THE "FOREIGN AGENT PROBLEM": AN INTERNATIONAL LEGAL SOLUTION TO DOMESTIC RESTRICTIONS ON NON-GOVERNMENTAL ORGANIZATIONS

Jacqueline Van De Velde†

The United States' Foreign Agent Registration Act (FARA), has recently come into the spotlight due to its use in the ongoing Russian election interference investigation. But the United States' foreign agent restriction is only one of many: while FARA was the first of its kind, it now exists among a multitude of such restrictions. Too, the U.S. foreign agent restriction is lenient, compared to the restrictions appearing in other countries—restrictions that now are crippling civil society and to which international law is ill-equipped to respond. This Article analyzes this sudden avalanche of "foreign agent" legislation: restrictive domestic legislation that curtails non-governmental organizations' ability to function in the international system. After providing an overview of existing "foreign agent" restrictions and an analysis of the means through which international law might be marshaled to challenge such restrictions, it proposes a novel strategy for addressing foreign agent restrictions as violations of the International Covenant on Civil and Political Rights (ICCPR). It concludes that using the ICCPR's treaty-based mechanisms for resolving disputes is the most effective means of crippling existing legislation and deterring new legislation.

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INTRODUCTION

On April 28, 2016, the Chinese President Xi Jinping's government passed restrictive legislation curtailing the freedom of non-governmental organizations (NGOs).[1] The new law[2] is estimated to affect over seven thousand NGOs, including the Ford Foundation and Greenpeace East Asia.[3] It imposes significant restrictions on NGOs under rhetoric of national security, barring NGOs from doing any work that harms China's national interests, spreads "rumors," or results in obtaining state secrets.[4] Under the regulations, NGOs may fundraise in China, conduct political activities, or operate without registering with the police. Moreover, the law requires all foreign NGOs to secure an official Chinese sponsor organization. Chinese law enforcement is in turn permitted to use its discretion to shut down NGOs' events,

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1 Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, N.Y. TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html.

2 As of the writing of this Article, no English translation has been made available of the Chinese legislation (Overseas NGO Management Law). However, a previous draft of this legislation is available in Chinese and English. *See* CHINA DEVELOPMENT BRIEF, *English Translation of the Overseas NGO Management Law (Second Draft)* (May 21, 2015), http://chinadevelopmentbrief.cn/articles/cdb-english-translation-of-the-overseas-ngo-management-law-second-draft [https://perma.cc/EWT4-WD3V]. This legislation was made open for public comment and was revised slightly before being passed. *See* CHINA DEVELOPMENT BRIEF, *Draft Overseas NGO Law Released Online for Public Consultation* (May 6, 2015), http://www.chinadevelopmentbrief.cn/news/foreign-ngo-law-released-online-for-public-consultation [https://perma.cc/EX6F-DXEC]; Simon Denyer, *China Passes Tough Law to Bring Foreign NGOs Under Security Supervision*, WASH. POST (Apr. 28, 2016), https://www.washingtonpost.com/world/china-passes-tough-law-to-bring-foreign-ngos-under-security-supervision/2016/04/28/080e5706-56fc-427b-a834-0cf3926620b4_story.html?utm_term=.02798968d925 [https://perma.cc/4HKQ-FCG3] (stating that "[s]ome revisions were made to the law to soften its effect").

3 *Chinese Police Given Sweeping Powers over Foreign NGOs*, FIN. TIMES (Dec. 30, 2016, 8:15 AM), https://www.ft.com/content/fab2de32-ce53-11e6-864f-20dcb35cede2 (stating that charities including Greenpeace, Oxfam, and the Ford Foundation would be affected by the new legislation).

4 Anthony Kuhn, *China Passes Law Putting Foreign NGOs Under Stricter Police Control*, NPR (Apr. 28, 2016, 4:39PM), https://www.npr.org/sections/parallels/2016/04/28/476060206/china-passes-law-putting-foreign-ngos-under-stricter-police-control [https//perma.cc/D4GV-YB96] ("The new law requires all foreign NGOs to have an official Chinese sponsor or host organization. The groups may not raise funds in China and may not conduct or fund political activities. If police suspect illegal activity, they can shut down NGO events, inspect their offices and finances and question staff at any time.").

examine their offices and finances, and question their staff. Such intrusions can occur at any time.[5]

Outcry against the legislation was immediate. It came both from foreign governments and from the NGO community,[6] who insisted in turn that the legislation would result in weakened civil society and force some NGOs to cease operations. Such sweeping restrictions, said then-U.S. Secretary of State John Kerry, create "a highly uncertain and potentially hostile environment for foreign non-profit, non-governmental organizations and their Chinese partners that will no doubt discourage activities and initiatives."[7]

But the other side was vocal, too. Chinese media portrayed the legislation as rightfully restricting NGOs that in fact serve as "fronts for foreign intelligence services"[8]—commonly termed "foreign agents." And the Chinese legislature insisted, moreover, that the law is in fact beneficial to NGOs: it clarifies the legal status of NGOs, guarantees their lawful rights, and makes their operations in China more efficient.[9]

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5 *See generally* sources cited *supra* notes 2–4.

6 *See, e.g.*, Press Statement, John Kerry, U.S. Sec'y of State, China's Passage of the Law on the Management of Foreign NGO Activities Inside Mainland China (Apr. 28, 2016) (finding the new Chinese law "deeply concern[ing]" and expressing worry that it will "negatively impact important people-to-people ties" between the United States and China); Statement, Ned Price, Nat'l Sec. Council, Statement by NSC Spokesperson Ned Price on China's Foreign NGO Management Law (Apr. 28, 2016) (expressing deep concern that the Chinese law "will further narrow space for civil society in China and constrain contact between individuals and organizations in the United States and China"); Megha Rajagopalan & Michael Martina, *Western Governments, Rights Groups Decry China's Tough New NGO Law*, REUTERS (Apr. 29, 2016), http://www.reuters.com/article/us-china-ngos-idUSKCN0XQ0SY [https://perma.cc/L8MQ-ZW3H] (stating that rights groups "say language in the law banning activities that threaten national security interests or endanger social stability is too ambiguous and could push out groups the ruling Communist Party does not like").

7 Kerry, *supra* note 6.

8 Kuhn, *supra* note 4 ("Chinese media allege that foreign-funded NGOs, serving as fronts for foreign intelligence services, helped foment the 'color' revolutions of the early 2000s in former Soviet states as well as Hong Kong's 2014 pro-democracy 'umbrella revolution.'"); *see also* Kristin Shi-Kupfer & Bertram Lang, *Overseas NGOs in China: Left in Legal Limbo*, DIPLOMAT (Mar. 4, 2017), https://thediplomat.com/2017/03/overseas-ngos-in-china-left-in-legal-limbo [https://perma.cc/P36G-5PHV] (stating that the Communist party "deeply distrusts foreign organizations and fears that their influence could undermine the legitimacy of its own leadership and the stability of the one-party system").

9 Zhang Yong, Deputy Dir., NPR Standing Committee Legislative Affairs Commission, Remarks at the Foreign Non-Governmental Organizations Activities Within Mainland China Press Conference (Apr. 26, 2016) (stating that the law "facilitates foreign NGOs lawfully and

The media reaction to the Chinese legislation, however, missed the forest for the trees. In fact, the Chinese restrictions are far from an isolated incident; they are rather the latest example in a recent avalanche of legislation. Over the past four years, over sixty countries have either passed or drafted laws curtailing the activity of NGOs and civil society organizations, and ninety-six countries have implemented policies otherwise curtailing NGOs' ability to operate[10]—all at a breathtaking, "viral-like" pace.[11]

This "foreign agent" legislation aims to silence, eliminate, or bring under state control civil society organizations. It has the purpose and effect of preventing NGOs from challenging state authority through legislative tools. It serves as a new form of oppression by authoritarian governments and a means of restricting citizens' exercise of their fundamental civil and political rights.[12] At the same time, it allows states to curtail activities that threaten the regime's authority, such as promotion of human rights or democracy. States implement varying levels of restriction. While the most common laws term NGOs as "foreign agents" and restrict their ability to receive overseas funding, the most stringent laws limit NGOs' ability to meet without government representatives present—all variations on the same theme.[13]

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orderly carrying out activities in China," and "guarantee[s]" the "legal rights of foreign NGOs").

[10] Harriet Sherwood, *Human Rights Groups Face Global Crackdown 'Not Seen in a Generation'*, GUARDIAN (Aug. 26, 2015, 4:44 AM), http://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation [https://perma.cc/3UC4-VCUW] ("Ninety-six countries have taken steps to inhibit NGOs from operating at full capacity.").

[11] THOMAS CAROTHERS & SASKIA BRECHENMACHER, CLOSING SPACE: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE 1 (2014) ("Of particular concern to many national and international democracy and rights activists is the viral-like spread of the new laws restricting foreign funding for domestic nongovernmental organizations.").

[12] INT'L CTR. FOR NOT-FOR-PROFIT LAW & WORLD MOVEMENT FOR DEMOCRACY SECRETARIAT AT THE NAT'L ENDOWMENT FOR DEMOCRACY, DEFENDING CIVIL SOCIETY 14 (2d ed. 2012), http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf [https://perma.cc/B455-D4BP] (describing legislation and regulations as a "legal barrier[]" to civil society organizations and stating that they create barriers to NGO entry, operational activity, speech and advocacy, contact and communication, assembly, and resources).

[13] *Donors: Keep Out*, ECONOMIST (Sept. 12, 2014), http://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations [https://perma.cc/P3LY-FSNM] (comparing restrictions contained within a number of NGO laws, and stating that some newer and more stringent laws include

Also notable is the domino effect of the legislation's implementation. Russia was one of the first states to successfully *implement* this form of legislation, passing a 2012 federal law tackling foreign funding of "political activities" by NGOs.[14] Since then, a number of states—including Azerbaijan, Mexico, Pakistan, Sudan, Uzbekistan, and Hungary—have each created remarkably similar restraints.[15] But more are on the horizon. Another dozen states—including Bangladesh, Egypt, Malaysia, and Nigeria—plan to implement their own foreign agent legislation.[16] These states are clearly learning from one another, as the legislative language they are implementing is strikingly similar.[17]

The impact of the legislation is widely felt, both by the citizens of these countries and by the NGOs themselves. The implemented legislation aimed to target NGOs that are actively involved in democracy building and human rights, but spillover effects reached NGOs assisting in public health, among other areas.[18] The result:

"some that limit freedom of association or the ability to meet without a government representative attending").

14 *Civic Freedom Monitor: Russia*, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/research/monitor/russia.html [https://perma.cc/FD7T-MXJL] (last updated Sept. 17, 2018) (analyzing the content of the 2012 Russian restrictions, which require NGOs to register with the Ministry of Justice, allow the Ministry of Justice to suspend organizations that participate "in political activities or implement[] other activities constituting a threat to the interests of Russia," and prohibit dual U.S.–Russian citizens from participating in NGO management in Russia—among other restrictions).

15 *Donors: Keep Out*, *supra* note 13 ("Azerbaijan, Mexico, Pakistan, Russia, Sudan and Venezuela have all passed laws in the past two years affecting NGOs that receive foreign funds.").

16 *Id.* (stating that "Bangladesh, Egypt, Malaysia, and Nigeria" are among a dozen countries that also plan to pass foreign agent legislation).

17 *Foreign NGOs in Azerbaijan Must Have National Chiefs*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 17, 2013, 2:19 PM), http://www.rferl.org/content/foreign-ngos-azerbaijan/25203809.html [https://perma.cc/9DA6-8FN9] ("The amendments to the Azerbaijani law are reminiscent of a restrictive law adopted a year ago in Russia that requires any NGO receiving foreign funding and engaging in 'political activities' to register as a 'foreign agent.'"); Catherine Putz, *Kazakhstan Considering a New NGO Law*, DIPLOMAT (Oct. 19, 2015) http://thediplomat.com/2015/10/kazakhstan-considering-a-new-ngo-law [https://perma.cc/4CSU-JQCE] ("[M]any commentators have drawn comparison with the notorious 'foreign agents' law introduced in Russia in 2012. The texts differ, but the intent is similar.").

18 *Donors: Keep Out*, *supra* note 13 ("NGOs focused on democracy-building or human rights are the most affected, but the crackdown is also hitting those active in other areas, such as public health.").

reduction in development aid, withdrawal of NGOs from states, and decreased social services for citizens.[19]

Meanwhile, hostility towards NGOs in many states has risen since 2012—perhaps a direct result of the legislation itself. The United States Agency for International Development (USAID) was suspended from Russia and Bolivia, some 11,000 NGOs in India lost their licenses to operate, and NGOs in Ethiopia were forced to withdraw from the country due to legislation sharply constraining their funding sources.[20]

Practitioners within the U.S. government have privately expressed uncertainty at how to handle this breed of legislation.[21] Its presence is a frustration; NGOs are a necessary element of civil society. They do heavy lifting on advocacy, reporting, and direct services. In recent decades, they have become increasingly involved in international policymaking processes[22]—where their presence has been shown to enhance democratic legitimacy, effectiveness, and the performance of global governance.[23] The international system will not function without them.[24]

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19 *See, e.g.*, Terry Carter, *ABA Closes Office in China While it Measures the Impact of New Restrictions on NGO Activities*, A.B.A. J. (Mar. 2017), http://www.abajournal.com/magazine/article/aba_roli_china_rights_law [https://perma.cc/QH8W-MJT4] (detailing the withdrawal of the American Bar Association from China in advance of the enforcement of the Chinese foreign agent restriction and stating that an estimated 7,000 other NGOs would likewise be affected).

20 *See, e.g.*, *Donors: Keep Out*, *supra* note 13 (stating that USAID was thrown out of Russia and Bolivia between 2012 and 2014 and that funding has been curtailed in Ethiopia); Vidhi Doshi, *India Accused of Muzzling NGOs by Blocking Foreign Funding*, GUARDIAN (Nov. 24, 2016, 12:00 AM), https://www.theguardian.com/global-development/2016/nov/24/india-modi-government-accused-muzzling-ngos-by-blocking-foreign-funding [https://perma.cc/8RYV-77AY] ("At least 25 Indian NGOs have lost licences to receive international funding because of their 'anti-national' activities, while a further 11,319 have lost licences for failing to renew them, shrinking India's pool of foreign-funded organisations to a little more than half the number it was two years ago.").

21 Interview with Anonymous U.S. Official, U.S. Mission to the United Nations, in New York, N.Y. (Aug. 16, 2015). *See also* Interview with Adotei Akwei, Managing Dir. for Gov't Relations, Amnesty Int'l USA, Yale Law Sch. (Feb. 26, 2016).

22 *See, e.g.*, Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 265 (1997) (stating that "NGOs are more active in international policymaking" than in previous decades).

23 *See, e.g.*, ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 34 (2005) (identifying NGOs as ameliorating the democratic deficit present in international law by presenting "diverse and conflicting information, opinions and concerns of different groups").

24 *See* discussion *infra* Part II.

At the same time, international tampering with domestic law restrictions on civil society organizations infringes upon state sovereignty. And states argue that they need to implement such restrictions in order to prevent terrorism or promote national security.[25] Creative lawyering is needed to strike a careful balance between respect for state sovereignty and respect for international obligations enshrined in the International Covenant on Civil and Political Rights (ICCPR or the Covenant).

This Article identifies and explicates two overlooked international legal problems: First, does international law provide protections for NGOs against restrictive domestic legislation?[26] In other words, in a domestic conflict between state sovereignty and international human rights surrounding—but not explicitly protecting—NGOs, which rights win? Second, how, if at all, can tools of international law be marshaled to influence and challenge domestic legislation? And, relatedly, even if they can be marshaled, should they be? The issue presented by foreign agent restrictions—a series of domestic laws implemented by individual states—does not fit the classical model of international law problems. And yet, as this Article argues, international law offers mechanisms, underutilized yet present, that can address domestic legislation that implicates broader human rights commitments.

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[25] Sherwood, *supra* note 10 (identifying as a source of the crackdown on NGOs "the proliferation of counter-terrorism measures—often promoted by the west—that sweep civil society organisations into their embrace, either inadvertently or deliberately. Legitimate measures to curb funding of and money-laundering by terrorist organisations often have a debilitating effect on NGOs").

[26] Defining "non-governmental organizations" is a surprisingly difficult task. One observer noted that the term itself is "an awkwardly negative title coined by the United Nations to describe a vast range of international and national citizens organizations, trade unions, voluntary associations, research institutes, public policy centers, private government agencies, business and trade associations, foundations, and charitable endeavors." Kerstin Martens, *Mission Impossible? Defining Nongovernmental Organizations*, 13 VOLUNTAS: INT'L J. VOLUNTARY & NONPROFIT ORGANIZATIONS 271, 274 (2002) (citing Angus Archer, *Methods of Multilateral Management: The Interrelationships of International Organizations and NGOs*, *in* THE US, THE U.N., AND THE MANAGEMENT OF GLOBAL CHANGE 303 (Toby Trister Gati ed., 1983)). And Steve Charnovitz remarked, "Everything about nongovernmental organizations is contested, including the meaning of the term." Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 351 (2006). This Article embraces Charnovitz's proposed definition for NGOs: "groups of persons or of societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking." *Id.* at 350.

Part I of this Article identifies the problem of "foreign agent restrictions" on NGOs and situates its development in terms of both chronology and content. It defines NGOs and paints a portrait of their role in the international legal order, both as personalities protected within international law and as influencers of international law in their own right. It then provides three case studies—the United States, Russia, and China—to discuss the three most prominent foreign agent restrictions and compare their content and impact on civil society.

Part II identifies how, specifically, foreign agent restrictions violate international law—and why state justifications for infringement on human rights guarantees are insufficient. Part III constructs the legal architecture protecting NGOs. It stresses the importance of NGOs for sustaining and creating the international system and highlights the broader rights under international law that guarantee protections to NGOs and other civil society organizations. What it reveals, however, is that while international law provides some protections for NGOs, it denies them legal personality—leaving them unable to challenge foreign agent restrictions in an international legal forum themselves. Rather, they depend on states to do so.

Part IV, then, identifies the most effective means by which to draw attention to and deter foreign agent restrictions within international law: addressing foreign agent restrictions as violations of the ICCPR. This Article argues that the state dispute resolution mechanism located in article 41 of the ICCPR is the best way to cripple existing legislation and prevent future restrictions. The legal architecture for this proposal already exists and there is a clear mechanism to take offending countries to task.

I. Foreign Agent Restrictions in Domestic Legislation

This Part outlines the role of NGOs in international law. After framing the Article with a discussion of the importance of NGOs, it outlines the historical development of what this Article identifies as foreign agent restrictions on NGOs.

A. *NGO Influence on International Order*

Foreign agent restrictions matter, in part, because the international system has never been able to function without the extensive assistance

of NGOs. A world without them is a world without international law. This is partially because of the "highly visible presence [of NGOs] . . . . [L]egitimated by international law and armed with accurate information, they have been a powerful force for institutional innovation, compliance monitoring, and policy change since the mid-twentieth century."[27] Without NGOs, international legal enforcement[28] and development[29] are both at risk.[30] Nor is their effect isolated to one particular moment in the international system; they contribute at all preparatory stages, bringing expert knowledge and field experience. And in several scenarios in international legal development or enforcement, NGOs are *particularly* useful: as prolific commentators when new fields of law are initiated or new treaties drafted; as critical actors in the interpretation of international law; as participants in international adjudication, often (but not always) through friend-of-the-court submissions;[31] in facilitating states' compliance with their international obligations; and in monitoring and assisting in collective enforcement efforts.[32]

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27 Daniel C. Thomas, *International NGOs, State Sovereignty, and Democratic Values*, 2 CHI. J. INT'L L. 389, 391 (2001).

28 Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 265 (2006) (outlining the role of NGOs in enforcing international law through their presence at and support of the formation and continued existence of the International Criminal Court).

29 *Id.* at 282 (concluding that "NGO networks with influence over the creation, dissemination, and interpretation of information may be powerful contributors to the development of international law").

30 JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 611 (2005) ("[N]o one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs."). *See also* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 167 (3d ed. 2004) (noting that "[t]oday, purely inter-state development of norms is probably non-existent in most fields of international law").

31 Though NGOs are most often involved with the submission of amicus materials in international adjudication, some tribunals have been more open to their involvement. For example, the African Commission on Human and Peoples' Rights allows NGOs to have observer status and to allege violations of the African Charter; the European Court of Human Rights allows NGOs to affirmatively bring cases if the NGO is itself the victim; and other international administrative entities like the World Bank Inspection Panel permit NGOs to bring complaints. For more information, see Charnovitz, *Nongovernmental Organizations*, *supra* note 26, at 354.

32 *See* Charnovitz, *Nongovernmental Organizations*, *supra* note 26, at 354 (stating that "NGOs are now often engaged in the review and promotion of state compliance with international obligations"); *see also id.* at 355 (noting NGOs' role in "collective enforcement" of

Beyond contributing to the development of international law, NGOs also provide other normative value. First, NGOs constantly imbue proceedings with independence. Because they are not required to defend any one national position, NGOs are free to express creativity, advocating[33] for policy and legal solutions unburdened by state interest. And NGOs provide democratic representation; particularly for citizens in states without a democratically elected government, their presence at the table ensures that marginalized citizens' voices are heard—at least in some capacity.

So too, NGOs serve an important translation function. They communicate the value of international law to states and citizens alike, fostering a culture of legal conscience that transcends national borders. Without them, not only will the development of international law be threatened, but also its core nature. States should therefore care about foreign agent restrictions not only because they are independent violations of international law, but also because they endanger the international system as a whole.

B. *The Historical Development and General Content of Foreign Agent Restrictions: Three Case Studies*

NGOs are in danger from the proliferation of foreign agent restrictions. Foreign agent restrictions are, on the one hand, an extremely recent development—spreading like wildfire from Africa, across Europe and the Caucuses, and to Asia within only the last decade. But at the same time, they are far from a new phenomenon.[34]

While restrictions on NGOs under domestic law are not new, the particular terminology of "foreign agents," the heightened rhetoric of national security, and the violations of freedoms guaranteed in the ICCPR set modern foreign agent restrictions apart from the rest. While

international law, including examples of the U.N. seeking support from NGOs in such a capacity).

33 *See id.* at 361 ("NGOs can be more creative than government officials because NGOs are not burdened with the need to champion a particular national or governmental interest.").

34 *See infra* Section I.B.1 (identifying FARA as a pivotal prior piece of legislation on which subsequent pieces have been modeled).

the first foreign agent restriction came from the United States in 1938,[35] modern "foreign agent" legislation began in Zimbabwe in 2004 with a draft "foreign agent" law.[36] The legislation was not implemented, but it served as a model for subsequent, successful foreign agent restrictions, beginning in Ethiopia in 2009 and spreading across the Horn of Africa in the years following, with similar iterations in Uganda,[37] South Sudan,[38] and (now successfully) Zimbabwe,[39] among other states.

This Section illustrates the development of foreign agent restrictions in three states: the United States, Russia, and China. This gives a historical overview of the development of these restrictions in three states, outlines the content of the restrictions, and presents the arguments that each state made in implementing foreign agent restrictions. This Section also speaks generally about the kind of restrictions present in each state's legislation, as a means of illustrating

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35 *Foreign Agents Registration Act*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/nsd-fara [https://perma.cc/6RPT-6CFB] (last visited Oct. 28, 2018) ("The Foreign Agents Registration Act (FARA) was enacted in 1938.").

36 *Zimbabwe: Draft Law Threatens Civil Society Groups*, HUM. RTS. WATCH (Dec. 3, 2004, 7:00 PM), https://www.hrw.org/news/2004/12/03/zimbabwe-draft-law-threatens-civil-society-groups [https://perma.cc/P2LV-FC6E] (identifying the Zimbabwean bill as allowing for governmental surveillance and control of civil society organizations, including requiring them to register, curtailing foreign funding, and refusing registration to NGOs involved in governance issue areas).

37 Alon Mwesigwa, *Uganda: NGO Bill Aims to Muzzle Civil Society, Say Activists*, GUARDIAN (June 24, 2015, 2:00 AM), http://www.theguardian.com/global-development/2015/jun/24/uganda-ngo-bill-aims-muzzle-civil-society-say-activists [https://perma.cc/KP6E-TX9G] ("Uganda's efforts to tighten state control over NGOs mirrored similar actions by other governments across the region, citing notably a 2009 law on charity funding in Ethiopia, which included a provision stating that any organisation receiving more than 10% of its funding from abroad was a 'foreign NGO', and thus banned from any activities concerning democratic and human rights, conflict resolution or criminal justice. 'It began in Ethiopia in 2009 with an extremely repressive NGO law and it appears many of the countries in the east and Horn of Africa are learning from Ethiopia.'").

38 It is worth noting that South Sudan's law does not reference "foreign agents" but does contain a restriction that at least one-fifth of workers in any NGO must be South Sudanese. Sam Jones, *South Sudan Risks 'Catastrophe' with New Aid Agency Law, Warn NGOs*, GUARDIAN (May 14, 2015, 7:22 AM), http://www.theguardian.com/global-development/2015/may/14/south-sudan-aid-agency-law-risks-catastrophe-warn-ngos [https://perma.cc/N6K4-QAM2].

39 Private Voluntary Organizations (PVO) Act 2007, c. 17, § 05 (Zim.), http://hrlibrary.umn.edu/research/Zimbabwe-NGO%20laws.pdf [https://perma.cc/S49U-EFN4]. For a discussion of the PVO Act in practice, see *Civic Freedom Monitor: Zimbabwe*, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/research/monitor/zimbabwe.html [https://perma.cc/P2AR-SPKF] (last updated Oct. 1, 2018).

the features present in legislation in other states. These states were chosen purposively; the United States issued the first modern foreign agent restriction, Russia issued the foreign agent restriction that has proliferated most widely, and China issued the restriction that has come under the greatest scrutiny and arguably has had the greatest impact on NGO activity.

1. The United States

It is not without irony that the first instance of foreign agent legislation came from the United States itself. FARA[40] was promulgated in 1938 as a legislative response to increasing propaganda in the United States by foreign agents.[41] The Committee on the Judiciary of the House of Representatives described the purpose of FARA.

> Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law. . . .
>
> As a result of such evidence, this bill was introduced, the purpose of which is to require all persons who are in the United States for political propaganda purposes . . . to register with the State Department and to supply information about their political propaganda activities, their employers, and the terms of their contracts. This required registration will publicize the nature of subversive or other similar activities . . . so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or

[40] Foreign Agents Registration Act, 22 U.S.C. § 611 (2006). For a background on the legislative history of FARA and its current practice, see also Yuk K. Law, *The Foreign Agents Registration Act: A New Standard for Determining Agency*, 6 FORDHAM INT'L L. J. 365 (1982).

[41] *FARA Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions [https://perma.cc/5GK3-FCLK] (last updated Aug. 21, 2017) ("In 1938, FARA was Congress' response to the large number of German propaganda agents in the pre-WWII U.S.").

> propaganda for the purpose of influencing American public opinion on a political question.[42]

The Senate hoped FARA would "force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill."[43]

FARA remains in force today. It requires any person or organization in the United States that is an "agent for a foreign principal" (a "foreign agent," if you will) to register with the U.S. Department of Justice, to disclose the principal for whom the agent works, and to make periodic public disclosure of the activities, receipts, and disbursements in support of those activities.[44] Foreign agents are prohibited from working with governments or individuals under U.S. sanctions and those designated as foreign terrorist organizations. In this regard, FARA serves as an information gathering tool.

But the regulations stop at information gathering; they do not actively curtail activity. For example, unlike restrictions in many other states, FARA does not provide any restrictions on foreign funding of NGOs. Importantly, due process protections remain in place for individuals or organizations who wish to challenge FARA. The U.S. Constitution provides robust protections for freedoms of expression and association, foreign NGOs have standing to sue in U.S. courts, and U.S. courts are sufficiently independent to be able to hear a challenge to FARA. These three factors are different in kind than many other states.[45]

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[42] H.R. REP. NO. 75-1381, at 1–2 (1937).

[43] H.R. REP. NO. 75-1381, at 3.

[44] Foreign Agents Registration Act, 22 U.S.C. § 611 (2018).

[45] Part IV argues that an ICCPR signatory should consider bringing a claim under article 41 of the ICCPR against a state with an egregious use of Foreign Agent Restrictions. Insofar as this is pursued, it is worth noting that a claim could potentially be brought against the United States, as well as against other states. The United States does, however, have key differences in kind and degree between FARA and other Foreign Agent Restrictions, these are broadly outlined in the above paragraph. However, more specifically, it is worth emphasizing that the United States' constitutional protections of freedom of expression and freedom of association place substantial limits on the degree and kind of restrictions that can be placed on foreign agents. Specifically, a ban on picketing or limits on the right to receive funding—both of which appear in the Russian Foreign Agent Restriction—would almost certainly be unconstitutional under U.S. law. And, speaking about the differences in kind, FARA is a tool of *information gathering*, rather than *behavior censoring*, making FARA substantively distinct from the recent proliferation of Foreign Agent Restrictions.

Despite these protections, the U.S. registration requirements were not lost on other states. Russia quite publicly referenced FARA in the midst of its own debate over the passage of its foreign agent restrictions.[46] And the U.S. registration requirements may well have inspired Russia to create its own.

2. Russia

In 2012, Russia produced and implemented perhaps the most influential foreign agent restrictions. This law required NGOs to register as "foreign agents" with the Ministry of Justice if they engaged in any "political activity" and received any foreign funding.[47]

A major element of Russia's foreign agent restrictions is societal stigmatization. Russia's legislation has the purpose and effect of weakening civil society's utilization of NGOs through ostracizing their role. As Human Rights Watch reported:

> Because in Russia "foreign agent" can be interpreted only as "spy" or "traitor," there is little doubt that the law aims to demonize and marginalize independent advocacy groups. Russia's vibrant human rights groups resolutely boycotted the law, calling it "unjust" and "slanderous." . . . On April 8, 2014 Russia's Constitutional Court upheld the law, ruling that there were no legal or constitutional grounds for contending that the term "foreign agent" had negative connotations from the Soviet era and that, therefore, its use was "not intended to persecute or discredit" NGOs.[48]

This societal stigmatization has the effect of restricting fundamental freedoms in Russia and inhibiting civil society.[49]

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46 Miriam Elder, *Russia Plans to Register 'Foreign Agent' NGOs*, GUARDIAN (July 2, 2012, 8:07 AM), http://www.theguardian.com/world/2012/jul/02/russia-register-foreign-agent-ngos [https://perma.cc/CJP4-P9FX] ("Supporters of the law have likened it to similar legislation in the US [sic] that requires lobbyists employed by foreign governments to reveal their financing.").

47 *Russia: Government vs. Rights Groups*, HUM. RTS. WATCH (June 18, 2018, 5:30 AM), https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle [https://perma.cc/ML9G-ZKYX].

48 *Russia: Government Against Rights Groups*, HUM. RTS. WATCH (Nov. 20, 2014, 4:00 AM), http://news.trust.org//item/20141127215004-w8n5q [https://perma.cc/GLY4-63DY].

49 *Statement by the Spokesperson on the "Foreign Agent" Status of the Memorial International Society*, EUR. UNION (Dec. 16, 2016, 12:08 PM), https://eeas.europa.eu/

Russia's foreign agent restrictions also function as a barrier to assembly. In legislation, barriers to assembly can look like bans on public gatherings, an advance notification requirement that functionally makes assembly impossible, or a barrier amounting to a functional request for permission that is denied arbitrarily or subjectively.[50] The Russian Federal Law of Assemblies, Meetings, Demonstrations, Marches and Picketing requires that NGOs notify the government of any "event"—a vague term that is defined as any internal gathering of more than one person.[51] The request must be in writing and must be given to the government at least ten days prior to the event itself.[52]

Finally, Russia's foreign agent restrictions limit the funding that NGOs can receive. Barriers to funding are commonly found within legislative restrictions on NGOs[53] and include altogether prohibiting certain funding sources, requiring advance government approval for foreign funding, or burdensome procedural requirements, such as routing funding through the government.[54]

The barriers to NGO formation and functioning were felt acutely in Russia. A third of all NGOs closed in the two years following the implementation of its foreign agent restrictions.[55] And capacity of those

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headquarters/headquarters-homepage/17427/statement-spokesperson-foreign-agent-status-memorial-international-society_en [https://perma.cc/9U2W-68TS] ("The European Union has repeatedly stated that the law on 'foreign agents' and the ensuing fines, inspections and stigmatisation, further tighten the restrictions on the exercise of fundamental freedoms in Russia, consume the scarce resources of NGOs and inhibit independent civil society in the country.").

50 *See* DEFENDING CIVIL SOCIETY, *supra* note 12, at 23–26 (outlining barriers to assembly, including bans on public gatherings, advance notification requirements, content-based restrictions, and restrictions on categories of persons).

51 Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing No. 54-FZ, Art. 7 (June 19, 2004) ("A notice of holding the public event (except for an assembly and picketing held by a single participant) shall be sent by its organiser in writing to the executive authority of the Subject of the Russian Federation or the body of local self-government within the period not earlier than fifteen and not later than ten days prior to holding of the public event.").

52 *See id.* Again, as noted in Part III, vague restrictions on barriers to assembly violate the ICCPR. *See* discussion *infra* Part III.

53 *See* DEFENDING CIVIL SOCIETY, *supra* note 12, at 26–28 (analyzing barriers to resources, and outlining states where such barriers were implemented in foreign agent legislation).

54 Some scholars have noted that these restrictions may violate a new right: the "right to receive funding," a logical outgrowth of the ICCPR's protection of freedom of association. *See infra* Section III.B.

55 Charles Digges, '*Foreign Agent' Law Has Put 33 Percent of Russia's NGOs Out of Business*, BELLONA (Oct. 20, 2015), http://bellona.org/news/russian-human-rights-issues/russian-ngo-

that remain has been crippled. NGOs report that the barriers to entry are too high, funding is impossible to procure, or government imposition is too great to continue their work.[56]

Most interestingly, several other states parroted the language of the Russian laws in their own domestic legislation, including Azerbaijan,[57] Kyrgyzstan,[58] Kazakhstan,[59] Tajikistan,[60] Belarus,[61] and Uzbekistan,[62] among others. And what was notable was that the legislation did, in fact, appear to be largely copied; the legislation is almost identical in its language and effect.[63]

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law/2015-10-foreign-agent-law-has-put-33-percent-of-russias-ngos-out-of-business [https://perma.cc/2MBD-59AV] ("[T]he number of NGOs and activists is dropping—fear, financial problems, bureaucratic hurdles—these are tools of the current regime and they are using them.").

56 *See, e.g.*, AMNESTY INTERNATIONAL, AGENTS OF THE PEOPLE: FOUR YEARS OF "FOREIGN AGENTS" LAW IN RUSSIA: CONSEQUENCES FOR THE SOCIETY 5 (2016) (reporting that the Russian law has had the effect of "cut[ting] off foreign funding and then giv[ing] domestic funding only to loyal organizations").

57 *Foreign NGOs in Azerbaijan Must Have National Chiefs*, RADIO FREE EUR. (Dec. 17, 2013, 2:19 PM), http://www.rferl.org/content/foreign-ngos-azerbaijan/25203809.html [https://perma.cc/MS6R-DL3Q] ("The amendments to the Azerbaijani law are reminiscent of a restrictive law adopted a year ago in Russia that requires any NGO receiving foreign funding and engaging in 'political activities' to register as a 'foreign agent.'").

58 *Civic Freedom Monitor: Kyrgyz Republic*, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/research/monitor/kyrgyz.html [https://perma.cc/8CX4-UWQR] (last updated Aug. 10, 2018) ("[I]n 2014, a group of parliamentarians proposed the draft Law on Foreign Agents, which is similar to the so-called Russian 'Foreign Agents' Law.").

59 Catherine Putz, *Kazakhstan Considering a New NGO Law*, DIPLOMAT (Oct. 19, 2015) http://thediplomat.com/2015/10/kazakhstan-considering-a-new-ngo-law [https://perma.cc/3FZN-9FTD] ("[M]any commentators have drawn comparison with the notorious 'foreign agents' law introduced in Russia in 2012. The texts differ, but the intent is similar.").

60 Daniel B. Baer, Ambassador, United States Mission to the OSCE: On Draft Legislation in Central Asia Impacting NGO Operating Space (Jan. 22, 2015), http://www.osce.org/pc/137176?download=true [https://perma.cc/WV9U-ZBPK] ("The United States is concerned about the introduction of draft legislation in Kyrgyzstan, Tajikistan, and Kazakhstan that could restrict the operating space for non-governmental organizations.").

61 Konstantin Parshin, *Tajikistan: Dushanbe Considering Bill to Restrict NGO Funding*, EURASIANET (Nov. 24, 2014), http://www.eurasianet.org/node/71081 [https://perma.cc/6J64-WJJG] (describing the legislation as "similar" to the Russian Foreign Agent restriction).

62 *See id.*

63 Kyrgyzstan's NGO legislation was proposed but not passed into law. Nonetheless, the language of the draft was similar to the Russian legislation in form, language, and intended effect. *See Civic Freedom Monitor: Kyrgyz Republic*, *supra* note 58.

3. China[64]

China almost certainly took its inspiration for its recent foreign agent restrictions from Russia. In fact, shortly before the draft law was circulated, one *Global Times* columnist suggested China "learn from Russia by introducing a 'foreign agent law,' so as to block the way for [the] infiltration of external forces . . . ."[65]

China's legislation illustrates several features of foreign agent restrictions that are present in other states. One such feature of the Chinese legislation is that it serves as a barrier to entry for NGOs. Barriers to entry can take many forms, such as: states limiting NGOs' rights to associate; state prohibitions against unregistered groups, making registration for these groups unduly burdensome; restrictions on founders; vague grounds of denial of registrations; and registration requirements.[66] Under the Chinese law, foreign NGOs that wish to

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64 Because Part IV of this Article posits a solution to addressing foreign agent restrictions—the use of the enforcement mechanism provided in article 41 of the ICCPR—including China as a case study deserves normative justification. I have chosen to include China as a case study for four reasons. First, pragmatism: China's restriction on foreign agents is both the most recent and the most public example of foreign agent restrictions, receiving widespread press coverage and provoking a broader debate on the role of non-governmental organizations and restrictions thereupon. As such, a paper that ignored China's recent restrictions would be unfortunately out of touch with the reality that the Chinese restrictions are of the most influential of those promulgated. Second, the scope of this Article: the core contribution of this Article is to identify the proliferation of foreign agent restrictions; to whatever extent a solution is proposed, this is a useful, but secondary contribution. China's foreign agent restrictions should thus be included because of their relative importance. Third, the viability of other solutions: China's lack of ratification of the ICCPR is a shadow in which NGOs, states, and citizens must operate. I chose the solution that best utilized international legal instruments to address domestic law. However, this Article does offer alternative solutions, many of which would be applicable for addressing the Chinese foreign agent restrictions. *See infra* note 170. Fourth, morality: China's lack of ratification of the ICCPR should not be a justification for not offering an equal opportunity critique of restrictive domestic legislation that does violate the ICCPR. China's foreign agent restrictions are thus viewed by the international community as violating international law, in custom, if not in letter.

65 Wang Haiyun, *Remain on Alert for Dangers of Western-backed 'Color Revolutions'*, GLOBAL TIMES (July 31, 2014, 10:03 PM), http://www.globaltimes.cn/content/873666.shtml [https://perma.cc/6MAH-W2KV].

66 *See* DEFENDING CIVIL SOCIETY, *supra* note 12 at 15–17; Christian Shepherd & Michael Martina, *International NGOs' China Operations Hit by Registration Delays Under New Law*, REUTERS (July 6, 2017, 8:13 P.M.), https://www.reuters.com/article/us-china-ngo-analysis/international-ngos-china-operations-hit-by-registration-delays-under-new-law-

conduct long-term activities in China must obtain the consent of a Chinese professional supervisory unit to register a representative office. If the NGO is unable to find a sponsor organization, it is unable to register with the Chinese government and is not permitted to conduct activities.[67]

And like other foreign agent restrictions, China's also limit NGOs' speech and advocacy. In general, barriers to speech and advocacy can include censorship, broad and vague restrictions against advocacy, and criminalization of dissent.[68] China's foreign agent restrictions prohibit participation in "terrorist" or "political" activity; however, neither term is clearly defined. In fact, the term "foreign agent" itself is representative of the entire legislation's vagueness.[69]

A particularly intrusive element of the Chinese foreign agent restrictions are the barriers to operational activity that they promulgate. Even once an organization successfully finds a local sponsor and receives a permit from the government, the law allows police forces to engage in highly intrusive activity in the organization's day-to-day life. Post-formation restrictions on operational activity appear in many foreign agent restrictions. Such restrictions might include direct prohibitions on a sphere of activity; invasive supervisory oversight; government harassment; criminal sanctions on individuals; failure to protect organizations or individuals from violation; and termination or dissolution of organizations.[70] States commonly use these regulations to harass or intimidate NGOs, infringing upon their freedom of association and their right to privacy under the ICCPR. For example, in China, the foreign agent restrictions authorize the government or police forces to request internal documents at any time without limits and to

idUSKBN19S00V [https://perma.cc/W5WY-J433] (reporting that many NGOs have been unable to expand their work, and at least one has put its work on "indefinite hold").

67 Laura E. Butzel, *China's New Laws on Foreign and Domestic NGOs*, EXEMPT ORG. RES. (May 19, 2016), https://www.pbwt.com/exempt-org-resource-blog/chinas-new-laws-foreign-domestic-ngos [https://perma.cc/GRV4-AP5M].

68 *See* DEFENDING CIVIL SOCIETY, *supra* note 12, at 18–19.

69 As noted in Part III, states may not utilize vague, imprecise, and broad concepts, such as "political" or "extremism," in drawing restrictions on NGOs' freedom of expression. *See infra* note 132 and accompanying text. The ICCPR Human Rights Committee reviewed the Russian Law "On Combating Extremist Activities" and expressed concern that "the definition of 'extremist activity' . . . is too vague to protect individuals and associations against arbitrariness in its application." *See* Rep. of the U.N. Human Rights Comm. On its Eighty-First Session, U.N. Doc. A/59/40, at 24 § 64 ¶ 20 (2004).

70 *See* DEFENDING CIVIL SOCIETY, *supra* note 12, at 15–18.

interrogate staff of the organization. The barriers to operational activity tend to be cloaked in justifications of national security, arguing that they serve a protective function against NGO infiltrators. Section II.A.1 offers a full critique of this position.

II. Foreign Agent Restrictions Violate International Norms and Values

States argue that their restrictions on NGOs are justified under both international legal norms and values. This Part analyzes state justifications for curtailing human rights, under language of norms and values. It provides an overview of the various kinds of constraints found within foreign agent restrictions. It concludes by outlining and considering the rationales proffered by states when implementing or introducing foreign agent restrictions, including (most prominently) the rationale that such restrictions ensure national security, are within state sovereignty, or ultimately benefit the NGOs themselves.

A. *State Justifications Do Not Sufficiently Justify Infringement on Civil Society*

Though the means of restrictions vary, states' rationales for the restrictions are remarkably consistent. The justifications include increasing prevention of foreign interference within domestic politics; protecting national security; increasing accountability; and ensuring states' sovereign right to pass such legislation.[71]

But most states that have implemented foreign agent restrictions are signatories to international treaties that guarantee rights to their citizens, rights that states can derogate only in exceptional circumstances. Particularly relevant to the question of foreign agent restrictions is the ICCPR, which constructs a high barrier to placing restrictions on the fundamental rights guaranteed therein, such as the

[71] *Introduction*, 12 INT'L J. NOT-FOR-PROFIT L. 6, 8 (May 2010) (listing as government justifications such restrictions as "increased accountability and transparency of [NGOs]; preventing foreign interference with domestic political processes; protecting national security; combating terrorism and extremism; and the coordination and harmonization of foreign aid and [NGOs] implementing foreign aid programs").

right to assembly and the right to association.[72] This Section discusses the ICCPR in greater depth and examines the particular protections within the ICCPR that apply not only to citizens, but also to NGOs.

There are four permissible reasons for infringing upon citizens' rights under the ICCPR: (1) to bolster national security or public safety; (2) to support public order; (3) to protect public health or morals; or (4) to protect the rights and freedoms of others.[73] Of these reasons, states tend to justify foreign agent restrictions under "state sovereignty" (generally referring to public morals), "national security" (collapsing national security and public order), and the allegation that these restrictions will actually be *beneficial* to NGOs by increasing transparency and creating a more coordinated, predictable environment.[74] None of these reasons are credible, nor are they sufficient to justify restrictions on the fundamental rights guaranteed by the ICCPR.

1. State Sovereignty

Among the most common justifications for the current regulatory backlash against NGOs is preventing interference with state sovereignty. States consistently express concern for guarding against foreign influence in domestic political affairs. Surrounding the latest restrictions—the Chinese foreign agent law—Chinese media alleged that

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72 It is worth noting that China has signed, but has not ratified, the ICCPR. Even without ratification, however, China is bound by its signature to abide by the object and purpose of the treaty. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.").

73 International Covenant on Civil and Political Rights, art. 22, ¶ 2, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 ("No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.").

74 Zhang Yong, Deputy Director, NPC Standing Committee Legislative Affairs Commission, Remarks at the Foreign Non-Governmental Organizations Activities Within Mainland China Press Conference (Apr. 26, 2016), https://www.chinalawtranslate.com/fngo-law-presser/?lang=en [https://perma.cc/6RKG-L2AZ] (stating that the law "facilitates foreign NGOs lawfully and orderly carrying out activities in China").

foreign-funded NGOs had served as fronts for foreign intelligence services in order to provoke two revolutions: the "color" revolutions in former Soviet states, and the "umbrella" revolution of 2014 in Hong Kong.[75] And Chinese officials called NGOs affected by the new legislation "foreign groups that support or manipulate domestic groups to harm China's laws."[76] In Russia, pro-government media routinely accuses NGOs of trying to topple Vladimir Putin's government by creating unrest.[77] In fact, the state prosecutor's office accused NGOs of working to "delegitimize election campaigns, organize political action to influence decisions taken by authorities and discredit the armed forces."[78] Articles in Uzbekistan's state-controlled media accused the United States of trying to undermine Uzbek sovereignty through democratization.[79] And finally, Zimbabwean President Robert Mugabe called Western NGOs fronts through which Western "colonial masters" subvert the government.[80]

States do fund NGOs in other states, and often with an explicitly political purpose. In 2006, for example, U.S. Secretary of State Condoleezza Rice asked Congress for $75 million in emergency funding. This funding was requested in order to "bolster Iranian activists" and "step up pressure on the Iranian government, including expanding radio and television broadcasts into Iran and promoting internal opposition to the rule of religious leaders."[81] Of this funding, $15 million would go to Iranian NGOs and democracy groups.[82]

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75 Kuhn, *supra* note 4 (stating that "Chinese media allege that foreign-funded NGOs, serving as fronts for foreign intelligence services, helped foment the 'color' revolutions of the early 2000s in former Soviet states as well as Hong Kong's 2014 pro-democracy 'umbrella revolution.'").

76 *Id.*

77 Thomas Grove, *Russia Squeezes Critics at Home by Declaring Them 'Foreign Agents'*, WALL ST. J. (Aug. 16, 2015, 10:23 PM), http://www.wsj.com/articles/russia-squeezes-critics-at-home-by-declaring-them-foreign-agents-1439778187.

78 *Id.*

79 Thomas Carothers, *The Backlash Against Democracy Promotion*, 85 FOREIGN AFFAIRS 55, 57 (2006).

80 *See id.* at 58.

81 Glenn Kessler, *Rice Asks for $75 Million to Increase Pressure on Iran*, WASH. POST (Feb. 16, 2006), https://www.washingtonpost.com/archive/politics/2006/02/16/rice-asks-for-75-million-to-increase-pressure-on-iran/55a7dd64-f51d-4236-8613-9640dd4a3e4f [https://perma.cc/8AFV-9TJE].

82 *Id.* ("An additional $15 million would go to Iranian labor unions, human rights activists and other groups, generally via nongovernmental organizations . . . .").

NGOs, however, are not always politically bent. Many NGOs, caught within the fray of foreign agent restrictions, work in fields such as healthcare, far removed from any political processes.

But for those organizations that are involved in politics, international law protects NGOs' abilities to push agendas, even those that contradict those of their state's own government. Once an NGO is formed it has the right to work towards a broad spectrum of permissible purposes—even purposes at odds with the state's own objectives. And this principle has been reiterated in international bodies and courts alike. The European Court of Human Rights (ECHR) concluded in *United Communist Party of Turkey & Others v. Turkey* that Turkey could not dissolve a political party simply because the national authorities viewed it as "undermining the constitutional structures of the State and calling for the imposition of restrictions."[83] So too, the Council of Europe explained that "NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society."[84] Moreover, the Council notes, NGOs are free to undertake "research, education and advocacy . . . regardless of whether the position taken is in accord with government policy or requires a change in the law."[85]

State sovereignty is not a permissible reason to *violate* freedom of assembly. Legally, the ICCPR contains a limited number of reasons that states are permitted to infringe upon freedom of association.[86] It provides no mechanism for expansion of this list through either

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83 United Communist Party of Turk. and Others v. Turk., App. No. 19392/92, ¶ 27, 26 Eur. Ct. H.R. (1998) ("The Court notes on the other hand that an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions."). The ECHR ultimately held in that case that Turkey was in violation of article 11 of the ICCPR (freedom of association).

84 *See* Council of Eur., *Recommendation CM/Rec (2007)14 of the Council of Europe Committee of Ministers to Member States on the Legal Status of Non-Governmental Organisations in Europe*, 106th Sess., Doc. No. HDIM.IO/59/08 at ¶ 11 (Sept. 30, 2008).

85 *See id.* ¶ 12 ("NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law."). Other positions include NGOs' freedom to "support a particular candidate or party in an election or a referendum" and their freedom to "pursue their objectives through membership of associations, federations and confederations of NGOs." *Id.* ¶¶ 13–15.

86 *See* International Covenant on Civil and Political Rights, *supra* note 73 and accompanying text.

interpretation or modification. And, to be clear, preservation of state sovereignty is not listed as a permissible reason for states to infringe upon freedom of association. Laws restricting foreign funding of NGOs in order to preserve state sovereignty are nearly always unlawful under the ICCPR.[87] And moreover, it is possible to restrict NGOs' activity without ultimately violating ICCPR guarantees. For example, the United States based FARA on rhetoric of national security, but FARA only burdens NGOs insofar as it requires that they disclose additional information. A sovereign state has the right to regulate NGOs—even to set restrictions on them. But international human rights law leaves room for states to implement necessary, legitimate, and proportionate restrictions: nothing more.

States claim that foreign agent restrictions are necessary in order to protect and promote state sovereignty, but in practice, they use state sovereignty as a blanket rationale. One need only look to Russian justification for state refusal to register an organization. When the Rainbow House, an organization that protects and promotes LGBTQ individuals, registered as an organization, the government denied the application, citing sovereignty concerns.[88] Russia stated that the application could not be processed in light of "the sovereignty and territorial integrity of the Russian Federation in view of the reduction of its population."[89] Many other organizations have been cited as posing "a threat to Russian sovereignty," too. A formal list was published in 2015 that named organizations including Freedom House, the National

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87 Rebecca B. Vernon, *Closing the Door on Aid: Restrictions on Foreign Funding of Civil Society*, 11 INT'L J. NOT-FOR-PROFIT L. 5, 6 (2009) (asserting that "[l]aws restricting or eliminating foreign funding of NGOs rarely if ever are able to withstand the demands of the ICCPR" because "the interests the [ICCPR] identifies are not threatened by legitimate foreign funding of NGOs").

88 HUM. RTS. WATCH, AN UNCIVIL APPROACH TO CIVIL SOCIETY: CONTINUING STATE CURBS ON INDEPENDENT NGOS AND ACTIVISTS IN RUSSIA 31 (2009) ("[T]he Ministry of Justice repeatedly and arbitrarily refused to register the NGO Rainbow House, a group that protects the rights of lesbian, gay, bisexual, and transgendered (LGBT) persons, because it apparently fell foul of vague registration requirements. In the denials, the authorities maintained that Rainbow House's objectives 'undermine spiritual public values' and can undermine the 'security of the Russian community and state.'").

89 Int'l Ctr. for Not-for-Profit Law, *Executive Summary*, 14 INT'L J. NOT-FOR-PROFIT L. 5, 17 (2012) (citing Matthew Schofield, *Putin Cracks Down on Nongovernmental Organizations*, MCCLATCHY D.C. BUREAU, https://www.mcclatchydc.com/latest-news/article24461236.html [https://perma.cc/95YD-77WQ] (last updated May 25, 2007, 1:46 AM)).

Endowment for Democracy, and the Open Society Foundation.[90] The MacArthur Foundation, which was also included on the list, closed its doors in Russia as a result of the publication, stating that "[t]he laws make it clear that the Russian government regards MacArthur's continued presence as unwelcome."[91]

2. Anti-Terrorism

As noted above, one of the ostensible justifications for amendments to the Russian NGO law stemmed from a perceived need to "combat terrorism and stop foreign spies using [NGOs] as cover."[92] And, in fact, combatting terrorism would be a valid means by which to limit the freedom of association guaranteed to NGOs under the ICCPR.[93] But national security infringement upon fundamental freedoms under the ICCPR may not come at the expense of respect for fundamental human rights standards. Where reasonable and objective national security justifications exist, a state must first demonstrate that the "prohibition of the association . . . [is] necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose."[94]

As a legal matter, most foreign agent restrictions fail to strike the careful balance between respect for international law (particularly

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[90] Charles Maynes, *The MacArthur Foundation Decides to Pull Out of Russia, Suggesting Its Presence There is Unwelcome*, PUB. RADIO INT'L. (July 23, 2015, 8:30 AM), https://www.pri.org/stories/2015-07-23/macarthur-foundation-decides-pull-out-russia-suggesting-its-presence-there [https://perma.cc/PV6X-77RQ] (listing MacArthur, Freedom House, the National Endowment for Democracy, and Open Society Foundation as included on Russia's "black list" of foreign-funded NGOs).

[91] *Id.*

[92] *Rights Groups Stopped in Russia*, AL JAZEERA (Oct. 19, 2006), http://www.aljazeera.com/archive/2006/10/2008410101949769612.html [https://perma.cc/TW2L-CVRZ].

[93] *See* International Covenant on Civil and Political Rights, *supra* note 73 and accompanying text.

[94] Human Rights Comm'n, Jeong-Eun Lee v. Republic of Korea, Comm. No. 1119/2002, ¶ 7.2, U.N. Doc. CCPR/C/84/D/1119/2002 (Aug. 23, 2005) ("[T]he existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.").

human rights law) and protection of national security.[95] First, it is worth noting that states face a high legal barrier for national security-justified restrictions on human rights. The Human Rights Committee's (HRC or Committee) statements illustrate a persistent skepticism toward national security justifications indicating that legitimacy of state action is not derived from a state's domestic legislation—which may well be out of line with international human rights law—but instead from the international legal apparatus of human rights.[96] This view "accords supremacy to the international regime," such that "the ICCPR . . . prove[s] to be the easy winner" in a conflict between international human rights law and a human rights law that violates international legal obligations—at least when the HRC is the referee.[97]

Second, but more importantly, foreign agent restrictions are not manifestations of legitimate national security concerns justifying infringement on ICCPR rights. The national security rationales are unsupported by evidence. China claimed that the restrictions were appropriate, in part, because foreign agents had caused "occupy" protests to spread to Hong Kong.[98] Likewise, Russia claimed that foreign

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95 *See infra* Section III.A.

96 *See* Human Rights Comm., Concluding observations by the Human Rights Committee on Colombia Under Article 40 of the International Covenant on Civil and Political Rights, ¶ 38, U.N. Doc. CCPR/C/79/Add.76 (May 3, 1997), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.76&Lang=en ("The Committee reiterates its views that a state of emergency should not be declared unless the conditions set out in article 4 of the Covenant apply and the declaration required under the said article is made."); *see also* Human Rights Comm., Comments of the Human Rights Committee on Sri Lanka in Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 13, U.N. Doc. CCPR/C/79/Add. 56 (July 27, 1995), at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.56&Lang=en ("The Committee is concerned that the derogation of rights under the various emergency laws and regulations may not be in full compliance with the requirement of the provisions of article 4, paragraph 2, of the Covenant. It is further concerned that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency.").

97 Salma Yusuf, *Protecting Human Rights While Countering Terrorism*, E-INT'L RELATIONS STUDENTS (Feb. 14, 2012), http://www.e-ir.info/2012/02/14/protecting-human-rights-while-countering-terrorism [https://perma.cc/L68Q-NCFS].

98 Sui-Lee Wee, Michael Martina & James Pomfret, *Foreign Governments, Non-Profits Press China to Revise Draft NGO Law*, REUTERS (June 1, 2015, 12:39 PM), http://www.reuters.com/article/us-china-ngos-idUSKBN0OH2I720150601 [https://perma.cc/7R5E-RMH5]. On Russia, see Lucan Way, *The Real Causes of the Color Revolutions*, 19 J. DEMOCRACY 55 (2008).

agents caused the "color" revolutions in former Soviet states.[99] As a preliminary matter, facts do not support either allegation.[100]

But turning from the facts to the law, states are only permitted to derogate from their international human rights commitments in the narrowest of circumstances—where cases of "public emergency" threaten "the life of the nation . . . ."[101] (And even then, to be lawful, the emergency must be "officially proclaimed" and derogation is limited only "to the extent strictly required by the exigencies of the situation," and even then only to the extent that "such measures are not inconsistent with their other obligations under international law . . . .")[102] Given all of these stipulations, "protests extremely rarely, if ever, give rise to the circumstances meeting the threshold for derogation."[103]

Nor do they meet the threshold here. Neither China nor Russia has been able to point to the "real, *and not only hypothetical* danger" to

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[99] ARCH PUDDINGTON, BREAKING DOWN DEMOCRACY: GOALS, STRATEGIES, AND METHODS OF MODERN AUTHORITARIANS 22, 23 (2017) (stating that Vladimir Putin "spoke of the color revolution as the latest form of American interventionism, and began a process of restricting Russian NGOs that was to reach a climax a decade later").

[100] Regarding Russian leadership and the color revolutions:

> The Russian leadership's reaction to the color revolutions, with its paranoid obsession with sinister outside forces, is a clear indication of the lack of self-confidence that is shared by all authoritarian powers. Whether the state is led by a strongman, a politburo, or a supreme religious leader, the world's most repressive regimes understand that their systems offer few regular outlets for public frustration with government performance.
>
> Fear of color revolutions has intensified since the 2014 events in Ukraine, with a particular focus on the alleged role of the United States as puppet master. Yet neither the Kremlin nor likeminded regimes have advanced credible evidence that the various civic movements were inauthentic. The American role in the Orange Revolution of 2004–[2005], for example, was limited to funding for voter training, upgrading of election technology, and other measures designed to assist authorities in ensuring fair balloting. There is no evidence of direct American government help to the Orange forces. If the United States influenced the eventual outcome, it did so by making it more difficult for the Ukrainian authorities to rig the election results.

Id. at 24–25. *See also* Chris Lau, Kwong Man-ki & Ng Kang-chung, *U.S. Has No Involvement in Fostering Occupy Protest, Obama Tells Xi*, S. CHINA MORNING POST, http://www.scmp.com/article/1638128/barack-obama-denies-us-involvement-occupy-central-protests [https://perma.cc/D924-ATZW] (last updated June 20, 2018, 4:39 PM).

[101] *See* International Covenant on Civil and Political Rights, *supra* note 73, art. 4, ¶ 1.

[102] *Id.*

[103] ARTICLE 19, THE RIGHT TO PROTEST: PRINCIPLES ON PROTECTION OF HUMAN RIGHTS IN PROTESTS 16 (2015).

public order stemming from either protest that justifies the sweeping restrictions they imposed, as is their burden to do.[104] And even then, for a derogation to be permissible, states must undergo an exhaustive checklist of actions. They must officially and lawfully proclaim their derogation in accordance with domestic and international law.[105] They have to inform the U.N. Secretary General.[106] They have to publicize the information to the HRC.[107] The HRC then reviews and opines on the derogation.[108] None of these requirements necessary for derogation have been so much as attempted by foreign agent restriction-implementing states.

Third, states could have implemented less intrusive measures to monitor NGOs—and had an obligation to do so. For example, the original foreign agent restrictions, FARA, manage to regulate civil society on the basis of a national security justification without violating the ICCPR. The minimal requirements therein do not serve as a barrier to speech and advocacy, operational activity, assembly, resources, or as a form of societal stigmatization. The barriers to entry that the restrictions impose—registration and periodic financial disclosures—moreover, are not unduly onerous. On the other hand, the scope proffered in modern foreign agent restrictions is so broad as to suggest that the promulgating state's intent is not to protect citizens from terrorism, but rather to consolidate its own power.

3. Foreign Agent Restrictions Benefit NGOs

A final counterargument that states make is that foreign agent restrictions are in fact *beneficial* to NGOs. By providing rules surrounding their operations and requiring transparency between them

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104 Jeong-Eun Lee, Comm No. 1119/2002, *supra* note 94, at ¶ 7.2 (emphasis added).

105 For a discussion of the limits and procedures for lawful derogation, see Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 677 (2011).

106 International Covenant on Civil and Political Rights, *supra* note 73, art. 4, cl. 3 ("Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations . . . .").

107 Hafner-Burton, Helfer & Fariss, *supra* note 105 ("The secretary general publicizes this information and circulates it to other treaty parties, who may challenge the derogation before an international monitoring body—the U.N. Human Rights Committee.").

108 *Id.*

and the government, the regulations create what is in fact a more predictable environment for NGO operation. Recently, the government of China insisted that the regulations in fact clarified the legal status of foreign NGOs, guaranteed their lawful rights, and made their operations in China more efficient.[109] A similar variation was manifest in the Ugandan legislation, the preamble of which stated that its goal was to "provide a conducive and enabling environment."[110]

Evidence simply does not support this allegation. In the Russian context, for example, approximately thirty NGOs chose to shut down by June 2016 rather than be labeled as "foreign agents."[111] Another NGO—the Golos Association, Russia's only independent election monitor—was threatened with forced closure for being a "foreign agent" after being awarded a prize from a Norwegian human rights organization. ("I pray we will not receive another prize," the director of the Golos regional association remarked.)[112] In China, an activist assessed the new NGO as having a similarly pernicious effect. "[M]any foreign NGOs will withdraw their offices from China and will cancel their grants in China," he said. "And it will affect many, many domestic NGOs' budgets because it is very hard for NGOs to raise funds inside China because the government has set up many, many restrictions on funding [sic] raising for domestic NGOs."[113]

III. FOREIGN AGENT RESTRICTIONS VIOLATE INTERNATIONAL LAW

Part III sketches the protections that international law bestows upon NGOs. It outlines the debate over the legal personality of NGOs, as well as the guaranteed rights bestowed upon them through

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109 Wong, *supra* note 1.

110 Mwesigwa, *supra* note 37.

111 *See Russia: Government vs. Rights Groups*, HUM. RTS. WATCH: BATTLE CHRON. (June 18, 2018, 5:30 AM), https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle [https://perma.cc/6FZH-JNR7] ("[A]bout 30 groups have shut down rather than wear the 'foreign agent' label.").

112 Kathy Lally, *Russia Foreign Agent Law Imperils Democracy, Putin Critics Say*, WASH. POST (May 26, 2013), https://www.washingtonpost.com/world/russia-foreign-agent-law-imperils-democracy-putin-critics-say/2013/05/26/f197026a-c484-11e2-914f-a7aba60512a7_story.html?utm_term=.a828c2a9e7a1 [https://perma.cc/LV57-BJGB].

113 Tom Phillips, *China Passes Law Imposing Security Controls on Foreign NGOs*, GUARDIAN (Apr. 28, 2016, 5:56 AM), https://www.theguardian.com/world/2016/apr/28/china-passes-law-imposing-security-controls-on-foreign-ngos [https://perma.cc/VDL3-72CP].

international legal instruments. This Part analyzes how these guarantees under the ICCPR are each violated: violation of a right to privacy, violation of a state duty to protect, and violation of freedom of association. Its conclusion is that international law does provide protections for NGOs—but does not empower NGOs to bring claims in the international legal system in order to challenge foreign agent restrictions. In making this point, Part III thus sets the stage for a critical examination in the following Part of the means by which international law can be creatively marshaled in order to curtail the proliferation of foreign agent restrictions.

A. *Non-Governmental Protections Under International Law: Legal Personality*

Despite their importance in the international system, NGOs are not universally agreed to have international legal personality or full acknowledgment in the international legal community, which in turn bestows rights, such as access to courts and protections under international law.[114] Why does international legal personality matter? Without full recognition thereof, NGOs are barred from bringing affirmative legal claims in the international system. They have to rely, instead, on states or individuals to litigate on their behalf.

NGOs have faced a decades-long battle for this recognition in the international legal system.[115] Wilfred Jenks noted, "While the number, importance, and influence of international associations have continued to increase, the problem of their legal status has not become of such acuteness and urgency as to make a comprehensive solution of it imperative."[116] Several attempts were made at the beginning of the twentieth century to both define NGOs and to codify their legal status. In 1910, the Institut de Droit International proposed an (unsuccessful)

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[114] Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 IND. J. GLOBAL LEGAL STUD. 1, 19 (2003) ("States have established conventions and treaties to regulate and define important relations in the international arena. NGOs, however, have not yet been recognized by states as having an international legal personality.").

[115] For a history of this struggle, see Charnovitz, *Two Centuries of Participation*, *supra* note 22, at 189–90.

[116] C. Wilfred Jenks, *Multinational Entities in the Law of Nations*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 70, 77 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1972).

draft convention on NGOs.[117] Then in 1912, a first draft treaty specific to the question of the international legal personality of NGOs was developed;[118] another was proposed in 1923.[119] None of these attempts, however, led to the establishment of an internationally agreed upon convention.

Without a specific charter of their own, NGOs found protections in the margins of other international agreements. Directly following World War II, the United Nations developed the first international legal instruments that began to bridge the gap in legal coverage. Article 71 of the U.N. Charter both offered the first instance of the term "NGO" and gave NGOs initial recognition under international law. Though the "recognition of their existence has only limited effect and can in no way be regarded as equivalent to a 'legal status,'"[120] article 71 served as a guide[121] for many other intergovernmental organizations within and without the U.N. system on the status of NGOs.[122] While article 71 does not fully recognize NGOs as having legal personality, it does bestow upon them a hybrid role as a "consultation partner," and it became a "*de*

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117 Martens, *supra* note 114, at 20.

118 *Id.* (citing Andreas von Weiss, *Die Non-Governmentalen Organisationen und die Vereinten Nationen*, 27 ZEITSCHRIFT FUR POLITIK 395 (1980)).

119 Charnovitz, *Two Centuries of Participation*, *supra* note 22, at 189 ("In 1923, the Institut de Droit International prepared a draft treaty on the juridical status of international associations."); *see also* Martens, *supra* note 114, at 20.

120 Martens, *supra* note 114, at 15 (quoting Marcel Merle, *A Legal Tangle: The "Status" of Non-governmental International Organizations Between International Law and National Laws*, TRANSNAT'L ASS'NS 326 (1995)) ("The United Nations initially coined the term 'NGO' after World War II. NGOs were first officially acknowledged in international law in 1945, with the introduction of the U.N. Charter, whose Article 71 referred to 'non-governmental organizations.'").

121 Martens, *supra* note 114, at 15 (suggesting that the term "NGO" was used after the U.N. coined the term).

122 Because there are currently no regulations under international law governing the establishment, requirements, and the legal status of NGOs, international law can generally be said to use U.N. criteria for NGOs. Charnovitz, *Two Centuries of Participation*, *supra* note 22, at 186. U.N. criteria for NGOs can be found in Current Resolution 1996/31, which has governed the consultative relationship between NGOs and the United Nations since 1996. It requires basic organizational principles and follows the broad criteria set up by the Union of International Associations. *See generally* UNION OF INTERNATIONAL ASSOCIATIONS, http://www.uia.org (last visited Aug. 23, 2018). Furthermore, the United Nations requires NGOs to fulfill criteria, such as "international standing," "independent governance," and "geographical affiliation." Economic and Social Council Res. 1996/31, Consultative Relationship Between the United Nations and Non-governmental Organizations, ¶¶ 9, 13, 44 (July 25, 1996) [hereinafter 1996 NGO Rule].

facto . . . charter" for their activities.[123] Consultative roles for NGOs eventually became established practice throughout the U.N. system. But recall that this victory is an incomplete one. NGOs are granted the ability to consult, but not to complain in their own right. They are considered reactors, not affirmative actors. This limitation suggests a conclusion that Part III eventually draws: as long as international legal personality is denied to NGOs, bringing an international legal case against a state for foreign agent restrictions is something that a *state* must do.

But even gaining *some* status benefitted NGOs. As other actors in the U.N. system began to treat NGOs as consultative partners, they looked to the U.N. Economic and Social Council's (ECOSOC) treatment of NGOs, and its definition of them, as the model for their own behavior. "Article 71 was implemented comprehensively by ECOSOC in 1950 . . . in a resolution . . . superseded . . . in 1996 by the resolution now in place (the 1996 NGO Rule)."[124] The 1996 Rule requires NGOs with consultative status to "be of recognized standing within the particular field of its competence or of a representative character."[125] But it does not require NGOs to be international rather than national.[126] And it stipulates governance requirements that reflect democracy and transparency.[127] Together, these changes to the U.N. regulations governing NGOs' special consultative status "reflect[] . . . growing concerns . . . about the legitimacy and accountability of NGOs[128]—a foreshadowing of the national security tenor of the foreign agent restrictions that would later restrict NGOs' domestic operations. Though NGOs are not deemed to have a legal personality, their consultative status accords them a level of recognition and respect that rises above other non-state actors. But their rights are far from dependent on article 71 of the U.N. Charter alone.

123 *See* Charnovitz, *Nongovernmental Organizations*, *supra* note 26, at 357.

124 *See* Charnovitz, *Nongovernmental Organizations*, *supra* note 26, at 358.

125 1996 NGO Rule, *supra* note 122, at ¶ 9.

126 *Id.* ¶¶ 4–5.

127 *Id.* ¶¶ 10, 12.

128 *See* Charnovitz, *Nongovernmental Organizations*, *supra* note 26, at 359.

B. *Protections Under International Law: Beyond Legal Personality*

Without legal personality, NGOs can rely on other states to bring claims on their behalf. If a state is to bring a claim on behalf of an NGO, it needs to root this claim in a violation of international law. International law does provide several explicit protections for NGOs. NGOs are protected via the ICCPR but also via the Universal Declaration of Human Rights[129] and a number of other human rights conventions and declarations.[130] These documents grant civil society (and NGOs as a component thereof) several positive and negative rights. These rights extend both to an NGO's formation and to its operations once the organization is established.

International law protects NGOs from unwarranted intrusion into their organizations' internal governance. States are obligated to respect NGOs' private, unique, and independent nature, and refrain from interfering with their internal operations. Such an interference in internal affairs (such as by insisting on viewing an NGO's internal financial statements, interrogating its staff, appointing board members, or insisting on domestic partner or sponsor organizations) amounts to a violation of freedom of association.[131]

NGOs are also protected by the right to freedom of expression, enshrined in the Universal Declaration of Human Rights and the ICCPR.[132] This right prevents states from limiting the subject matter on which NGOs are permitted to speak out.[133] The HRC has stated that

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129 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

130 "These include . . . the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the African Charter on Human and People's Rights, the American Convention on Human Rights, the Arab Charter on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms." DEFENDING CIVIL SOCIETY, *supra* note 12, at 34. For a comprehensive—and frankly, excellent—overview of the rights of and protections guaranteed to NGOs under international law, see *id.* at 34–52.

131 *See* Council of Eur., *supra* note 84, at 70 ("No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.").

132 *See* G.A. Res. 217 (III) A, *supra* note 129, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").

133 *See* Freedom & Democracy Party (ÖZDEP) v. Turk., 1999-VIII Eur. Ct. H.R. 293.

restrictions on freedom of expression should never be applied to: "[d]iscussion of government policies and political debate; *reporting on human rights*, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups."[134] NGOs, then, who do heavy lifting on human rights reporting, should only rarely be restricted in their expression.

In fact, international law prescribes only a small number of situations in which freedom of expression can be limited: when the limitation is provided by law; when it pursues one of the two legitimate government purposes of article 19(3) of the ICCPR (respect of the rights or reputation of others, or national security); and when it is the least restrictive means required to achieve the aim. All three elements of this test must be met for the state's restriction to be permissible.[135] Moreover, states may not utilize vague, imprecise, and broad concepts, such as "political" or "extremism," in drawing restrictions on NGOs' freedom of expression.[136] And once an NGO is formed, the NGO has the right to operate free from unwarranted state interference, as a corollary of the right to freedom of association.[137] Drawing upon the example of the Chinese foreign agent restrictions, this is not often the case. In that example, both the wide discretion of the police and the lack of clarity concerning definitions of several terms in the legislation are problematic.

This Article focuses on the protections afforded to NGOs under the ICCPR, a multilateral treaty containing a comprehensive list of civil and political rights that States Parties are obligated to "respect and ensure."[138] This is because the ICCPR is widely signed and ratified—to

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134 Human Rights Council Res. 12/16, Freedom of Opinion and Expression, § 5(p) (Oct. 12, 2009) (emphasis added).

135 Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at ¶¶ 39–40 (1986).

136 The ICCPR Human Rights Committee reviewed the Russian law, "On Combating Extremist Activities," and expressed "concern that the definition of 'extremist activity' . . . is too vague to protect individuals and associations against arbitrariness in its application." Rep. of the Human Rights Comm., at 24, U.N. Doc. A/59/40 (vol. 1) (2004).

137 DEFENDING CIVIL SOCIETY, *supra* note 12, at 39.

138 International Covenant on Civil and Political Rights, *supra* note 73, art. 2, cl. 1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,

such a level that one scholar noted "becoming a party to this covenant seems to be concomitant with joining the U.N.."[139] State actions that are contrary to provisions of the ICCPR go against, therefore, the values (and the content of international law) publicly expressed and endorsed by a majority of states in the international system.

1. Right to Privacy

Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[140] The HRC in its General Comment No. 31(9) on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant makes it clear that this right also applies to organizations:

> Although . . . the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others.[141]

While governments can have some limited degree of oversight over NGOs in the interest of transparency, governmental oversight should be reasonable. "[O]versight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue."[142]

Foreign agent restrictions on NGOs violate the right to privacy under article 17 of the ICCPR. For example, in the case of the Chinese legislation, the government having the power to look at any information of the registered NGO at any time infringes upon the ICCPR.[143] Rather,

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without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

[139] Linda Camp Keith, *The United Nations International Covenant on Civil & Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999).

[140] International Covenant on Civil and Political Rights, *supra* note 73, art. 17, cl. 1.

[141] Human Rights Comm., Gen. Comment No. 31 on its 80th Sess., at § 9, Mar. 29, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[142] Org. for Sec. & Co-operation in Eur., Guidelines on Freedom of Association § 228 (Office for Democratic Inst. & Human Rights 2014)

[143] Press Briefing, U.N. Office of the High Commissioner for Human Rights, *China: Newly Adopted Foreign NGO Law Should Be Repealed, U.N. Experts Urge*, U.N. OFF. HIGH

the government needs a legal basis for the information and the information must be proportional to the aim.

2. "Duty to Protect"

Under article 2 clause 1 of the ICCPR, a State Party[144] undertakes to "respect and ensure" Covenant rights to "all individuals within its territory and subject to its jurisdiction."[145] Thus, foreign agent restrictions on NGOs violate States' duty to protect.

As members of the United Nations, every member government is obligated to protect the rights enshrined in international law.[146] The strength of this obligation has been increasing over time, and the concept of a "duty to protect" has increasingly been given weight in the U.N. General Comments.[147]

Under the duty to protect framework, States have both negative and positive rights. They must refrain from interfering with human

COMMISSIONER HUM. RTS. (May 3, 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19921&LangID=E [https://perma.cc/P4MB-5CL5] ("Such broadly crafted restrictions fail to comply with international human rights norms and standards relating to freedom of association and freedom of expression.").

144 A State Party is "a State that has expressed its consent, by an act of ratification, accession or succession, and where the treaty has entered into force (or a State about to become a party after formal reception by the United Nations Secretariat of the State's decision to be a party)." *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMMISSIONER HUM. RTS., http://indicators.ohchr.org (click on "Description" button above map) [https://perma.cc/NL8U-DLD7] (last visited Nov. 14, 2018).

145 International Covenant on Civil and Political Rights, *supra* note 73, art. 2, cl. 1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

146 U.N. Charter, arts. 55–56 (holding that States must promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"). *See also* International Covenant on Civil & Political Rights, *supra* note 73, art. 2, cl. 2 ("[E]ach State Party . . . undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.").

147 Individual Report, U.N. Office of the High Commissioner for Human Rights State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations' Core Human Rights Treaties (July 2007), https://www.business-humanrights.org/sites/default/files/media/bhr/files/Ruggie-report-Convention-on-Rights-of-Child-Jul-2007.pdf [https://perma.cc/Y26B-LUD5].

rights and must ensure respect thereof.[148] The positive right impacts State obligations to create a legislative framework that fulfills their legal obligations.[149] When States fail to provide a legislative framework that protects the rights enshrined in international law—and in fact create policies that infringe upon them—they violate ICCPR article 2.

A State has several means through which it can enforce a duty to protect. General Comment 31 encourages State Parties to call on other State Parties to comply with Covenant obligations.[150] A State could consider drawing attention to a violation of the duty to protect. The General Comment stresses this should not be seen as "an unfriendly act," but rather a "reflection of legitimate community interest."[151]

In fact, States may have an *affirmative obligation* to raise objections to violations of the duty to protect. Under article 2 clause 1 of the ICCPR, State Parties undertake to respect and ensure Covenant rights to all individuals within the "power or effective control" of that State Party.[152] This obligation extends even to those outside the State Party's national territory. It has largely been interpreted as applicable to security forces abroad; however, if an NGO is acting on the State's behalf (acting on the instructions of a State, for example), the State Party may be obliged to intervene.

148 Human Rights Comm., Gen. Comment No. 31, *supra* note 141, at § 6 ("The legal obligation under article 2, paragraph 1 [of the ICCPR], is both negative and positive in nature.").

149 *Id.* § 7 ("Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.").

150 *Id.* § 2 ("Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.").

151 *Id.*

152 *Id.* § 10 ("States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.").

3. Freedom of Association

Perhaps the most critical right that applies to NGOs is the right of freedom of association. The ECHR has held that article 11 of the ICCPR is not limited to trade unions,[153] but rather extends to NGOs due to the critical function that they play within democratic society.[154] Moreover, within international law, freedom of association does not hinge upon a legal status. Therefore, NGOs are granted this freedom despite lacking international legal personality. In the context of foreign agent restrictions, states should not force NGOs to register,[155] and even when registration is optional, registration should be done carefully.

Other states' parties have an obligation to ensure that the freedom of association is protected. The Inter-American Commission on Human Rights has affirmed the responsibility of member states to "[e]nsure that the procedure for entering human rights organizations in the public registries will not impede their work and that it will have a declaratory and not constitutive effect."[156] And in *Sidiropoulos and Others v. Greece*, the ECHR found that "the right to form an association is an inherent part"[157] of the right to free association, "without which that right would be deprived of any meaning."[158]

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153 United Communist Party of Turk. and Others v. Turk., App. No. 19392/92, at ¶ 24, 26 Eur. Ct. H.R. (1998) ("[T]he conjunction 'including' clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised.").

154 Gorzelik v. Pol., App. No. 44158/98, at ¶ 92, Eur. Ct. H.R. ("While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage . . . seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.").

155 DEFENDING CIVIL SOCIETY, *supra* note 12, at 37.

156 Inter-Am. Comm'n H.R., Report on the Situation of Human Rights Defenders in the Americas, Doc: OEA/Ser.L/V/II.124Doc.5rev.1 (March 7, 2006), Recommendation 16, at 83, http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf [https://perma.cc/QFH8-JKJE].

157 The language of article 11 of the European Convention is virtually identical to the language of article 22 of the ICCPR, and decisions interpreting the European Convention are considered extremely persuasive for interpreting the ICCPR, although they lack binding authority. *Compare* European Convention on Human Rights art. 11, Sept. 3, 1953, 213 U.N.T.S. 222, *with* International Covenant on Civil and Political Rights, *supra* note 73, art. 22.

158 Sidiropoulos & Others v. Greece, 1998-IV Eur. Ct. H.R. ¶ 40 ("The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should

Modern foreign agent restrictions are neither strictly necessary, nor do they promote states' bona fide objectives. Each restriction on the freedom of association, where challenged, is subject to a rigorous legal test, as defined in ICCPR article 22.[159] Unless the State is able to show that the restriction at issue is prescribed by law, in the interest of legitimate government aims, and necessary in a democratic society, then that restriction is not justified.[160] Any restriction that fails to meet *just one* of the conditions is unlawful under the Covenant, and it is the State's obligation to demonstrate that the interference passes scrutiny.[161] However, almost all restrictions on foreign funding of nonprofits fail to meet "at least one of these three conditions."[162]

First, the restrictions fail because they are not narrowly tailored derogations as required by law. For example, the Chinese foreign agent restrictions that bar NGOs from doing any work that "undermine[s] the country's unity, security, or ethnic solidarity," and that leaves police officers to determine what "rumors" and "state secrets" mean, violates

be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning . . . . Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation . . . .").

159 International Covenant on Civil and Political Rights, *supra* note 73, art. 22, cl. 2 ("No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.").

160 Human Rights Comm., Gen. Comment No. 31, *supra* note 141, at § 6 ("Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.").

161 ARTICLE 19, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION, Principle 1(d) (1996) ("The burden of demonstrating the validity of the restriction rests with the government.").

162 Vernon, *supra* note 87, at 21.

this requirement of the ICCPR.[163] The Azerbaijani foreign agent restrictions stipulate that the Ministry of Justice is permitted to "study" NGOs' activities. However, the term "study" is neither defined nor limited, giving the government of Azerbaijan unrestricted authority to intrude into the activities of NGOs.[164]

Second, the restrictions fail to clear the high threshold that the word "necessary" demands. A restriction must be proportionate to the interest and cannot extend beyond what is strictly necessary to further that interest. The restriction must be narrowly tailored and must address a valid threat. Foreign agent restrictions fail this test.[165] For example, Uzbekistan's foreign agent restrictions—requiring funneling of foreign NGO funding through government-controlled organisms—are not necessary to prevent terrorism, as there are more effective and less restrictive means of ensuring that funding from terror groups is not camouflaged as civil society funding.

Finally, restrictions on free association do not further legitimate state interests. Permissible restrictions on free association must bolster national security or public safety; support public order; protect public health or morals; or protect the rights and freedoms of others. Section II.B delved into the "state interests" justifications and examined why they are insufficient.

IV. PROTECTING CIVIL SOCIETY VIA INTERNATIONAL LAW

Having mapped the avalanche of legislation curtailing NGOs—typically on the basis of national security or state sovereignty—provided an overview of the importance of NGOs within international law, and outlined the protections bestowed upon NGOs within international law,

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163 Shannon Tiezzi, *China Passes Foreign NGO Law amid National Security Push*, DIPLOMAT (Apr. 29, 2016), https://thediplomat.com/2016/04/china-passes-foreign-ngo-law-amid-national-security-push [https://perma.cc/4SHT-HRAZ] ("[T]he law contains the sort of broad language China uses to crack down on dissidents of all stripes. Foreign NGOs are prohibited, for example, from taking actions that 'undermine the country's unity, security, or ethnic solidarity.' Those same charges have been used by Chinese authorities to arrest human rights lawyers, journalists, women's rights advocates, and Uyghur and Tibetan activists.").

164 *Civic Freedom Monitor: Azerbaijan*, INT'L CTR. NOT-FOR-PROFIT L., http://www.icnl.org/research/monitor/azerbaijan.html [https://perma.cc/4VQF-UEAA] (last updated Mar. 21, 2016).

165 *See supra* Part I.

this Article now turns to the thornier question: what, if anything, can states do to challenge domestic legislative restrictions on NGOs? This Article posits a novel solution: asserting that foreign agent restrictions violate the ICCPR and proposing that another state bring a claim under article 41 of the ICCPR—a dispute resolution mechanism that, shockingly, has never before been used. The Article argues that the issue of foreign agent restrictions poses a scenario uniquely positioned for its inaugural use.

A. *Foreign Agent Restrictions Require a Legal Solution*

Before turning to the precise legal solution posited, it is worth exploring why this Article suggests a solution that is based in law, rather than in policy. And it is worth considering why an international solution, rather than a domestic one, is an appropriate means of addressing the issue.

Foreign agent restrictions do not fit the typical model of international legal problems, more often conceived in terms of collective action problems (for example, protecting the oceans, restoring the ozone layer, or keeping states from pursuing nuclear weapons development). They are instead a *domestic* problem more aptly requiring a solution within domestic law or policy. Despite their divergence from what is typically conceived of as an international legal problem, this Article argues that international law can, and should, be marshaled to address foreign agent restrictions. And international law should be marshaled to address this issue for at least three reasons.

1. Domestic Redress is Ineffectual

First, every attempt at domestic redress has been unsuccessful. Though international law generally favors exhaustion of domestic remedies,[166] domestic litigation has proven unsuccessful at addressing foreign agent restrictions in many implementing states. Scholars have identified this exhaustion requirement as an element of customary

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[166] Minnesota Advocates for Human Rights, *Exhaustion of Domestic Remedies, International Law—United Nations System*, UNIV. OF MINN. (2003), http://hrlibrary.umn.edu/svaw/law/un/exhaustion.htm [https://perma.cc/7NJ3-7RCT].

international law in which states should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before calling into question its international responsibility.[167] In general, complaints to international bodies are only accepted when accompanied by proof that domestic remedies have been exhausted, including information about any legal proceedings that took place in that country.[168] International bodies appreciate exhaustion of remedies because of a presumption that national remedies are more effective than international ones—national courts being more expedient, accessible, and less resource-intensive. And furthermore, national courts are presumed to have relative expertise at interpreting domestic law.

The principle of exhaustion of domestic remedies, however, cuts in favor of marshaling international law to address foreign agent restrictions. This is both because some states have rejected challenges to foreign agent restrictions and because due process and corruption concerns in other states render viable an NGO's direct application to an international tribunal. On the first point, several states' highest courts have heard domestic challenges to foreign agent restrictions. In Russia, for example, four organizations and their leaders affected by the foreign agent law challenged the legislation in Russia's Constitutional Court. The Court upheld the law on April 8, 2014, ruling that there were no legal or constitutional grounds for contending that the "foreign agent" term had negative connotations from the Soviet era, and that its use was "not intended to persecute or discredit" NGOs. The Constitutional Court also held that the designation of "foreign agent" was in line with public interest and state sovereignty.[169] Some international tribunals have already heard appeals from domestic courts. For example, the

167 A.A. CANCADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS 1 (Cambridge U. Press, 1983).

168 Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, EUI Working Paper LAW No. 2007/02, at 11, http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf?sequence=1 [https://perma.cc/B5J6-39N7] (citing Akdivar & Others v. Turk., 1996-V, Eur. Ct. H.R., explaining exhaustion as obliging "those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system . . . . The rule is based on the assumption . . . that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law").

169 *Russia: Government vs. Rights Groups*, *supra* note 47.

Government of Azerbaijan has lost five cases appealed from domestic courts to the ECHR.[170] There, the Court found, in each case, that denials of NGOs' registration violate freedom of association under article 11 of the European Convention on Human Rights.[171]

This is not to say that domestic courts must *always* have heard or decided a case. Circumstances such as a state's failure to carry out justice or correct a human rights violation can justify immediate consideration by an international tribunal. In states where there are substantiated allegations of corruption, lack of due process, or ineffective judicial review, international human rights instruments tribunals may prove willing to hear a complaint without requiring the typical exhaustion of domestic remedies. And international human rights law contains a particular presumption in favor of the alleged victim, rather than the sovereign state. Though human rights instruments contain precise provisions on the exhaustion of domestic remedies,[172] these provisions each incorporate a caveat: if domestic solutions are delayed beyond a reasonable period, the international tribunal is qualified to issue its own decision. In practice, the rule of exhaustion of local remedies is interpreted in a more flexible manner in international human rights law

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170 *Harassed, Imprisoned, Exiled: Azerbaijan's Continuing Crackdown on Government Critics, Lawyers, and Civil Society*, HUM. RTS. WATCH (Oct. 20, 2016), https://www.hrw.org/report/2016/10/20/harassed-imprisoned-exiled/azerbaijans-continuing-crackdown-government-critics [https://perma.cc/8XKH-3752] ("Azerbaijan has already been found to have violated the right to freedom of association in five cases since its ratification of the ECHR in 2002.").

171 For example, on November 13, 2014, the ECHR ruled in *Islam-Ittihad Ass'n & Others v. Azerbaijan* that Azerbaijan's dissolution of an NGO violated the right to freedom of association under article 11 of the European Convention on Human Rights. NGOs argued, in part, that they had been denied the right to a fair trial, arguing that hearings before the domestic courts were cursory. *European Court: Azerbaijan Violated NGO's Freedom of Association*, EUROPEAN HUM. RTS. ADVOCACY CTR. (Nov. 21, 2014), http://ehrac.org.uk/news/european-court-azerbaijan-violated-ngos-freedom-of-association [https://perma.cc/3CFS-7NQV].

172 *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 73, art. 41 ("The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged."); *see also* Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, art. 5.2 ("The Committee shall not consider any communication from an individual unless it has ascertained that . . . (b) [t]he individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.").

than in other fields of international law. The European Convention and the HRC have continually affirmed that "the rule requires the exhaustion of remedies which are available, effective, adequate and sufficient."[173] These caveats recognize the balance struck between the respect and protection of state sovereignty and the protection of individual victims of alleged human rights violations, where the law gives greater recognition to the alleged victim.

Exhaustion of local remedies aside, foreign agent restrictions pose a problem that not only *can* be considered by an international body, but also should be. First, though foreign agent restrictions can be conceived as individual domestic problems, this Article argues that they are more properly conceived as one cohesive international legal problem. This is in part because of their coherence, and in part because of their subject matter. In terms of their coherence, the related language and content of the restrictions serve as some evidence that foreign agent restrictions are a transnational phenomenon. And in terms of their subject matter, foreign agent restrictions directly implicate and stifle rights that are guaranteed under international human rights treaties. As demonstrated in this Subsection, foreign agent restrictions violate international treaties that states are bound to uphold. In this sense, scattershot domestic litigation is inappropriate because it fails to address the *international* nature of the problem, and piecemeal policy solutions are inappropriate because they fail to address the *legal* nature of the problem.

2. Diplomacy is Insufficient

Second, foreign agent restrictions have thus far not been addressed by any of the tools that have been used.[174] Conversations with practitioners—and the lack of any resolution of the foreign agent restrictions thus far—indicate that any diplomatic solutions have failed. Because domestic litigation has failed, and diplomacy has failed, an innovative solution rooted in international law is the appropriate next step.

173 Silvia D'Ascoli & Kathrin Maria Scherr, *supra* note 168, at 12.

174 *See Harassed, Imprisoned, Exiled: Azerbaijan's Continuing Crackdown on Government Critics, Lawyers, and Civil Society*, *supra* note 170 (indicating that domestic litigation has been unsuccessful at challenging domestic NGO restrictions).

3. NGOs' Protection Under International Law

Foreign agent restrictions should be considered by an international body because NGOs receive protection under international law, rather than domestic law, on account of their unique role in the international system. Without a discrete treaty or an agreement recognizing their legal personality, NGOs are left vulnerable to domestic legislation in a way that neither states nor individual citizens are. Identifying a solution rooted in international law could draw attention to the relative lack of protections around NGOs in international law. And creative, successful claims under international law might have positive spillover effects. Perhaps paving the way for stronger protections of civil society—which, as Part III demonstrated—is critical for a robust, sustainable international community.

B. *ICCPR Article 41: The First Step to a Solution*

This Article now turns to an international legal solution. A state should use the optional dispute resolution mechanisms under article 41 of the ICCPR to bring a claim against a proliferator of foreign agent restrictions. The legal architecture for this proposal already exists, and there is a clear mechanism to take offending countries to task. But, no scholar has called to do so. This is surprising because—as outlined below—the nature of the issue, the widespread acceptance of the ICCPR, and the public nature of bringing a challenge under article 41 make it the ideal mechanism for bringing a spotlight and a challenge to foreign agent restrictions.

1. Enforcement Mechanisms under the ICCPR

The HRC monitors compliance with the ICCPR. Moreover, specific articles within the ICCPR set out a dispute resolution mechanism for States to call one another to task for falling out of compliance with the human rights obligations within the ICCPR. Articles 41–43 of the ICCPR propose an elaborate procedure for dispute resolution between States over a State Party's fulfillment of its

obligations under the ICCPR.[175] The procedure only applies to State Parties to the ICCPR who have made a declaration accepting the competence of the relevant Committees in this regard.[176]

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[175] International Covenant on Civil and Political Rights, *supra* note 73, arts. 41–43, at 182–84.

[176]

> 1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
>
> (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
>
> (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
>
> (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;
>
> (d) The Committee shall hold closed meetings when examining communications under this article;
>
> (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;
>
> (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
>
> (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;
>
> (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

The ICCPR has three monitoring systems: (1) States Parties must submit periodic reports to the HRC, explaining the measures they have taken to implement the guarantees of the Covenant;[177] (2) a State Party may complain to the HRC about another State Party's breach of the

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> (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
>
> (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
>
> 2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph [1] of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Id. art. 41, at 182–83.

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> 1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
>
> (b) Thereafter whenever the Committee so requests.
>
> 2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
>
> 3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
>
> 4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
>
> 5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Id. art. 40, at 181–82.

Covenant;[178] or (3) individuals may submit communications to the HRC under the Optional Protocol to the ICCPR, claiming to be victims of a State Party's violation of the Covenant.[179]

The first option—using periodic reporting under article 40 of the ICCPR—requires States Parties to "undertake to submit reports on the measures they have adopted which give effect to the rights recognized" in the Covenant.[180] In practice, States Parties must submit an initial report within one year of the Covenant coming into force for the State concerned and then every five years afterwards. The reports indicate measures that the State Party has adopted to give effect to Covenant guarantees, while also acknowledging challenges in implementation. In response, the Committee drafts and adopts comments critiquing the reports, noting their positive factors, drawing attention to concerns, and making recommendations. The Committee is instructed to "study" States Parties' reports and, in turn, to transmit "its reports, and such general comments as it may consider appropriate" to the States.[181]

But article 40 is an ineffective tool for persuading states to modify their domestic legislation. This, in part, is because article 40 reporting is a diplomatic endeavor, with greater focus on process than on substance. The language of article 40 itself—"general comments as it may consider appropriate"—has been interpreted by the Committee to address States Parties as a whole rather than to individually respond to any one State Party's report.[182] Not only are responses far from specific, but the subjects of State Party's reports have increasingly moved away from holistic reporting.[183] The HRC recently moved away from requesting

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[178] *Id.* art. 41, at 182–83 ("A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.").

[179] *Id.* ("If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.").

[180] *Id.* art. 40, at 181–82.

[181] *Id.*

[182] Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, *in* THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 15, 22 (Philip Alston & James Crawford eds., 2000).

[183] *See* Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. U.N. L. 341, 348–49 (2001) (citing *Report of the Human Rights Committee*, GAOR, Suppl. No. 40 (Doc. A/35/40), 83–87 (1980)) (explaining that inquiry was designed "in such a way as not to

full reports and instead implemented a "simplified reporting procedure" in which the Committee prepares a list of issues before the State submits its period report.[184] This results in allowing States to bypass examination of civil society protections entirely, should the topic not be on the HRC's list. States Parties frequently and easily manipulate facts and circumstances to paint a favorable picture of their human rights record, leaving the HRC to resort to reports from other U.N. organs and outside NGOs to see the fuller picture of the State's implementation of Covenant rights.[185] And though NGOs make crucial contributions to the HRC reporting process, they are not permitted to seek enforcement of their rights through this mechanism, as "the HRC does not issue binding judgments with the force of law in the reporting process."[186]

A second means of addressing foreign agent restrictions via the ICCPR comes in the First Optional Protocol, which institutes a system of complaints against States Parties by individuals who "claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."[187] The Optional Protocol gives the HRC competence to "receive and consider communications" from individuals who claim to be victims of violations by a State Party of any rights enshrined in the ICCPR.[188] The Committee is then authorized to "forward its views" about whether or not there has been a violation to the individual and State concerned.[189] In practice, the Committee considers communications in closed meetings.[190] Though the Optional Protocol instructs the HRC to consider communications in light of "all written

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turn the reporting procedure into contentious or inquisitory proceedings, but rather to provide valuable assistance to the State party concerned in the better implementation of the provisions of the Covenant").

184 *See Simplified Reporting Procedure*, U.N. OFF. HIGH COMMISSIONER HUM. RTS., https://www.ohchr.org/EN/HRBodies/CCPR/Pages/SimplifiedReportingProcedure.aspx [https://perma.cc/G5F6-83WP] (last visited Nov. 11, 2018); *see also* Human Rights Committee, *Focused Reports Based on Replies to Lists of Issues Prior to Reporting (LOIPR): Implementation of the New Optional Reporting Procedure (LOIPR Procedure)*, U.N. Doc. CCPR/C/99/4 (Sept. 29, 2010).

185 *See* CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 68–72 (Tullio Treves et al. eds., 2005); *see also* Vernon, *supra* note 87, at 26.

186 *See* Vernon, *supra* note 87, at 26.

187 *See* Optional Protocol, *supra* note 172.

188 *See id.*

189 Steiner, *supra* note 182, at 16.

190 *See* Optional Protocol *supra* note 172, art. 5.3, at 303 ("The Committee shall hold closed meetings when examining communications under the present Protocol.").

information made available to it," the Committee has never sought to supplement written submissions with either oral argument or testimony.[191]

While this mechanism has been used many times before, it is limited in the scope of what it can accomplish by several factors. For example, overextension of the Committee and procedural restrictions that curtail the scope and extent of claims that can be brought.[192] For the purposes of illustration: in the first twenty years of the Optional Protocol's existence, 765 communications involving 54 States Parties were registered with the Committee, which only resulted in issuance of 263 views under the Protocol.[193]

The gap between claims and decisions, in part, may stem from the language of the Protocol itself; language that is "guarded" and "leaves great lacunae that suggest the political compromises in its formulation."[194] The descriptions of the Committee's work itself—"communications," rather than complaints, and "views" rather than decisions—distance the HRC from the forceful role typically associated with adjudication.[195] And the drafting history of the ICCPR indicates, too, that states had significant reservations about the use of individual complaints. There was no mechanism for individual complaints in early drafts of the ICCPR, and mechanisms were introduced only by the Third Committee before being distanced from the ICCPR itself and relegated to an Optional Protocol thereafter.[196]

As such, this Article does not recommend individual complaints to the ICCPR for several reasons. First, only individuals in States that are signatories of the ICCPR, and who have *additionally* ratified the First Optional Protocol, can bring complaints under this mechanism. No Chinese citizen, for example, has access to this dispute resolute mechanism. Second, the Optional Protocol contains an exhaustion requirement. Requiring an individual victim to exhaust domestic remedies pits an individual's relative resources—in terms of time and wealth—against that of a State Party. It is highly unlikely that a State Party would exhaust its resources before the alleged victims would do

191 *See* Steiner, *supra* note 182, at 23.

192 *Id.* at 15–35.

193 *Id.* at 32.

194 *Id.* at 22.

195 *Id.*

196 *Id.* at 23.

so, thus creating a possibility that the HRC would never have an opportunity to hear the case. But more fundamentally to the specific problem of foreign agent restrictions, NGOs are not permitted to bring claims under the Optional Protocol.[197] Therefore, though a class of litigants exists, the immense resources required in bringing a case makes chances slim that this procedure would be best equipped to encourage States to change domestic legislation.

No State has ever utilized the article 41 optional inter-State complaint mechanism to complain about another State Party's breach of the ICCPR.[198] Scholars theorize that this is because States Parties tolerate violations in order to avoid injuring delicate international relations.[199] But reprisals notwithstanding, this Article argues that article 41 is perfectly positioned for use within the international system to address the foreign agent restrictions problem.

2. A State Party Should Bring a Claim Under Article 41 of the ICCPR

At the time of drafting of the ICPPR, article 41 was intended to be the principal mechanism of implementation. However, it was reduced to an optional procedure requiring both States Parties to declare recognition of the Committee's power to consider such complaints.[200] Article 41 provides that a State Party to the Covenant may at any time allow the Committee to "receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."[201] There is a limitation on the

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197 *See* Vernon, *supra* note 87, at 27 ("An NGO that is unable to receive foreign funding because of legal restrictions cannot bring a complaint to the HRC.").

198 International Covenant on Civil and Political Rights, *supra* note 73, art. 41, at 182–83. ("A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.").

199 *See* CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, *supra* note 185, at 84.

200 A.H. Robertson, *The Implementation System: International Measures*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 332 (Louis Henkin ed., 1981).

201 *See* International Covenant on Civil and Political Rights, *supra* note 73, art. 41, at 182–83 ("A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the

States that can bring these complaints: the Committee will only consider communications "submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee."[202] As of September 2016, fifty-three States have made declarations.[203]

Article 41's procedure has never been used.[204] This, in part, is because prior experience has shown that States Parties are extremely reluctant to make use of inter-State dispute mechanisms.[205] The establishment of a complaint procedure, allowing one State Party to take action before an international authority for failure to fulfill a human rights obligation, was first established in articles 26–34 of the 1919 Constitution of the International Labour Organisation (ILO).[206] Similar complaint procedures were institutionalized in article 24 of the ECHR, in article 8 of the UNESCO Convention against Discrimination in Education and in Arts, articles 11–13 of the Committee on the Elimination of Racial Discrimination, article 45 of the American Convention on Human Rights, article 47 of the African Charter on Human and Peoples' Rights, and article 21 of the Convention Against Torture.[207]

But despite these inter-State dispute resolution procedures being available (and, in some circumstances, mandatory), States Parties have rarely used them. The complaint procedures under the ILO have been utilized only *six* times since their institutionalization in 1919.[208] Under

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effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.").

202 *See id.*

203 International Covenant on Civil and Political Rights, Declarations Recognizing the Competence of the Human Rights Committee Under Article 41, Mar. 23, 1976, 999 U.N.T.S. 171 (United Nations Treaty Collections Status as at Apr. 6, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en [https://perma.cc/QQK8-B2CS].

204 U.N. Hum. Rts. Comm, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 1996).

205 MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 757 (2d ed. 2005).

206 *See generally* Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249, 277 (1988).

207 *See* NOWAK, *supra* note 205, at 757.

208 *See id.* at 757 n.5 ("Ghana v. Portugal (1961) and Portugal v. Liberia (1962) were both complaints dealing with alleged violations of the prohibition of forced labour . . . . There were also three complaints by France against Panama in 1976 and 1978, and the case of Tunisia v.

the ECHR, only twelve inter-State complaints have occurred to date. Article 41 of the ICCPR has never been used.

The reasons for the reluctance to initiate inter-State complaint procedures vary. Manfred Nowak attributes the apparent reluctance to the fact that "submission of an inter-State complaint places such a burden on political and diplomatic relations[209] that governments resort to this tool in only extreme situations."[210] In relation to the ECHR complaints, for example, most cases were brought in connection to a political conflict, frequently under the function of "diplomatic protection" of the individuals affected by an alleged violation of the Convention, stepping in to protect States Parties even when there was no specific benefit, but rather for the sake of upholding rule of law.[211] Scholars note that because inter-State relationships are fragile, article 41's complaint mechanism may never be used at all.[212]

While the obstacles to effective use of inter-State complaints are numerous,[213] practitioners believe the dispute resolution mechanism has utility. In fact, the HRC recently and expressly reminded States Parties that the inter-State complaints procedure both exists and has great potential value:[214]

Libya concerning equality of treatment (1986) . . . . All other complaints pursuant to Art. 26 (e.g., Greece, Chile, Argentina, the Dominican Republic, Haiti, Poland, the Federal Republic of Germany, Nicaragua, Romania, South Africa, Sweden, and Cote d'Ivoire), as well as more than 1,500 complaints under ECOSOC Res. 277 (X), were not submitted by governments but rather by NGOs (usually, employee associations).").

[209] It is difficult to predict what the diplomatic consequences of bringing an article 41 claim might be, as none has previously been brought. To speak generally, however, there are two foreseeable categories of consequences. The first is that a State Party may withdraw its declaration of recognition of the competence of the Human Rights Committee to consider whether another State Party is fulfilling its obligations under the present Covenant. The second category is that a State Party that brings an article 41 claim might receive diplomatic pushback in other negotiations or interactions with the State against which a claim is brought. But it is worth reemphasizing that as no State Party has brought an article 41 claim, these predictions are speculative rather than based in precedent.

[210] *See* NOWAK, *supra* note 205, at 758.

[211] *See id.*

[212] Torkel Opsahl, *The Human Rights Committee*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 420 (Philip Alston ed., 1992).

[213] *See* Scott Leckie, *supra* note 206.

[214] U.N. Hum. Rts. Comm. on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31, ¶ 2, CCPR/C/21/Rev.1/Add. 1326 (May 2004).

> [T]he Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. . . . [T]he article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.[215]

In fact, U.S. government officials seeking a means of stemming the tide of foreign agent restrictions may not have considered this option because States have not traditionally conceptualized the ICCPR as a dispute resolution mechanism.

Yet the ICCPR *is* a dispute resolution mechanism, and article 41 is the appropriate mechanism for resolving these disputes for many reasons. First, claims could be brought against any signatory to the ICCPR who has made declarations recognizing the competence of the HRC under article 41.[216] Many promulgators of foreign agent restrictions are signatories. Second, bringing a claim under article 41 would provide an opportunity to revitalize an underutilized piece of international legal architecture. As noted above, the HRC has been eager to see this legal apparatus operationalized, and doing so would reinvigorate the ICCPR.[217]

Moreover, bringing a claim on behalf of a third party—an NGO rather than from another State Party—may alleviate some of the concerns around diplomatic blowback that scholars have theorized has kept States Parties from using these mechanisms in the past, by creating a buffer zone between a State Party bringing the claim and the State Party against which the claim is brought. And similarly, other means of resolving this issue—implementation of sanctions or the lessening of

215 *Id.*

216 International Covenant on Civil and Political Rights, Declarations Recognizing the Competence of the Human Rights Committee Under Article 41, *supra* note 203.

217 *See* General Legal Obligation Imposed, *supra* note 214.

diplomatic relations—seem inappropriate for punishment of domestic legislation. Rather, bringing a claim through a neutral international forum makes a State Party not a solitary enforcer of international law, but instead a partner to the international institutions that are better positioned to examine the issue. This mechanism is likewise appropriate because, while important, time is not of the essence whereas it might be in another human rights situation (in which lives were on the line, for example—arbitrary detention, torture, etc.). Certainly, the reasons that have typically kept States from bringing inter-State complaints under other international human rights settings exist here. But so does the primary underlying reason that has encouraged States to bring complaints (especially under the ECHR) in the past: a sense of "diplomatic protection," in which States were "prepared to accept negative political consequences even in the absence of specific self-interests" because "they view themselves as *collectively responsible* for the observance of treaty obligations."[218]

Finally, this complaint should be brought in an international forum—rather than having an NGO bring litigation in the domestic context—for several reasons. First, inter-State complaints are more appropriate than the individual complaint procedure to draw attention to large-scale human rights abuses. Second, States are better positioned than NGOs to bring complaints, as the problem is not truly a domestic problem, but in fact a transnational problem. The problem is better reflected as a failure of States to respect their obligations under ICCPR than they are, for example, a violation of any individual State's constitution.[219] And because the States appear to be learning from one another, using similar legislative language, for example, the problem transcends borders and extends into the international community. Third, NGOs have failed to overturn the restrictive laws via domestic litigation. Moving directly to the international stage sidesteps issues of lengthy litigation in domestic courts that may be more concerned with maintaining the status quo than they are with upholding international legal obligations under the ICCPR.

Because States such as China, Azerbaijan, and others that have implemented foreign agent restrictions have not made a separate

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[218] *See* NOWAK, *supra* note 205, at 758.

[219] *See Harassed, Imprisoned, Exiled: Azerbaijan's Continuing Crackdown on Government Critics, Lawyers, and Civil Society*, *supra* note 174.

declaration recognizing the competence of the HRC under article 41, any claim that is brought would be only a partial solution. In that respect, this Article recognizes that other strategies such as diplomacy, naming-and-shaming, reporting mechanisms, tying foreign aid to compliance with the ICCPR—and, in a more legal vein, bringing litigation under Bilateral Investment Treaties or challenging the laws in domestic courts—will be necessary to bring about holistic change.[220] But bringing the first ever claim under ICCPR article 41 against the most prolific and influential State in the foreign agent restrictions space is a strong first move in bringing attention to the issue and casting it, appropriately so, as an *international human rights issue*, not an isolated issue of domestic regulation, national security, and territorial sovereignty.

3. Extensive Coverage of the Issue of Foreign Agent Restrictions Justifies Bringing a Complaint

One of the reasons that a complaint should be brought is the attention that the recent proliferation of foreign agent restrictions has received from the scholarly community[221] and the alarm raised by the NGO community.[222] The attention is likely due to several factors: (1) more restrictions exist now than they did five years ago; (2) the restrictions that have recently been implemented violate rights guaranteed to NGOs under the ICCPR, which was not true of restrictions such as FARA; and (3) the result of the passage of said restrictions have rendered many NGOs unable to function,[223] burdening both domestic civil society in the States where the restrictions operate, and the international community as a whole.

The possibility of bringing a complaint is likewise justified by the expressed interest of stakeholders, who have sought a solution within

220 For additional solutions posed to address foreign agent restrictions promulgated by non-ICCPR signatories, see *id.* This Article argues that there are myriad solutions to address foreign agent restrictions in international law but prefers to thoroughly explore ICCPR article 41 as the most holistic and innovative means of addressing the problem.

221 Thomas M. Callahan, Note, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourse for Affected Civil Advocates*, 38 FORDHAM INT'L L.J. 1219 (2015).

222 *Russia: Government vs. Rights Groups*, *supra* note 111.

223 *Id.*

international law. Government officials and NGOs are equally interested in identifying a solution. According to an official at the U.S. Mission to the United Nations,[224] "anything that would shed additional light on the phenomenon would be of great value to practitioners grappling with what to do in response." In a February 2016 talk by Adotei Akwei of Amnesty International USA, Akwei mentioned the recent restrictions on NGOs in China and Russia and indicated that his organization, too, was stumped.[225] In a January 2017 interaction with advocates at the Paul Tsai China Center at the Yale Law School, the advocates noted that several of their partner NGOs found themselves forced to close up shop and worried about their ability to continue human rights work.[226]

4. Who Could Bring the Complaint—and Against Whom a Complaint May Be Brought

The question of what State Party should bring the complaint is a natural one. One option is the United States, as the genesis of this Article was a discussion with U.S. government officials who were seeking a means of addressing foreign agent restrictions via international law. A second option is a Western European State. Several Western European States have proven willing to bring claims under the ECHR inter-State dispute resolution mechanism in the past. Because of their "greatest readiness to submit to an inter-state complaint,"[227] they may, as such, be best positioned to bring another. One of the reasons that this Article suggests several Western States, and not the United States in particular (officials of whom inquired about feasible international legal solutions) is that many Western European States do not have foreign agent restrictions of their own. As such, the possibility that a claim may be in turn brought against them is nonexistent, whereas a claim by the United States could feasibly result in a responsive claim.

[224] Interview with Anonymous U.S. Official, U.S. Mission to the United Nations, in New York, N.Y. (Aug. 16, 2015).

[225] Interview with Adotei Akwei, Managing Dir. for Gov't Relations, Amnesty Int'l USA, Yale Law Sch. (Feb. 26, 2016).

[226] Discussion with Robert D. Williams, Paul Tsai China Center, Yale Law School (Jan. 7, 2017).

[227] *See* NOWAK, *supra* note 205, at 758.

Even so, the United States should not be afraid of being subject to a similar complaint mechanism. As stated in Section I.A, States are permitted to monitor NGO activity, so long as that monitoring does not cross the line into interfering with their rights guaranteed under international human rights treaties. The United States' foreign agent restrictions, unlike many more modern restrictions, do not involve impermissibly limiting NGOs' freedoms of association, speech, or assembly. As such, the United States may well see any claim brought against it via article 41 as a means of having an international body (1) clarify the permissible scope of State monitoring of NGO activity, and (2) affirm the United States' restrictions as appropriate.

A complaint may be brought against any number of States that have proliferated foreign agent restrictions, provided that they have made a declaration recognizing the competence of the HRC under article 41. Of these, Russia would be a particularly appropriate State against which a claim could be brought, for three reasons. First, Russia was the central proliferator of modern, and international law-violating, foreign agent restrictions. Because the language of the foreign agent restrictions in the Caucus states so closely mirror Russia's foreign agent restrictions, and because they were implemented subsequent to Russia's implementation, it is logical to assume that Russia's passage of their restrictions either inspired states to pass their own, or else Russia suggested their ally states pass foreign agent restrictions of their own. Either way, evidence indicates that Russia has been influential in spreading foreign agent restrictions that impermissibly restrict the rights of NGOs. Second, Russia's restrictions have been particularly harmful. A third of all Russian NGOs closed in the years subsequent to their passage of the foreign agent restrictions.[228] Third, NGOs play a unique role in Russia as a proponent and facilitator of civil society, as a counterweight and watchdog of the state, and as an extension of and supporter of the international community.[229]

228 Alec Luhn, *Russian Green Group Labelled 'Foreign Agent' in Crackdown on NGOs*, GUARDIAN, https://www.theguardian.com/environment/2016/jan/14/russian-green-group-labelled-foreign-agent-in-crackdown-on-ngos [https://perma.cc/KTN2-Q8VV] (last updated Apr. 12, 2017) (reporting that one-third of Russian NGOs are estimated to have closed their doors since the 2012 NGO restrictions were passed).

229 Jo Crotty, *Making a Difference? NGOs and Civil Society Development in Russia*, 61 EUR.-ASIA STUD. 85, 86 (2009).

Though article 41 contains an exhaustion requirement, it can be waived at the discretion of the Committee. Foreign agent restrictions are a perfect opportunity for the Committee to waive an exhaustion requirement. This text states that the Committee will only address matters "after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law."[230] However, this situation appears ripe for application of the immediately following exception to the general rule: "This shall not be the rule where the application of the remedies is unreasonably prolonged."[231] The expansion of this right allows the Committee to waive the general rule requiring the exhaustion of available domestic remedies if it believes that such a prolonging will not bring effective relief to the individuals affected. Because many foreign NGOs may not be able to sue in state courts, either because of lack of legal personality, because of corruption, or because they no longer are permitted to exist in the state due to foreign agent restrictions, applying the exhaustion requirement would be inappropriate. A petitioning State could make a compelling argument for waiver of domestic exhaustion requirements while bringing an article 41 claim. And, depending on the State against which a claim is brought, the issue of exhaustion may be moot, as litigation has already occurred—and been denied—in many States.[232]

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230 International Covenant on Civil and Political Rights, *supra* note 73, art. 41(1)(c), at 182.

231 *Id.*

232 The most prominent of these is Russia. *See Russia: Government vs. Rights Groups*, *supra* note 111.

CONCLUSION

NGOs are critical for the development and enforcement of international law. Foreign agent restrictions, therefore, are a serious threat. Not only does curtailing civil society affect domestic populaces, but it also affects the health of the broader international system. This threat is not one to be taken lightly.

The proliferation of foreign agent restrictions pose such a unique issue; however, judicial challenges in domestic courts have been wholly unsuccessful, perhaps, in part, because of standing issues, corruption in domestic courts, or NGOs' lack of legal personality. And international law, at least facially, does not presume to offer a solution.

Yet innovative thinking about the enforcement mechanisms under international law may offer at least one tentative solution to the problem. Framing foreign agent restrictions as a violation of the ICCPR highlights an institutional value—the sheer number of State signatories to the ICCPR. While working through a bilateral investment treaty might garner efficient enforcement and crafting a new right into international law might be a progressive vision of international law, utilizing the ICCPR's treaty-based mechanisms for enforcement is pragmatic. It is the best option, in part, because it might lead to a greater change. And creativity is critical for addressing foreign agent restrictions. The distinct status of NGOs in international law makes it necessary for States to advocate on their behalf in the international arena. And piecemeal reprisals against problematic legislation will not be an effective means of curtailing its propagation.

Treating foreign agent restrictions as a violation of the ICCPR allows a State alleging violations of the ICCPR to put violations in context. Alleging these violations together will help to diffuse some of the tensions around calling one State to task for violations of international law. States will also be able to avoid reprisals (at least on the same issue), as they are calling States to task for their treatment of NGOs—*not* for their treatment of other States. And at the same time, this Article argues that for any NGOs that the State holds effective control over, the sState has an affirmative *obligation* to report abuse under the ICCPR article 2 clause 1 duty to protect.

States will continue to implement domestic legislation that infringes upon human rights obligations under the guise of state

sovereignty and national security. Creative lawyering is necessary to use the tools of international law to defend the individuals—or in this case, the organizations—affected. States have a unique, impactful role in reporting violations of the ICCPR. This proliferation of legislation represents an ideal moment to use that ability, as the consequences of curtailing civil society are too great—both for the restricting States' citizens and for the development and enforcement of international law.