Seeks To Spur Literacy*, America.gov (20 Jul. 2007), http://www.america.gov/st/washfile-english/2007/July/200707201511311CJsamohT0.6146356.html.
17 *Id.*
18 *Intellectual Property Rights Office for the United States*, IP Rights Office, https://intellectualpropertyrightsoffice.org/United_States?c=united_states.
19 *Copyright Timeline: A History of Copyright in the United States*, Association of Research Libraries, https://www.arl.org/copyright-timeline/; *The 19th Century*, Copyright.gov, https://www.copyright.gov/timeline/timeline_19th_century.html.
20 *Id.*
21 Bodó, *supra* note 1, at 30.
22 *Id.*
23 Bodó, supra note 1, at 44, 45.

libraries unintentionally violated copyright law once they spread to the U.S. curriculum and extracurricular resources.

II. LAWSUITS

One of the most relevant cases against shadow libraries is *Cengage Learning, Inc., Bedford, Freeman & Worth Publishing Group, LCC d/b/a Macmillan learning, McGraw Hill LLC, and Pearson Education, Inc. v. Does 1-50 d/b/a Library Genesis, bookwarrior cdn1.booksdl.org, jlibgen.tk, libgen.ee, libgen.fun, libgen.gs, libgen.is, libgen.lc, libgen.li, libgen.pm, libgen.rocks, libgen.rs, libgen.space, libgen.st, libgen.su, library.lol and llhlf.com* (hereinafter Cengage Learning, Inc. et al. v. Does 1-50 et al.).[24] In this case, a group of publishers sued the "persons of unknown identity who own, operate, and/or control Library Genesis" over "extensive violations of federal copyright law."[25]

This case is one of many that have been filed against Library Genesis. For instance, in *Elsevier Inc. et al. v. The Library Genesis Project d/b/a Libgen.org et al.*, the plaintiff also sued LibGen for copyright infringement.[26] No defendants appeared, however, and although the court found LibGen guilty of copyright infringement and ordered the domain registries to transfer LibGen's domains to Elsevier, LibGen continued to operate under new domains.[27] *Elsevier Inc. et al. v. The Library Genesis Project et al.* is a prime example of the difficulty courts and prosecutors face in indicting shadow libraries. The operators of LibGen and other shadow libraries are anonymous and likely based in a foreign country. As seen in the above case, the defendants rarely appear in court.

Despite being successful, *Elsevier Inc. et al. v. The Library Genesis Project et al.* didn't permanently harm LibGen. Filing court cases against an anonymous and endlessly multiplying entity is like a game of whack-a-mole: after seizing one domain, another one pops up. Shadow libraries are unquestionably illegal under U.S. copyright law, but the lack of jurisdiction the U.S. has over foreign countries and the replicable nature of the libraries themselves allow shadow libraries to continue operating even after being found guilty.

Cengage Learning Inc. et al. v. Does 1-50 et al. is the most recent court case involving LibGen, receiving judgement in September 2024. The case followed similar patterns as *Elsevier Inc. et al. v. The Library Genesis Project et al.*, as "no Defendant has filed an Answer or otherwise responded to the Complaint [or] the Motion."[28] Unsurprisingly, the court found LibGen guilty and ordered a list of charges, including the transference of LibGen's current and future domain names, the destruction of electronic copies of the plaintiff's copyrighted works, and $30,000,000 in damages.[29] Yet, as the operators of LibGen are anonymous, it is unlikely that the works were destroyed and the designated $30,000,000 was paid. This isn't the first time a shadow library has avoided damage payment, either. In the 2017 case *Elsevier Inc. et al. v. Sci-Hub d/b/a www.sci-hub.org, The Library Genesis Project d/b/a libgen.org, Alexandra Elbakyan, John Does 1-99*, the defendants were similarly found guilty and ordered to pay $15,000,000.[30] This amount went unpaid, with the only named defendant, Alexandra Elbakyan, living in Kazakhstan, outside the boundaries of U.S. law. The government is powerless in cases where defendants are anonymous or reside in foreign countries outside their jurisdiction, which characterizes many shadow libraries.

Yet, *Cengage Learning Inc. et al. v. Does 1-50 et al.* is significant because it had a much stricter crackdown policy against LibGen's domains. It not only targeted current domains, but also future domains.[31] Over 15 of LibGen's associated domains were seized, and any new ones created in the future are also going to be under this injunction and similarly blocked. Yet LibGen continues to create new domains, and even today some LibGen-associated sites (e.g., libgen.mx, libgenesis.net, etc.) are accessible within the U.S.[32] Although publishing companies ensured that future sites would be privy to take downs, LibGen remains available in the U.S. This does not account for other sites such as Sci-Hub that scrape data from LibGen and maintain its catalog. Court cases against shadow libraries are an example of winning a battle but losing the war.

There are many other cases against shadow libraries not only in the U.S. but worldwide, in countries such as Germany, Denmark, France, Russia, and the U.K.[33] Many were successful, resulting in domain seizures. As mentioned before, however, new domains can be created, and a domain seizure is rarely the end of a shadow library run by anonymous and foreign moderators. Having established the weakness of U.S. courts against foreign players, the discussion now turns to what happens when the operator of a shadow library is based in the U.S.

In *United States of America v. Aaron Swartz*, the defendant, twenty-four-year-old Harvard University research fellow and internet activist Aaron Swartz was charged with violating the Computer Fraud and Abuse Act of 1986 for using an MIT computer to download approximately 4.8 million articles off JSTOR.153 He intended to "distribute a significant portion of JSTOR's archive of digitized journal articles through one or more file-sharing sites."[34]

This was not the first time Swartz illegally downloaded and distributed files. In 2009, he downloaded 19,865,160 pages of documents from PACER.[35] PACER, which stands for Public Access to Court Electronic Records, is a government catalog of federal court decisions, briefs, and other legal documents. It has been denounced for not only having a system "'15 to 20 years out of date,'" but also for charging 8 cents per page.[36] As government documents aren't covered by copyright, many individuals felt af-

24 Cengage Learning, Inc. et al v. Does 1-50 et al, 1:23-cv-08136, District Court S.D. New York, https://www.courtlistener.com/docket/67797468/cengage-learning-inc-v-library-genesis/.
25 *Id*, Complaint, Document 1, 5 2.
26 *Id*, Complaint, Document 1, 15-16.
27 *Id.*
28 *Id*, Judgment, Document 36, 2.
29 *Id,* 6 7.
30 Elsevier Inc. Elsevier B.V., Elsevier LTD. v. Sci-Hub d/b/a www.sci-hub.org, The Library Genesis Project d/b/a libgen.org, Alexandra Elbakyan, John Does 1-99, 15-cv-4282, District Court S.D. New York, https://arstechnica.com/tech-policy/2017/06/scientific-research-piracy-site-hit-with-15-million-fine/.
31 *Id.*
32 *See*, e.g, Library Genesis, (Jul. 28, 2025), https://libgen.ac/.
33 *See* Cambridge University Press, Harper Collins, Elsevier, and John Wiley & Sons v. Library.nu, Hachette v. Internet Archive, etc.
34 United States of America v. Aaron Swartz, 11-er-10260, United States District Court District of Massachusetts. https://www.documentcloud.org/documents/217117-united-states-of-america-v-aaron-swartz/.
35 *Id.* at 11.
36 *Id.*

fronted by the fact that PACER charged for access. Carl Malamud, leader of the non-profit organization Public.Resource.org, took matters into his own hands to increase access to court documents. Malamud urged individuals to use PACER's free trial at public libraries to download court documents and send them to him for replication on the web.[37] Swartz downloaded almost 20% of PACER's entire catalog and sent it to Malamud. Despite complaints from the Government Printing Office, the FBI found that neither Swartz nor Malamud violated any laws as government documents weren't privy to copyright anyway, yet another example of how large online databases of information can exist legally if the information is under U.S. public domain.[38]

The situation was different for *United States of America v. Aaron Swartz*, as unlike PACER, JSTOR's catalog is private and copyrighted. The court indicted Swartz for "wire fraud, computer fraud, unlawfully obtaining information from a protected computer, and recklessly damaging a protected computer."[39] If convicted, he could have been sentenced to 35 years in prison and fined $1,000,000.160 Yet the conviction never happened, as he died by suicide before his federal trial.[40]

Swartz himself was an advocate of free and accessible information. In his own words, "Those with access to these resources—students, librarians, scientists—you have been given a privilege. […] Meanwhile, those who have been locked out are not standing idly by. [They] have been […] liberating the information locked up by the publishers and sharing them with [their] friends. […] It's called stealing or piracy, as if sharing a wealth of knowledge were the moral equivalent of plundering a ship and murdering its crew. But sharing isn't immoral—it's a moral imperative."[41] Much like Sci-Hub, LibGen, and Anna's Archive, Swartz was working toward sharing knowledge that is usually restricted by paywalls. Yet he was unable to operate as freely as the aforementioned sites since U.S. copyright law prohibits the dissemination of protected information. As a U.S. citizen, he couldn't escape the charges—as Alexandra Elbakyan had done—because he was under the jurisdiction of U.S. law. Although the U.S. can bring domestic shadow libraries to court and hold them accountable, the issue of foreign-based shadow libraries remains unresolved.

III. SOLUTIONS

Even though the U.S. was able to prosecute Swartz for disseminating copyrighted information, the current international operating framework of shadow libraries means that total regulation is difficult. Even if a government agency were created for the explicit purpose of finding and taking down shadow libraries' domains, people in the U.S. could still access them via methods such as virtual private networks (VPNs). Although shadow libraries are undeniably against U.S. copyright law, the U.S. government's infrastructure is not well-equipped to permanently remove shadow libraries from the internet.

To fully address the legal gray area that shadow libraries inhabit, we must go back to the roots of their creation. Shadow libraries were born under the information restriction and censorship policies of the USSR. The crux of them is a need for free and accessible knowledge provided to everybody, not just upper-class individuals who have the means to find and purchase the media they need. To alleviate the need for shadow libraries, there must be a route through which everyone can responsibly acquire free and accessible texts.

The solution lies in finding other ways to make information accessible through safe and legal means, in a way that does not violate copyright law while also providing all people with equal opportunity to receive information. As previously discussed, this could involve online databases of publications that are not protected under copyright, whether it is because copyright has expired or because copyright never applied in the first place (e.g., government publications). Solutions in this avenue could involve shortening the length of copyright protection. If this period was shortened, more works could be made legally accessible online.

Another possible solution is to use the public library system, which anyone with an U.S. address can access. As libraries legally purchase the books that they hold, they don't violate copyright law. Public libraries, however, rely heavily on state and federal funding, and libraries have never been the main focus of government funding.[42] On March 14, 2025, U.S. President Donald Trump signed an order calling for the reduction of the federal bureaucracy and ordered the Institute of Museum and Library Services to "reduce the performance of their statutory functions and associated personnel to the minimum presence and function required by law," meaning that resources for libraries will be severely cut.[43] Reliance on federal and state governments for funding means that libraries often are not able to focus on acquiring new books, and there is a high probability that the book a patron needs is not available at their local library.

Some library systems, such as the King County Library System in the State of Washington, participate in book sharing among inter-system libraries. If a library book is unavailable at one location but is available at another location, it can be shipped over. Additionally, some library systems participate in inter-library loans (ILL), which allow books to be shipped from different library systems entirely, which is how many university libraries operate.[44] A problem with ILLs, however, is that they are expensive and usually operate within consortia—groups of participating libraries.[45] According to the library non-profit Online Computer Library Center, "[ILL] is notoriously labor intensive, making it one of the more expensive services typically offered by libraries."[46] Many smaller libraries do not have the funds necessary to participate in ILL. Not to mention, even if a library has ILL, if a

37 *Id.*
38 *Id.*
39 *Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network*, The United States Attorney's Office District of Massachusetts (Jul. 19 2011), https://web.archive.org/web/20120526080523/http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html.
40 *Id.*
41 *Aaron Swartz, internet freedom activist, dies aged 26*, BBC News (Jan. 13 2012), https://www.bbc.com/news/world-us-canada-21001452.
42 *The 2024-25 Budget California State Library*, Legislative Analyst's Office: The California Legislature's Nonpartisan Fiscal and Policy Advisor (Mar. 13 2024), https://lao.ca.gov/Publications/Report/4882#:~:text=Nearly%2025%20percent%20comes%20from,in%20ongoing%20local%20assistance%20funding.
43 *Continuing the Reduction of the Federal Bureaucracy*, The White House (Mar. 14 2025), https://www.whitehouse.gov/presidential-actions/2025/03/continuing-the-reduction-of-the-federal-bureaucracy/.
44 *Interlibrary Loan and Suggest a Purchase FAQs*, King County Library System, https://kcls.org/faq/interlibrary-loan-suggest-a-purchase/.
45 *OCLC Interlibrary Loan Cost Calculator*, OCLC, Inc., https://www.oclc.org/research/areas/systemwide-library/interlibrary-cost-calculator.html.
46 *Id.*

particular book is not available within a library's consortium, then it remains inaccessible.

A solution to the logistical challenges of ILL might be to lean into eBooks. After all, although fees for processing and retrieval would remain, shipping would not be a part of the cost. Yet eBooks come with their own problems. Unlike physical books, which the library directly purchases, the library purchases licenses for eBooks.[47] This means the library does not keep the book permanently, nor does it have complete discretion over how it is distributed.[48] Furthermore, eBooks purchased by libraries are "3-4 times the consumer price for an eBook or audiobook license […] even if that license later expires."[49] The support services director for Spokane Public Library details how the average cost for a physical book is $8-30, while the cost for an eBook is $40 and an audiobook is $73—not to mention the fact that these licenses must be renewed.[50] Spokane Public Library spends approximately $8,000 on digital books per week.[51] The increased cost and temporary nature of eBooks means that while they are more convenient, they are also more expensive and privy to licensing agreements, meaning they cannot be used for ILL unless the publisher agrees.

Yet books are only one side of the equation. Research papers are also a valuable source of information, and they are often not offered by libraries. One reason for this is expense; for instance, JSTOR costs $1,300 annually even for very small libraries (serving under 50,000 people), and up to $9,500 for large ones.[52] Not to mention that JSTOR is only one journal database out of thousands—Academic Search, Web of Science, LexisNexis, etc., are all journal databases that similarly require subscriptions in order to get a full range of academic texts.

In Brazil, the government has tried to solve this dilemma by providing universities with the CAPES portal, a database that carries articles from "just about every major publisher, including Elsevier, Project MUSE, JSTOR, [etc.]".[53] Yet, "as the cost of journal access has risen, the CAPES portal has become an increasingly expensive program."[54] The dependance of Brazilian universities on CAPES means they are in a catch-22, though: should they continue pouring money into an exorbitant database, or leave millions of students and professors without access to academic texts? Although combining every journal subscription into a single database is a good idea for assembling information, it is not sustainable. As more articles are published, the cost of journal subscriptions will only continue to rise, making subscribing to every database untenable for universities with less funding.

Another possible solution is making student and government-funded publications open-access. In Brazil, all graduate programs are required to make their "students' output available online" (although thesis and dissertation writers can opt out).[55] Similarly, government-funded publications could also be made open-access. In 2024, the Department of Health and Human Services awarded $777 billion in grants to 144,546 research projects.[56] Government publications themselves aren't copyrighted in the first place and extending that to funded publications would make hundreds of thousands of academic texts accessible for everyone. This is not a perfect solution, of course, but it is a step toward increased accessibility.

IV. CONCLUSION

A book that has been vital to this paper, Joe Karaganis' *Shadow Libraries: Access to Knowledge in Global Higher Education*, came through the Claremont Colleges' ILL, saving the hassle of buying it or going without it at all. But this is a privilege offered for students at a well-funded academic institution. If I wasn't a student here and did not have access to the Claremont Colleges' extensive ILL program—if I were an ordinary citizen and went to a public library—I may not have been able to acquire this book at all. As students, we are privileged to have a wide range of access to information.

But not everyone has access to the same resources, such as a large library, free access to academic databases, and ILL. And that is part of the problem. Accessibility to information is an indicator of financial status, nationality, and address that often puts minorities and lower-class people at a disadvantage by preventing them from receiving the textbooks they need to pass their classes, the research papers used to write their theses, and the media they desire for leisurely entertainment.

Until the government and legal systems confront the problem of providing accessible information to the public, shadow libraries such as Anna's Archive, LibGen, and Sci-Hub will continue to exist. Copyright, lawsuits, and injunctions may win battles for the government, but shadow libraries will continue to win the war for free, accessible information.

While the majority of shadow libraries cannot be reconciled with U.S. copyright law, sites and systems such as Project Gutenberg and ILL programs can provide free and accessible texts while operating within the bounds of copyright law. Current actions of bringing shadow libraries to court only address the surface-level problem of how their existence violates copyright while not considering the root issue—lack of access, censorship, and economic barriers. The only way to truly eliminate shadow libraries and stop this war would be to direct more attention and funding toward content accessibility.

This piece was written by Shixiao Yu and edited by Amy Du.

47 Rachel Noorda, Kathi Inman Berens, *Digital Public Library Ecosystem 2023*, American Library Association, 6 (2023).
48 *Id.*
49 *Id.* at 6.
50 Robert Roose, *The True Cost of eBooks and Audiobooks for Libraries*, Spokane Public Library (Jan. 14, 2025), https://www.spokanelibrary.org/the-true-cost-of-ebooks-and-audiobooks-for-libraries/.
51 *Id.*
52 *Public libraries*, JSTOR, https://about.jstor.org/librarians/fees/public-libraries/#:~:text=Full%20access%20begins%20with%20your,50%25%20minimum%20starting%20fee.).
53 Pedro Mizukami, Jhessica Reia, *Brazil: The Copy Shop and the Cloud,* in Shadow Libraries: Access to Educational Materials in Global Higher Education 241 (Joe Karaganis ed. 2018).
54 *Id.* at 242
55 *Id.* at 240.
56 *Grants by Location – US/World*, TAGGS, HHS, https://taggs.hhs.gov/ReportsLocation/GrantsByLocationIndex.

REBUILDING HAITI:

CONFRONTING CONSTITUTIONAL FRAGILITY, GANG RULE, AND THE LEGACY OF FOREIGN INTERVENTION

INTRODUCTION

Haiti's enduring governance crisis stems from a historical cycle of foreign intervention, constitutional instability, and rampant gang rule, all of which have systematically weakened state institutions and eroded the rule of law. The U.S. occupation (1915–1934) established elite control, centralized power, and suppressed democratic development, leaving behind a fragile political system prone to crisis.[1] The 2021 assassination of Haitian President Jovenel Moïse starkly exposed constitutional flaws and deepened the power vacuum.[2] Absent effective governance, armed gangs including the Revolutionary Forces of the G9 Family and Allies have seized state authority and exacerbated violence.[3] Restoring Haiti's political and legal stability requires clearer presidential succession laws, robust checks and balances, and decentralized governance to curb elite dominance. Judicial independence, law enforcement resources, and anti-corruption measures must be reinforced to uphold the rule of law. International involvement must shift toward Haitian-led governance and community-based security initiatives rather than foreign-driven interventions prioritizing external interests over long-term stability.[4] Section I of this paper examines the historical and political context that led to Haiti's post-earthquake constitutional crisis. In Section II, I analyze the failures and limitations of international humanitarian interventions in promoting democratic reform. In Section III, I explore proposals and pathways for constitutional and institutional rebuilding that center Haitian agency and legitimacy. Finally, in Section IV, I assess the implications of these dynamics for future governance and sovereignty in post-disaster contexts.

I. HISTORICAL CONTEXT

Haiti's trajectory exemplifies the structural vulnerabilities outlined in the state fragility framework where weak institutions, external dependence, and internal conflict form a reinforcing cycle of instability.[5] Haiti's governance crisis is deeply rooted in a complex history of foreign intervention, constitutional fragility, and the rise of armed groups.[6] These factors have collectively undermined state institutions and the rule of law, creating prolonged instability.[7] Understanding this crisis is essential as it sheds light on the country's struggles and highlights the structural reforms needed to achieve long-term stability.

The implications of this governance crisis are far-reaching. For example, the disbandment of Haiti's Parliament in 2020 left the country without a functioning legislative body, eliminating essential checks on executive authority.[8] Police forces, underfunded and often infiltrated by gang networks, have struggled to maintain public order.[9] These institutional failures not only reflect a breakdown in state capacity but also foster public disillusionment, creating a political vacuum that gangs and other non-state actors readily exploit.[10] As recent international attention intensifies, including proposed interventions by Kenya and Caribbean Communities and Common Markets (CARICOM) nations, understanding these structural weaknesses is critical for designing solutions that are both effective and grounded in Haiti's complex reality.

Haiti's current crisis is not an isolated moment of instability but rather the latest chapter in a cycle of interrupted democracy. The nation has endured repeated leadership vacuums, inconsistent elections, systemic corruption, economic hardship, and natural disasters. A clear example of this is the 2010 earthquake. When the 7.0-magnitude earthquake struck Haiti on January 12, 2010, the ground didn't just swallow homes and streets; it swallowed institutions. The National Palace lay in ruins, and so too did the public's last shred of faith in their government. In the days that followed, foreign NGOs arrived faster than any national coordination plan. As one survivor in Port-au-Prince, Haiti's capital, told a journalist, "The UN feeds us. The government is just a ghost." Over 90% of aid bypassed Haitian ministries entirely.[11] That wasn't just inefficiency; it was a declaration of no confidence in Haiti's ability to lead its own recovery. The absence of Haitian leader-

1 *U.S. Invasion and Occupation of Haiti*, 1915–34, Office of the Historian, https://history.state.gov/milestones/1914-1920/haiti.

2 Evens Sanon & Dánica Coto, *Transitional Council in Haiti to Choose New Leaders Is Formally Established amid Gang Violence*, Associated Press, Apr. 12, 2024, https://apnews.com/article/haiti-transitional-council-gang-violence-86ae6d010d0fba2a5742ec82ec05ac25.

3 Edith M. Lederer, *Haitian Gangs Escalate Violence and Expand Attacks Outside the Capital, Top UN Official Says*, Associated Press, Oct. 22, 2024, https://apnews.com/article/un-haiti-gangs-violence-escalate-food-attacks-a531646bc9744fc6f68afa5f4485c9ad.

4 InSight Crime, *G9 and Family*, InSight Crime, Dec. 11, 2023, https://insightcrime.org/haiti-organized-crime-news/g9-family-profile/.

5 *U.S. Occupation of Haiti*, 1915-1934, Naval History and Heritage Command, Jul. 29, 2020, https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/u/us-occupation-of-haiti-1915-1934.html.

6 Aakanshi Bansal, *Critical Analyses of the Impacts of Foreign Intervention on the Security and Development of Haiti*, Centre for Joint Warfare Studies, Jun. 11, 2024, https://cenjows.in/critical-analyses-of-the-impacts-of-foreign-intervention-on-the-security-and-development-of-haiti/.

7 Edith M. Lederer, *Haiti Could Face 'Total Chaos' without More International Support, UN Envoy Warns*, Associated Press, Apr. 21, 2025, https://apnews.com/article/un-haiti-gangs-violence-chaos-kenya-funding-df2e837506653612d53cc7486f295c1a.

8 Jake Johnston, *More Than 90 Organizations Reject Calls for Military Intervention in Haiti*, Center for Economic and Policy Research, Nov. 1, 2022, https://cepr.net/publications/more-than-90-organizations-reject-calls-for-military-intervention-in-haiti/.

9 *Integrated Country Strategy: Haiti*, U.S. Dep't of State, Mar. 18, 2022, https://www.state.gov/wp-content/uploads/2022/04/ICS_WHA_Haiti_Public.pdf.

10 Stewart Patrick, *Weak Links: Fragile States, Global Threats, and International Security*, Oxford Academic, Apr. 12, 2011, https://academic.oup.com/book/34852?login=false.

11 *Haiti: Pathways to Responding to Recurrent Crises and Chronic Fragility*, International Bank for Reconstruction and Development, Jun. 2022, https://documents1.worldbank.org/curated/en/709131656602892706/pdf/Haiti-Systematic-Country-Diagnostic-Update-Pathways-to-Responding-to-Recurrent-Crises-and-Chronic-Fragility.pdf.

ship in rebuilding not only exposed institutional fragility but also entrenched a narrative that Haiti needed outsiders to fix what was broken. That perception still haunts every conversation about constitutional reform.[12] According to the World Bank, nearly 60% of Haitians live in poverty and over four million face food insecurity.[13] These compounding crises have undermined civic engagement, as many citizens view the government as incapable or complicit in their suffering. As a result, trust in institutions has eroded to historic lows. In a 2023 survey conducted by Internews and Policité, only 14% of respondents expressed confidence in the national government.[14] This disillusionment has allowed armed groups, often embedded in political networks, to exploit public despair and fill power vacuums left by absent state authority.

II. LASTING IMPACT OF FOREIGN INTERVENTION

The U.S. occupation of Haiti from 1915 to 1934 fundamentally reshaped the country's political system.[15] After the assassination of Haiti's president in 1915, the U.S. intervened under the pretext of restoring stability, but the move was deeply rooted in protecting its strategic and economic interests. The U.S. had recently completed the Panama Canal and viewed instability in the Caribbean, especially near vital shipping lanes, as a threat to its regional dominance.[16] Additionally, American financial institutions had substantial loans invested in Haiti and feared default amid political chaos. American forces took control of Haiti's government, finances, and military, rewriting the constitution to allow foreign land ownership and prioritizing U.S. economic interests.

Although the U.S. built infrastructure and restructured institutions, Haitian nationalists and civil society leaders viewed the occupation as a violation of their sovereignty.[17] Armed resistance, particularly from the Caco rebels, was countered decisively with overwhelming military force. The Cacos were rural militias who opposed both domestic authoritarian rule and the American occupation.[18] Led by nationalists such as Charlemagne Péralte, they organized widespread uprisings against American forces in defense of Haitian sovereignty.[19] In response, U.S. Marines carried out aggressive military campaigns, ultimately killing Péralte in 1919 and suppressing the Caco movement by 1920.[20] The occupation ended in 1934 under President Franklin D. Roosevelt's Good Neighbor Policy, but it left behind a legacy of political and economic disruption.[21]

By reinforcing elite control and centralizing power, the occupation stifled democratic progress and left Haiti with a fragile political system that remained highly vulnerable to instability and crises. This centralization of authority concentrated power in the hands of a select few, leaving little room for broader participation or democratic growth. Throughout Haiti's history, foreign interventions have played a significant role in shaping the country's governance, often by supporting specific political elites aligned with foreign economic interests or conservative agendas. These interventions consistently undermined Haiti's sovereignty, weakened state institutions, and hindered the development of a robust democratic framework.[22] Foreign powers frequently bypassed local decision-making processes, which eroded the capacity of Haitian citizens to govern themselves.[23] In addition, these external influences undermined the independence of the judiciary, making it more susceptible to outside pressure and less capable of holding the government accountable.[24] The reliance on foreign administrators and military forces further perpetuated this cycle of dependence, leaving Haiti's political structure weak and its democratic institutions underdeveloped. This limited the development of accountable, homegrown institutions and prevented sustainable democratic governance by stifling civic participation, discouraging political pluralism, and fostering a culture of dependency on external actors.[25] These long-term consequences continue to shape Haiti's political instability today, with governance structures that remain susceptible to external influence and internal power struggles.

III. CONSTITUTIONAL FLAWS

A. Leadership Voids and the Crisis of Succession

Haiti's constitution lacks clarity regarding presidential vacancies and interim leadership.[26] This has led to repeated power struggles, uncertainty, and political instability in the nation.[27] When a president vacates office due to resignation, assassination, or incapacitation, the Constitution's ambiguous language fails to provide a definitive process for selecting an interim leader.[28] This has created a situation in which various political factions and institutions contest who should assume power, often leading to a lack of consensus and delayed governance.[29] The absence of a precise, legally defined mechanism for transitions of power has contributed to a cycle of uncertainty, undermining public confidence in the political system

12 Vijaya Ramachandran & Julie Walz, *Haiti: Where Has All the Money Gone?*, Ctr. for Glob. Dev., May 14, 2012, https://www.cgdev.org/publication/haiti-where-has-all-money-gone.
13 *Haiti: Pathways to Responding to Recurrent Crises and Chronic Fragility, supra* note 11.
14 *Assessment of Citizen Needs and Understanding of the Political System in Haiti*, Internews and Policite, Apr., 2024, https://internews.org/wp-content/uploads/2024/10/Assessment-of-Citizen-Needs-and-Understanding-of-the-Political-System-in-Haiti.pdf.
15 *U.S. Invasion and Occupation of Haiti, supra* note 1.
16 *Boyer: Expansion and Decline*, U.S. Library of Congress, https://countrystudies.us/haiti/13.htm .
17 *Haiti's Resistance to U.S. Rule*, Socialist Worker, Aug. 7, 2015, https://socialistworker.org/2015/08/07/haitis-resistance-to-us-rule.
18 Hans Schmidt, *The United States Occupation of Haiti*, 1915-1934, Rutgers University Press, Mar. 1, 1995, https://www.rutgersuniversitypress.org/the-united-states-occupation-of-haiti-1915-1934/9780813522036/.
19 Matt Dunn, *Charlemagne Peralte and the Cacos*, Haitian Art Society, May 25, 2020, https://haitianartsociety.org/blog/charlemagne-peralte-and-the-cacos.
20 Edwidge Danticat, *The Long Legacy of Occupation in Haiti, The New Yorker*, Jul. 28, 2015, https://www.newyorker.com/news/news-desk/haiti-us-occupation-hundred-year-anniversary.
21 *US Occupation of Haiti, 1915-1934*, Naval History and Heritage Command, Jul. 29, 2020, https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/u/us-occupation-of-haiti-1915-1934.html.
22 Aude Darnal, *Haitian Perspectives on the International Response to the Political and Security Crisis*, Stimson, Jun. 26, 2024, https://www.stimson.org/2024/haitian-perspectives-on-the-international-response-to-the-political-and-security-crisis/.
23 Doudou Pierre Festile & Micherline Islanda Aduel, *Haiti: Another Foreign Intervention Will Not Solve the Crisis. The Country Needs a Solution Coming from Its People*, La Via Campesina Haiti, Apr. 25, 2024, https://viacampesina.org/en/2024/04/haiti-another-foreign-intervention-will-not-solve-the-crisis-the-country-needs-a-solution-coming-from-its-people/.
24 Michel S. Laguerre, *Haiti: Deconstructing Military Entanglements in Politics*, Politics, Dec. 17, 2020, https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1823.
25 G9 and Family, *supra* note 4.
26 Michael Friedl, *Constitutional Crisis in Haiti*, GW Law, Aug. 9, 2021, https://studentbriefs.law.gwu.edu/ilpb/2021/08/09/constitutional-crisis-in-haiti/.
27 *'A Cycle of Instability': Haiti's Constitutional Crisis*, Center for Strategic and International Studies, Feb. 5, 2021, https://www.csis.org/analysis/cycle-instability-haitis-constitutional-crisis.
28 Brian Concannon, *Haiti's Constitution and the Coup*, Znetwork, Jun. 1, 2004, https://znetwork.org/znetarticle/haitis-constitution-and-the-coup-by-brian-concannon/.
29 *Uncertainty in Haitian Politics: Leadership in Question*, Council on Hemispheric Affairs, Jun. 22, 2016, https://coha.org/uncertainty-in-haitian-politics-leadership-in-question/.

and fueling further divisions among the country's leadership. The 2021 assassination of Moïse exposed deep institutional gaps, leaving Haiti without a clear path to legitimate leadership.[30] Moïse was killed in his home by a group of foreign mercenaries amid a climate of political unrest, gang violence, and widespread protests.[31] His presidency had been marked by efforts to consolidate power and implement anti-corruption measures, including investigations into embezzlement within public institutions, which may have alienated political and business elites.[32] At the time of his death, Haiti had no functioning parliament and no clear succession plan, intensifying the country's leadership vacuum. Moïse, who had been in office since 2017, faced growing opposition partly due to his efforts to combat corruption and modernize the economy.[33] Critics saw his attempts to control Haiti's oil funds and his push for constitutional reform as authoritarian moves, and many accused him of using his position for personal gain. The assassination, carried out by a well-coordinated group of attackers, many of whom were former Colombian soldiers, plunged Haiti further into political crisis.[34] Prime Minister Ariel Henry, appointed shortly before Moïse's death, took power without a formal swearing-in, and his legitimacy was widely contested—notably by opposition political factions, civil society groups, and members of the Haitian public—who argued that his appointment lacked constitutional grounding and feared it would perpetuate the same authoritarian practices they had protested under Moïse.[35] With no functioning parliament or elected officials, a power vacuum emerged, allowing armed gangs to seize control of over 85% of Port-au-Prince and expand nationwide.[36] This triggered a humanitarian crisis marked by mass displacement, violence, and the collapse of essential services such as healthcare systems, with hospitals and clinics overwhelmed or destroyed; education, as schools were forced to close, disrupting children's education; infrastructure, with roads, bridges, and utilities damaged or destroyed; access to clean water, leading to significant health risks; food security, as widespread hunger and disrupted food supply chains exacerbated the crisis; law and order, with law enforcement unable to function and widespread impunity taking hold; and economic stability, as unemployment skyrocketed and local businesses collapsed.[37] In April 2025, a transitional council approved a "wartime budget" to combat gang violence, but stability remains elusive.[38] In the aftermath, President Moïse's unconstitutional dismissal of three Supreme Court judges, named by opposition leaders as potential transitional figures, and his appointment of replacements without legal authority underscored the fragility of Haiti's succession process and the erosion of judicial independence.[39] The absence of explicit succession laws has resulted in political deadlock and weakened state authority.

B. Presidential Overreach and the Weakening of Checks and Balances

Another significant fault is the excessive concentration of power in the executive branch. The Haitian Constitution grants the president considerable authority, including control over the legislative and judicial branches, which weakens the system of checks and balances.[40] Since January 13, 2020, when parliamentary terms expired without replacement elections, the president ruled by decree, an overtly authoritarian move that has been strongly denounced by many members of Haitian civil society and international observers, including the Organization of American States (OAS), the United Nations, and the U.S. State Department.[41] Notably, decrees reduced the power of anti-corruption agencies, created a National Intelligence Agency, and even altered judicial appointments unilaterally.[42] In practice, this has enabled political elites to consolidate power and marginalize other branches of government. The executive branch's unchecked power has contributed to corruption, abuses of power, and a lack of accountability within Haiti's governance structures. A more balanced power distribution among the branches of government is essential for ensuring democratic governance and preventing the erosion of the rule of law.[43]

C. Broken Courts and Compromised Elections

Haiti has struggled with inconsistent election timelines and disputed outcomes, which have fueled public distrust in political processes.[44] Electoral instability has led to governance crises, undermining the legitimacy of elected officials and contributing to an ongoing cycle of political unrest. Parliamentary elections scheduled for October 2019 never occurred, leaving a legislative vacuum that enabled executive overreach.[45] Additionally, the unilateral creation of a Provisional Electoral Council (CEP) in September 2020 without consultation with traditional civil society stakeholders—such as religious leaders, human rights organizations, business groups, labor unions, and academic institutions—further undermined electoral legitimacy.[46] Strengthening Haiti's electoral framework is essential for building public confidence in democracy.

Electoral dysfunction in Haiti has also eroded public trust

30 Sanon & Coto, *supra* note 2.
31 *Haiti President Jovenel Moïse killed in attack at home*, BBC, Jul. 7, 2021, https://www.bbc.com/news/world-latin-america-57750358.
32 Maria Abi-Habib, *Why Was Haiti's President Assassinated?*, N.Y. Times, Dec. 14, 2021, https://www.nytimes.com/2021/12/14/podcasts/the-daily/jovenel-moise-haiti-president-assassination.html.
33 Nick Schifrin & Morgan Till, *Moise Assassination May Be Linked to What He Knew about Haitian Drugs, Arms Trafficking*, PBS, Dec. 13, 2021, https://www.pbs.org/newshour/show/moise-assassination-may-be-linked-to-what-he-knew-about-haitian-drugs-arms-trafficking.
34 Henry Shuldiner, *Was Haiti's President Moïse Killed for Valuable State Contracts?*, InSight Crime, Feb. 25, 2023, https://insightcrime.org/news/was-haitis-president-moise-killed-for-valuable-state-contracts/.
35 Vanessa Buschschlüter, *Ariel Henry: The Rise and Fall of Haiti's Prime Minister*, BBC, Mar. 12, 2024, https://www.bbc.com/news/world-latin-america-68542077.
36 *Haiti's government adopts a 'war budget' as town after town falls to gangs*, Associated Press, Apr. 14, 2025, https://apnews.com/article/haiti-gangs-violence-war-budget-mirebalais-saut-deau-daa19487d58e9ada1846ad674bca0e54.
37 Carlos S. Maldonado, *La Violencia Condena a Haití: Médicos Sin Fronteras Cierra Dos Centros y Cruz Roja Alerta de Que "La Vida Se Vuelve Cada Vez Más Precaria"*, El País, Apr. 10, 2025, https://elpais.com/america/2025-04-10/la-violencia-condena-a-haiti-medicos-sin-fronteras-cierra-dos-centros-y-cruz-roja-alerta-de-que-la-vida-se-vuelve-cada-vez-mas-precaria.html.
38 Reuters, *Haiti Approves "War Time Budget" as Criminal Gangs Wreak Havoc*, Reuters, Apr. 14, 2025, https://www.reuters.com/world/americas/haiti-approves-war-time-budget-criminal-gangs-wreak-havoc-2025-04-14/.
39 2021 CONG US HR 2471, United States Library of Congress, Apr. 13, 2021, https://1-next-westlaw-com.ccl.idm.oclc.org/Document/IA9B-86071C51511EBB0DEE5F43C6A1F32/View/FullText.html.
40 Sam Bojarski, *Line of Succession Unclear Following Haiti President Moïse Assassination*, The Haitian Times, Jul. 7, 2021, https://haitiantimes.com/2021/07/07/line-of-succession-unclear-following-moise-assassination/.
41 Reuters, *Haiti Opposition Condemns Country's Slide into Rule by Decree*, WION News, Jan. 15, 2020, https://www.wionews.com/world/haiti-opposition-condemns-countrys-slide-into-rule-by-decree-274329.
42 *U.S. Occupation of Haiti*, *supra* note 8.
43 *Locked in Transition: Politics and Violence in Haiti*, International Crisis Group, Feb. 19, 2025, https://www.crisisgroup.org/latin-america-caribbean/caribbean/haiti/107-locked-transition-politics-and-violence-haiti.
44 Peter Appleby, *Haiti Crime Boss' Death Signals Possible Shift in Balance of Power*, InSight Crime, Nov. 23, 2023, https://insightcrime.org/news/haiti-crime-boss-death-signals-possible-shift-in-balance-of-power/.
45 *Political Crisis, Shrinking Civic Space Compounding Dire Economic, Humanitarian Situation in Haiti, Special Representative Tells Security Counci*l, United Nations, Feb. 22, 2021, https://press.un.org/en/2021/sc14442.doc.htm.
46 *U.S. Occupation of Haiti*, *supra* note 8.

in democratic institutions. Surveys conducted by Haitian civil society organizations indicate that voter turnout has steadily declined due to fears of violence, lack of transparency, and skepticism about meaningful change.[47] This distrust creates a feedback loop in which low participation fuels elite entrenchment and political instability, further eroding the legitimacy of electoral processes. In the absence of credible elections, gangs and other local actors increasingly claim to represent community interests, filling the gap left by absent or untrusted political leadership.[48]

While the Haitian Constitution ostensibly provides for an independent judiciary, the judiciary has been weak and easily influenced by the executive branch. Judges are often appointed based on political connections rather than merit, and the absence of protection for judicial tenure or independence has led to corruption and inefficiency within the legal system. For example, in February 2021, Moïse ordered the Haitian National Police to arrest Supreme Court Judge Yvickel Dabrésil, accusing him of participating in an alleged coup attempt. This move raised serious concerns about the politicization of the judiciary. Moreover, three Supreme Court justices were forcibly retired and replaced by executive decrees, violating constitutional procedures and further eroding judicial autonomy.[49] The lack of an independent judiciary means that political power can influence legal decisions, undermining the rule of law and limiting the ability of the state to provide justice and hold influential figures accountable.

Other nations that faced post-occupation instability have prioritized judicial reform to rebuild trust and accountability. In Rwanda, for instance, the post-genocide government implemented community-based Gacaca courts alongside formal legal reforms to address mass crimes and restore legitimacy.[50] Similarly, Colombia's transitional justice system was designed to reduce impunity for armed actors while strengthening state authority.[51] Haiti can draw from these models by establishing hybrid judicial mechanisms incorporating community oversight committees alongside formal courts, allowing citizens to monitor legal outcomes and address local concerns. This could involve creating mobile legal aid units to reach underserved rural populations, providing education on legal rights, and simplifying procedures for filing complaints. Additionally, transparent legal reforms might include publicly accessible case-tracking systems, regular publication of court decisions, and independent oversight bodies to review judicial conduct, all aimed at restoring public trust and making justice more equitable and accountable.[52]

This dynamic is not unique to Haiti; scholars of comparative politics have identified similar patterns in other post-conflict states where judicial independence is eroded through "informal presidentialism," where power is exercised through personal networks rather than formal institutions.[53] To combat this, Haiti must implement robust reforms, including life tenure for judges, independent judicial councils, and transparent appointment processes that insulate the judiciary from political interference.[54] Without these changes, any effort to restore the rule of law will be superficial.

IV. THE RISE OF GANGS AND THE BREAKDOWN OF STATE AUTHORITY

Haiti's political turmoil has created a power vacuum that armed groups have exploited to expand their influence.[55] Criminal organizations have increasingly assumed roles traditionally performed by the state, such as providing security and social services. The dominance of gangs such as the G9 alliance has led to widespread violence and lawlessness, further eroding public trust in government institutions.[56] The G9, formed in 2020 by former police officer Jimmy "Barbecue" Chérizier, is a coalition of at least 12 armed groups. Initially claiming to restore order, it quickly became notorious for massacres, kidnappings, and extortion. The G9 controls key areas of Port-au-Prince and is suspected of links to political figures and state security forces, weakening the state's ability to curb gang violence and eroding public confidence in the government.[57] This breakdown in state authority has severe consequences for public safety, human rights, and the overall stability of Haitian society.

The explosion of gang activity in Haiti is not merely a crime problem; it is also political crisis. Gangs, including the G9 alliance, now control over 80% of Port-au-Prince and wield more authority in some neighborhoods than elected officials do.[58] This dominance has been fueled by social neglect, political collusion, and economic desperation.With limited access to education, jobs, and public services, many young men see joining a gang as a means of survival. At the same time, political elites have historically funded and weaponized gangs during election cycles, forming symbiotic relationships that erode democratic legitimacy.[59] In some communities, gangs provide services including food distribution and dispute resolution, positioning themselves as de facto governments. This mirrors dynamics seen in Somalia and Mexico, where cartels and armed groups have filled the voids left behind by weak or absent governance structures. Any solution to gang violence in Haiti must therefore address not just security, but also the deeper socioeconomic roots of gang legitimacy, including unemployment, urban inequality, and political disenfranchisement.[60]

This dynamic complicates reform efforts, as military-style crackdowns may alienate residents who rely on gangs for basic

47 *Assessment of Citizen Needs and Understanding of the Political System in Haiti,* Internews, Oct. 7, 2024, https://internews.org/resource/assessment-of-citizen-needs-and-understanding-of-the-political-system-in-haiti/.
48 *Haiti: Events of 2021*, Human Rights Watch, Oct. 21, 2021, https://www.hrw.org/world-report/2022/country-chapters/haiti.
49 *U.S. Occupation of Haiti*, *supra* note 8.
50 *Justice Compromised - The Legacy of Rwanda's Community-Based Gacaca Courts*, Human Rights Watch, May 31, 2011, https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts.
51 *Transitional Justice: Mechanisms in Colombia*, ICTJ, https://www.ictj.org/sites/default/files/subsites/colombia-timeline/index_eng.html.
52 Marie Delcas, *Transitional Justice in Colombia Progresses Slowly*, Le Monde, May 2, 2025, https://www.lemonde.fr/en/international/article/2024/04/04/slow-progress-for-transitional-justice-in-colombia_6667418_4.html .
53 Katarína Šipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, Cambridge University Press, Mar. 8, 2024, https://www.cambridge.org/core/journals/german-law-journal/article/decay-or-erosion-the-role-of-informal-institutions-in-challenges-faced-by-democratic-judiciaries/8290F147BE0E4B66DCF6871AC545027F.
54 *Haiti: Attacks on Judicial Independence*, Human Rights Watch, Feb. 22, 2021, https://www.hrw.org/news/2021/02/22/haiti-attacks-judicial-independence.
55 *Haitian Gangs Escalate Violence*, *supra* note 3.
56 Henry Shuldiner, *Haitian Gang Leader, 'Barbecue,' Targeted in UN Sanctions Resolution*, InSight Crime, Oct. 18, 2022, https://insightcrime.org/news/haitian-gang-leader-barbecue-targeted-un-sanctions-resolution/.
57 Jacqueline Charles, *Haitian Gang Leader Jimmy 'Barbecue' Chérizier's G9 Alliance Is Deepening Chaos*, Miami Herald, Sep. 2020, https://www.miamiherald.com/news/nation-world/world/americas/haiti/article246056397.html.
58 *Haiti Could Face 'Total Chaos"*, *supra* note 7.
59 Katie Jones, *Haiti Massacres Reveal Active Gang Support from Police, Officials*, InSight Crime, May 3, 2021, https://insightcrime.org/news/gang-led-massacres-relied-support-police-state-officials-haiti/.
60 Dánica Coto, *The Number of Children Recruited by Gangs in Haiti Soars by 70%, UNICEF Says*, Associated Press, Nov. 25, 2024, https://apnews.com/article/haiti-gangs-child-recruitment-violence-ca5e78661185d36f3a94e774018a1dae.

needs. Moreover, some gangs have been known to fund political campaigns or collaborate with state actors, blurring the lines between political and criminal power and making it even more difficult to separate legitimate governance from organized crime.[61]

V. POTENTIAL SOLUTIONS

A. Constitutional and Legal Reforms

Addressing Haiti's governance crisis requires comprehensive constitutional and legal reforms. The country must reform its presidential succession laws to prevent future power vacuums and decentralize power to strengthen local governance.[62] Judicial independence should be safeguarded through merit-based appointments, tenure security, and strict anti-corruption enforcement.[63] Additionally, law enforcement agencies must receive adequate oversight, training, and resources to combat crime effectively.[64] Establishing specialized courts to expedite gang-related prosecutions would also restore law and order by creating judicial bodies with trained judges, prosecutors, and law enforcement officials focused solely on organized crime, gang violence, and related offenses. These courts could streamline the legal process, ensuring quicker and more efficient trials while fostering expertise in handling complex criminal networks.

Other nations have successfully implemented legal reforms after governance breakdowns, offering valuable lessons for Haiti. For example, Kenya's 2010 constitutional reform process incorporated extensive public consultation and emphasized devolution of power to local governments.[65] This reduced centralized corruption and improved service delivery in many rural regions. A similar approach could involve redistributing administrative authority and budgetary control to municipal governments, particularly in historically neglected departments such as Grand 'Anse or the Artibonite. This would allow local leaders to respond more directly to community needs, reduce dependency on Port-au-Prince, and increase government responsiveness. Further, a national consultation process could involve civil society, diaspora members, and rural communities in drafting reforms, enhancing legitimacy and buy-in from the Haitian population.[66] A similar participatory approach in Haiti, through constitutional referendums, community forums, and civic education, could foster greater legitimacy and accountability in future legal reforms.[67]

B. Combating Organized Crime

To dismantle gang networks, Haiti must implement intelligence-driven policing strategies.[68] Authorities should focus on seizing illicit weapons and cutting off criminal financial flows to weaken these organizations while expanding access to essential services through state institutions. This means pairing enforcement with investments in community-based infrastructure, such as clinics, schools, and food programs, to reduce reliance on gangs that often fill these gaps. Law enforcement actions should be coordinated with civil society groups and local leaders to ensure that anti-gang operations do not alienate residents or trigger retaliatory violence. For instance, Baltimore's Group Violence Reduction Strategy employs a "carrot and stick" approach by offering resources and social services to those likely to be involved in gun violence, while threatening police investigation and potential prosecution if they continue criminal activities. Since its launch in January 2022, Baltimore has seen a significant reduction in homicides and nonfatal shootings.[69] Expanding community policing initiatives can help rebuild public trust in security forces.[70] Furthermore, providing economic alternatives to gang recruitment, such as vocational training and reintegration programs, can reduce the appeal of criminal organizations and offer at-risk individuals pathways toward stable livelihoods.

C. Restructuring International Involvement

International engagement in Haiti must shift from military intervention to governance support, prioritizing Haitian leadership.[71] Foreign aid should be directed toward strengthening institutions rather than fostering dependency.[72] Additionally, expanded legal cooperation is necessary to curb transnational crime and hold international actors accountable for their roles in Haiti's instability.[73] Stability can only be achieved through policies that empower Haitian leaders and communities to take charge of their governance and security.

Future international assistance must prioritize Haitian ownership and align with local aspirations. Haitian civil society groups, such as Nou Pap Dòmi and Papaye Peasant Movement (MPP), have repeatedly emphasized the need for transparency, inclusiveness, and sustainability in external aid.[74] Their calls highlight a broader desire for governance solutions rooted in Haitian culture and history rather than foreign strategic interests. Empowering these local organizations to lead reform efforts would help ensure that interventions are responsive to the population's needs and not imposed from above.[75]

D. Decentralization and Civic Participation

Haiti's hyper-centralized government, with power concentrated in the executive branch and the capital, has failed to serve rural and peripheral communities.[76] Decentralization could offer a

61 Sergio Saffon & Parker Asmann, *GameChangers 2021: Barbecue, Gangs and Political Power in Haiti*, InSight Crime, Dec. 29, 2021, https://insightcrime.org/news/gamechangers-2021-barbecue-gangs-and-political-power-in-haiti/.
62 *Transitional Council in Haiti*, *supra* note 2.
63 *U.S. Occupation of Haiti*, *supra* note 8.
64 Parker Asmann, *Haiti President Assassinated in Port-Au-Prince*, InSight Crime, Jul. 7, 2021, https://insightcrime.org/news/haiti-president-assassinated-port-au-prince/.
65 Andrea Rigon, *20 Years of "Sweat and Blood": Lessons from the Constitutional Review Process in Kenya*, ISPI, Jun., 2010, https://www.ispionline.it/sites/default/files/pubblicazioni/pb_188_2010_0.pdf.
66 Natasha Kimani, *Meeting the Promise of the 2010 Constitution: Devolution, Gender and Equality in Kenya*, Chatham House, May 11, 2020, https://www.chathamhouse.org/2020/05/meeting-promise-2010-constitution/challenges-devolution.
67 Vanessa L. Deane, *Towards a Decentralized Haitian State: The Promises and Shortcomings of the Post-Duvalier Constitution of 1987*, Nov. 22, 2021, https://wagner.nyu.edu/impact/research/publications/towards-decentralized-haitian-state-promises-and-shortcomings-post.
68 *Haiti: Deconstructing*, *supra* note 11.
69 Lea Skene, *How Baltimore Is Saving Lives by Offering Young Men Resources When They Put down the Guns*, Associated Press, Jan. 18, 2025, https://apnews.com/article/baltimore-homicides-group-violence-reduction-strategy-guns-564a6d247d73805279af95d856cafeb8.
70 David Alire Garcia, *What's behind the Escalating Violence in Haiti?*, Reuters, Oct. 5, 2024, https://www.reuters.com/world/americas/after-haiti-suffers-fresh-gang-massacre-whats-behind-escalating-violence-2024-10-05/.
71 *G9 and Family*, *supra* note 4.
72 *Haiti Approves "War Time Budget"*, *supra* note 18.
73 *2022 Country Reports on Human Rights Practices: Haiti*, U.S. Dep't of State, https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/haiti.
74 *A Rights-Based Approach to U.S.-Haiti Policy: Centering Haitian Voices in a Haiti-led Solution*, Amnesty Int'l, Mar. 3, 2025, https://www.amnestyusa.org/reports/a-rights-based-approach-to-u-s-haiti-policy-centering-haitian-voices-in-a-haiti-led-solution/.
75 *The United Nations system and the Government of Haiti sign a Cooperation Framework for Sustainable Development*, United Nations, Apr. 20, 2023, https://haiti.un.org/en/228321-united-nations-system-and-government-haiti-sign-cooperation-framework-sustainable.
76 Vanessa L. Deane, T*oward a Decentralized Haitian State: The Prom-*

path toward greater inclusion and responsiveness. Kenya's 2010 constitutional reform, which introduced county-level governance with devolved budgets, has shown how distributing power can improve service delivery and reduce tensions between marginalized groups and the central state.[77] Haiti could adopt similar reforms by empowering communes to elect their councils, manage localized development funds, and engage in participatory budgeting. Civil society organizations, particularly women-led groups and peasant movements, play vital roles in community resilience. Granting them formal roles in governance would not only increase accountability but also revitalize civic engagement in a country where voter turnout and institutional trust remain low.[78]

E. Stakeholder Implications of Reform

Implementing these reforms would have varied implications for stakeholders both in and outside Haiti. For Haitian citizens, especially those living and working in marginalized neighborhoods, decentralization and stronger legal protections could increase access to justice and local representation.[79] Civil society organizations would gain more significant influence in shaping governance, while political elites may face reduced authority as checks and balances are restored. For the international community, these reforms present an opportunity to transition from reactive crisis management to long-term partnership grounded in mutual accountability. Long sidelined in policymaking, the Haitian diaspora could also play a critical role by providing remittances, advocacy, and technical expertise. The diaspora, which contributes over $3 billion in annual remittances, remains an underutilized force in governance reform.[80] Policies that create channels for diaspora engagement could bridge global advocacy with local legitimacy. Recognizing and addressing these stakeholder dynamics will be essential for building durable, inclusive institutions. While decentralization offers a path toward equity, implementation remains challenging in the absence of trained local officials, financial autonomy, and monitoring mechanisms to prevent elite capture.[81]

F. Soft Law Mechanisms and Normative Accountability

The UNGPs guarantees the responsibilities of states and businesses to respect human rights. While non-binding, they establish clear guidelines for regulating private actors engaged in transnational activities. States are encouraged to adopt national action plans incorporating the UNGPs into domestic legislation, which the U.S. could use to monitor and regulate far-right organizations.

The OECD Guidelines similarly establish soft law standards for responsible business conduct. Far-right organizations that operate as incorporated entities could be scrutinized under these guidelines, particularly in cases involving financial support for discriminatory policies. Although soft law mechanisms lack the coercive force of treaty obligations, its normative influence should by no means be underestimated. As one scholar asserts, they serve as precursors to binding obligations and provide a basis for advocacy, capacity-building, and reputational accountability.[82]

This part has explored how the actions of U.S.-based groups violate key provisions of international human rights treaties, as well as mechanisms of indirect state responsibility, due diligence, domestic legislation, and soft law frameworks that could hold these actors accountable. Building on this, the next part provides policy recommendations to reconcile U.S. sovereignty concerns with its international responsibilities.

IV. CONCLUSION

Haiti's challenges stem from political, legal, and security issues, all of which are deeply interconnected. Addressing these problems requires legal, political, and institutional reforms to restore stability and public confidence in government institutions. Strengthening Haiti's rule of law, implementing clear governance structures, and addressing gang violence are crucial steps toward rebuilding a functional state. A shift toward Haitian-led governance and sustainable development will ensure lasting peace and stability. Haiti's path forward must honor its revolutionary legacy by centering Haitian voices in building a sovereign, democratic future. As the first Black republic, Haiti has always symbolized the fight for dignity and self-determination. Honoring that legacy means placing Haitians—not foreign powers, not political elites, not gang leaders—at the forefront of the nation's reconstruction. Haiti's long struggle for sovereignty can still be fulfilled, but only through policies and leadership that trust and empower its people. requires pragmatic solutions. These reforms and policy recommendations I offer consider the constitutional framework of the U.S., its geopolitical position, and the need to effectively address the extraterritorial activities of U.S.-based entities implicated in human rights violations.

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ises and Shortcomings of the Post-Duvalier Constitution of 1987, The Journal of Haitian Studies, 2021, https://wagner.nyu.edu/files/faculty/publications/Deane_Decentralized%20State.pdf.

77 Muwonge Abdu et al., *Making Devolution Work for Service Delivery in Kenya*, World Bank Group, Feb., 2022, https://openknowledge.worldbank.org/entities/publication/5e13fb57-40dd-572a-93ea-bf096fe64ae2.

78 Beverly Bell, *A History of Haitian Women's Political Involvement*, Truthout, Mar. 24, 2010, https://truthout.org/articles/a-history-of-haitian-womens-political-involvement-international-womens-day-part-ii/.

79 *Towards a Decentralized Haitian State*, *supra* note 56.

80 Manuel Orozco, *Haiti's Turnaround and Its Impact on Remittances*, The Dialogue, Nov. 15, 2022, https://thedialogue.org/blogs/2022/11/haitis-turnaround-and-its-impact-on-remittances.

81 *Implementing Exiting Laws on Decentralization in Haiti*, Haïti Prioritise, Apr. 21, 2017, https://copenhagenconsensus.com/sites/default/files/haiti_prioritise_decentralization_-_english.pdf.

82 Bini Saroj & Abba Kolo, *Soft Law in International Investment Law*, BuID Doctoral Research Conference (Mar. 29, 2024).

SOVEREIGNTY AND SECURITY:

HOW PRESIDENT TRUMP'S SANCTIONS ON THE INTERNATIONAL CRIMINAL COURT UNDERMINE THE INTERNATIONAL PURSUIT OF JUSTICE

INTRODUCTION

In 2023, U.S. President Joe Biden welcomed the International Criminal Court (ICC)'s arrest warrants for Russian leaders Vladimir Putin and Maria Lvova-Belova for war crimes in Ukraine.[1] Two years later, U.S. President Donald Trump sanctioned the ICC for investigating alleged Israeli war crimes committed in the State of Palestine. Trump argued that the ICC has no jurisdiction over the U.S. and Israel, condemning the warrants as "baseless" and a threat to U.S. and Israeli national security and sovereignty.[2] The ICC's warrants against Israeli Prime Minister Benjamin Netanyahu and Former Minister of Defense Yoav Gallant are unprecedented, marking the first time an arrest warrant has been issued on an American ally.[3] As a result of Trump's sanctions, 79 ICC member states issued a joint statement reaffirming their support for the ICC's "indispensable role in ending impunity, promoting the rule of law, and fostering lasting respect for international law and human rights."[4]

Historically, the U.S. has played a major role in framing an international rules-based order. However, its pragmatic and inconsistent engagement with the ICC aligns more closely with realism, a theoretical framework in which states are viewed as self-interested actors that prioritize their national interests, sovereignty, and security to maintain power.[5] These tensions between state sovereignty and the ICC's ability to intervene to uphold the law undermine the U.S.' commitment to maintaining a rules-based order. This paper argues that Trump's sanctions demonstrate the U.S.' selective approach to justice; threaten global accountability and damage the U.S.' international credibility.

This paper proceeds as follows: Section I details the ICC's establishment and how past tribunals and trials have shaped the court, as well as the long-standing tension between the U.S. and the ICC. Section II explores the ongoing situation in the State of Palestine, including ICC arrest warrants on Israeli and Palestinian leaders and international responses to the warrants. By analyzing the U.S.' response to the ICC, Section III dissects how sanctions hinder the ICC's pursuit of justice globally, and explores the ways in which the U.S.' selective engagement with the ICC undermines the U.S.' credibility as a world leader.

I. THE ICC

A. The Origins

Established in 2002 as the world's first permanent criminal court, the ICC aims to deter future atrocities by upholding international law "in cases where national courts fail to act."[6] The 1998 Rome Statute outlined the ICC's jurisdiction over crimes including genocide, war crimes, crimes against humanity, and crimes of aggression.[7] As of April 2025, 125 states are party to the Rome Statute; however, Israel and major powers such as the U.S., China, India, and Russia do not recognize the court's jurisdiction due to concerns over sovereignty and national interests.[8] Based on this argument, these countries believe they are not obligated to adhere to the ICC's rules.

B. Previous Trials and Tribunals that Shaped the ICC

The U.S. played a significant role in establishing the foundations of the ICC. Soon after the surrender of Nazi Germany, the Allied powers established the International Military Tribunal (IMT) to prosecute twenty-four of Nazi Germany's "most influential and powerful men" for crimes committed during the Holocaust.[9] Prior to the IMT, state leaders who committed crimes within their borders were considered immune to prosecution by other nations under the doctrine of state sovereignty. However, by prosecuting Nazi leaders for war crimes, crimes against peace, and crimes against humanity, the international community established that no individual should be held above the law.[10] The IMT enshrined individual responsibility, whereby high-ranking leaders

1 *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, Int'l Crim. Ct. (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and; *See generally Putin arrest warrant: Biden welcomes ICC's war crimes charges*, BBC, (Mar. 18, 2023), https://www.bbc.com/news/world-europe-64998165.

2 Exec. Order No. 14,203, 90 Fed. Reg. 1-5, (Feb. 6, 2025), https://ofac.treasury.gov/media/933981/download?inline, at 1.

3 *Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant*, Int'l Crim. Ct. (November 21, 2024), https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges ; *See* Anthony Dworkin, *The International Criminal Court and Netanyahu: A Test for European Principle*s, ECFR (2024), https://ecfr.eu/article/the-international-criminal-court-and-netanyahu-a-test-for-european-principles/ (last visited Apr 7, 2025).

4 Ministerie van Buitenlandse Zaken, *Joint Statement - Sanctions International Criminal Court*, Gov't of Neth (Feb. 7, 2025), https://www.government.nl/documents/diplomatic-statements/2025/02/07/joint-statement---sanctions-international-criminal-court-icc.

5 John S. Smith, *SOVEREIGNTY VS. JUSTICE: U.S. REALISM AND THE ICC DILEMMA*, 8 Int'l J. Pol. Sci. & Soc. Sci. 9 (Sep. 21, 2023), https://top-journals.org/index.php/IJPSS/article/view/717.

6 Int'l Crim. Ct., *About the Court*, https://www.icc-cpi.int/about/the-court (last visited Apr. 18, 2025); *International Criminal Court*, Encyclopaedia Britannica, (Feb. 24, 2025), https://www.britannica.com/topic/International-Criminal-Court.

7 *See* Rome Statute of the International Criminal Court art. 5(1) (a)–(d), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), https://legal.un.org/icc/statute/english/rome_statute(e).pdf.

8 *The States Parties to the Rome Statute*, Int'l Crim. Ct., https://asp.icc-cpi.int/states-parties (last visited Apr 18, 2025).

9 *In Pursuit of Justice: Examining the Evidence of the Holocaust*, (Kevin Mahoney & United States Holocaust Memorial Museum eds., 1997), at 231.

10 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279, https://legal.un.org/imt/charter.pdf.

could be found culpable for their actions, regardless of directives given by the state. The Nuremberg Trials, a set of 12 follow-up trials conducted by the U.S., prosecuted specific Nazi-regime groups such as doctors, judges, Schutzstaffel (SS) members, and police commanders.[11] The Nuremberg Trials applied the IMT's definitions of war crimes and crimes against humanity to their proceedings, which further contributed to the development of international criminal law. Beyond addressing the Holocaust, the IMT and Nuremberg recognized an international obligation to bring justice to victims of mass atrocities.

Israel also played a major role in laying the groundwork for international law by setting a precedent of universal jurisdiction through the Eichmann Trial. Adolf Eichmann, a Nazi official responsible for facilitating mass deportations of Jews, fled to Argentina to escape punishment. On May 11, 1960, Israeli intelligence officials captured Eichmann and brought him to stand trial in Israel. Despite controversies over Israel's jurisdiction and breach of Argentina's national sovereignty, the Israeli court recognized the "principle of universal jurisdiction of third-party courts over crimes such as 'crimes against humanity' and genocide."[12] By holding Eichmann accountable for crimes committed outside of its territory, Israel demonstrated that individual responsibility takes precedence over state sovereignty.

Israel's stance against the ICC's most recent arrest warrants marks a stark contrast from the Eichmann Trial's precedent of universal jurisdiction. Its argument against the ICC's jurisdiction goes directly against its historically established legal principle. Through the Eichmann Trial, Israel invoked the concept of individual responsibility and set a precedent of universal jurisdiction. Yet, Israel is reluctant to enforce these concepts when it would threaten its national interests.

C. The U.S. and ICC's Complicated Relationship

In the same way as Israel, the U.S. selectively engages with the ICC. Though its leadership was fundamental in shaping the ICC's establishment, the U.S. has only supported the court in specific cases. Its engagement with the ICC has also varied significantly, ranging from hostile to cautious depending upon a given president's approach to foreign policy.[13] U.S. opposition to ICC membership reflects concern that the court's jurisdiction will infringe upon its sovereignty, thereby threatening national security. Critics of the court fear this infringement could enable politically motivated prosecution against the U.S.[14] These concerns have thus deterred the U.S. from consistently supporting the court's efforts. This long-standing tension between the U.S. and ICC reflects how the U.S.' support for the ICC is conditional, and can be interpreted through the lens of realism, where the U.S. seeks to safeguard its national interest from foreign interference to maintain its dominance.

D. The ICC Today

Since its establishment in 2002, the ICC has handled 33 cases, issued 60 arrest warrants, convicted 11 individuals, and concluded 5 investigations.[15] Currently, it has 12 ongoing investigations. Though the ICC's mission is to pursue justice internationally, it has been criticized for its historic "blatant Western exceptionalism" due to its focus on atrocities in Africa, and lack thereof in Europe.[16] For instance, 47 out of the 54 individuals indicted by the ICC are African; and, "budget constraints" have deterred the ICC from investigating war crimes by the United Kingdom in Iraq in 2020, despite the fact that the Office of the Prosecutor had found evidence of such crimes.[17] Further, Amnesty International also reported that the ICC refused to authorize investigation into U.S. war crimes in Afghanistan, marking "a shocking abandonment of victims" that "will further weaken the court's credibility."[18] Biraj Patnaik, South Asia Director at Amnesty International, has also stated that the ICC's decision to not authorize an investigation "signals its weak resolve" to U.S. political pressure.[19] It is evident that despite the U.S.' nonmembership, it holds notable international influence and can exercise diplomatic pressure over the court.

II. SITUATION IN THE STATE OF PALESTINE

A. Context

On October 7, 2023, the Palestinian militant group Hamas, designated as a foreign terrorist organization by numerous international organizations and countries including the U.S., executed a surprise attack on Israel, taking over 251 hostages from Israel to Gaza and killing more than 1,200 people, a majority of them civilians.[20] Israel retaliated by launching a deadly counter-of-

11 *The Nuremberg Trials*, The National WWII Museum, https://www.nationalww2museum.org/war/topics/nuremberg-trials (last visited May 4, 2025).
12 *The Eichmann Trial Fifty Years On*, 29 German Hist. 265 (2011), https://academic.oup.com/gh/article-lookup/doi/10.1093/gerhis/ghr041 (last visited Apr 18, 2025).
13 Leila Sadat & Mark Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship*, Wash. U. Sch. L. St. Louis Legal Stud. Rsch. Paper Ser. (Jul., 2016), https://scholarlycommons.law.wlu.edu/wlufac/504.
14 Marco Rubio, *Imposing Sanctions in Response to the ICC's Illegitimate Actions Targeting the United States and Israel*, U.S. Dep't of State (Jun. 5, 2025), https://www.state.gov/releases/office-of-the-spokesperson/2025/06/imposing-sanctions-in-response-to-the-iccs-illegitimate-actions-targeting-the-united-states-and-israel/ ("The ICC is politicized and falsely claims unfettered discretion to investigate, charge, and prosecute nationals of the United States and our allies. This dangerous assertion and abuse of power infringes upon the sovereignty and national security of the United States and our allies, including Israel.").
15 About the Court, *supra* note 3.
16 *See, e.g.*, *A chance for Africa to counter the pitfalls of international criminal justice?*, Amnesty Int'l (Apr. 22, 2024), https://www.amnesty.org/en/latest/news/2024/04/a-chance-for-africa-to-counter-the-pitfalls-of-international-criminal-justice/.
17 *Id.*
18 *Afghanistan: ICC refuses to authorize investigation, caving into USA threats*, Amnesty Int'l (Apr. 12, 2019), https://www.amnesty.org/en/latest/press-release/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/.
19 *Id.*
20 *See, e.g.*, *Foreign Terrorist Organizations*, U.S. Dep't of State, https://www.state.gov/foreign-terrorist-organizations/ (last visited Apr 20, 2025); Ministère de l'Europe et des Affaires étrangères, I*srael/Palestinian Territories – Hamas' Leader in the Gaza Strip, Yahya Sinwar, Listed as a Terrorist by the European Union*, Ministry Eur. & Foreign Aff. (16 Jan. 2024), https://www.diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/news/2024/article/israel-palestinian-territories-hamas-leader-in-the-gaza-strip-yahya-sinwar; Government of Canada, *Currently Listed Entities*, Pub. Safety Can. (2018), https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx (last visited Apr 20, 2025); *See generally Why Did Hamas Attack Israel?*, Council on Foreign Rel., https://education.cfr.org/learn/learning-journey/why-did-hamas-attack-israel/israeli-palestinian-conflict-timeline (last visited Apr 20, 2025); *See generally*, Bill Hutchinson, *Israel-Hamas War: Timeline and Key Developments*, ABC News, https://abcnews.go.com/International/timeline-surprise-rocket-attack-hamas-israel/story?id=103816006 (last visited Apr 20, 2025); Jeremy M. Sharp & Jim Zanotti, *Israel and Hamas Conflict In Brief: Overview, U.S. Policy, and Options for Congress*, Cong. Rsch. Serv. (Oct. 4, 2024), https://

fensive aiming to eradicate Hamas in Gaza.[21] As conflict intensified, Israeli forces attacked hospitals and targeted designated safe zones.[22] Israeli blockades also caused a shortage of food and supplies, preventing humanitarian assistance from reaching civilians in Gaza.[23] As of June 2025, more than 55,000 Palestinians have been killed, according to the Palestinian Ministry of Health.[24] In response to this humanitarian crisis, the ICC launched an investigation into Israel and Hamas for violations of international law.

B. Jurisdiction

Despite Israel not being a signatory state to the Rome Statute, the ICC recognizes the State of Palestine as a party and subject to the court's jurisdiction. The United Nations (U.N.) General Assembly also recognized Palestine's right to be a non-member observer state in 2012.[25] This recognition of Palestine's membership allows the ICC to hold Israeli individuals accountable for crimes committed in Palestinian territory. As a result of Palestine's membership in the ICC and the U.N.'s recognition of the Palestinian right to a state in territories occupied by Israel, the ICC concluded that its jurisdiction extends to Gaza, the West Bank, and East Jerusalem.[26] Therefore, President Trump's assertion that the "ICC has no jurisdiction over the United States or Israel" is partially flawed.[27] The U.S. objects to the ICC's actions against Israel, but has supported warrants against Russian leaders in the case of Ukraine, despite both Russia and Israel not being signatories to the Rome Statute.

C. Filing Arrest Warrants

On May 20, 2024, ICC Prosecutor Karim Khan filed arrest warrants for Israeli leaders Netanyahu and Gallant, as well as for Palestinian leaders of Hamas Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyeh.[28] For both parties, Khan cited war crimes and crimes against humanity.[29] While Khan acknowledged Israel's sovereign right to defend its nation, he also addressed Israel's alleged violations of international law, stressing that "the laws of armed conflict apply to all."[30] Khan listed Israel's violations of international law, including the "starvation of civilians as a method of warfare," willful killing and causing great suffering, murder, persecution, intentional attacks directed towards civilian populations, and other inhumane acts.[31] Khan called on the international community to fight against impunity, stating that if the law is applied selectively, "we will be creating the conditions for its collapse."[32] Khan's statement highlights the ICC's foundational values, reminding the international community that its cooperation is necessary to uphold the court's standards of justice and impartiality. To ignore U.S. and Israeli involvement in crime would undermine the very foundations of international law.

D. Issuing Arrest Warrants

On November 21, 2024, ICC Pre-Trial Chamber I issued arrest warrants for Hamas leader Al-Masri, and for Israeli leaders Netanyahu and Gallant.[33] The Court's pre-trial chamber deemed Israeli Prime Minister Benjamin Netanyahu and Former Minister of Defense Yoav Gallant criminally responsible for war crimes and crimes against humanity, specifically "the war crime of starvation as a method of warfare; and the crimes against humanity of murder, persecution, and other inhumane acts," as well as conducting widespread targeted attacks against civilians in Gaza.[34] The court also found that Netanyahu and Gallant intentionally deprived Gazan civilians of "objects indispensable to their survival," including humanitarian aid, food, water, medical aid, electricity.[35]

E. Israeli and International Responses to the Arrest Warrants

The ICC's warrants received mixed responses from the international community. Major European powers such as France, Germany, and Italy expressed partial support for the ICC's mission; however, their responses to whether they would enforce the warrants were ambiguous. In a statement in November 2024, France stated it would comply with its obligation to the ICC, but asserted that immunity should "apply to Prime Minister Netanyahu and the other ministers concerned" due to Israel's lack of membership in the ICC.[36] Germany also issued a statement acknowledging the warrants, but stressed its "unique relationship and a great responsibility with Israel" due to its complex history.[37]

Meanwhile, Netanyahu rejected the ICC's arrest warrants as "antisemitic," stating that the ICC has become "the enemy of

www.congress.gov/crs-product/R47828.

21 *Id.*

22 *Gaza "humanitarian zone" struck almost 100 times, BBC Verify finds,* BBC (2025), https://www.bbc.com/news/articles/cx2jld7j50eo (last visited Apr 20, 2025); *See generally 'Horrifying milestone': Israel's war on Gaza has killed 50,000 Palestinians*, Al Jazeera, https://www.aljazeera.com/news/2025/3/23/israeli-offensive-in-gaza-has-killed-50000-palestinians-since-october-2023 (last visited Apr 20, 2025).

23 Sharp & Zanotti, *supra* note 21.

24 *More than 55,000 Palestinians have been killed in the Israel-Hamas war, Gaza health officials say*, Associated Press (June 11, 2025), https://www.ap.org/news-highlights/spotlights/2025/more-than-55000-palestinians-have-been-killed-in-the-israel-hamas-war-gaza-health-officials-say/#:~:text=Home%20News%20Highlights%20Spotlights%20More,than%20half%20the%2055%2C000%20dead.

25 G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (Dec. 4, 2012), https://docs.un.org/en/A/RES/67/19.

26 *ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine*, Int'l Crim. Ct. (February 5, 2021), https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-issues-its-decision-prosecutors-request-related-territorial; *See generally* Int'l Crim. Ct. *supra* note 3.

27 *See* Exec. Order No. 14,203, 90 Fed. Reg. 1-5 (Feb. 6, 2025), https://ofac.treasury.gov/media/933981/download?inline.

28 *See Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine,* Int'l Crim. Ct. (May 20, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

29 *Id.*

30 *See* Int'l Crim. Ct., *supra* note 23 ("Israel, like all States, has a right to take action to defend its population. That right, however, does not absolve Israel or any State of its obligation to comply with international humanitarian law. Notwithstanding any military goals they may have, the means Israel chose to achieve them in Gaza – namely, intentionally causing death, starvation, great suffering, and serious injury to body or health of the civilian population – are criminal.").

31 *Id.*

32 *Id.*

33 *State of Palestine*, Int'l Crim. Ct., https://www.icc-cpi.int/palestine.

34 Int'l Crim. Ct., *supra* note 3.

35 *Id.*

36 Ministère de l'Europe et des Affaires étrangères, *Israel – International Criminal Court '27.11.24)*, France Diplomacy - Ministry for Europe and Foreign Affairs, https://www.diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/news/2024/article/israel-international-criminal-court-27-11-24 (last visited Apr 15, 2025).

37 *Erklärung der Bundesregierung zum Beschluss des Internationalen Strafgerichtshofs*, Die Bundesregierung informiert | Startseite (2024), https://www.bundesregierung.de/breg-de/aktuelles/erklaerung-der-bundesregierung-zum-beschluss-des-internationalen-strafgerichtshofs-2321638 (last visited Apr 15, 2025).

humanity."[38] Gallant argued that the ICC's actions placed Hamas and Israel "in the same row."[39] However, despite claims that the ICC is preventing Israel from exercising its sovereign right to defend itself, Prosecutor Karim Khan emphasized that, irrespective of sovereignty, Israel violated international law by targeting civilians. By condemning the ICC's warrants, Netanyahu portrays the ICC as a biased institution that seeks to target Israel without probable cause. In doing so, Israel not only denies the ICC's legitimacy, but undermines precedents of impartiality that Israel itself had developed after World War II. Israel's allies are reluctant to express full cooperation with the ICC, which poses threats to the court's stance against impunity.

III. THE U.S.' RESPONSE TO THE ICC'S WARRANTS

A. Executive Order No. 14203

The ICC's ongoing investigation into the State of Palestine led President Trump to issue sanctions on the court on February 6, 2025. Through Exec. Order No. 14203, Trump ordered visa restrictions and the "blocking of property and assets, as well as the suspension of entry into the United States of ICC officials, employees, and agents, as well as their immediate family members."[40] Although the sanctions specifically target ICC Prosecutor Karim Khan, they can be expanded to encompass any foreign individual who has engaged in the ICC's effort to "investigate, arrest, detain, or prosecute a protected person without consent of that person's country of nationality," or assisted anyone who has acted on the behalf of "any person whose property or interests in property are blocked pursuant to this order."[41]

B. U.S. Sanctions' Implications on the ICC and Rule of Law

U.S. sanctions have been met with legal challenges, such as arguments against its constitutionality. On April 11, 2025, the American Civil Liberties Union (ACLU) and the ACLU of Maine filed a lawsuit on behalf of two human rights advocates, Matthew Smith and Akila Radhakrishnan.[42] According to the ACLU, Smith has provided the Office of the Prosecutor with evidence of genocide and forced deportation in Myanmar, and analyzed evidence of atrocity crimes in Myanmar and Bangladesh; and Radhakrishnan has assisted the Office with its investigation of sexual violence against Afghan women by the Taliban.[43] The ACLU argued that Trump's executive order violated the First Amendment, which "does not allow the government to impose such sweeping limits on what Americans can say, and to whom they can say it."[44] The interpretation of the Executive Order as unconstitutional further reflects the nature of U.S. foreign policy under the Trump Administration. The U.S. views the ICC as a threat to its national security and sovereignty; so, by sanctioning the court, Trump has demonstrated a realist approach to foreign policy in which the U.S. is safeguarding its interests from foreign interference. In addition, Trump's executive order criminalizes individuals for assisting the ICC in certain capacities, such as "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services."[45] Due to these restrictions, Smith and Radhakrishnan were forced to stop conducting humanitarian work with the Court.[46] This case is evidence of how these sanctions not only target foreign individuals who assist the ICC, but have gone even further to directly impact U.S. citizens—and civil rights organizations including the ACLU. Additionally, these sanctions compromise the right to free speech in an attempt to protect U.S. national interests. By preventing individuals from assisting the Court's investigations into other ongoing cases, these sanctions ultimately delay the ICC's progress and ability to pursue justice in a timely manner.

Further, in the executive order, Trump encouraged U.S. allies to oppose "any ICC actions against the United States, Israel, or any other ally of the United States that has not consented to ICC jurisdiction."[47] Though the U.S. is not a member of the ICC, it is still interfering with member states' ability to work with the ICC, which is reliant on international cooperation. By encouraging countries to disregard the ICC's role in the international community, Trump attempts to leverage U.S. alliances to shield the U.S. and Israel from penalty. This embraces impunity—which goes against the purpose of having an international criminal court.

B. Spillover Effect to Other Countries and Investigations

Trump's sanctions on the court have potential spillover effects to other countries and the ICC's ongoing investigations. For one, sanctions support Israeli and Russian hopes to evade legal accountability. Both Israel and Russia are not signatories to the Rome Statute and have praised Trump for sanctioning the ICC.[48] Russia even applauded Trump, calling the sanctions a "gift to Moscow."[49] Russia's praise exemplifies how ICC-indicted individuals such as Putin view Trump's actions as a possible loophole that will allow them to escape impending consequences. As a result, Trump's rejection of the ICC's legitimacy through Exec. Order No. 14203 can enable other states to "take the United States' attitude towards international institutions as a blueprint for their own conduct."[50] By sanctioning the ICC, Trump signals

38 *ICC issues arrest warrants for Netanyahu, Gallant and Hamas commander*, BBC (2024), https://www.bbc.com/news/articles/cly2exvx944o (last visited Apr 18, 2025).
39 *Id.*
40 Exec. Order No. 14,203, 90 Fed. Reg. 1-5, (Feb. 6, 2025), https://ofac.treasury.gov/media/933981/download?inline, at 1.
41 *Id.*, at 2.
42 Smith v. Trump, American Civil Liberties Union, https://www.aclu.org/cases/smith-v-trump (last visited Apr 16, 2025).
43 *Id.*
44 *Human Rights Advocates Sue Trump Administration Over Sanctions Targeting ICC*, American Civil Liberties Union, https://www.aclu.org/press-releases/human-rights-advocates-sue-trump-administration-over-sanctions-targeting-icc (last visited Apr 18, 2025).
45 Exec. Order No. 14,203, 90 Fed. Reg. 1-5, (Feb. 6, 2025), https://ofac.treasury.gov/media/933981/download?inline, at 2.
46 *Id.*
47 Exec. Order No. 14,203, 90 Fed. Reg. 1-5, https://ofac.treasury.gov/media/933981/download?inline, at 2.
48 Permanent Mission of the Republic of Sierra Leone to the United Nations, *Joint Statement in Support of the International Criminal Court (ICC)*, Permanent Mission of Sierra Leone to the UN Security Council (2025), https://www.slmissionun.gov.sl/joint-statement-in-support-of-the-international-criminal-court-icc/ (last visited Apr 18, 2025).
49 Pyotr Kozlov, *Kremlin Gloats as Trump Sanctions International Criminal Court*, The Moscow Times (2025), https://www.themoscowtimes.com/2025/02/07/kremlin-gloats-as-trump-sanctions-international-criminal-court-a87911 (last visited Apr 18, 2025).
50 Stefan Talmon, *The United States under President Trump: Gravedigger of International Law*, 18 Chinese Journal of International Law 645 (2019),

the U.S.' support for impunity towards Israel, and consequently Russia. This hinders the court's ability to conduct investigations in other states, which emboldens countries such as Russia and Israel to continue violating international law. The sanctions' impact not only extends beyond the scope of investigations into Palestine, but can allow perpetrators of mass atrocity to evade punishment. At the same time, sanctions prevent justice for all affected Ukrainians, Palestinians, and Israelis alike. Ironically, if the convicted Hamas leaders were still alive, it is likely that the Israeli public would have supported the ICC's arrest warrants to seek justice for the Israeli victims of Hamas' crimes. Now, Trump has utilized sanctions as a political tool against the ICC to protect Israel. The U.S. protects its allies and rejects efforts to hold them accountable for their actions. This undermines international cooperation and may enable other states—especially the U.S.' allies—to follow the U.S.' self-interested approach if they see there are no mechanisms to enforce international accountability.

C. A Selective Approach to Justice

Trump's sanctions are not the first time that the U.S. has authorized sanctions against the ICC. On June 11, 2020, Trump issued Exec. Order No. 13928, which declared a national emergency, authorized asset freezes, and banned ICC officials, employees, and their immediate family members entry into the U.S.[51] This was issued against the ICC for asserting jurisdiction over the U.S. and its allies in regard to Afghanistan, which Trump argued threatened U.S. sovereignty and national security[52] However, on April 2, 2021, the Biden administration revoked Executive Order 13928; and while the Biden Administration continued to oppose ICC investigations into U.S. crimes in Afghanistan and Israeli crimes in Palestine, the administration supported ICC investigations on Russian war crimes in Ukraine.[53] Both Trump and Biden's decisions demonstrate the U.S.' shifting position toward international law, in which the U.S. seeks immunity for itself and for its allies.

D. The Issue with U.S. Credibility

This selective approach to justice challenges the U.S.' position of moral authority. Historically, the U.S. has emphasized democracy and the protection of human rights as "fundamental goals of U.S. foreign policy."[54] U.S. leadership in drafting and ratifying international agreements such as the U.N. Charter of 1945 has also underscored its commitment to an international rules-based order.[55] Thus, the U.S.' current positionality reveals a disconnect between its long-standing principles and present commitment to justice. The U.S.' refusal to confront Israel's violation of international law due to their alliance demonstrates a selective adherence to the law, with Trump's delegitimization of the ICC's warrants on Israeli leaders epitomizing this hypocritical approach. As it stands, the U.S. chooses to apply the law only when it benefits them. If the U.S. continues to demonstrate this weak commitment to principles it had historically fought to establish, countries may lose confidence in the U.S.' moral authority, which is detrimental to its reputation as a world leader committed to justice. It is paradoxical that the U.S., a nation historically committed to a rules-based order, has taken action against the ICC to seek impunity for Israel. This selective approach to justice demonstrates how the U.S. holds countries to different standards of accountability. If leaders of another country were to violate internationally established rules, any U.S. criticism would appear hypocritical and hollow.

CONCLUSION

The ICC plays a crucial role in maintaining the pursuit of global justice; however, the court relies on international cooperation to enforce its standards of individual accountability. International responses to U.S. sanctions and ICC warrants highlight tensions between state sovereignty and international justice. U.S. sanctions threaten the ICC by undermining international cooperation, and thus, the court's ability to bring justice to victims of mass atrocities. By sanctioning the ICC, President Trump has signaled support for Israel—regardless of Netanyahu and Gallant's alleged crimes in Gaza. This self-interested approach to foreign policy reflects the U.S.' prioritization of its political alliances over the law. By encouraging international opposition to the court, Trump ultimately uses sanctions as a political tool to shield the U.S.' interests, indirectly pressuring the ICC to concede its values of impartiality. The ICC's inability to enforce these standards would demonstrate its weakening power as an institution, signaling to perpetrators that they can evade culpability for their crimes. Trump's sanctions embrace impunity for the U.S. and Israel, threatening the historically established principle that no individual or country should be held above the law. Setting this dangerous precedent would embolden powerful individuals to commit mass atrocities without retribution. For now, it is unclear whether the ICC's member states will follow through with their obligation to enforce the warrants on Netanyahu and Gallant. Despite this uncertainty, the sanctions do not pose an immediate threat to the ICC's fundamental existence as a court. Still, the sanctions undermine the integrity of international law. To reinforce and strengthen a rules-based international order, all leaders—regardless of their relationship to the U.S.—must be held to the same standards of accountability.

This piece was written by Sarah Chianglin and edited by Graham Robbins.

https://academic.oup.com/chinesejil/article/18/3/645/5585937 (last visited Apr 18, 2025).

51 *Factsheet: U.S. Sanctions on the International Criminal Court,* Center for Constitutional Rights, https://ccrjustice.org/node/9137 (last visited Apr 20, 2025).

52 *Id.*

53 *President Biden Revokes Executive Order Regarding Certain Persons Associated with the ICC*, Am. Immigration Lawyers Assc'n., https://www.aila.org/library/eo-icc (last visited Apr 18, 2025).

54 *Factsheet: U.S. Sanctions on the International Criminal Court*, *supra* note 51.

55 *Id.*

THIRD WORLD APPROACHES TO INTERNATIONAL LAW AND THE JUSTICIABILITY OF THE RIGHT TO FOOD:

A CASE FOR RECONCEPTUALIZING THE FOOD SOVEREIGNTY OF THE GLOBAL SOUTH

"The very universality of international law is a mask for the continued dominance of certain worldviews over others; the Third World must assert its own visions of order and justice." - Makau Mutua, 'What is TWAIL?' (2000)

INTRODUCTION

The food sovereignty movement pushes a radical ethical frame based on control over and access to food as an element of the confluence of economic, social, cultural, political, and environmental rights.[1] This frame conceptualizes food as a human right–a focus of consumer and aid policy–and the right to choose how and by whom that food is produced. This reconceptualization finds a theoretical and historical parallel in Third World Approaches to International Law (hereinafter known as TWAIL),[2] a legal scholarly movement that challenges the enduring colonial and neocolonial structures within international law that are detrimental to the Third World.[3] Much like TWAIL, the food sovereignty movement shows how the law itself has become a tool that global markets use to erode the power of local communities to control their food and futures. In that light, this paper critically examines how international legal regimes–especially trade and intellectual property (IP) law–perpetuate power imbalances that disproportionately disadvantage the food sovereignty of the Global South. Part I introduces TWAIL and argues that, aside from the two broad stages of development of TWAIL,[4] there is a third wave of TWAIL (TWAIL III), either emerging or already in existence, that expands its scope to be more engaged with transnational solidarity movements. Part II discusses the emergence of the food sovereignty movement and the distinction between food security and food sovereignty. Part III focuses on how TWAIL's critique of international law parallels the food sovereignty movement's critique of the global food regime. Part IV offers a reflection on the justiciability of the right to food, where I lean on Jorge Freddy Milian Gómez's "four-fold legal interpretation thesis" of the right to food, paying particular attention to his treatment of its food sovereignty dimension. Part V concludes the paper by assessing whether TWAIL can inform a new legal framework for food sovereignty and TWAIL-informed recommendations.

I. OVERVIEW OF THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TWAIL)

a) Origins and evolution of TWAIL as a critical legal movement

A critical reading of the TWAIL scholarship reveals that it consists of both deconstructive and reconstructive dimensions.[5] As a deconstructive tool, Kwadwo Appiagyei-Atua notes that TWAIL aspires to interrogate the entrenched presumptions and tenets of neutrality and systemic orderliness that international law purports to embody.[6] In doing so, it dismantles and decentres the relics of coloniality, hegemonic dominance, Eurocentric orthodoxy, and the illusion of universality, all of which are ideological constructs that have dictated both the discourse and praxis of international law. As a reconstructive tool, TWAIL advocates for a legal order that seeks to empower the Third World through the reclamation of sovereignty and equitable development. This renewed outlook provides a new way of thinking about, understanding, and practicing international law.

b) TWAIL I and TWAIL II

TWAIL is not a recent phenomenon and has, over the years, undergone two main stages of evolution: TWAIL I (1950s-1970s) and TWAIL II (1990s-present).[7] TWAIL I scholarship focused mainly on the formal decolonization of Third World states and their engagement with the post-World War II international legal order. At its very core, TWAIL I scholarship believes it is the failure of international law to be adequate and truly universal that contributed to all its moral and political failures, and therefore, it needs to be made truly universal.

The TWAIL II movement marked a shift from looking at international law's absence as the source of all problems, to looking at its presence as a sometimes conscious instrument of injustice.[8] The newfound realization that international law itself functions as a power structure, consciously or unconsciously embedding colonial legacies and economic domination into its norms, institutions, and practices, influenced the TWAIL II movement. The movement fights for a more democratic and equitable international legal order, and it has decisively moved away from the ideology of TWAIL I.[9]

c) The argument for TWAIL III

There is a strong argument to be made in favor of a third

1 *See* La Via Campesina, *The Nyéléni Declaration*, La Via Campesina (2007),https://viacampesina.org/en/2007/02/declaration-of-nyeleni-mali-2007/.
2 *See generally* James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography,* 3 Trade L. & Dev. 26 (2011).
3 Makau Mutua, *What Is TWAIL?*, 94 Am. Soc'y Int'l L. Proc. 31 (2000), https://digitalcommons.law.buffalo.edu/journal_articles/560; *See generally*, Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 Verfassung u. Recht Üb. 195 (2012), https://www.jstor.org/stable/43256852.; James Thuo Gathii, *The Promise of International Law: A Third World View*, 36 Am. U. Int'l L. Rev. 377 (2021)
4 *See generally*, Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 Int'l Comm. L. Rev. 371 (2008).
5 *Id.*
6 Kwadwo Appiagyei-Atua, *Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review*, 8 Afr. J. Legal Stud. 209 (2015), https://doi.org/10.1163/17087384-12342063 (last visited April 22, 2025).
7 Okafor, *supra* note 4.
8 Balakrishnan Rajagopal, *International Law and Its Discontents: Rethinking the Global South*, 106 Am. Soc'y Int'l L. Proc. 176 (2012), https://www.jstor.org/stable/10.5305/procannmeetasil.106.0176
9 Appiagyei-Atua, *supra* note 6.

wave of TWAIL that is either emerging or already in existence. Unlike its predecessors, there is not yet any substantive literature on TWAIL III. However, emerging strands in contemporary scholarship and practice suggest its contours are forming mostly through transnational social movements, which this paper will discuss briefly. This wave is more praxis-oriented and, unlike TWAIL I and TWAIL II, which were largely academic, TWAIL III is more engaged with grassroots movements and transnational solidarity networks. This shift arises from both necessity and historical learning. TWAIL I relied too much on the nation-state, due in part to faith in postcolonial nationalism as a tool for liberation. But their role in formal decolonization proved to be woefully inadequate in addressing postcolonial inequality, since newly independent states often reproduced exclusionary structures domestically[10] or became complicit in global regimes of domination.[11] TWAIL II deepened the critique by exposing how international law's presence was used for reproducing injustice.

In contrast, the conditions of the current global order have precipitated a new kind of urgency. Many of the world's problems today have moved beyond state-centric and institutional solutions. This is further compounded by the proliferation of South-South inequalities,[12] the rise of regional hegemons,[13] and the growing influence of non-state actors,[14] including multinational corporations and digital platforms,[15] which have exposed the limits of both nation-state advocacy and purely academic critique.

TWAIL III, therefore, appears to be forming around one main developmental, issue-specific area and builds from local and indigenous legal traditions that challenge international norms. The conditions giving rise to TWAIL III find their very roots in the recognition that structural global injustice cannot be addressed by critique alone or through appeals to state sovereignty. International law is being challenged and reworked through collective action that redefines the very terms of legal engagement. It is based on this ideological scaffolding that I now proceed to discuss the emergence of the food sovereignty movement.

II. ANALYSIS OF THE ORIGINS OF THE FOOD SOVEREIGNTY NETWORK

a) The concept of food sovereignty

Food sovereignty is rooted in Latin American political thought and was formally introduced on the global stage during the NGO Forum's response to the 1996 World Food Summit in Rome. The concept was further popularized by La Via Campesina, an international movement that coordinates peasant organizations of small and medium-sized producers, agricultural workers, rural women, and indigenous communities from Asia, America, and Europe.[16] In 2007, the Nyéléni Forum in Mali brought together 500 representatives from 80 countries to define food sovereignty as the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.[17] This birthed the Nyéléni Declaration, which is a key discursive foundation for the proliferation of food sovereignty practice and politics in a variety of places.

There are seven pillars of food sovereignty: (I) Focus on food for people; (II) Build knowledge and skills; (III) Work with nature; (IV) Value food providers; (V) Localize food systems; (VI) Localize control; and (VII) Food is sacred.[18] Since the end of World War II, agricultural production in nearly every part of the world has transitioned to some degree to a modernist agricultural system characterized by a vertically-integrated market (versus subsistence) economy of food[19]—a system in which large agribusiness corporations control multiple stages of the food supply chain instead of farmers working independently and selling their crops in local markets.[20] This has commodified food and concentrated power in a few large firms, with national governments increasingly tailoring food regulation to the demands of agribusiness.[21] This has also impoverished millions by removing them from the land and into wage-labor relations in the global economy. Food sovereignty, therefore, is framed as a radical, rights-based alternative that seeks to return decision-making power to communities, peasants, and local producers, and it is clear about decommodifying food and transforming the political-economic foundations of the global food system and the corporate food regime.

b) Interrelation between food security and food sovereignty

As critiqued by several authors writing from a food sovereignty perspective, the definition of food security treats food as a problem of insufficient trade, access, and distribution rather than hunger by privileging access to food rather than control over systems of production and consumption.[22] Food security, in its dominant definitions provided by the Food and Agriculture Organization (FAO), focuses on availability, access, and utilization, but not on agency or sovereignty. In this conception, food is a tradable commodity rather than a right, and hunger is simply a problem of distribution. Policies that employ market mechanisms to distribute food to the poor are consistent with neoliberal notions that position the individual as responsible for nutritional intake via purchasing food or receiving it as food aid.[23] This reflects how the food security model prioritizes access without addressing who controls production

10 *See* Mahmood Mamdani, *Citizen and Subject*: *Contemporary Africa and the Legacy of Late Colonialism* (1996).
11 *See* Thandika Mkandawire & Charles C. Soludo, *Our Continent, Our Future: African Perspectives on Structural Adjustment* (1998).
12 *See generally* Rajagopal Balakrishnan, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).
13 Anne-Marie Slaughter & Gordon LaForge, *Opening Up the Order: A More Inclusive International System*, Foreign Affairs (Mar./Apr. 2021), https://www.foreignaffairs.com/articles/world/2021-02-16/opening-order (last visited April 22, 2025).
14 Simon Curtis, *Global Cities in the International System: A New Era of Governance*, Diplomatic Courier (Nov. 28, 2018), https://www.diplomaticourier.com/posts/global-cities-in-the-international-system-a-new-era-of-governance.
15 Milan Babic et.al., *Who Is More Powerful – States or Corporations?*, The Conversation (July 10, 2018), https://theconversation.com/who-is-more-powerful-states-or-corporations-98941.
16 Alessio Azzariti, *The Right to Food Sovereignty in International Law,* 4 Ordine Int'l e Diritti Umani 990, 990–1012 (2021), https://ssrn.com/abstract=3946207 (last visited April 22, 2025); Raj Patel, *Food Sovereignty*, 36(3) The Journal of Peasant Studies 663(2009).
17 *Id.*
18 Hannah Wittman, *Food Sovereignty: A New Rights Framework for Food and Nature?*, 2 Env't & Soc'y: Advances in Rsch. 87 (2011).
19 Harriet Friedmann, *The Political Economy of Food: A Global Crisis*, New Left Rev. 29, 29–57 (1993).
20 *Id.*
21 Amy Trauger, *Putting Food Sovereignty in Place*, in *Food Sovereignty in International Context: Discourse*, Politics and Practice of Place 1, 1–15 (Amy Trauger ed., Routledge 2015), https://doi.org/10.4324/9781315764429 (last visited April 22, 2025).
22 *See generally* Elena Briones Alonso, Lara Cockx & Johan Swinnen, *Culture and Food Security*, 17 Glob. Food Security 113 (2018).; Raquel de Pinho Ferreira Guiné et al., *Food Security and Sustainability: Discussing the Four Pillars to Encompass Other Dimensions*, 10(11) Foods 2732 (2021).
23 Federica Porcheddu, *Nature and Food Commodification. Food Sovereignty: Rethinking the Relation between Human and Nature,* 33 Filozofija i društvo/Philosophy and Society 189, 189-217 (2022).

and distribution.

The failures of food security and other state-based policies to guarantee the right to food are, in some ways, what drive the radical reforms called for by food sovereignty. Food sovereignty, more fully, embodies the right to food because it adds a human dimension to food security and acknowledges that one should have a say in their relationship with food. This renders the movement more inclusive of other rights such as the right to cultural life, women's rights—women being disproportionately affected by the oppression of farm workers[24]—indigenous practices, and environmental rights.

In the 1996 NGO statement, food sovereignty is positioned as a prerequisite to achieving food security.[25] Additionally, early food security discourses were related to food sovereignty in their emphasis upon state responsibility to provide food for their citizens through strategies of self-reliance and food reserves.[26] Initially, both emphasized food self-sufficiency, particularly in postcolonial and socialist states such as India and Cuba. As food security discourses became increasingly embedded in developmentalist discourses of the 1980s and 1990s, food security was defined as market access and integration into the global food system, while food sovereignty discourses were found within anti-globalization discourses. Their interrelatedness has become particularly apparent at the grassroots level in community food security movements, in indigenous peoples' movements for self-determination, and in most of FAO's international food policy publications and the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) report all appearing after the world food crisis of 2007–2008.[27]

III. INTERSECTION OF TWAIL AND FOOD SOVEREIGNTY

a) Core theoretical parallels

At the core of the three waves of the TWAIL movement is the critique that international law has never been a disinterested or universal enterprise. Instead, it has functioned as a mechanism of imperial expansion and neo-colonial control that shapes global hierarchies and persists under the guise of sovereignty and legality. In a similar vein, the food sovereignty movement identifies global food governance structures, most notably trade law, IP regimes, global agricultural policies, agribusiness hegemony, among others, as instruments of corporate and geopolitical dominance that do away with local control over food systems.[28]

A starting point is acknowledging first that rising levels of global food production and technological improvements in food processing have not by any means, translated into equitable access to food.[29] The UN notes that across the Global South, and even within affluent nations, hunger, malnutrition, and famine persist as structural conditions that shape daily life for millions.[30] These are not failures of production alone but also of distribution, access, and policy choices.[31] The law then steps in and becomes a central actor, dictating how food systems are organized and whose interests they serve. International legal regimes play a decisive role. Its institutional architecture, like trade law and IP frameworks, dictates the terms under which food is grown, moved, sold, and consumed. Yet, these legal structures more often than not reflect the priorities of powerful states and corporate actors, rather than responding to the needs of the most food-insecure communities.

b) International Trade Law and the WTO Agreement on Agriculture

The legal architecture of the World Trade Organization (WTO) Agreement on Agriculture functions as a textbook example of double standards. Wealthy states try as much as possible to insure their farmers with generous subsidies to ensure domestic stability and political goodwill; meanwhile, those same legal frameworks require Global South states to strip away protections and open their markets.[32] They are required to undertake tariff reductions and reduce non-tariff barriers under Agreement on Agriculture disciplines. This phenomenon exposes local farmers to competition that they cannot withstand. Smallholder farmers who are unable to compete with artificially cheap imports are pushed off their land or into precarious labor markets.[33]

Over more than a century, international agreements– both public treaties and private commercial arrangements– have been carefully structured in a way so as to secure the interests of sugar producers and consumers in Europe and North America, while systematically excluding producers in the Caribbean and Africa from meaningful participation in global markets.[34] The irony, of course, is that international law speaks the language of universality, but its practical outcomes are lopsided. Michael Fakhri has shown how, in the case of sugar, this pattern has persisted from the colonial treaties of the early 20th century through to the WTO era,with each new legal instrument reaffirming the pecking order.[35] For TWAILers, these patterns are active structures of power maintained by legal regimes that remain deaf to the voices of those who till the land.

Regardless, the takeaway is that the legal disempowerment of Global South farmers is an actual consequence of the intentional design of international trade law, where the economic security of one part of the world is safeguarded by systematically compromising that of another, whether consciously or unconsciously.

c) IP Law and TRIPS

Often, IP law is presented as a technical mechanism for protecting innovation, but it plays a far more intrusive role in the Global South. For farmers in these regions, IP regimes, particularly those codified in international agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), determine what can be planted,[36] how it must be grown,[37] under

24 Keiko Budech, *Missing Voices, Hidden Fields: The Gendered Struggles of Female Farmworkers* (2014) (B.A. thesis, Pitzer College) (on file with Scholarship@Claremont, Claremont Colleges Library).
25 *NGO Declaration in World Food Summit Report, Rome Declaration on World Food Security*, Converge, https://www.converge.org.nz/pirm/food-sum.htm#ngo.
26 *See* Per Pinstrup-Andersen, *Food Security: Definition and Measurement*, 1 Food Security 5 (2009).
27 Lucy Jarosz, *Comparing Food Security and Food Sovereignty Discourses*, 4(2) Dialogues Hum. Geography 168 (2014).
28 Patel, *supra* note 16, at 673.
29 Olivier De Schutter, *The Right to Food: Report of the Special Rapporteur to the UN General Assembly*, A/68/288, (Jan. 24, 2014).
30 *Global Hunger Crisis*, World Food Programme (Mar. 2, 2025), https://www.wfp.org/global-hunger-crisis.
31 *Id.*
32 A. Haroon Akram-Lodhi, Cristóbal Kay & Saturnino M. Borras,*The Political Economy of Land and the Agrarian Question in an Era of Neoliberal Globalization*, in Peasants and Globalization 25 (1st ed. Routledge 2009).
33 *Id.*
34 Michael Fakhri, *Sugar and the Making of International Trade Law (*2014).
35 *Id.*
36 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27.3(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 154 [hereinafter TRIPS].
37 TRIPS art. 27.1.

whose terms,[38] and even who gets to own what's planted.[39] There are international agreements that mandate that states incorporate these protections into their domestic laws.[40] This effectively subordinates local agricultural systems to the profit motives of transnational corporations. The result is a landscape that constrains state sovereignty and peasant autonomy in equal measure. Farmers now find themselves navigating licensing agreements that dictate seed use and compel reliance on chemical inputs tied to patented seed varieties. As TWAILers have argued, this dynamic is systemic.

TRIPS was emblematic of international law's evolution into a system of global property rights in which private actors wield legal authority over sovereign states.[41] The Intellectual Property Committee (IPC), which consisted of a coalition of 12 U.S. multinational CEOs was instrumental in lobbying for and shaping TRIPS.[42] These private sector actors succeeded in getting most of what they wanted from a global IP agreement, which now has the status of public international law. Indeed, through TRIPS, corporations gain the capacity to enforce their ownership claims across borders, with domestic law required to fall in line.[43] Two decades of TRIPS implementation have resulted in homogenized standards that suppress local innovation and replace indigenous knowledge and experimentation with rigid, externally imposed frameworks.[44] In Africa, as Titilayo Adebola has also shown, these regimes prioritize the interests of corporate plant breeders over the needs and practices of local farmers, who are increasingly marginalized in their own food systems.[45]

The consequences of these legal regimes extend well beyond individual farmers. Ernesto Hernandez Lopez provides an analysis of the Mexican experience with GMO corn as a good example.[46] Mexico, the home to corn's greatest genetic diversity, has struggled to protect this heritage in the face of legal pressures stemming from trade agreements.[47] Legal challenges, grounded in the Precautionary Principle, temporarily halted the release of GMO corn in Mexico's fields. Yet, Lopez reports that the arrival of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), the successor to the North American Free Trade Agreement (NAFTA)s, has begun to erode these hard-won protections.[48] Under its terms, Mexico is required to defer to U.S. and Canadian regulatory determinations and to refrain from impeding trade in genetically engineered crops, even when domestic biodiversity is at risk.[49]

Here, international law is dressed in the language of free trade and scientific progress, but it acts as a mechanism for subordinating the food sovereignty interests of the Global South to the commercial imperatives of the North. The legal capacity to regulate seeds, which once constituted a matter of domestic concern and community practice, is now transnationally governed, with narrow corporate interests elevated above collective ecological stewardship. In this process, both state agency and farmer autonomy are steadily eroded.

It is trite that TWAIL as a concept was pivotal for decolonization and for asserting formal independence, but sovereignty in international law has often been rendered conditional and stratified.[50] The Global South's sovereignty is frequently constrained by international financial institutions, trade agreements, and investment treaties, which limit domestic policy space. Similarly, in the food sovereignty movement, sovereignty is not understood as a monolithic or absolute power. The literature, alongside happenings around the world, suggests rather that it is a relational and contested practice.[51]

Thus, sovereignty in both movements must be reimagined beyond state authority toward democratic control by affected communities. Considering these parallel critiques and struggles over sovereignty and control, it is necessary to turn to the role of international human rights law to assess whether the right to food can be legally enforced, and if so, what precedents exist to this effect.

IV. INTERNATIONAL LAW AND THE JUSTICIABILITY OF THE RIGHT TO FOOD

The consideration of the right to food as a justiciable right, (i.e., as a right that can be interpreted by the courts and can be the subject of litigation and judicial adjudication), is subsumed under a category of rights recognized broadly as economic, social and cultural rights (ESC rights).[52] As such, any meaningful discussion must situate the right to food within the broader context of ESC rights. This area of international law is vast with a rich body of literature debating its scope and possibilities. While a comprehensive treatment of that literature would exceed the bounds of this paper, I will offer a focused overview that is sufficient to situate the right to food within that broader normative framework. In doing so, I draw liberally from Jorge Freddy Milian Gómez's four-fold legal interpretation thesis of the right to food. In particular, I discuss his analysis of the food sovereignty dimension of this right: the right to enforce entitlements to food as a claim to control over the means of production, distribution, and cultural determination of food systems.

a) Justiciability of ESC Rights

While ESC rights have been part of the international human rights regime at least since the adoption of the Universal Declaration of Human Rights in 1948, considerably less effort has been made[53] to develop a conceptual framework to give them content and

38 TRIPS art. 28.
39 TRIPS art. 28, 34.
40 *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 1(1), 27.3(b), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154; International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, as revised Oct. 23, 1978 & Mar. 19, 1991, 815 U.N.T.S. 89, 1503 U.N.T.S. 161; Economic Partnership Agreements, Eur. Union–ACP States; Agreement Between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018, 59 I.L.M. 132.
41 Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* 2 (2003).
42 *Id.* at 7.
43 B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8(1) Int'l Comm. L. Rev. 3 (2006).
44 *See* James Thuo Gathii, *Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries*, 44(3) Ga. J. Int'l & Comp. L. 499 (2016).
45 Titilayo Adebola, *Africa and Intellectual Property Rights for Plant Varieties*, Oxford Bibliographies, April 2020, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0210.xml.
46 Ernesto Hernandez Lopez, *Food Law and Third World Approaches to International Law (TWAIL): Ingredients in a Movement, Techniques for Analysis, Recipes for Reform, and a Future Menu*, in Research Handbook on International Food Law (Michael T. Roberts ed., 2023).
47 Ernesto Hernández-López, *GMO Corn, México, and Coloniality,* 22 Vanderbilt J. of Entertainment & Tech. L 725 (2020).
48 *Id.* at 48.
49 Ernesto Hernández-López, *GMO Corn in México: Precaution as Law's Decolonial Option*, 2 Law, Technology and Humans 97 (2020).
50 B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd ed. 2017).
51 Philip McMichael, *Historicizing Food Sovereignty*, 41 J. PEASANT STUD. 933 (2014).
52 UN Econ. & Soc. Council, *CESCR General Comment No. 12: The Right to Adequate Food* (Art. 11), U.N. Doc. E/C.12/1999/5 (1999).
53 Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332

to construct protection mechanisms to enforce them than in the case of civil and political rights. One of the long-standing concerns surrounding ESC rights has been their justiciability: whether individuals who believe their rights have been violated can bring a complaint before an independent body and seek appropriate remedies. The question of justiciability remains the subject of lively and ongoing debate. Some critics argue that ESC rights are fundamentally distinct from civil and political rights and, as such, are ill-suited for resolution through the courts.[54] Others, however, contend that the distinction between these categories of rights is merely one of degree rather than of kind, and that there is no inherent reason why ESC rights should not be capable of judicial enforcement.[55]

According to scholars such as Christian Courtis, the notion that ESC rights, by virtue of their particular character, are in toto unsuited to judicial enforcement is fundamentally flawed.[56] This view, he argues, fails to consider the substantial body of comparative case law[57] demonstrating that courts across various jurisdictions have, in fact, adjudicated claims involving alleged violations of ESC rights, thereby providing empirical evidence that such rights can and do find meaningful expression through judicial processes.

There is a presumed consensus in the literature that litigation and judicial adjudication should not be the primary vehicle for the realization of ESC rights, due in part to the nature of these rights. The relevant question is not whether litigation and judicial adjudication should be the main means through which ESC rights are advanced, but instead whether or not litigation and judicial interpretation should play some role in this area.

Recognizing that ESC rights can be subject to judicial adjudication does not mean they are automatically ready for litigation. Like any other right, they must satisfy certain conditions to be fit for adjudication. These include the presence of a clear legal rule to assess legality, clear identification of both right-holders and duty-bearers, fair and appropriate judicial procedures, and an independent judiciary. [58] Without these foundations, litigation is unlikely to be effective and may even be counterproductive.

b) Gómez's four-fold legal interpretation thesis of the right to food

Gómez offers a four-fold framework that expands the meaning of the right to food beyond minimalist or consumer-centric approaches[59] through four interconnected dimensions: (I) Minimum food for survival; (II) Adequate food; (III) Food security; and (IV) Food sovereignty. In this paper, I will only discuss the fourth dimension.

Gómez introduces "food sovereignty" as a right in and of itself. If, as Gómez argues, food sovereignty is an integral dimension of the broader right to food, then it must follow that entitlements flowing from food sovereignty are likewise justiciable, and critically, that they are violable. This could include challenges to government policies that prioritize industrial agriculture at the expense of smallholder farmers, deny access to land and local seeds, or undermine traditional food systems through trade liberalization or corporate monopolization.[60]

The legal enforceability of this right has become popular across national and international courts, particularly through its framing as an ESC right under instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).[61] The Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that the right to food is legally binding and justiciable where adequately incorporated into domestic law.[62]

In Ecuador, the 2008 Constitution explicitly enshrines food sovereignty in Article 281 and has enabled constitutional complaints on this basis.[63] This has served as a basis for judicial and legislative developments aligned with sovereignty-based food governance. Similarly, Nepal adopted the Right to Food and Food Sovereignty Act in 2018, which affirms the right and allows individuals and communities to initiate legal action when food sovereignty is compromised.[64]

Even in jurisdictions without explicit recognition, courts, such as those in India and South Africa, have interpreted the right to life or ESC rights broadly enough to encompass food-related entitlements.[65] In India, the Supreme Court has read the right to food into Article 21 of the Constitution, which guarantees the right to sufficient food, in cases such as Grootboom, affirming that socio-economic rights are justiciable and actionable.[66] These precedents provide fertile ground for extending similar protections to food sovereignty, especially when linked to land, livelihood, or access to traditional food systems.

There are also regional and international legal sources that further reinforce the trend toward justiciability. In the landmark Ogoni case, the African Commission on Human and Peoples' Rights held that Nigeria violated the right to food, among others, by failing to prevent environmental degradation and third-party interference with community access to natural resources.398 Latin American courts have also contributed significantly. In Sawhoyamaxa Indigenous Community v. Paraguay, the Inter-American Court of Human Rights held that Paraguay had violated the right to food, among other socio-economic rights, by dispossessing indigenous peoples of their ancestral lands and failing to create sustainable food

(1987), https://doi.org/10.2307/761879 (last visited April 22, 2025).

54 *See* Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1-3 (2006); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Christian Tomuschat, *An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?*, in Weltinnenrecht Liber amicorum Jost Delbrück 815 (2005).

55 *See* Victor Abramovich & Christian Courtis, L*os Derechos Sociales Como Derechos Exigibles* (2d ed. 2004); R. Alexy, *A Theory of Constitutional Rights* (2nd ed. 1994); Centre on Housing Right and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (2003) https://www.right-to-education.org/fr/resource/litigating-economic-social-cultural-rights-legal-practitioners-dossier; Cécile Fabre, S*ocial Rights Under the Constitution: Government and the Decent Life* (2000).

56 Christian Courtis, *The Right to Food as a Justiciable Right: Challenges and Strategies* (2013).

57 *See, e.g.,Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (1) SA 46 (CC) (S. Afr.); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) (S. Afr.); *People's Union for Civil Liberties v. Union of India* AIR 1997 SC 568; Corte Constitucional [C.C.] [Constitutional Court], Jan. 22, 2004, T-025/04 (Colom.).

58 *Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide*, Int'l Comm'n of Jurists (2014), https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf (last visited Apr. 22, 2025).

59 Jorge Freddy Milian Gómez, *Rethinking the Human Right to Food from a Single Perspective to a Four-Fold Legal Interpretation*, 15 Sustainability 15086 (2023).

60 Olivier De Schutter, *The Right to Food and the Political Economy of Hunger, in Economic, Social, and Cultural Rights* in International Law: Contemporary Issues and Challenges 229 (E. Riedel, G. Giacca & C. Golay eds., 2014).

61 International Covenant on Economic, Social and Cultural Rights, art. 11,Dec. 16, 1966, 993 U.N.T.S. 3.

62 UN Econ. & Soc. Council, *supra* note 52.

63 Constitución de la República del Ecuador [Constitution], Sep. 2008, art. 281.

64 Right to Food and Food Sovereignty Act, 2018 (Act No. 18/2018) (Nepal).

65 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (1) SA 46 (CC) (S. Afr.); *People's Union for Civil Liberties v. Union of India* AIR 1997 SC 568.

66 *People's Union for Civil Liberties v. Union of India* AIR 1997 SC 568.

systems for their survival.[67] In Colombia, the Constitutional Court's T-025/2004 ruling required the state to adopt public policies guaranteeing transparency, information, and meaningful participation by disadvantaged groups in food governance.[68]

Additionally, soft law instruments such as the FAO's Voluntary Guidelines on the Right to Adequate Food stress the importance of participatory, culturally appropriate, and locally controlled food systems, further aligning squarely with the principles of food sovereignty.[69] Although non-binding, such guidelines shape international consensus and provide normative guidance to national courts and legislatures.

Therefore, the question of whether food sovereignty is justiciable should be understood in functional and purposive terms. It should be asked whether, as a subsumed and essential element of the broader right to food, it meets the legal thresholds for recognition, enforceability, and remedy. The answer, both doctrinally and normatively, is yes. Moreover, as Gómez rightly observes, if food sovereignty is accepted as a core constituent of the right to food, then denying its justiciability would create an internal inconsistency within the legal treatment of ESC rights. It would imply that while individuals may litigate for certain entitlements or food parcels, they may not claim a legal interest in the structural conditions that determine their capacity to grow or culturally shape their food systems.

V. TOWARDS A TWAIL-INFORMED LEGAL FRAMEWORK FOR FOOD SOVEREIGNTY

In what follows, I turn to the question of whether—and how—TWAIL can inform the development of a more just, equitable, and pluralistic legal framework for food sovereignty in the Global South. I offer three preliminary recommendations.

a) Reorient legal frameworks around plural sovereignties and local agency

The first recommendation is to decenter the nation-state as the sole subject of sovereignty in international law and instead embrace plural, community-based sovereignties. International law is based on the idea that only states are the main decision-makers. Local groups and movements are usually treated as part of civil society, meaning they can give input but don't have a real say in shaping the rules of the game. For food sovereignty to work, these local actors would either need to be formally recognized in international law or given real power through democratic processes within their own countries. As I have shown, both TWAIL and the food sovereignty movement reveal the limitations of state-centric legal frameworks, especially where states themselves become complicit in neoliberal regimes. The TWAIL-informed legal framework I propose must therefore create legal space for localized forms of authority such as indigenous councils, peasant movements, and women's cooperatives. This would require legal recognition, perhaps through international soft law or binding regional instruments, of community-based governance over food production and distribution, akin to how the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms indigenous control over land and resources.

b) Embed historical redress into Trade and IP Law reform

A second recommendation calls for the incorporation of historical justice and redistributive equity into the reform of trade and IP law. TWAIL teaches that international law has been instrumentalized to reproduce colonial patterns of extraction and dispossession. The TRIPS Agreement, as I have shown, is a clear example. The TWAIL-informed legal framework I propose must advocate for a moratorium or rollback of IP regimes that inhibit seed saving and biodiversity particularly in regions where these systems were imposed without meaningful participation.

More radically, there is a case for retrospective equity clauses in international agreements, legal instruments that acknowledge historical disadvantage and provide Global South states and communities with preferential rights, safeguards, or compensation mechanisms in agrarian and food systems.[70]

c) Legalize participatory food governance through international standards

Finally, the international legal community must move beyond rhetorical commitments to participation and institutionalize legal mechanisms for democratic, participatory food governance. TWAIL's reconstructive impulse calls for new legal processes that can elevate subaltern voices in decision-making. Drawing from instruments such as the FAO's Voluntary Guidelines and the Nyéléni Declaration, international law can develop binding procedural rights including the right to consultation to culturally appropriate food systems, and to participation in the negotiation of trade and agricultural policy.

Such legal reforms could be embedded in future iterations of the ICESCR or in a protocol dedicated to the right to food sovereignty, explicitly recognizing non-state actors as legal subjects with a say in how global food governance is shaped. These would empower movements like La Via Campesina legally by bringing grassroots food politics into the center of international legal reform.

CONCLUSION

This paper has traced how TWAIL parallels the food sovereignty movement by showing that both arise from a shared imperative, which is to critique and transform international legal structures that perpetuate historical and ongoing forms of domination. The legal disenfranchisement of farmers, indigenous communities, and smallholder producers in the Global South is, as TWAIL argues, the result of design. Whether through trade liberalization or the depoliticization of hunger as an issue of access, international legal regimes have actively facilitated the erosion of local agency over food systems. And yet, both TWAIL and food sovereignty offer a constructive vision. As I have argued, food sovereignty, understood as a justiciable dimension of the right to food, invites legal reform that reimagines sovereignty itself as a relational and community-embedded practice. The possibilities of this reimagination are already visible in constitutional trends in Ecuador and Nepal, and in jurisprudence from India, South Africa, and regional human rights bodies.[71] If international legal regimes are to serve all peoples, especially those who have long been affected by its exclusions, then it must be remade in conversation with those very same peoples. That is the task of a TWAIL-informed food future.

This piece was written by Victor Hughes Anyomi and edited by Graham Robbins.

67 *Id.*
68 *Francis Coralie Mullin v. Union Territory of Delhi* 1981 2 SCR 516.
69 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (1) SA 46 (CC) (S. Afr.).
70 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria [2001] ACHPR 35 (Nigeria).
71 *Id.* at para. 224-227, 240 ,230–231.



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