

**Informal Consensus-Building as an Emerging Praxis in
International Human Rights Law**

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Abstract

This dissertation examines the practice of informal consensus-building in international law. It defines this practice as a collaborative process through which scholars, advocates, and practitioners, working outside formal institutional mandates, develop shared understandings of legal norms. Drawing on findings from case studies and insider action research in international human rights law, this research demonstrates how such practices can shape the interpretation, implementation, and progressive development of international legal norms.

Yet not all such practices are alike, and some have proven more influential than others over time. A comparative analysis of three past initiatives—the 1945 *Statement of Essential Human Rights*, the 1984 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, and the 1985 *Paris Minimum Standards of Human Rights Norms in a State of Emergency*—illustrates how the influence of an informal consensus-building initiative is closely tied to the perceived legitimacy of its outputs.

That perceived legitimacy, in turn, is shaped both by the strategic choices made during drafting and dissemination and by the broader political and institutional contexts in which these initiatives emerge. To explore this dynamic in contemporary practice, the dissertation examines the development of the 2023 *Principles and Guidelines on Human Rights and Public Health Emergencies*. As an insider to this consensus-building process, I provide a detailed account of its development, focusing on the tensions between inclusivity, representation, technical rigour, timeliness, and impact.

Together, the case studies and action research presented here contribute to scholarly efforts to understand how norms gain legitimacy and traction within communities of practice. Building on the work of Emanuel Adler, Thomas Franck, Magdalena Sepúlveda Carmona, and others, this dissertation underscores both the normative potential and procedural complexity of informal consensus-building as a distinct mode of praxis in international human rights law. It calls for greater scholarly attention to these practices, and for enhanced transparency, inclusivity, and methodological rigour in their development.

Dedication

For Joan Hartman (née Fitzpatrick), Professor of International Law at the University of Washington, and one of the foremost experts on human rights derogations, whose bright light left this world far too soon.

May all brilliant women who dedicate their lives to advancing human rights through scholarship and advocacy find the support, care, and community they need before it is too late.

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1 Setting the Stage

1.1 Why do the Siracusa Principles matter?

In 1984, a group of international law scholars, practitioners, and jurists from around the world met for a four-day colloquium in Siracusa, Italy, and drafted the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles).¹ The Siracusa Principles sought to clarify the conditions under which states were permitted to limit or derogate from their human rights obligations during national states of exception and emergency, as prescribed by the International Covenant on Civil and Political Rights (ICCPR).² As frontline responders to the states of emergency and states of exception that had been declared over the past decade, the non-governmental organizations that stewarded the drafting of the Siracusa Principles sought to fill an interpretive void that had yet to be bridged by the jurisprudence of the nascent United Nations (UN) Human Rights Committee—the treaty body charged with oversight of the ICCPR.³

The Siracusa Principles first received international recognition when they were issued as a UN document at the initiative of the Permanent Representative of the Netherlands to the UN. In a Note Verbale dated 24 August 1984, the Dutch Permanent Representative asked that the

¹ “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (1985) 7:1 Hum Rts Q 3 [Siracusa Principles]

² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

³ The Siracusa Principles were co-sponsored by the International Commission of Jurists, the American Association for the International Commission of Jurists, the International Association of Penal Law, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Studies. Although the ICCPR had entered into force in 1976, the Human Rights Committee had yet to produce its vast body of case law pertaining to the interpretation of provisions in the Covenant. The Siracusa Principles nevertheless addressed a subject matter which had gained prominent international focus following a spate of states of siege and exception that accompanied political unrest, particularly in Argentina, Brazil, Chile, Egypt, India, Ireland, Malaysia, and Pakistan.

principles be distributed as an official document at the 41st session of the UN Commission on Human Rights in 1985.⁴ In the decades that followed, the Siracusa Principles would have a profound impact on the work of the Committee, as well as other UN human rights treaty bodies and special procedures, domestic courts, constitutional and international law reform projects, transnational civil society advocacy, and in legal scholarship.

The most well-known instance of this impact is found in the 2001 General Comment 29 on Article 4 of the ICCPR concerning “Derogations during a State of Emergency.” The Human Rights Committee referred to the Siracusa Principles in this General Comment as one of the “developments within international law as to human rights standards applicable in emergency situations” that the parties to the ICCPR should take note of.⁵ Subsequent general comments issued by the Committee have similarly referenced the Siracusa Principles, including most recently General Comment no. 37 on the right of peaceful assembly.⁶ On the right of peaceful assembly in particular, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that the Siracusa Principles provide a “clear framework for...authorized limits under international law.”⁷

Proceedings before the Human Rights Committee pursuant to the Optional Protocol of the ICCPR further reveal that in practice, states parties and individuals who claim violations of their rights before the Committee wield the Siracusa Principles in their legal argumentation on a range

⁴ *Note verbale dated 84/08/24 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General, Commission on Human Rights, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) [Siracusa Principles Note Verbale]*

⁵ UN Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) at 7-8.

⁶ UN Human Rights Committee, *General Comment No 37: Article 21 (Right of Peaceful Assembly)*, UN Doc CCPR/C/GC/37 (2020) at paras 42-44.

⁷ Maina Kiai, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association: Addendum*, UN Doc A/HRC/29/25/Add.2 (2015) at para 59.

of issues. In the 2014 case of *Ilyasov v Kazakhstan*, for instance, both the State Party and the complainant referenced the Siracusa Principles in their submissions before the Committee, arguing for and against the legally permissible use of state measures to limit the complainant's right to enter their home country.⁸ At local levels, the Siracusa Principles have also found their way into pleadings before domestic courts⁹ and guidelines issued by national human rights institutions,¹⁰ and influenced national and international law reform projects.¹¹

Other UN human rights treaty bodies too have integrated the Siracusa Principles within their mandated work. In 2022, for instance, the Committee on Economic, Social and Cultural Rights issued Concluding observations to the Democratic Republic of the Congo that explicitly called on the State to “ensure that absolute immunity of civilians is respected and that the state of siege in the provinces of North Kivu and Ituri is implemented in a manner consistent with

⁸ UN Human Rights Committee, *Communication No. 2009/2010 – Ilyasov v Kazakhstan, Views adopted by Committee*, 111th sess, UN Doc CCPR/C/111/D/2009/2010 (2014), at paras 4.13, 5.5 and 7. Other instances before the Human Rights Committee have similarly directly cited specific provisions of the Siracusa Principles to support legal argumentation. *See for instance* UN Human Rights Committee, *Joslin et al v New Zealand (Communication No. 902/1999) – Views*, 75th sess, UN Doc CCPR/C/75/D/902/1999 (2002) at para 3.3; UN Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 2661/2015*, 130th sess, UN Doc CCPR/C/130/D/2661/2015 (2021), at para 6.6.

⁹ *See for instance* *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* (factum of the intervener, Amnesty International Canada) 2017 SCC 54 at para 15 & 17; *Charkaoui (Re)* [2009] 3 FCR 67 at 57 and 77.

¹⁰ Australian Human Rights Commission, “Submission to the Parliamentary Joint Committee on Intelligence and Security: Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (2019)” (25 July 2019), online: <<https://humanrights.gov.au/our-work/legal/submission/inquiry-impact-exercise-law-enforcement-and-intelligence-powers-freedom>>.

¹¹ Drawing from a personal interview conducted with the International Commission of Jurists former Secretary-General, Niall MacDermot, Howard B Tolley wrote that “some of the principles [in the Siracusa Principles] were followed in redrafting Hungary’s Constitution.” *See* Howard B Tolley, *The International Commission of Jurists: Global Advocates for Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 1994) at 175. On international law reform, the Siracusa Principles, for instance, were cited in the rationale submitted by the Republic of Korea, accompanying their proposed amendments to the 2005 International Health Regulations. *See* World Health Organization, *Proposed Amendments to the International Health Regulations (2005) submitted in accordance with decision WHA75(9)* (Geneva: World Health Organization, 2022).

international humanitarian law...and international human rights standards including the [Siracusa Principles].”¹²

The Principles have since also become entrenched in the academic law scholarship on the limitations and derogations of human rights during national states of emergency,¹³ sometimes without any acknowledgment of their provenance from an informal network of experts,¹⁴ and even invoked in the literature of public health ethics and medicine.¹⁵

Developed through a consensus-building effort among 31 jurists, practitioners, and international law academics experts that inhabited a shared community of practice, the Siracusa Principles are now widely recognized as an influential statement guiding governments when they seek to adopt measures that place restrictions on certain human rights during national states of emergency and states of exception. Forged outside of intergovernmental processes,¹⁶ the

¹² UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the Democratic Republic of the Congo*, 71st sess, UN Doc E/C.12/COD/CO/6 (2022) at para 5.

¹³ See for instance Craig Forcese & Leah West, “Chapter 8—Emergencies” in *National Security Law*, 2nd ed (Toronto: Irwin Law, 2020); Rosario M Isasi & Thu Minh Nguyen, “The Global Governance of Infectious Diseases: The World Health Organization and the International Health Regulations” (2005) 43:2 *Alta L Rev* 497 at 508; Nikki Kumar, “Public Health or Public Harm: DDT, Malaria and the Right to Health” (2007) 23 *Windsor Rev Legal Soc Issues* 85; Janet E Mosher, “Accessing Justice Amid Threats of Contagion” (2014) 51:3 *Osgoode Hall LJ* 919.

¹⁴ See for instance Myrna El Fakhry Tuttle, “Freedom of Movement During COVID-19” (19 September 2020), online (blog): <<https://www.lawnow.org/freedom-of-movement-during-covid-19/>>; Ryan Alford, “Bill C-49 and the Former Bill C-22: Compromised Oversight and Continuing Threats to Non-Derogable Rights” (2018) 69 *UNBLJ* 57 at 82.

¹⁵ See for instance Katherine Wiltenburg Todrys, Emily Howe & Joe Amon, “Failing Siracusa: governments’ obligations to find the least restrictive options for tuberculosis control” (2013) 3:1 *Public Health Action* 7–10; Diego S. Silva & Maxwell J Smith, “Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles” (6 February 2015), online (blog): <<https://www.hhrjournal.org/2015/06/commentary-limiting-rights-and-freedoms-in-the-context-of-ebola-and-other-public-health-emergencies-how-the-principle-of-reciprocity-can-enrich-the-application-of-the-siracusa-principles/>>; Ross Upshur, “Principles for the Justification of Public Health Intervention” (2002) 93:2 *Can J Public Health* 101.

¹⁶ The 31 participants of the Siracusa conference are listed in “Participants at the Siracusa Conference” (1985) 7:1 *Hum Rts Q* 156–157 [Siracusa Participants]. The group was made up of professors, practitioners, current and past officials of UN entities, and judges—including future judges of the International Court of Justice. Participants were primarily based at institutions in Europe and the United States, with one participant from each of Kuwait, India, Turkey, Costa Rica, and Chile. Only four women participated in the Siracusa conference.

Siracusa Principles are but one manifestation of a phenomenon that has riddled efforts to explain how informal rules gain transnational normative influence.¹⁷

Most international lawyers agree that states are the main subjects of international law, although other entities are endowed with international legal personality to some degree.¹⁸ By extension, states are the primary entities that can create, authorize, and enforce international law.¹⁹ How, then, has a set of principles articulated exclusively by a group of independent experts more than 40 years ago achieved global influence among a wide swath of state and non-state actors? Does the act of expert consensus-building inevitably lead to an outcome of normative value in international law? If so, what consequences, if any, derive from their authoritativeness? What are best practices in building such consensus, considering critiques of accountability, transparency, and representativeness in such processes? This dissertation aims to address these questions.

¹⁷ See in general Harold Hongju Koh, “Review Essay: Why Do Nations Obey International Law?” (1997) 106:8 Yale LJ 2599.

¹⁸ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 173.

¹⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, [1986] ICJ Rep 14 [Nicaragua Case] at para 269 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned. . .”).

1.2 Dissertation overview

This dissertation is positioned within the broader body of scholarship on informal and transnational lawmaking, including studies on the influence of transnational expert networks, advocacy coalitions, and the transnational legal process in shaping, disseminating, and solidifying norms. It advances this scholarship by focusing on what I call the practice of **“informal consensus-building in international law.”** In the context of international law, informal consensus-building involves the convening of a community of scholars, advocates, and practitioners (whom I refer to interchangeably as ‘experts’ or ‘participants’) in a joint practice to develop consensus-based interpretations of international norms in relation to contemporary political, economic, and social challenges. Unlike official forms of interpretive consensus-building in international law, such as those undertaken by the International Law Commission in their studies on discrete topics in international law or within UN human rights treaty monitoring bodies in relation to provisions of an international human rights treaty, informal consensus-building initiatives are *informal*. By this, I mean that such initiatives:

- (1) do not derive their basis or mandate from any formal organizations, bodies, or instruments of international law;
- (2) involve subject-matter experts, often from academic or non-governmental organizations, who serve in their independent capacity (and not as diplomatic or organizational representatives); and

(3) result in outputs that are neither binding nor qualify as soft law in the strict sense of the term.²⁰

All three conditions are necessary for a *bona fide* practice of informal consensus-building in international law. For both substantive and procedural reasons (outlined below), this dissertation focuses on practices of informal consensus-building within the field of international human rights law in particular.

First and substantively, international human rights law has long evolved under the influence of soft law instruments and expert interpretations, making it an ideal setting to explore how informal norms gain legitimacy and authority.²¹ Unlike areas of international law that are primarily treaty-based, the field is rife with non-binding yet widely influential human rights principles, such as the Siracusa Principles and the Yogyakarta Principles on LGBTQ+ rights, that move the needle on international human rights law over time. The mainstream use of such standards offers rich case studies for examining the mechanisms of informal consensus-building.

Moreover, the evolution of international human rights law has historically relied on diverse coalitions of actors, including states, non-governmental organizations (NGOs), scholars, international organizations, and independent experts—many of which coalesce over time into communities of practice.²² Central to the activities undertaken by such communities are practices of defining, interpreting, and promoting human rights norms, often outside of formal legal

²⁰ This focus on informality draws inspiration from Pauwelyn, Wessel & Wouters' study of informal international lawmaking, further described below. See Joost Pauwelyn, Ramses Wessel and Jan Wouters, *Informal International Lawmaking* (Oxford: Oxford University Press 2012) at 17.

²¹ Stéphanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, "Introduction: Tracing the Roles of Soft Law in Human Rights" in *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016) 1.

²² Margaret E Keck & Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: NY: Cornell University Press, 1998). See also Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge: Cambridge University Press, 2021).

processes. The study of informal consensus-building in this context therefore offers important insights into how expert-driven statements acquire normative weight, the conditions under which they are accepted and institutionalized, and the broader questions of legitimacy, inclusivity, and power dynamics that animate informal lawmaking.

From a methodological perspective, anchoring this dissertation within a single field of international law also enables meaningful comparisons across cases. Although the field of international human rights law is vast and diverse, it retains distinct features, such as the obligations of states towards individuals, that separate it from other fields of international law. This analytical scope enables a structured analysis of how informal consensus-building has operated in different political and social contexts and across time.

By focusing on international human rights law, this dissertation aims to shed light on the role of informal consensus-building practices in shaping the implementation and evolution of norms, while also contributing to broader debates on soft law, norm diffusion, and the legitimacy of international lawmaking beyond formal lawmaking processes.

The remainder of **Chapter 1** situates this research within the larger body of literature examining informal law, communities of practice, and the practice turn in international law. Following this review of the literature, **Chapter 2** provides an outline of two key methodological approaches taken in this dissertation: comparative case studies, which forms the basis of the analyses undertaken in **Chapters 3** and **4**, and insider action research, which is the focus of analysis in **Chapter 5**. **Chapter 6** brings the findings from the analytical chapters together, summarizing how informal consensus-building constitutes a distinct legal practice in international human rights law, showing how such initiatives influence norm interpretation and

development, and laying the groundwork for future research into their evolving role, legitimacy, and impact.

As illustrated in **Appendix A**, informal consensus-building practices have become increasingly common in international human rights law since the 1940s. Chapters 3 and 4 present a descriptive and comparative analysis of three notable past cases of informal consensus-building: the American Law Institute's 1945 *Statement of Essential Human Rights*, which influenced the drafting of the *Universal Declaration of Human Rights*; the 1984 Siracusa Principles, widely recognized as an authoritative statement on the human rights obligations of the state in times of emergency; and the lesser-known 1985 *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (the Paris Minimum Standards), which sought to codify a similar set of interpretations to the Siracusa Principles.²³

Using archival documents, scholarly works, and grey literature, Chapters 3 and 4 identify common characteristics of informal consensus-building in these works, tracing evolving trends in participant engagement and consensus-building processes, including the meaning (or meanings) ascribed to consensus, and the methodological approaches used.²⁴ The chapters also examine patterns in the normative issues addressed and the material contexts that sparked and influenced these initiatives. Finally, the chapters assess the outputs of such processes (e.g., principles,

²³ Richard B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79:4 AJIL 1072 [Paris Minimum Standards].

²⁴ A variety of procedural elements may be of interest to this description, from the composition and number of participants involved to how they are engaged, and to whether any others beyond those directly engaged with the project (e.g., invited experts/collaborators) are invited to contribute.

guidelines, and recommendations),²⁵ their interpretive frameworks, target audiences,²⁶ and their post-development life, including in subsequent advocacy and legal commentary.

Beyond describing and comparing the participants, processes, and subject matter of the selected cases of informal consensus building initiatives, the case studies seek to address two key analytical questions. First, does the practice of informal consensus-building merely clarify or restate existing international rights human law, or does it also seek to promote the progressive development of international law through interpretations that go beyond the letter of the law? Second, under what conditions do the outputs of informal consensus-building gain legitimacy and authority within international human rights law?

In answering the first question, the chapters illustrate through a synthesis of all three informal consensus-building case studies that while such initiatives often claim to be purely interpretive and clarificatory in nature, their outputs invariably extend beyond the strict textual interpretation of legal texts.

In some cases, these outputs nevertheless shape legal discourse thereafter. This leads to the second question, which Chapters 3 and 4 seek to address by juxtaposing the case of the *Statement of Essential Human Rights* against the Siracusa Principles and the Paris Minimum Standards. In so doing, the chapters demonstrate how informal consensus-building processes evolved as international human rights law itself became a more established field within

²⁵ Frequently used in the context of informal consensus-building practices, the term ‘principles’ connotes a tool for the interpretation of particular norms in international law. The usage of ‘principles’ in the informal consensus-building setting is distinct from its use in the context of the sources of international law stipulated under Art. 38(1)(c) of the Statute of the International Court of Justice.

²⁶ Drawing from Venzke: “interpretations have to live up to the standards of legal argument and need to find acceptance within the relevant community in order to succeed.” See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012) at 4.

international law. At the same time, by contrasting the widespread influence of the Siracusa Principles with the relative obscurity of the Paris Minimum Standards, the chapters advance an explanatory account of how some outputs of informal consensus gain legitimacy and authority, while others—even when drafted against the backdrop of similar social and political contexts—do not. Drawing on theoretical scholarship on the legitimacy of norms and norm diffusion,²⁷ the analysis underscores the importance of consensus-based interpretive discourse and multi-stakeholder deliberation and dissemination.

Today, even the Siracusa Principles have fallen out of step with new developments in international law, as the International Commission of Jurists opined in an unpublished conference paper circulated in 2021.²⁸ The impetus for developing the 2023 *Principles and Guidelines on Human Rights and Public Health Emergencies* (PHE Principles), which form the basis of the insider action research catalogued in **Chapter 5**, flowed directly from this realization.²⁹

Building on insights from Chapters 3 and 4, Chapter 5 asks how the accountability, transparency, and representativeness of informal consensus-building processes can be enhanced

²⁷ A sample of this scholarship includes the following: Paul Schiff Berman, “A Pluralist Approach to International Law” (2007) 32:2 *Yale J Int’l L* 301; Reiners, *supra* note 22; Keck & Sikkink, *supra* note 22.

²⁸ Among other areas requiring further progressive interpretation of the law, the ICJ’s Legal and Policy Director, Ian Seiderman, notes that the framing of “limitations” as being ‘rights-limiting’ in the Siracusa Principles may require re-assessment, given that limitations to certain human rights may nevertheless expand or promote other rights (e.g., limiting freedom of movement may be necessary to protect and promote the right to health and to life in the context of a public health emergency). Drawing on examples from the ICJ’s response to counterterrorism in the aftermath of 11 September 2001, Seiderman notes that “new language in a revised Siracusa Principles [could] reflect this point at the level of general principle, including that limitation and derogation objectives must be effectuated in a rights-based manner.” See Ian Seiderman, “Siracusa Principles Revision Discussion Paper” (Paper delivered at the first ICJ-GHLC consensus conference in Mantello, Italy, 21 November 2021) [unpublished].

²⁹ For an overview of why the PHE Principles were developed, see Roojin Habibi, Tim Fish Hodgson & Steven J Hoffman, “Failing Forward: How Human Rights Failures in Governments’ COVID-19 Responses Can Inform the Development of International Human Rights Law” (2022) 24:3 *Intl Community L Rev* 209. On insider action research, see Hilary Bradbury, *The SAGE Handbook of Action Research* (Thousand Oaks, CA: SAGE Publications, 2015).

while ensuring the utility and impact of their outputs in the long-term. It explores this perspective through the lens of interdisciplinary communities of practice at the intersection of global health law and human rights law. Periods of crisis are known to create windows of opportunity for change in international law, even if such windows are short-lived or further fragment the international legal landscape.³⁰ Through the PHE Principles, Chapter 5 captures in unprecedented detail the key phases of an informal consensus-building process, from generating stakeholder and funder buy-in for project initiation to disseminating the final consensus output within the broader communities of practice and stakeholders. It documents the critical decisions that confronted consensus conference organizers, including myself, and the full range of experts who took part in the initiative, as we collectively marched to the final consensus-based output.³¹

This three-year project culminating in the PHE Principles offered fertile ground for action research, as it reflected ongoing normative uncertainty about applicable legal frameworks (e.g., international human rights law, global health law, or their intersection) and built upon past informal consensus-building initiatives like the Siracusa Principles. More fundamentally, the making of the PHE Principles vividly illustrated the increasingly pluralistic nature of relevant expertise in informal consensus-building, and how such plurality shapes the development of consensus over time.

Having undertaken these case-based analyses of past and current informal consensus-building initiatives, **Chapter 6** concludes by engaging with the broader the implications of such

³⁰ Hilary Charlesworth, “International Law: A Discipline of Crisis” (2002) 65:3 Mod L Rev 377.

³¹ “The principles and guidelines on human rights and public health emergencies” (2024) 1:1 J Global Health L 122. See also Global Health Law Consortium, “The Principles and Guidelines on Human Rights and Public Health Emergencies”, online: <<https://www.pheprinciples.org>> [PHE Principles].

processes, including with respect to accountability, transparency, and participation.³² Through references to the cases surveyed in Chapters 3, 4, and 5, the chapter cautions against an uncritical embrace of informal consensus-building as an alternative to developing new norms in multilateral fora. There are potential risks associated with informal consensus-building in international law if the outputs of such consensus are projected as new standards unto themselves. For example, if the participants involved in the consensus-building process are not representative of diverse perspectives and interests, the resulting consensus may be biased and not reflective of the wider range of views and interests in society.³³

At the same time, while legitimacy and credibility critiques are compelling, there are no satisfactory solutions for addressing them through informal consensus-building. The chapter aims to strike a balance between critique and pragmatism, arguing that the inherent procedural shortcomings of informal consensus-building do not necessarily detract from the value of such practices. Rather, they underscore the need for a cautious and nuanced approach to such initiatives, taking account of the limitations of these initiatives while recognizing their potential role in transnational legal process. In doing so, the chapter contributes to a broader conversation about the role of experts and expertise in the interpretation, and eventually the development, of international legal norms.

³² Ayelet Berman, *Reining in the Regulators: Transnational Regulatory Networks and Accountability* (PhD Dissertation, Graduate Institute of International and Development Studies, 2014). *See also* David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016).

³³ To borrow from Susan Marks' argument that everyone should have a right to a say in decision-making that affects them (her principle of democratic inclusion). *See for instance* her critique of Global Administrative Law (GAL): Susan Marks, "Naming Global Administrative Law" (2005) 37:4 NYUJ Intl L & Pol 995.

This research is novel in that it is the first comprehensive study of informal consensus-building within communities of practice in the field of international law. Given the lack of prior research in this area, Chapter 6 also sets out a research agenda for future scholars and practitioners of international law and international relations. Taking account of critiques of informal consensus-building initiatives, this chapter maps a set of good practices that can enhance the legitimacy, credibility, and impact of informal consensus and its outputs. Encouraging future informal consensus-building research and praxis, the chapter makes a valuable contribution to the practice of international law, which has long struggled to balance the competing demands of legitimacy and effectiveness. Overall, this dissertation advances our understanding of informal consensus-building in international human rights law and provides a useful guide for those seeking to engage in such practices in the future.

In line with the above dissertation overview, I turn next to a theoretical grounding of the normative contribution of informal consensus-building practices within the larger international legal landscape.

1.3 Informal consensus-building in international law

Legal theorists have long debated the nature and definition of ‘international law’. The 19th century saw the rise of a liberal conception of international law, transposing domestic contractual theories onto the international stage and displacing naturalism from mainstream practice.³⁴ According to this tradition of “international legal positivism,” the rules of international law emanate from the will and consent of equal and sovereign States—a doctrine famously encapsulated by the Permanent Court of International Justice’s 1927 *Lotus* decision.³⁵ Given the paramountcy of a State’s sovereignty in international law, it follows that States are simultaneously the primary subjects and sources of international law.³⁶ The framework of international legal positivism underscores the importance of formalism, that is, explicit legal procedures and formalities in identifying and interpreting international legal obligations. Law is either valid and legally binding or it is not law, but rather a moral, political, or other statement with no binding authority on States.³⁷ This formalism strives to ensure clarity, precision, and

³⁴ Per David Kennedy, “international legal positivism is simply the working out of the private law metaphor of contract for a public legal order.” See David Kennedy, “International Law and the Nineteenth Century: History of an Illusion” (1996) 65:3–4 *Nordic J Intl L* 385 at 398.

³⁵ The Permanent Court of International Justice’s famous passage on this: “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . Restrictions upon the independence of States cannot therefore be presumed.” See *S.S. Lotus Case (France v Turkey)* (1927), PCIJ (Ser A) No 10 [Lotus Case] at 18. On the analogies between domestic contractual theories and international legal positivism, see Ingo Venzke’s helpful summary: “Classical liberalism in international law portrayed the state as an individual, state sovereignty came close to individual autonomy, and state consent has served as a normative foundation for international law ever since,” in Venzke, *supra* note 26 at 248.

³⁶ Of note here is the 1933 *Montevideo Convention on the Rights and Duties of States* which defines “[t]he state as a person of international law” [emphasis added]. See *Convention on the Rights and Duties of States* (‘Montevideo Convention’), 26 December 1933, 165 LNTS 19 at art 1.

³⁷ Sharifah Sekalala, *Soft Law and Global Health Problems* (Cambridge: Cambridge University Press, 2017) at 31. Within positivist approaches to international law, some distinctions are worth highlighting. The term ‘formalism’ refers to the distinction between law and non-law through rules of recognition. It should not be confused with ‘voluntarism’ which posits that rules of international law are valid because states consent to be bound by them (i.e., the rule of recognition is further narrowed by the paramountcy of state consent). To borrow from the Permanent Court of International Justice’s decision in *S.S. “Lotus” (France v. Turkey)*, “[t]he rules of law binding upon States...emanate from their own free will.” See *Lotus Case*, *supra* note 35 at 18.

predictability in the international legal system. It finds its most popular expression in the sources of international law listed under Article 38(1) of the Statute of the International Court of Justice, further discussed below along with some of the key challenges associated with the formalistic approach to international law.

1.3.1 International law and its sources according to Article 38(1) of the Statute of the International Court of Justice

Treaties, conventions, and other multilateral agreements concluded between states stand out as easily recognizable formal sources of international legal obligation. The determination of form and consent largely hinges on whether a state has ratified or acceded to the international legal instrument.³⁸ The sources of international law, however, are not exclusively written. In fact, in the history of international law that predates the UN, written norms did not even predominantly shape the international legal landscape.³⁹ A positivist understanding maintains that even unwritten rules of international law may be indirect manifestations of state consent.

Most international lawyers today rely on the International Court of Justice, the main judicial organ of the UN, for guidance on ascertaining international law. Article 38(1) of the

³⁸ Per Article 2(1)(a) of the *Vienna Convention on the Law of Treaties*, a treaty is “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [VCLT] at art 2(1)(a). Note however, as Malgosia Fitzmaurice explains, that “it is possible for states to allow themselves to be bound by certain rules to which they have not given their express consent, but which are brought into existence by a rule making process to which they *have* given their consent.” See Malgosia Fitzmaurice, “Modifications to the Principles of Consent in Relation to Certain Treaty Obligations” (1997) 2 *Austrian Rev International & European L* 275 at 276.

³⁹ Rüdiger Wolfrum, “Sources of International Law” in *Max Planck Encyclopedia of Public International Law* (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 2011) at para 22. It is worth noting that since the advent of the UN and the International Law Commission, important segments of customary international law – such as the law of treaties and the law of the sea, have become written law. See Robert Jennings, “What is International Law and How Do We Tell It When We See It?” in Martii Koskeniemi, ed, *Sources of International Law* (London: Routledge, 2000) 59 at 66.

Statute of the International Court of Justice grants the Court the authority to apply various sources of law in its adjudication of disputes.⁴⁰ These sources are:

- (1) international conventions, whether general or particular, establishing rules expressly recognized by the consenting States;
- (2) international custom, as evidence of a general practice accepted as law;
- (3) the general principles of law recognized by...nations;
- (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Under Article 38(1)(b), 'international custom,' also known as customary international law, is grounded in unwritten rules and can evolve over time. Intergovernmental or other adjudicative institutions consider these rules legally binding on states following a careful review of empirical evidence, specifically regarding (1) general state practice; and (2) *opinio juris*, or proof of state 'acceptance' of the rule as law.⁴¹ Some argue that this state acceptance signifies tacit consent to be bound by international custom.⁴² Indeed, in the commentary to its study on the identification of customary international law, the International Law Commission, delegated by the General Assembly pursuant to the UN Charter to codify and progressively develop international law, clarified that for customary international law to exist, states must have "acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a

⁴⁰ *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, 33 UNTS 933 [ICJ Statute]. Note that the provision does not establish a hierarchy between the sources listed from art 38 (1) (a) to (c).

⁴¹ These constituent elements of customary international law have been repeatedly set out by the case law of the International Court of Justice. *See for instance* Nicaragua Case, *supra* note 19 at 97-100. More recently, the International Law Commission has elaborated on the source through their study, led by Special Rapporteur Sir Michael Wood on the identification of customary international law. *See* Chapter V. "Identification of customary international law" *Report of the International Law Commission*, UNGA, 70th sess, UN Doc A/73/10 (2018) 117 [ILC Customary International Law Study].

⁴² Grigoriĭ Ivanovich Tunkin, *Theory of International Law* (Cambridge: Harvard University Press, 1974).

rule.”⁴³ Conversely, the doctrine of the 'persistent objector' holds that if a state consistently objects to the emergence of a customary international law rule, that rule is not applicable to that state.⁴⁴

Attributing state consent to 'general principles of law recognized by...nations' under Article 38(1)(c) poses a particular challenge. The Court has seldom invoked 'general principles of law' in its adjudication of disputes and when referred to, such references have tended to be ambiguous and incidental to the reasoning of the Court.⁴⁵ Most agree, however, that where a principle is derived from the convergence of various municipal legal systems of the world, it may be transposable to international law.⁴⁶ The International Law Commission has moreover recognized in its draft conclusions on the identification of general principles of law, provisionally adopted at the time of writing, that such principles may originate within the international legal system itself. While this second lineage of 'general principles' spawns more debate, its finding requires clear evidence that “the community of nations has recognized the principle [in question] as intrinsic to the international legal system.”⁴⁷ Xuan Shao, who is supporting the work of the International Law Commission Special Rapporteur on General Principles of Law, asserts that unlike treaties or customary international law, general principles of law are driven by the need for a 'coherent system' of international law akin to the role that

⁴³ See ILC Customary International Law Study, *supra* note 41 at 138.

⁴⁴ *Ibid* at 152.

⁴⁵ Giorgio Gaja, “General Principles in the Jurisprudence of the ICJ” in Mads Andenas et al, eds, *General Principles and the Coherence of International Law* (Leiden: Brill Nijhoff, 2019) 35.

⁴⁶ *Ibid* at 36.

⁴⁷ The International Law Commission's study of 'general principles of law' was added to the Commission's programme of work in 2017 and is ongoing, led by Special Rapporteur Marcelo Vázquez-Bermúdez. The latest iteration of this study as of January 2024 presented 11 articles to the 75th session of the International Law Commission, which were adopted by the Committee on first reading. See International Law Commission, *General principles: text of the draft conclusions provisionally adopted by the Drafting Committee on first reading, 74th sess*, UN Doc A/CN.4/L.982 (2023) [ILC General Principles of Law Study].

equity fulfills in the tradition of English common law. General principles of law, by Shao's account, constitute a form of 'gap-filling' within a fragmented international legal system and 'implied consent' by states.⁴⁸

Ostensibly, the formal sources of law under Article 38(1) allow us to determine the existence and character of international legal obligations while remaining value-neutral, conditioned on state consent, and preoccupied with law as it exists (*lex lata*) rather than as it ought to be (*lex ferenda*). Yet Article 38(1) is an incomplete formalist account of modern international law. The provision formed first part of the Statute of the Permanent Court of International Justice, before being transported with few modifications into the Statute of the International Court of Justice. Disavowing an uncritical embrace of the provision in 1981, Sir Robert Jennings cautioned that:

[Article 38] is a 1920 draft and not always well-suited to international law in the 1980s...we must use it, but interpreting where need be; as in a written constitution; remembering that it is an open question whether it is now of itself sufficient guide to the content of modern international law.⁴⁹

⁴⁸ Xuan Shao, "What We Talk about When We Talk about General Principles of Law" (2021) 20:2 Chinese J International L 219 at 240.

⁴⁹ See Jennings, *supra* note 39 at 61.

These words of caution resonate still today.⁵⁰ There are yet more sources of international law not listed under Article 38(1), such as *jus cogens* or peremptory norms of international law⁵¹ and binding decisions of international organizations.⁵² Moreover, processes for identifying the existence and content of rules of customary international law, and even more so general principles of law, are subject to perennial debates about their indeterminacy and malleability.⁵³ The International Law Commission has devoted years of study and deliberation on these questions without quelling the debate among jurists.⁵⁴

A vast body of scholarship examines international law's formality beyond the confines of Article 38(1).⁵⁵ For the purposes of this dissertation, I have undertaken only a brief survey of this broader terrain. Yet international law's formality is made more complex not only by the insufficiency or indeterminacy of the sources listed in the Statute of the International Court of

⁵⁰ See for instance Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press 2011); Gerald G Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law" in Martti Koskenniemi, ed, *Sources of International Law* (London: Routledge, 2000) 57.

⁵¹ Peremptory norms, in particular, underscore the existence of a hierarchy of sources in international law, a principle explicitly acknowledged in art 53 of the *Vienna Convention on the Law of Treaties*. According to art 53, a treaty is rendered void "if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The provision goes on to define a peremptory norm of general international law as one that is "accepted and recognized by the international community of States as a whole as norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See VCLT, *supra* note 38. See also "Chapter IV. Peremptory Norms of General International Law (*jus cogens*)" *Report of the International Law Commission on the work of its seventy-third session*, UNGA, 77th sess, UN Doc A/77/10 (2022) 10.

⁵² In terms of the legislative powers of international organizations, while uncommon, one can consider the norm-creating function of the UN Security Council as an example. Decisions made under Chapter VII of the UN Charter are recognized as having normative implications. It could be argued that the consensual nature of Security Council decisions arises from the fact that states have ratified the UN Charter. See *United Nations Charter*, 26 June 1945, Can TS 1945 No 7 [UN Charter].

⁵³ See for instance the *Opinio Juris* Symposium on Customary International Law: Monica Hakimi, "An Introduction to Making Sense of Customary International Law" (7 June 2020), online (blog): <<https://opiniojuris.org/2020/07/06/an-introduction-to-making-sense-of-customary-international-law/>>.

⁵⁴ On the identification of customary international law, see ILC Customary International Law Study, *supra* note 41. On the identification of general principles of law, see ILC General Principles of Law Study, *supra* note 47.

⁵⁵ d'Aspremont, *supra* note 50.

Justice. Formalism rarely makes space for the problematization of the colonial legacies and Eurocentric origins that underpin the doctrine of sources and its foundational concepts, including statehood and sovereignty.⁵⁶ For scholars like Antony Anghie, a clear-eyed understanding of “the legal notion of sovereignty” sees the concept as having been “forged not only in such intra-European crucibles as the Thirty Years War, but also in the fires of colonial conquest, such as the Spanish expansion in the Americas, pre-dating Westphalia by more than a century.”⁵⁷

Makau W. Mutua has similarly argued that a rigid insistence on the state form, and colonial borders, subverted the process of decolonization, allowing for the continued exploitation of Indigenous peoples by domestic and international elites.⁵⁸ The Eurocentricity of international law permeates current day practices as well, with James Thuo Gathii remarking in 2021 that pedagogy and practice focus on international law hubs such as New York, Geneva, Paris or London, to the detriment of “international law produced in places like Arusha, Tanzania.”⁵⁹

These critiques, broadly represented under the ambit of ‘Third World Approaches to International Law,’ expose the “Eurocentric spirit flowing across the content and operation of international law” and the “blight of bias” that permeates every level of the system.⁶⁰ At their

⁵⁶ The literature capturing this query is rich and well-documented. For illustrative work in this regard, see Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40:1 Harv Intl LJ 1; Antony Anghie, “The evolution of international law: Colonial and postcolonial realities” (2006) 27:5 Third World Quarterly 739.

⁵⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 13-31.

⁵⁸ Makau wa Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1994) 16:4 Mich J Intl L 1113–1176.

⁵⁹ James Thuo Gathii, “The Promise of International Law: A Third World View” (2021) 36:3 Am U Intl Rev 377 at 380. For a more exacting critique of mainstream international law pedagogy, see Mohsen Al Attar: “From Vattel to Westlake to Yoo, century after century of international legal academics produce scholarship in service of Euro-American imperial ambition and might,” in Mohsen Al Attar, “Must International Legal Pedagogy Remain Eurocentric?” (2021) 11:1 Asian J Intl L 176 at 180.

⁶⁰ Mohsen Al Attar, *ibid* at 179.

core, these critiques unsettle the very legitimacy of the modern day international legal system. For all its shortcomings, however, the fact remains that Article 38(1) is an important cornerstone of any student's initiation into the field of public international law.⁶¹ Thereafter, its influence persists in mainstream practice and scholarship.⁶² The focus on international legal positivism as expressed in Article 38(1) is necessary, if only as a starting point for the discussion that follows in this dissertation. Building on this starting point, an alternative account of international law focuses on a continuum of normativity in international legal rules. I turn now to this continuum.

1.3.2 Continuum of normativity in international law

Positivist, voluntarist, and formalist approaches to international law risk glossing over the complex and dynamic nature of norms in contemporary global governance, as well as the diversity of actors who influence and take part in their development.⁶³ For a variety of reasons, norms that derive from the formal sources of international law as conceived in Article 38(1) can fall short of influencing state behaviour in practice.⁶⁴ Conversely, norms which are not contained in formal sources, such as resolutions, declarations, guidelines, or recommendations, are not always impotent and without effect.⁶⁵ An inflexible reliance on the formal sources of law fails to appreciate international law “in her infinite variety” and its intertwinement with the practice and discourse of state and non-state actors.⁶⁶

⁶¹ Samantha Besson & Jean d'Aspremont, “The Sources of International Law: An Introduction” in Jean d'Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2018).

⁶² Jennings, *supra* note 39 at 60.

⁶³ Joost Pauwelyn “Is It International Law or Not, and Does It Even Matter?” in Joost Pauwelyn, Ramses Wessel and Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press 2012) at 127.

⁶⁴ Steven J Hoffman et al, “International treaties have mostly failed to produce their intended effects” (2022) 119:32 *Proceedings of the National Academy of Sciences* e2122854119.

⁶⁵ Sharifah Sekalala & Haleema Masud, “Soft Law Possibilities in Global Health Law” (2021) 49:1 *JL Med & Ethics* 152.

⁶⁶ To borrow from Judge Richard Baxter of the International Court of Justice. See Richard R Baxter, “International Law in ‘Her Infinite Variety’” (1980) 29 *Inti & CLQ* 549.

To better account for the diverse ways through which norms are developed, socialized, enforced, and made to influence state and non-state behaviours, many contemporary legal scholars conceptualize international law's normativity⁶⁷ in degrees, along a continuum or through a prism of factors that strengthen normativity or detract from it.⁶⁸ Implicit in such approaches is the diversity of actors involved in the creation and implementation of norms, and the evolving nature of the international legal order.

The concept of *informal* international lawmaking, as developed by Pauwelyn, Wessel and Wouters, advances one such nuanced approach. The authors argue that law's informality can be understood along three critical dimensions. First, informality can arise in the *process* of lawmaking, taking place within loosely organized networks or forums, rather than formal treaty negotiations under the auspices of international organizations. Second, informality can arise in terms of the *actors* involved in lawmaking, which can include non-traditional diplomatic actors such as domestic regulators. Finally, informality can relate to the *outputs* of lawmaking, amounting not necessarily to a traditional source of international law, but outcomes with normative effects, steering the behaviour of target actors in global governance.

The outputs of informal international lawmaking may be legally binding in the strict sense of the term. Yet informal international *lawmaking* also need not amount to *law*. As the authors note, informal international lawmaking “may...fall outside law and still be part of a law- or norm-making process, or it may simply have legal or normative effects without being law.”⁶⁹

⁶⁷ I draw on Venzke's usage of the term “normativity” here, referring to a sense of legal obligation that lies at the juncture between “what *should* be a norm...and what *is* a norm” – or in other words, the “force that makes a rule binding” – which can come in varying degrees. See Venzke, *supra* note 26 at 5-6.

⁶⁸ See for instance Andrew T Guzman, “A Compliance-Based Theory of International Law” (2002) 90:6 California L Rev 1823; Kenneth W Abbott et al, “The Concept of Legalization” (2000) 54:3 International Organization 401.

⁶⁹ Pauwelyn, Wessel and Wouters, *supra* note 20 at 17.

While a degree of tolerance is afforded in characterizing the processes, actors and outputs that comprise informal international lawmaking, Pauwelyn, Wessel and Wooters caution against casting the net too wide, and in this regard maintain that the actors who engage in informal international lawmaking must still be linked to public authority. They use the term “lawmaking” to denote this link to public authority.⁷⁰

It follows from the above that informal international lawmaking may sometimes lead to ‘softer’ norms. Definitions of ‘soft law’ range in scope from the sweeping to the narrow.⁷¹ Abbott and Snidal advance the concept of ‘legalization’ as a form of institutionalization of international rules, with legalization viewed on a continuum from ‘hard’ to ‘soft’ based on (1) *obligation*, or the degree to which actors are legally bound by the international rule(s) or commitment(s); (2) *precision*, or the degree to which rules are defined in a sufficiently precise manner in order to assess their implementation; and finally (3) *delegation*, or the degree to which third parties have been granted authority to enforce the rules.⁷² Each of these elements can vary independently of the other. ‘Hard’ law is characterized by higher degrees of legal obligation, precision, and delegation, and states are more likely to pursue hard legal arrangements where broad consensus can be found on key issues, and where the “transaction costs” of operating within the legal framework are reduced. Soft law, conversely, diminishes the costs of achieving

⁷⁰ Joost Pauwelyn, “Informal International Lawmaking: Framing the Concept and Research Questions” in Joost Pauwelyn, Ramses Wessel and Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press 2012) at 21.

⁷¹ Lord McNair is credited with having made the first mention of the term. See AJP Tammes, “Soft Law” in *Essays on International and Comparative Law in Honour of Judge Eroses* (The Hague: TMC Asser Institut, 1983) 187.

⁷² Kenneth W Abbott & Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 *International Organization* 421; Abbott et al, *supra* note 67.

some level of legalization in the first place, and where issues are broad or uncertain in nature, it minimizes sovereignty costs for states.⁷³

One of the main challenges in conceptualizing soft law is the broad array of norms and instruments that the phenomenon can capture. A consensus-based definition of soft law remains elusive.⁷⁴ While Abbott and Snidal’s continuum of legalization offers a useful framework for understanding the varying degrees of normativity in international law, it does not explain how law gains its legal character, and moreover, risks rendering all law ‘soft.’⁷⁵ Even a legally binding treaty formally ratified by states may exhibit soft legalization according to their continuum, depending on factors such as the level of obligation, precision, or delegation involved.⁷⁶

Theorists also cannot agree on whether—and if so, which—non-state actors can be sources of soft law. Thürer, for instance, understands soft law as “a phenomenon in international relations” which covers “all those social rules generated by *States or other subjects of international law* which are not legally binding but...nevertheless of special legal relevance [emphasis added].”⁷⁷ Narrower still, Sekalala describes soft law instruments as being (1) agreements by states and/or international organizations vested with authority, which (2) possess normative character; and (3) are non-binding.⁷⁸ In contrast, Christine Chinkin explains that soft

⁷³ *Ibid* at 436.

⁷⁴ Venzke, *supra* note 26 at 226.

⁷⁵ To account for law’s inherent normativity, Sekalala clarifies that norms of ‘hard law’ are “legally binding obligations with normative character that are precise or can be made precise through an effective body that can adjudicate or issue detailed regulations that delegate authority, interpret or implement the law.” See Sekalala, *supra* note 37 at 35.

⁷⁶ As discussed above, states have legitimate reasons for maintaining ambiguity within the text of international treaties.

⁷⁷ Daniel Thürer, “Soft law” in *Max Planck Encyclopedia of Public International Law* (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 2009) at para 8.

⁷⁸ Sekalala, *supra* note 37 at 52.

law can be developed by a broad range of actors, including NGOs, and reflected in instruments ranging from:

...treaties...which include only soft obligations ('legal soft law')...non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations ('non-legal soft law') [and] statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.⁷⁹

Though the soft law thesis has gained many proponents in recent decades, it has also attracted notable scrutiny.⁸⁰ For instance, French law professor Prosper Weil famously warned that the endless proliferation of a diverse and differentiated set of legal norms in international law is a "pathological phenomenon" that is "doomed to flabbiness" and risks destabilizing "the whole international normative system," turning it into "an instrument that can no longer serve its purpose."⁸¹ Others rail against the binary soft-hard law distinctions in international law, noting that the important consideration for a legal text should simply be "whether [its] rules actually constrain the actions of states in practice or not."⁸²

Weil, although critical, puts forward an alternative proposition for the role that varieties of non-binding law play in the international legal order, viewing such rules as "prenormative" acts which may eventually become norms should the process of socialization enable them to do so. In rare cases, soft law may harden over time into custom, as has arguably been the case for many if not all provisions of the *Universal Declaration of Human Rights*, adopted in the third session of

⁷⁹ Christine M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 *Inti & CLQ* 850 at 851.

⁸⁰ Jan Klabbers, "The Redundancy of Soft Law" (1996) 65 *Nordic J Intl L* 167 at 168.

⁸¹ Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 *AJIL* 413 at 416, 423.

⁸² Arnold N Pronto, "Some Thoughts on the Making of International Law" (2008) 19:3 *Eur J Intl L* 601 at 615.

the UN General Assembly in 1948.⁸³ Laurence Boisson de Chazournes similarly contemplates that softer norms expand law's empire by "clearing unexplored normative fields" and encouraging states to bring issues to the international negotiating agenda.⁸⁴ Even as final instruments, Boisson de Chazournes maintains that soft law instruments can have real-world effect, noting that standards typically understood to be non-legally binding may nonetheless be transported into domestic legal systems in near wholesale form due to their high degree of technicality and reflection of evolving knowledge and practice.⁸⁵

For all these efforts to explain how non-legally binding norms come to influence the subjects of international law in the real-world, some attention is warranted to Weil's critique that opening the floodgates to recognize all varieties of non-legally binding norms as *law* risks undermining the structural integrity of the international legal system itself. Jan Klabbbers cautions that the soft law thesis "presupposes that there is not one single international legal order, but...various international legal orders."⁸⁶ He notes that even if a pluriverse of legal orders was plausible, such an arrangement is not borne out in judicial and state practice. Courts, for instance, frequently refer to resolutions, declarations, and guidelines issued by international organizations but only insofar as such instruments can help inform the nature of treaty obligations (e.g., in the form of subsequent agreements and subsequent practice per the rules of the *Vienna Convention*

⁸³ *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III) [UDHR]. For a broad-ranging survey of the status of the *Universal Declaration of Human Rights* in international and transnational law, see Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995–1996) 25 Ga J Intl & Comp L 287.

⁸⁴ Laurence Boisson de Chazournes, "The International Law Commission in a Mirror—Forms, Impact and Authority" in United Nations, ed, *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (New York: United Nations) 133 at 138.

⁸⁵ Examples in this regard include norms of the International Organization for Standardization (ISO) in global industrial production and distribution and the *Codex Alimentarius* in relation to food, food production and food safety. See Boisson de Chazournes, *ibid* at 139.

⁸⁶ Klabbbers, *supra* note 80 at 168.

on the *Law of Treaties*) or of customary international law (e.g., by demonstrating the existing of *opinio juris*). Thus, soft law can be used as an aid in the interpretation of the formal obligations set out in international law.⁸⁷

Irrespective of the precise definitional boundaries adhered to, the phenomenon of soft law responds to the observation that some norms of a non-legally binding nature which do not count as formal or ‘hard’ law may nevertheless have legal effects and should be taken seriously. Soft law, as Chinkin argues, is a rejoinder to the need for more dynamism in international lawmaking, particularly against the backdrop of a legal order which requires “a wide range of modalities for change and development.”⁸⁸

I have thus far limited this analysis to the normativity of international rules, omitting a closer look at the role that their interpretation and application plays in setting free “normative force.”⁸⁹ Legal norms do not “spring from dark and hidden places into daylight.”⁹⁰ It is one thing to identify the existence of norms, and quite another to discern their meaning. The latter is done through practices deployed in large part by international lawyers—individuals who act as academics and teachers, advocates, judges, government advisers, or any combination thereof. International law is made, applied, and extinguished by human agents in a “messy” world and against its backdrop, “official, quasi-official, and unofficial norms are pursued by multiple communities controlling various means of coercive and persuasive authority.”⁹¹ An alternative animating force behind the normativity of international rules, legally binding or not, is the set of

⁸⁷ *Ibid* at 174.

⁸⁸ Chinkin, *supra* note 79 at 866.

⁸⁹ Venzke, *supra* note 26 at 6.

⁹⁰ *Ibid* at 18.

⁹¹ Berman, *supra* note 27 at 303.

practices that relate to the *interpretation* of international law. I examine this set of practices in the next section.

1.3.3 Realist-constructivist accounts of international law

Identifying the existence of a rule and determining its content require two separate analyses. For one, while it may seem simple to point to legal obligations articulated within bilateral or multilateral treaties, negotiating states may leave the precise meaning of provisions in international legal agreements *intentionally* ambiguous and their case specific application far from decided.⁹² International law is identifiable through interpretation, interpretation is undertaken by actors, and actors have agency. In Oscar Schachter's words, international law's "concepts and norms are deeply enmeshed in the interests of national states and in the philosophic and political attitudes of diverse social and cultural societies."⁹³

Schachter alludes to a theoretical orientation that closely tracks with a constructivist account of international lawmaking. The fundamental proposition of constructivism is that humans are social beings, and that their relations *make* the world what it is.⁹⁴ A constructivist account of international law recognizes that norms are created and maintained through the actions of states, international organizations, academic institutions and other non-state entities in the international system, as well as networks of actors operating at different levels of governance

⁹² Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 188-189. Explaining the propensity of states to negotiate indeterminate agreements or to create 'zones of ambiguity,' the authors cite the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude the other).

⁹³ Oscar Schachter, "Invisible College of International Lawyers" (1977) 72:2 Nw UL Rev 217 at 218.

⁹⁴ Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (London: Routledge 2012).

within these institutions. In the words of Anne-Marie Slaughter, the architects of the world order are not “hypothetical leaders or experts” but rather:

...heads of state, ministers, judges, legislators, heads of international organizations, civic and corporate leaders, professors, and pundits [who] all make choices and participate in the processes that design a blueprint of world order at any given moment and give it continually evolving substance.⁹⁵

Constructivism brings to the fore the role of international lawyers—and the social practices they engage in—as shapers of the rules and norms that govern the behavior of states and even other non-state actors. A constructivist orientation has inspired the rise of several notable schools of thought in recent international law theory. The New Haven school, developed at Yale in the 1960s by law professor Myres S. McDougal and his political science counterpart, Harold D. Lasswell, represents an early articulation of this constructivist-realist account of international law.⁹⁶ According to the New Haven school, also known as the school of ‘policy-oriented’ jurisprudence or law, legal norms are generated through a process of interaction among a multitude of actors and their increasingly fixed expectations about appropriate behaviour.⁹⁷ In this approach, law is understood not as a formal body of rules, but rather as a “continuous flow of authoritative and controlling decisions,”⁹⁸ with each actor in the decision-making process

⁹⁵ Drawing on Anne-Marie Slaughter’s concept of a disaggregated world order. See Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) at 161.

⁹⁶ Myres McDougal & Harold D Lasswell, “The Identification and Appraisal of Diverse Systems of Public Order” in Richard Falk & Saul Mendlovitz, eds, *The Strategy of World Order: International Law* (New York: World Law Fund, 1966).

⁹⁷ Jutta Brunnee & Stephen J Toope, “Constructivism and International Law” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York: Cambridge University Press, 2012) at 130. W. Michael Reisman, McDougal’s contemporary at Yale, later refined the outlines of the New Haven School by advancing the notion of international lawmaking as a “process of communication.” See Andrea Bianchi, “The New Haven School” in *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016) at 95.

⁹⁸ W Michael Reisman, Siegfried Wiessner & Andrew R Willard, “The New Haven School: A Brief Introduction” (2007) 32 *Yale J Intl L*, 579-580.

faced with a policy choice between competing legal arguments.⁹⁹ The New Haven school stood as a critique to formalist and positivist approaches to international law, offering the international lawyer an interdisciplinary framework and method against which to systematically evaluate the decisions being made by a plethora of actors on the global stage. For its adherents, the decision (or policy choice) that should prevail is the one that advances the basic goal of the law: a world public order of human dignity.¹⁰⁰ This normative pursuit positions the international lawyer as the “skilled expert and the agent that masters the method to prescribe, apply, and *appraise* decisions made by the decision-maker [emphasis added].”¹⁰¹

The New Haven school’s emergence in the aftermath of the Second World War and the Holocaust explains in part the emphasis it placed on the normative pursuit of human dignity.¹⁰² While infusing law with social ends may seem noble, the New Haven approach eventually became mired in controversy as critics charged it with supporting value-based arguments about authoritative decision-making that selectively cohered with US foreign policy interests.¹⁰³ For many, this critique came to life during the Vietnam War, with Schachter, who broke path with the school, warning that the New Haven approach, “(i)f applied with a nationalist bias . . . becomes an ideological instrument to override specific restraints of law.”¹⁰⁴

⁹⁹ It should be noted that the New Haven School espoused a broad understanding of the ‘participants’ in any decision-making process of international law, including not only those with formal competence (e.g., legislators and judges) but also those who can influence policy outcomes even without formal competence (e.g., NGOs, pressure groups, interest groups and other individuals “who act on behalf of other participants and on their own). *Ibid*, at 578.

¹⁰⁰ *Ibid* at 582.

¹⁰¹ Bianchi, *supra* note 97 at 99.

¹⁰² Anne Orford, “Scientific Reason and the Discipline of International Law” (2014) 25:2 *Eur J Intl L* 369 at 381.

¹⁰³ These critiques were reflected, for instance, in remarks made by Oscar Schachter and Richard Falk at the ASIL Annual Meeting in 1985. *See* Weston Burns et al, “McDougal’s Jurisprudence: Utility, Influence, Controversy” (1985) 79 *Proceedings of the ASIL Annual Meeting* 266.

¹⁰⁴ *Ibid*. Oscar Schachter memorably remarked in the AJIL Symposium at 267, 271, 273:

(i)f applied with a nationalist bias, [the New Haven approach] becomes an ideological instrument to override specific restraints of law . . . a unilateralist version of policy jurisprudence in which law plays a

Another postwar movement of American international legal thought similarly rooted in realist and constructivist sensibilities is the International Legal Process school initially pioneered at Harvard Law School by Henry M. Hart Jr. and Albert M. Sacks, and later refined by Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld.¹⁰⁵ Like New Haven, International Legal Process emphasizes the social *process* of lawmaking over the static existence of a set of rules.¹⁰⁶ Unlike the New Haven school, however, International Legal Process maintained a more modest focus on law as it is, and not on prescribing actions or policy choices rooted in perceived duties to advance world public order of human dignity.¹⁰⁷

At the turn of the twenty-first century, a group of scholars began to delineate the outlines of a ‘new’ New Haven school.¹⁰⁸ This collection of contemporary approaches to international law merged qualities from Yale and Harvard traditions, such as their commitment to combining theory with practice, their openness to intertwining international law with other disciplinary approaches (e.g., political science), and their challenge to the reification of the state as a monolithic entity detached from the “many conflicting political and social subgroups, ideals, and

secondary role and policy is determined by the perception of self-interest of a particular state... (B)y subordinating law to policy, the McDougal approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.

¹⁰⁵ Henry M Hart (Jr) & Albert Martin Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994).

¹⁰⁶ Abram Chayes, Thomas Ehrlich & Andreas F Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little Brown & Co, 1968).

¹⁰⁷ In distinguishing these two schools, Harold Hongju Koh has remarked that “while the New Haven School saw legal rules as *policy-driven*, the International Legal Process School focused on process primarily as a *policy constraint*,” see Harold Hongju Koh, “American Schools of International Law” in *Collected Courses of The Hague Academy of International Law* (Leiden: Brill, 2020) at 46.

¹⁰⁸ See for instance Volume 32 of the *Yale J Intl L*, which consisted of a special commemorative issue capturing proceedings from their 2007 Conference on “*The ‘New’ New Haven School: International Law—Past, Present & Future*.” See foreword by then co-editors in chief Lauren E Baer & Stephen M Ruckman, “The ‘New’ New Haven School: International Law-Past, Present & Future” (2007) 32:2 *Yale J Intl L* 299.

motivations” that animate it.¹⁰⁹ The turn towards a ‘new’ New Haven school of thought, however, was also characterized by a focus on the transnational and the pluralistic dimensions of law.

Transnational legal process emerged as one such contemporary blend of the Yale and Harvard schools of international legal thought in the early 1990s, alongside the growth of international regimes and institutions, the proliferation of non-state actors (e.g., multinational enterprises, NGOs and private individuals), and the increasing development of norms across borders and public and private fora.¹¹⁰ To conceptualize transnational legal process one must first understand *transnational law*. Former judge of the International Court of Justice, Philip C. Jessup, first used the term in his 1956 Storrs lectures at Yale referring then to “all law which regulates actions or events that transcend national frontiers...[including] [b]oth public and private international law...[plus] other rules which do not wholly fit into such standard categories.”¹¹¹ The concept of transnational law has since taken on a variety of meanings depending on the concept user. In advancing the transnational legal process framework, former American State Department Legal Adviser and law professor Harold Hongju Koh expanded on Jessup’s usage to refer to three different categories of law:

(1) law that is "downloaded" from international to domestic law...such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international

¹⁰⁹ Laura A Dickinson, “Toward a ‘New’ New Haven School of International Law?” (2007) 32:2 Yale J Intl L 547–552 at 552.

¹¹⁰ Harold Hongju Koh, *supra* note 107.

¹¹¹ Philip C Jessup, *Transnational law (Storrs lectures on jurisprudence)* (New Haven, CT: Yale University Press, 1956) at 1.

law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or “horizontally transplanted” from one national system to another: for example, the “unclean hands” doctrine, which migrated from the British law of equity to many other legal systems.¹¹²

According to Koh, transnational legal process operates on the basis of four key principles:

(1) it is *non-traditional*, explicitly disavowing traditional dichotomies of public versus private or domestic vs international law;¹¹³ (2) it is *non-statist*, incorporating the actions of both state and non-state actors;¹¹⁴ (3) drawing on the above understanding of transnational law, it is *dynamic*, pursuing law which transforms, mutates, and percolates up and down...from the domestic to the international level and back down again...¹¹⁵; and (4) it is *normative*, giving rise to new rules of law that are fed back into a repeated process of rule interpretation, interaction, and internalization engaging a continuum of norms from soft to hard.¹¹⁶

Koh primarily used the transnational legal process framework to explain how international norms are internalized and why they are adhered to from global to domestic spaces.¹¹⁷ Although he recognized the ‘jurisgenerative’ potential of transnational legal processes,¹¹⁸ this aspect of the

¹¹² Harold Hongiu Koh, “Why Transnational Law Matters” (2006) 24 Penn State Intl L Rev 745 at 745-746.

¹¹³ Harold Hongiu Koh, “The 1994 Roscoe Pound Lecture: Transnational Legal Process” (1996) 75:1 Neb L Rev 181 at 184

¹¹⁴ *Ibid*

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* at 184, 204.

¹¹⁷ It is beyond the scope of this dissertation to expand upon the merits and critiques of the compliance/internationalization explanation of transnational legal process theory. For an excellent summary in this regard, see Regina Jefferies, “Transnational Legal Process: An Evolving Theory and Methodology” (2021) 46:2 Brook J Intl L 311, 332 – 337.

¹¹⁸ The term ‘jurisgenerative’ derives from Robert Cover’s works, in which he describes the process through which interpretive communities “create law and...give meaning to law through their narratives and precepts.” See Robert M Cover “The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative” (1983) 97:4 Harv L Rev 18 at 40. Koh explicitly adopted the term and acknowledged the relevance of Cover’s work in his early delineations of transnational legal process, describing the Iranian Hostage crisis of 1979 as jurisgenerative, because “it not only generated law – the domestic private law of letters of credit, the domestic public law of executive power, the

theory has been thinly described, drawing in part on anecdotes and perspectives from Koh's personal career advising the US State Department. Numerous scholars have since engaged in "midrange theorizing"¹¹⁹ to explain how rules of international law have followed a transnational legal process towards change in particular contexts. Wayne Sandholtz and Kendall Stiles, for instance, offer a model for transnational normative change that links actions to disputes, disputes to arguments, and arguments to norm change over time.¹²⁰ They provide empirical grounding to the transnational legal process framework through case studies spanning areas of law ranging from international refugee and asylum law to the prohibitions of piracy and terrorism, arguing that norms should be viewed not only as the outcomes of the transnational legal process, but as key components of the context in which new rules are incubated and eventually emerge.¹²¹

For all its versatility, the transnational legal process framework has done less to illuminate *how* rules gain recognition as *law* among a plethora of state and non-state actors.¹²² This endeavour does not carry much weight for scholars who align with a transnational legal process

international private law of diplomatic relations law – but generated new interpretations of those rules and internalized them into domestic law that now guides and channels those actors' future conduct." See Koh *supra* note 113 at 186.

¹¹⁹ Gregory Shaffer and Tom Ginsburg describe the empirical turn in international law scholarship as one that focuses on "midrange theorizing concerning the conditions under which international law...is formed and those under which it has effects in different contexts," See Gregory Shaffer & Tom Ginsburg, "The Empirical Turn in International Legal Scholarship" (2012) 106:1 AJIL 1 at 1.

¹²⁰ Wayne Sandholtz & Kendall Stiles, *International Norms and Cycles of Change* (New York: Oxford University Press, 2008) at 3.

¹²¹ Sandholtz and Stiles analyze and organize their case studies into two streams of norms: (1) "sovereignty norms" – that is, norms which "extend, clarify, or specify specific rules relating to the rights and duties of sovereign states" – and (2) "individual human rights norms," including the abolition of slavery and the slave trade, the prohibition of genocide, the protection of refugees and asylum seekers, and humanitarian intervention. Across these two categories of case studies, they maintain that there are discernable similarities in terms of the phases of the norm cycle that ensue (from disputes to argumentation to rule change). See also Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2008).

¹²² Brunnée and Toope perceptively remark that "[a]lthough Koh is interested in the notion of 'obedience,' he does not explore the role that the binding quality of international law plays in generating it," see Jutta Brunnée, & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 118.

approach. In this regard, the school is closely aligned with Paul Schiff Berman's global legal pluralist approach to international law, which dispenses with the need to distinguish between what is law and non-law, arguing that instead "the relevant question is the normative commitments of communities, not the formal status of those commitments."¹²³ Drawing on Robert Cover's work on jurisgenerative practices, Berman describes the international community as "a collection of interests," with "norms [being] articulated by international, transnational, non-state, and epistemic communities [and] influenc[ing] both policy decisions and categories of thought over time."¹²⁴ In a similar vein, Patrick Cottrell and David Trubek conceptualize the utility of transnational legal process as a form of problem-solving occurring within a global space that takes shape through "deliberation among a...diverse set of actors."¹²⁵

Although they grapple with important critiques, the postwar Harvard, Yale, and other realist-constructivist approaches to international law challenged certain traditional anxieties in international legal scholarship, including questions on what counts as international law and whether international law matters. Refocusing the lens from the doctrine of sources to the social processes involved in identifying, interpreting, and applying rules of international law, these theoretical frameworks shed light on the dialogic and multidirectional paths through which legal determinations are reached, revealing how interpretations of the law are influenced by shifting power dynamics, evolving ideologies, human creativity, and other external pressures. Central to this dynamic are international lawyers themselves—academics, advocates, judges, government

¹²³ Berman, *supra* note 27 at 323.

¹²⁴ *Ibid* at 311, 327.

¹²⁵ Patrick M Cottrell & David M Trubek, "Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space" (2012) 21 *Transnat'l L & Contemp Probs* 360 at 371.

officials, or any combination thereof—and above all as human beings who “[embody]...law’s stories and whose daily experience involves speaking and writing... narratives” about the law.¹²⁶

This emphasis on the agency of the international legal community and its members underscores the responsibilities that befall those who are placed in positions of authority by vocation.¹²⁷ Acknowledging this space for human agency, however, remains a challenge for much of mainstream international law and practice. Driven by a concern for the neutrality, objectivity, and autonomy of international law as a discipline, formalist and positivist approaches to international law obfuscate the discursive practices, disciplinary biases, and landscapes of human psyche that infiltrate and infuse the practice of international law.¹²⁸ Yet the ‘validity’ of legal argumentation can also be seen as an outcome, instead of a characteristic, of law as practice.¹²⁹ One can examine how social practices establish the standards that determine a valid legal argument without undermining international law’s autonomy as a field of practice.¹³⁰

I turn to such practices in the next section, examining (a) the international lawyer as an agent of interpretation in international law, (b) as constituents of increasingly influential and diverse communities of practice, and (c) as contributors to the discursive process of building international consensus on the meaning behind international legal norms.

¹²⁶ Anne Orford, “Embodying Internationalism: The Making of International Lawyers” (1998) 19 *Australian YB International L* 1 at 3.

¹²⁷ Bianchi, *supra* note 97, at 107.

¹²⁸ For instance, Professor Klabbers has mounted strong critiques of international law’s move towards interdisciplinarity, urging international lawyers to “jealously guard the relative autonomy of their discipline,” Jan Klabbers, “The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity” (2005) 1:1–2 *Journal of International Law and International Relations* 35 at 36.

¹²⁹ Tanja Aalberts & Ingo Venzke, “Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice” in Jean d’Aspremont et al, eds, *International Law as a Profession* (Cambridge: Cambridge University Press, 2017) 287 at 290.

¹³⁰ *Ibid.*

1.3.3.1 The role of the international lawyer

To some degree, international law is shaped by “what international lawyers do and how they think.”¹³¹ Although briefly set out in 1977, Schachter's concept of the “invisible college of international lawyers” is an early effort in describing how a community of human agents shape international law.¹³² Schachter referred to the metaphor of an ‘invisible college’ to describe an epistemic community with vested interests. In later years, he even characterized international lawyers as being bound not just by subject matter, as tort or contract lawyers are, but by identification with an almost crusade-like common *cause*.¹³³

Schachter conceded that the notion of a ‘college’ was better suited to international law’s revival in the wake of the Second World War, where one could still easily make out the small number of people who were members of the college. Yet even today, scholars have retained reference to the human in international law. David Kennedy has remarked that “international law is a group of *people* pursuing projects in a common professional language [emphasis added].”¹³⁴ Recent scholarly works, such as the Cambridge University Press volume on *International Law as a Profession* edited by Jean d’Aspremont and colleagues, have more robustly examined the agency of individuals in the development, interpretation, and application of international law.¹³⁵

¹³¹ *Ibid.*

¹³² Schachter, *supra* note 93 at 217.

¹³³ Mieke J Clincy, “An Interview with Oscar Schachter” (2001) 95 Proceedings of the ASIL Annual Meeting 18 at 18.

¹³⁴ David Kennedy, “One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream” (2007) 31 NYU Rev L & Soc Chang 641 at 650.

¹³⁵ Jean d’Aspremont et al, eds, *International Law as a Profession* (Cambridge: Cambridge University Press 2017). For a helpful overview of the literature on this question in particular, see Jean d’Aspremont et al, “Introduction” in Jean d’Aspremont and others, eds, *International Law as a Profession* (Cambridge: Cambridge University Press 2017) at 3-6.

A growing body of literature reveals the rapid evolution of the invisible college over the past five decades, expanding on Schachter's notion of a community of professionals engaged in a "continuous process of communication and collaboration" in the common enterprise of giving life to international law.¹³⁶ It moreover underscores the multidimensional nature of the contemporary international lawscape, characterized by increasingly specialized domains of research and practice, each with its own cadre of professionals wielding discourse and legal argumentation in ways that are unique to their roles as scholars, practitioners, teachers, and judges.¹³⁷ Speaking at the American Society of International Law's Annual Meeting more than thirty years after he first described the invisible college, Schachter likened such specializations to communities on a map, with some communities (such as the international human rights law community) having grown into cities, while others (such as the global health law community) remain only villages or hamlets. Each community remains connected through roads and inlets, but one may plausibly reside within one specialty of international law (and one community) without having to use main roads or having recourse to general notions.¹³⁸

In a similar vein, Anthea Roberts encourages the study of *comparative* international law, emphasizing that international lawyers are ultimately "agents" with a socially founded sense of the rules of the professional game, their best interests, and their place within a field of

¹³⁶ Schachter, *supra* note 93 at 217.

¹³⁷ Michael Waibel, "Interpretive Communities in International Law" in Andrea Bianchi, Daniel Peat and Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press 2015). *See also* Andrea Bianchi, "Gazing at the Crystal Ball (Again): State Immunity and Jus Cogens beyond *Germany v Italy*" (2013) 4 J International Dispute Settlement 457. For a helpful survey of how interpretive processes differ across five of the main roles assumed by professional lawyers (legal advisers, NGO lawyers, judges, academics and litigators), *see* Arianne Zidar, "Interpretation and the International Legal Profession" in Andrea Bianchi, Daniel Peat and Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press 2015). *See also* Charles Wilfred Jenks, "Craftsmanship in International Law" (1956) 50:1 AJIL 32 at 37.

¹³⁸ Clincy, *supra* note 133 at 20.

practice.¹³⁹ Building on the concept of social fields pioneered by Pierre Bourdieu and others, she notes that the rules that apply to a given field may differ along multiple axes, including whether the lawyer works in the national context or transnationally, whether their work involves practice, research, or teaching (or cuts across all of these activities), which subjects of law the lawyer engages with (e.g., international human rights law, environmental law, humanitarian law etc.) and even *where* the lawyer completes their international law training¹⁴⁰ or takes up practice and teaching.¹⁴¹ In engaging the rules of the game, legal experts, including academics and practitioners, ultimately take part in “building and legitimating markets for their expertise at the transnational level.”¹⁴²

Thus, despite conventional portrayals of lawyers as detached and emotionally vacant figures mechanically interpreting legal tenets, a reckoning with the interior lives of lawyers also merits closer study.¹⁴³ Specialized fields in international law are rich in personal connections, friendships, and mentorships that populate it, with these “professional family trees” animating the shared assumptions, tacit understandings, and personal and professional choices made by international lawyers.¹⁴⁴ An understanding of the “unconscious workings of the rules and

¹³⁹ Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press 2017) at 24. For an application of Bourdieusian approaches to international legal fields, see also Mikael Rask Madsen, “Transnational Fields and Power Elites: Reassembling the International with Bourdieu and Practice Theory” in Tugba Basaran et al, eds, *International Political Sociology* (London: Routledge 2016).

¹⁴⁰ Luíza Leão Soares Pereira, Luíza & Fabio Costa Morosini, “Textbooks as Markers and Makers of International Law: A Brazilian Case Study” (2024) 35:1 Eur J Intl L 25. See also Roberts, *supra* note 139.

¹⁴¹ Artur Simonyan, “International Lawyers in Post-Soviet Eurasia: Decoding the Divisibility” (2024) 35:1 Eur J Intl L 63.

¹⁴² Roberts, *supra* note 139 at 24.

¹⁴³ See in general Gerry Simpson, *The Sentimental Life of International Law* (Oxford: Oxford University Press, 2021).

¹⁴⁴ Luíza Leão Soares Pereira & Niccolò Ridi, ‘Mapping the “Invisible College of International Lawyers” through Obituaries’ (2021) 34 Leiden J Intl L 67.

principles that make up the...legal system,” which ultimately reside within the mind of the legal expert, is crucial. To again quote Kennedy:

...[international lawyers] have intuitions, prejudices, impressions about one another, but we resist acknowledging, and studying, let alone embracing, our differences.¹⁴⁵

Moreover, international lawyers, like many other professionals, meander through their careers assuming multiple and sometimes conflicting roles in international law as legal practitioners, scholars, teachers, advocates, and diplomats.¹⁴⁶ In so doing, they acquire knowledge which includes not only ‘information’ but also “the intersubjective background or context of expectations, dispositions, and language that gives meaning to material reality.”¹⁴⁷ These formal roles also belie the inner psychological turnings of international lawyers, inhabiting a landscape ‘between apology and utopia.’¹⁴⁸

As the foregoing shows, practices of teaching, writing about, and expounding the rules of international law are far from reproducible and predictable scientific exercises undertaken by machines.¹⁴⁹ To some degree, they are shaped by the practices of *communities* of professionals

¹⁴⁵ Kennedy, *supra* note 134 at 649.

¹⁴⁶ Martti Koskenniemi, “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice” in Jean d’Aspremont et al, eds, *International Law as a Profession* (Cambridge: Cambridge University Press, 2017) 38.

¹⁴⁷ Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Abingdon: Routledge, 2004) at 3.

¹⁴⁸ As Koskenniemi aptly put it, “[t]o struggle for ‘world peace through law’, ‘world order models’, the rights of future generations, ‘fairness’ or indeed global governance is far from a recipe for diplomatic success. But we could not recognise the profession for what it is if it did not hark back to such objectives.” See Koskenniemi, *supra* note 146 at 41.

¹⁴⁹ I note this with a grain of salt, recognizing the potentially disruptive influence artificial intelligence tools may soon have on how international law is identified, interpreted and applied. See for instance Tarcisio Gazzini, “Artificial Intelligence and Article 33.4 VCLT” (14 March 2024), online (blog): <<https://cil.nus.edu.sg/blogs/artificial-intelligence-and-article-33-4-vclt/>>.

who engage in international law.¹⁵⁰ I turn to the concept of *communities of practice* in international law next.

1.3.3.2 Communities of practice in international law

The second half of the 19th century saw the emergence of a culture of ‘internationalism’ and the ‘professionalization’ of international law, aided by several parallel transformations that would pave the way for communities of practice in international law.¹⁵¹ Driving the independence of international law as a “self-standing” area of study and practice, this period saw the emergence of learned societies and scholarly publications dedicated entirely to international law, as well as professorships specifically for the teaching of international law.¹⁵²

In tandem, a range of private and professional associations emerged, assuming a prominent role in setting new international standards. Among these were pacifist associations, women’s rights activists, social reformist associations, international trade unions, the International League for the Prohibition of Duels, industrial associations, international scientific associations, the International Committee of the Red Cross, and importantly, international law associations.¹⁵³

¹⁵⁰ By ‘broadly understood,’ I adopt Bianchi’s stance that “almost everyone who has a place in the profession...can participate in it.” This categorization includes students who contribute to the writing of legal scholars as well as judicial clerks who ‘help’ judges write decisions. This is not to imply, however, that all participants in the ‘game’ of interpretation carry the same out. For more, see Andrea Bianchi, “The Game of Interpretation in International Law” in Andrea Bianchi, Daniel Peat & Matthew Windsor, ed, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 34 at 39.

¹⁵¹ The term ‘internationalism’ has been variously defined as ‘the ideology of international bonding,’ see Carsten Holbraad, *Internationalism and Nationalism in European Political Thought* (New York: Palgrave Macmillan, 2003) at 1. It has also been understood as “the idea that we both are and should be part of a broader community than that of the nation or the state,” see Fred Halliday, “Three Concepts of Internationalism” (1988) 64 *International Affairs* 187 at 187.

¹⁵² Jean d’Aspremont, “The Professionalisation of International Law” in Jean d’Aspremont and others, eds, *International Law as a Profession* (Cambridge: Cambridge University Press 2017) at 21.

¹⁵³ Jochen von Bernstorff, “New Responses to the Legitimacy Crisis of International Institutions: The Role of ‘Civil Society’ and the Rise of the Principle of Participation of ‘The Most Affected’ in International Institutional Law” (2021) 32 *Eur J Intl L* 125 at 131.

The latter, which included the International Law Association, the Institut de droit international, and regional and national associations of international law, continue to hold prominence today.

Well before the advent of the UN, these groups worked fluidly across the borders of newly recognized nation states, often assuming a crucial role in the knowledge and policy network of countries and in the promotion and adoption of international standards developed at that time.¹⁵⁴

The International Bureau for the Suppression of White Slave Traffic, for instance, was instrumental to the promotion of an international agreement on the traffic of women which in 1904 garnered signatures from a dozen European states.¹⁵⁵ So too was the International Committee of the Red Cross, led by civilians, the driving force behind the adoption of first Geneva Convention of 22 August 1864 by state diplomats, ushering in the international humanitarian law regime we know today.¹⁵⁶

These early associations align with Etienne Wenger and Jean Lave's social learning concept of "communities of practice," later adapted by Emanuel Adler to the context of international relations.¹⁵⁷ Specifically, Adler conceptualized a community of practice (see figure 1) as:

¹⁵⁴ In 1907, for instance, Simeon Baldwin wrote in the *American Journal of International Law* of hundreds of meetings termed "leading congresses, associations and societies of an unofficial description" which tend to "promote the solidarity of the world." See Simeon Baldwin, "International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World" (1907) 1:3 *AJIL* 565, at 572-573.

¹⁵⁵ See Stephanie A. Limoncelli, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women* (Stanford, CA: Stanford University Press 2010).

¹⁵⁶ François Bugnion, "Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)" (2012) 94 *Intl Rev Red Cross* 1299 at 1324.

¹⁵⁷ Adler, *supra* note 147 at 14. While it is beyond the scope of this dissertation to address conceptual similarities and differences between 'communities of practice' and other models of social aggregation in international law, it is worth recognizing that the concepts of 'epistemic community' and 'interpretive community' bear some relevance to the arguments made in this paper. Adler notes that 'all these communities can be conceptually subsumed under communities of practice' with the caveat that communities of practice in particular encompass 'not only the conscious and discursive dimensions and the actual doing of social change, but also the social space where structure and agency overlap and where knowledge, power and community intersect,' see Emmanuel Adler, "The Spread of

...a domain of *knowledge*, which constitutes like-mindedness, a community of *people*, which creates the social fabric of learning, and a shared *practice*, which embodies the knowledge the community develops, shares and maintains [emphases added].¹⁵⁸



Figure 1 Conceptualization of a community of practice

Communities of practice create the conditions for the emergence and establishment of collective meaning, discourse, identity, and learning.¹⁵⁹ This resonates with the characterization of Schachter’s invisible college of international lawyers as a “professional community” with vested interest in “creating new law and extending existing law to meet emerging needs.”¹⁶⁰ As

Security Communities: Communities of Practice, Self-Restraint, and NATO’s Post—Cold War Transformation” (2008) 14 *European J International Relations* 195 at 199.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid* at 13.

¹⁶⁰ Schachter, *supra* note 93 at 223. While referring to an ‘invisible college of international lawyers’ in this section, I do not agree that there is a single or uniform community of practice among international lawyers. As d’Aspremont notes, “there is not one strictly uniform professional community of international lawyers but a great variety of communities of international lawyers, each of them of different nature and subject to different structures,” *see* d’Aspremont, *supra* note 152 at 32. Indeed, Schachter himself abandoned this claim in his later observations on the matter. *See* Clincy, *supra* note 133.

examples, Schacter cites works produced by such societies of international lawyers as the International Law Association and the Institut de droit international as “prelegislative.”¹⁶¹

The very earliest efforts of these entities focused on the codification of interpretation of what was viewed as existing international law. Indeed, the Institut de droit international, established in 1873 by European-American jurists, was preoccupied by this purpose, and even today expresses within its statute the goal of promoting the progress of international law “by lending its co-operation in any serious endeavour for the gradual and progressive codification of international law.”¹⁶² The International Law Association, for its part, was organized in the same year as the ‘Association for the Reform and Codification of the Law of Nations,’ although its membership was (and remains) broader and less exclusive than the Institut de droit international.¹⁶³ Similar to the Institut, however, the Association’s objectives include “the study, clarification and development of international law...and the furtherance of international respect and understanding for international law.”¹⁶⁴

It is important to note that there is no ‘correct’ level of aggregation in analyzing communities of practice. As alluded above, the modern professional society of international law

¹⁶¹ *Ibid* 224.

¹⁶² Institut de droit international, *Statutes of the Institute of International Law* (Ghent: Institut de droit international, 1873) at art 1.

¹⁶³ “Societies of International Law” (1907) 1:1 AJIL 135. Today, the International Law Association boasts an expansive network of regional and national branches all over the world.

¹⁶⁴ International Law Association, *Constitution of the International Law Association adopted at the 77th conference* (Johannesburg, SA: ILA, 2016). Indeed, the Association’s report from the 1976 Madrid conference even seemed to suggest that the work of the Association was equivalent to the mandate of the UN General Assembly:

Now that the United Nations Charter entrusts the General Assembly with promoting the progressive development of international law and its codification, the Association is endeavouring to play its full part in this task.

See International Law Association, “International Law Association: Its Origin, Objects, History and Work” in *International Law Association: Report of the Fifty-Seventh Conference Held at Madrid (August 30th, 1976, to September 4th, 1976)* (London: ILA, 1976).

has branched out in complexity today, accommodating committees and interest groups across a wide range of international law specialties and sub-specialties. Beyond these semi-formalized societies of international law, there are other networks or social aggregations that are constituted more loosely yet blend readily with the concept of an international law community of practice. Examples in this regard include the Extraterritorial Obligations (ETO) Consortium, ATLAS Women (for women in international law) and the Global Health Law Consortium (which I return to in **Chapter 5**). The porous and informal structure of these entities does not preclude them from being considered a community within which certain practices flourish. While these communities and sub-communities have come into being through diverse paths, their members have “a shared sense of timing, placing and sense-making” on issues of common interest.¹⁶⁵

The notion of a community of practice is rooted in practice theory. Practice theory is an umbrella term for approaches which “put social practice—as an actual, contingent, evolving and productive set of activities—centre stage.”¹⁶⁶ As Dunoff and Pollack explain, practice theory strives to overcome familiar divides in international legal scholarship between the material and the discursive, between continuity and change, and between agency and structure.¹⁶⁷ Centering the focus on *practice* means studying “socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world.”¹⁶⁸

¹⁶⁵ Federica Bicchi, “Communities of practice and what they can do for International Relations” (2022) 48:1 *Rev International Studies* 24 at 25.

¹⁶⁶ Jeffrey L Dunoff & Mark A Pollack, “Practice theory and international law” in Moshe Hirsch & Andrew Lang, eds, *Research Handbook on the Sociology of International Law* (London: Edward Elgar Publishing, 2018) at 254.

¹⁶⁷ *Ibid* at 255-257.

¹⁶⁸ Emanuel Adler and Vincent Pouliot, “International Practices” (2011) 3 *International Theory* 1 at 5. Different strands of practice theory offer different definitions of practice. I use Adler & Pouliot’s definition, which has been largely formed the basis of practice-oriented scholarship in international law and international relations.

Efforts to approach international law from a practice lens have taken off since the turn of millennium, inspiring projects that seek to empirically study and explain practices in international legal argumentation, international judicial practices, and the recognition of legal norms by the international legal community. The latter work is captured in Jutta Brunnée and Stephen Toope's "interactional theory of international law" which conceptualizes legality as practice.¹⁶⁹ Brunnée and Toope argue that legal norms gain their distinctive legal character by adhering to specific criteria of legality drawn from Lon Fuller's *The Morality of Law*. Their emphasis is on how the practice of legality fuses with shared understandings cultivated within communities of practice to generate, maintain, and support the evolution of norms that can be recognized as *law*.¹⁷⁰ In so doing, Brunnée and Toope relegate formal sources to the backseat of norm determination.

This dissertation takes as its starting point the understanding that communities of practice in international law enable detailed studies on contemporary legal issues which in essence amount to the "informal codification" of particular topics.¹⁷¹ While not replacing the role of international organizations and other officially mandated bodies such as International Law Commission, such communities may supplement works of these bodies by examining areas of international law that remain low on the international communities' list of priority issues. For instance, the International Law Association's 1966 *Helsinki Rules on the Use of Waters of International Rivers* played a key role in framing the 'equitable and reasonable utilization' as the

¹⁶⁹ Brunnée & Toope, *supra* note 122.

¹⁷⁰ *Ibid* at 86.

¹⁷¹ Alan E Boyle & Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press 2015) at 163.

basic rule of international law for the transboundary use and development of waters.¹⁷² This contribution is acknowledged in the preamble of the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses*, which makes reference to the “valuable contribution” of NGOs in the “codification and progressive development of international law in this field.”¹⁷³ More recently, the International Law Association has adopted standards on, among other issues, *Legal Principles relating to Climate Change*,¹⁷⁴ and the Institut de droit international on *Epidemics, Pandemics and International Law*.¹⁷⁵

More than one-off occurrences, I show through concrete examples that follow in **Chapters 3 to 5** that such informal, yet consensus-based interpretation and codification efforts have solidified into the *practice* of informal consensus-building in international law. By resorting to this practice, international law communities play an influential role in further developing, vernacularizing, and ensuring the uptake of international legal norms. I next turn to describing some of the ways through which this influence might unfold.

1.3.4 The interpretive act: clarifying the law, developing the law or both?

The literature on informal international law-making generally describes informality in terms of the actors, processes, and outputs involved in norm proliferation.¹⁷⁶ A key assertion of the so-called turn to informality is the decline or stagnation of formal treaty-making processes in

¹⁷² *Ibid.*

¹⁷³ *Convention on the Law of the Non-navigational Uses of International Watercourses*, 21 May 1997, UNTS vol 2999, No 52106 (entered into force 17 August 2014) at preamble.

¹⁷⁴ Shinya Murase and Lavanya Rajamani, “Legal Principles Relating to Climate Change Part II: Committees” (2014) 76 *International Law Association Reports of Conferences* 330.

¹⁷⁵ Institut de droit international, “Epidemics, Pandemics and International Law: Resolution of the 12th Commission” (4 September 2021), online (PDF): <https://www.idiil.org/app/uploads/2021/09/2021_online_12_en.pdf>.

¹⁷⁶ Joost Pauwelyn, *supra* note 70.

terms of both their quality and quantity.¹⁷⁷ This assertion appears particularly relevant in today's world, as the international community marches inexorably towards extremes of multi-polarity and inequality.¹⁷⁸

It is equally plausible, however, that what the international community needs now are not additional international legal frameworks but rather enhanced efforts to unpack and clarify the norms embedded in already existing treaties and regimes. The recent convergence of requests for advisory opinions before the International Tribunal of the Law of the Sea, the International Court of Justice, and the Inter-American Court of Human Rights underscores the critical role of interpretation in elucidating international legal obligations concerning climate change—a paramount existential threat.¹⁷⁹ While slow-moving intergovernmental negotiations may struggle to address these and other similar challenges promptly, the existence of treaties lends relevance and purpose to new interpretive initiatives in international law.

In a similar vein, the Siracusa Principles were articulated not in the *absence* of a legally binding treaty, but *because* of it. The official aim of the Siracusa Principles was to clarify international legal obligations contained in the ICCPR. Yet as Venzke convincingly argues, the act of interpretation itself may amount to “a constitutive element of a norm.”¹⁸⁰ In *How Interpretation Makes International Law*, Venzke uses the lens of international organizations to

¹⁷⁷ Joost Pauwelyn, Ramses Wessel & Jan Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking” (2014) 25:3 Eur J Intl L 733 at 734.

¹⁷⁸ Yves Daudet, “‘Never Let a Good Crisis Go to Waste’: Can International Law Seize the Advantage?” (2021) 115 Proceedings of the ASIL Annual Meeting 129.

¹⁷⁹ Juan Auz & Thalia Viveros-Uehara, “Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights” (3 February 2023) online: <<https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>>.

¹⁸⁰ Ingo Venzke, “Prohibiting Plunder: How Norms Change” (2008) 19:4 Eur J Intl L 866 at 866.

show how the semantic content of norms is negotiated through practices of interpretation which regularly arise in processes of global governance.

Building on Venzke’s 2012 monograph, this dissertation shows a similar flexibility in interpretation being exercised in informal communities of practice, where norms are interpreted by consensus. The Siracusa Principles subtly advanced interpretations of the ICCPR which are far from established doctrine in international law.¹⁸¹ For instance, in interpreting clauses that list “public morals” as possible grounds for limiting human rights under the ICCPR, Alexandre Kiss—the rapporteur who drafted the commentary on the limitations section of the Siracusa Principles—wrote that the drafters struggled to “find a uniform conception of morals, in some cases even at regional level.”¹⁸² Instead, they offered their own definition of public morals as “principles which are not always legally enforceable but which are accepted by a great majority of the citizens as general guidelines for their individual and collective behavior [sic].”¹⁸³

As discussed below, many other initiatives have since emerged aiming to build consensus among a transnational network of experts on principles and guidelines, particularly as these relate to the state of international law in dealing with ever more complex contemporary human rights challenges.¹⁸⁴ The stated purpose of such efforts is to interpret an established, legally binding set of norms that confront evolving challenges in global governance. While legal

¹⁸¹ *See in general* the legal commentaries accompanying the Siracusa Principles, which highlight as a supplementary source of interpretation decisions of the European Court of Human Rights: Alexandre Kiss, “Commentary by the Rapporteur on the Limitation Provisions” (1985) 7:1 Hum Rts Q 15; Daniel O’Donnell, “Commentary by the Rapporteur on Derogation” (1985) 7:1 Hum Rts Q 23. These and other creative twists of interpretation in consensus-building initiatives will be the subject of study in Chapters 3 and 4.

¹⁸² Kiss, *supra* 181 at 20.

¹⁸³ *Ibid.* It is unclear from Kiss’ commentary whether the definition proposed by the drafters was drawn from any legal or interpretive source or was simply agreed to over the course of deliberations on the Siracusa Principles.

¹⁸⁴ Magdalena Sepúlveda Carmona, “Human Rights Guiding Principles: A Forward-Looking Retrospective” in Frank Adamson et al, eds, *Realizing the Abidjan Principles on the Right to Education* (Cheltenham, UK: Edward Elgar Publishing, 2021).

interpretation is bound by certain rules, there is agency in the choices made by those who lead expert consensus-building initiatives in international law and those who participate in such processes. As I describe below, such agency interacts with other actors, networks, and institutions in a transnational legal process that contributes to the evolution and crystallization of norms.¹⁸⁵ Prior to this, however, it is necessary to further interrogate what ‘informal consensus-building’ entails within sphere of international law. I briefly survey this point in the next section.

1.3.5 Informal consensus-building in international law

In general, consensus-building involves the convening of participants in discussions and negotiations to reach a decision that is agreeable or at minimum sufficiently un-objectionable to all parties involved.¹⁸⁶ Expert consensus-building processes are well-regarded in many professions and especially in the fields of health and medicine, where professionals rely on a defined set of technical and ethical standards to guide their actions and help ensure optimal outcomes for clients or patients. These standards must adapt to evolving societies and evolving evidence. Consensus among experts can help forge some clarity amid a groundswell of uncertainty, serving as a trusted source of evidence synthesis and a basis for decision-making and considered action on a given matter.¹⁸⁷

¹⁸⁵ See in general Sandholtz, *supra* note 121.

¹⁸⁶ Michael L. Poirier Elliott, “The Role of Facilitators, Mediators and Other Consensus Building Practitioners” in Lawrence Susskind, Sarah McKeamen & Jennifer Thomas-Lamar, eds, *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Thousand Oaks, CA: SAGE Publications, 1999) at 202.

¹⁸⁷ Health research and clinical practice have long used a variety of consensus-building tools and methods, including clinical practice guidelines, consensus statements and consensus conferences. For an overview of these methods, see Jane Waggoner, Jan D Carline & Steven J Durning, “Is There a Consensus on Consensus Methodology? Descriptions and Recommendations for Future Consensus Research” (2016) 91:5 Acad Med 663.

A reverence for expert consensus-building has also found its way into many other fields that rely on or engage with scientific and other forms of technical knowledge.¹⁸⁸ In the domain of public health and medicine, this focus has led to an emerging body of literature that studies the methodology behind consensus-building.¹⁸⁹ In law, and in particular in international law and its sub-domains, the existing literature has thus far paid little attention to the methods and influence of expert consensus-building. This may be unsurprising given that contestation is a mainstay of the lawyer's craft¹⁹⁰ and discord is a lived, and even welcome, reality.¹⁹¹ In Koskenniemi's words, international law "revels in adversity, not in consensus."¹⁹²

Nonetheless, international lawyers do by implicit practice turn to expert consensus-building in a vast range of settings, from formally convened expert panels to informal and largely horizontal initiatives to find interpretations of international law that are fit for confronting contemporary social challenges. The "teachings of the most highly qualified publicists of the various nations" are moreover one of the most widely cited sources of international law.¹⁹³

Informal consensus-building practices have enjoyed special prominence in the international human rights regime. As early as the immediate post-WWII period, legal professionals were

¹⁸⁸ See for instance James Lawrence Powell, "The Consensus on Anthropogenic Global Warming Matters" (2016) 36:3 Bull Science Tech & Soc 157. Note however that the idea of establishing scientific consensus on policy relevant matters through a "Science Court" was also spearheaded by Arthur Kantrowitz in the 1970s, who sought to establish an "adversary hearing, open to the public, governed by a disinterested referee, in which expert proponents of opposing scientific positions would argue their cases before a panel of scientists/judges" – the aim being to "provide a sounder basis for public decisions" such as nuclear power disturbances to the ozone layer and food additives. The Science Court proposed by Kantrowitz was eventually adopted as the National Institutes of Health (NIH) Consensus Conference. See Arthur Kantrowitz, "The Science Court Experiment" (1977) 17:4 Jurimetrics J 332.

¹⁸⁹ Paul Blazey et al, "It Is Time for Consensus on 'Consensus Statements,'" (2022) 56:6 Br J Sports Med 306–7.

¹⁹⁰ Jenks, *supra* note 137 at 37.

¹⁹¹ See in general Monica Hakimi, "Constructing an International Community" (2017) 111:2 AJIL 317.

¹⁹² Martti Koskenniemi, "The Mystery of Legal Obligation" (2011) 3 International Theory 319 at 321.

¹⁹³ ICJ Statute, *supra* note 40 at art 38(1)(d). Even as such teachings are considered a "subsidiary means" for the determination of international law, it is far from clear who the "most highly qualified publicists" are, and how far one should ascribe to their teachings as 'established' law. See Roberts, *supra* note 139.

engaged in the submission of ‘human rights guiding principles’ to advocate for the expansion of new international laws and legal authorities for human rights in the new UN system. For instance, while drafts of the *Universal Declaration of Human Rights* were in progress, the American Law Institute prepared its own consensus-based *Statement of Essential Human Rights* and shared it with the committee tasked with drafting the Declaration.¹⁹⁴ Years later, John P. Humphrey—the first Director of the Human Rights Division—reflected in his memoir that he “borrowed freely from [the Statement]” in producing the original draft of the Declaration.¹⁹⁵ The making of the *Statement of Essential Human Rights*, further explored in **Chapter 3**, coheres with Schacter’s description of informal codification efforts as prelegislative.¹⁹⁶

Today, a wide range of human rights guiding principles produced by consensus among experts clarify and provide for a unification of developments in international law and standards in relation to contemporary legal issues.¹⁹⁷ Indeed, the website of the Office of the High Commissioner for Human Rights dedicates an entire page to the impact of “human rights standard setting,” citing among other initiatives, the *Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education* (Abidjan Principles)¹⁹⁸ which were recognized by the African Commission on Human

¹⁹⁴ William Draper Lewis et al, *Statement of Essential Human Rights* (New York: Americans United for World Organization, Inc., 1945).

¹⁹⁵ John Peters Humphrey, *Human rights & the United Nations: a great adventure* (Dobbs Ferry, NY: Transnational Publishers, 1983) at 29.

¹⁹⁶ Schacter, *supra* note 93 at 224.

¹⁹⁷ See for instance Siracusa Principles *supra* note 1; “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights Symposium” (1987) 9:2 Hum Rts Q 122–135 [Limburg Principles]; “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20:3 Hum Rts Q 691 [Maastricht Guidelines on ESCR Violations]; and “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (2011) 29:4 Nethl QHR 578 [Maastricht Principles on ETOs]. See also Sepúlveda Carmona, *supra* note 184.

¹⁹⁸ Office of the High Commissioner for Human Rights, “Impact of the work of Special Procedures: Human rights standard setting” (2022) online: <<https://www.ohchr.org/en/special-procedures-human-rights-council/impact-work-special-procedures-human-rights-standard-setting>>.

and Peoples' Rights as a reference tool for implementing the right to education,¹⁹⁹ and referred to in the Human Rights Council's resolution on the right to education.²⁰⁰

The foregoing is, of course, predicated on the degree to which such principles are perceived as "legitimate." Thomas Franck characterizes legitimacy within international law as a function of:

a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe the rule or institution has come into being and operates in accordance with generally accepted principles of right process.²⁰¹

Building on Franck's process-driven concept of legitimacy, Magdalena Sepúlveda Carmona, who has been involved in the development of several human rights guiding principles as former Executive Director of the Global Initiative for Economic, Social and Cultural Rights, proposes five 'critical determinants' of legitimacy for such principles. These determinants apply to both the process of rule adoption and the adopted rules themselves. They involve:

- (1) the independence and expertise of the drafters and signatories;
- (2) the diversity of the drafters and signatories in terms of, *inter alia*, gender, geographical representation, knowledge of different social and legal systems and areas of expertise;
- (3) the rigour and persuasiveness of the principles;

¹⁹⁹ *Resolution on the Need to Develop Norms on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services*, African Commission on Human and Peoples' Rights, 27th Extraordinary Session, ACHPR/Res. 434 (EXT.OS/ XXVII1) (2020), at preamble.

²⁰⁰ UN Human Rights Council, *The right to education: follow-up to Human Rights Council resolution 8/4*, 41st sess, UN Doc A/HRC/41/L.26 (2019).

²⁰¹ Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990) at 24.

- (4) the practicality of the principles; and
- (5) the validation of the principles through national and international fora and resource materials.²⁰²

As this dissertation suggests, equally or perhaps *more* importantly, the legitimacy of human rights guiding principles depends on how all of the above determinants are *perceived*.²⁰³

When they are perceived to be legitimate sources of normative authority, human rights guiding principles can have significant influence.²⁰⁴ They may be adopted by national courts, policy makers and legislators as authoritative interpretations of international law.²⁰⁵ At the international level, they may be given considerable weight by international tribunals and international human rights treaty bodies and mandate holders.²⁰⁶ They may also serve as points of reference to guide planning and decision-making more broadly, and equip civil society advocates with tools for government accountability and the ‘vernacularization’ of human rights law, as it relates, for instance, to health.²⁰⁷ Even as they clarify the law, consensus-based interpretations of international law can allow for interpretations that are effective and fit for

²⁰² Sepúlveda Carmona, *supra* note 184 at 7; *See also* Roberta Cohen, “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10:4 *Global Governance: A Review of Multilateralism and International Organizations* (2004) 459 at 468.

²⁰³ *See* Chapter 5 of this dissertation.

²⁰⁴ *See in general* Sepúlveda Carmona, *supra* note 184.

²⁰⁵ Jennifer Sellin, “Access to Medicines and the TRIPS Agreement” in M. Gibney, G. Erdem Turkelli, M. Krajewski & W. Vandenhole, eds, *The Routledge Handbook of Extraterritorial Human Rights Obligations* (2022) 339 at 341.

²⁰⁶ *See* Steven Bernstein, & Erin Hannah, “Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space” (2008) 11:3 *J Intl Econ Law* 575. *See also* Joanne Scott, & Susan P Sturm, “Courts as Catalysts: Rethinking the Judicial Role in New Governance” (2007) 13 *Colum J Eur L* 565.

²⁰⁷ Sepúlveda Carmona, *supra* note 184 at 25-51. *See also* Tolley, *supra* note 11; Michael O’Flaherty, “The Yogyakarta Principles at Ten” (2015) 33:4 *Nordic Journal of Human Rights* 280; Gregory C Shaffer, “Transnational Legal Ordering and State Change” in Gregory C Shaffer, ed, *Transnational Legal Ordering and State Change* (Cambridge: Cambridge University Press, 2012) 1 at 22, 122.

evolving social, political, and economic challenges, creating pathways for international law's progressive development to effectively meet these challenges.²⁰⁸

1.4 Chapter Conclusion

This dissertation began with a simple question: why have the Siracusa Principles come to be recognized by a broad segment of professional communities in international law and other fields as an authoritative statement of international human rights law? To set the scene for this inquiry, the chapter first surveyed the literature that aims to address how international norms come to be known as 'law'. Moving beyond the binary law/non-law framing of positivist and formalist approaches, the chapter engaged with theories that posit a continuum or gradient of authority in international legal norms. It then described the complex ecosystem of actors—both formal and informal—who contribute to the identification, interpretation, and application of norms along this gradient.

Central to this ecosystem of actors are international lawyers themselves, both as individuals and as members of broader interpretive communities. It is here that the chapter drew on the “practice turn” in international legal theory to foreground the widespread yet understudied practice of informal consensus-building in international law. As the chapter discussed, informal consensus-building has been a mainstay of communities of practice in international law since at least the nineteenth century. Such practices are *informal* because they lack a formal basis or mandate from states or other established international organizations, bodies, or instruments. Informal consensus-building typically involves subject-matter experts, often affiliated with

²⁰⁸ See in general Cohen, *supra* note 202.

academic or civil society organizations, who participate in their independent capacities to collectively develop interpretations of international law.

These interpretive outputs of informal consensus-building are neither legally binding nor, by most accounts, do they qualify as soft law. Yet, as the Siracusa Principles show, they may nonetheless influence the words and actions of key actors within broad communities of practice in international law. Such influence may, in some cases, exert a stronger compliance pull than even legally binding norms. It may also inspire further law reform initiatives, paving the way for the further development of the international legal architecture.

Subsequent chapters of this dissertation shed light on informal consensus-building as an avenue for driving meaningful legal and social change, while also addressing the procedural challenges that hamper the inclusivity of the consensus-building process and the effectiveness of its outputs. The historical accounts of the making of the *Statement of Essential Human Rights*, the Siracusa Principles and the Paris Minimum Standards in **Chapters 3** and **4** strive to explain the conditions under which the outputs of informal consensus-building accrue legitimacy over time. Meanwhile, the insider action research presented in **Chapter 5** highlights the enduring challenges of operationalizing key procedural and contextual determinants of legitimacy—such as the representativeness of the experts involved—and of balancing inclusive deliberation with the pursuit of practical outcomes.

Before turning to these chapters, however, an overview of the methodological approaches taken in this dissertation is warranted. I turn next to the justification and limitations of the methodological approaches that guide this dissertation.

2 Research Methods

2.1 Research questions

Drawing on constructivist and practice-oriented accounts of international law surveyed in Chapter 1, this dissertation takes a multi-method approach to examine the practices and outputs of informal consensus-building in international human rights law. Four research questions guide this inquiry:

- **R1:** What are the shared characteristics—specifically regarding participants, processes, outputs, and dissemination—of informal consensus-building practices in international human rights law, and how have these characteristics evolved over time?
- **R2:** Does such informal consensus-building merely clarify or restate existing norms of international human rights law, or does it also contribute to their progressive development?
- **R3:** Under what conditions do the outcomes of informal consensus-building acquire legitimacy and authority within communities of practice in international human rights law?
- **R4:** How can informal consensus-building practices be designed and led to enhance accountability, transparency, and representativeness while ensuring that their outputs acquire legitimacy and impact over time?

These research questions are addressed incrementally through the case studies and insider action research featured across **Chapters 3 to 5**.

2.2 Methodological approaches

2.2.1 Case studies of past informal consensus-building initiatives

Case study research is an empirical method that “investigates a contemporary phenomenon (the ‘case’) in depth and within its real-world context, especially when the boundaries between phenomenon and context may not be evident.”²⁰⁹ The case study method is suitable for research that seeks to understand a real-world event, while taking account of relevant contextual conditions. Case studies can also be used to explain or test theory. In **Chapters 3 and 4**, however, the case study method is deployed to describe, compare, and explore past informal consensus-building initiatives and the context which gave rise to such initiatives.²¹⁰

R1, R2 and R3 are addressed in Chapters 3 and 4 through three distinct cases of informal consensus-building: the 1945 *Statement of Essential Human Rights*, the 1984 Siracusa Principles, and the 1985 *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Paris Minimum Standards). By examining the selected cases, these chapters aim to explore and describe the key features of informal consensus-building in real-world settings. In this sense, the analysis of these cases closely approaches ethnographic study, wherein the attempt is a contextualized account of social phenomena over an extended period of time.²¹¹

2.2.1.1 Selection of case studies

The cases analyzed in Chapters 3 and 4 are a subset of past informal consensus-building practices that have sought to build consensus on norms of human rights in international law. The

²⁰⁹ Robert K Yin, *Case Study Research and Applications: Design and Methods* (Thousand Oaks, CA: SAGE Publications, 2018) at 15.

²¹⁰ Arya Priya, “Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application” (2021) 70:1 *Sociological Bulletin* 94 at 100.

²¹¹ *Ibid* at 97.

cases were chosen purposively—to facilitate comparison of cases that are similar in normative content while maintaining timing as a key dimension of difference—and also for intellectual reasons, with normative evolution in international human rights law occurring through well-documented processes of transnational advocacy and discourse, where the participation of civil society, experts, and other non-state actors has been especially prominent.²¹² The selected cases have each had significant influence on the development and clarification of international human rights norms in legal scholarship and practice. Through the lens of case studies, the chapters provide insights into the goals, processes, and shortcomings of informal consensus-building as praxis in international human rights law.

Further reasons underlie the selection of cases in this dissertation. First, these cases span two notable phases in the history of contemporary international human rights law, facilitating a comparative analysis of how informal consensus-building practices have evolved over time and in step with certain social and professional trends. The *Statement of Essential Human Rights* was drafted in the years and months immediately preceding the *Universal Declaration of Human Rights*, highlighting the unique role of communities of practice in identifying and codifying the relevance of human rights for a future “world organization.”²¹³

By the time the Siracusa Principles and the Paris Minimum Standards were developed in the 1980s, the two covenants of the international bill of rights had already been adopted, and the international community was engaged in a thriving UN human rights apparatus, with human rights treaty-making and jurisprudence in full bloom for so-called ‘first generation’ civil and

²¹² See Reiners, *supra* note 22.

²¹³ Draper Lewis, *supra* note 194 at Foreword.

political rights.²¹⁴ Early attempts were made to build informal consensus on the interpretation of ‘second generation’ rights—that is, economic, social, and cultural rights—but the promise of such initiatives quickly dissipated.²¹⁵ It would take many more years before international bodies such as the UN Committee on Economic, Social, and Cultural Rights and its growing body of General Comments would equip communities of practice with authoritative ‘soft law’ on which further nuanced clarifications of economic, social, and cultural rights could develop.²¹⁶

Second, these three cases were chosen based on the volume of documentation publicly available. Detailed accounts of the context and methods behind informal consensus-building practices are rare. Short of conducting one-on-one interviews with individuals who were at the helm of specific initiatives, the rich store of knowledge and experience acquired through an informal consensus-building project is seldom preserved in the public domain or even within the archives of institutions that facilitated such convenings. There is merit in undertaking semi-structured interviews with those who have previously led informal consensus-building initiatives. For seminal past cases such as the *Statement of Essential Human Rights*, however, those who led

²¹⁴ Karel Vasak, “A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights” (1977) 11 UNESCO Courier 29.

²¹⁵ For instance, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* were written just over 5 years following the Siracusa Principles but referenced by academics, practitioners and courts and tribunals far less often. See *Limburg Principles*, *supra* note 197.

²¹⁶ Philip Alston, “The General Comments of the UN Committee on Economic, Social and Cultural Rights” (2010) 104 Proceedings of the ASIL Annual Meeting 4. The Abidjan Principles, which were adopted in 2019, are an illustration of an informal consensus-building project that sought to address gaps in economic, social, and cultural rights frameworks. When compared to the *Statement of Essential Human Rights* and the Siracusa Principles, the Abidjan Principles also clearly illustrate how acceptable procedures in building informal consensus have evolved over time. While the *Statement of Essential Human Rights* was uniquely drafted by men holding authoritative positions in the legal profession (e.g., professors, ambassadors and legal advisors), the Abidjan Principles were developed through a process that prioritized inclusivity and diversity in drafting and deliberations, including through engagement with civil society and individuals without legal education. See Sylvain Aubry, Mireille De Koning & Frank Adamson, “Developing human rights guiding principles on State obligations regarding private education” in Frank Adamson et al, eds, *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education* (Cheltenham UK: Edward Elgar Publishing, 2021).

the initiative are no longer with us. For this reason, Chapters 3 and 4 largely draw on available archival resources, including letters and correspondences, grey literature, and scholarly works relating to these initiatives. Archival sources are outlined in detail within each chapter.

2.2.1.2 Exclusion of hybrid consensus-building initiatives

In selecting the above cases, I deliberately focused on projects initiated and carried out by private individuals and NGOs—that is, those operating within communities of practice—without mandate or official facilitation by entities subject to international law, such as state actors or international organizations and bodies.

Nonetheless, there are important examples of consensus-building initiatives driven by hybrid coalitions of state and/or international organizations or bodies on one hand, and non-state actors on the other. The *Guiding Principles on Internal Displacement*, developed in the 1990s under the mandate of Sudanese diplomat Dr. Francis Deng, illustrate this hybridity. Appointed as a special representative by the UN Commission on Human Rights, Dr. Deng was tasked with examining the causes and consequences of internal displacement, the legal status of internally displaced persons in international law, the adequacy of institutional responses to their needs, and strategies to enhance their protection and assistance.²¹⁷ With minimal resources to undertake his UN mandate, he worked in close collaboration with individuals from NGOs and academic institutions to build consensus on the Guiding Principles.²¹⁸ The Guiding Principles have since had widespread uptake and influence over international norms of internal displacement. Although the processes and actors involved in developing the Guiding Principles may bear

²¹⁷ See for example Francis Deng, *Internally Displaced Persons: Report of the Representative of the Secretary-General – Compilation and Analysis of Legal Norms*, Commission on Human Rights, 51st sess, UN Doc. E/CN.4/1996/52/Add. 2 (1995).

²¹⁸ Cohen, *supra* note 202.

semblance to the cases featured in Chapters 3 and 4, the drafters of the Guiding Principles had immediate access to, and conceptual backing from, certain states and international organizations. Fully informal consensus-building initiatives lack this sphere of influence.²¹⁹

Other well-known hybrid consensus-building initiatives include: the *Principles Relating to the Status of National Human Rights Institutions* (the ‘Paris Principles’) of 1991, the *International Guidelines on Human Rights and Drug Policy* of 2018 (led jointly by the UN Development Programme together with the International Centre on Human Rights and Drug Policy at the University of Essex), the *8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty* of 2023 (led jointly between the International Commission of Jurists, the Office of the High Commissioner for Human Rights, and UNAIDS).²²⁰

2.2.1.3 Key features of the case studies examined

In answering **R1**, this dissertation examines three key features of the selected case studies: (1) the *context* that gave rise to the initiative, including relevant social and political contexts, the purported legal problem, and the substantive *content* addressed; (2) the *experts* who participated in the informal consensus-building initiative and the *processes* used to reach consensus among

²¹⁹ When Dr. Deng presented the Guiding Principles to the Commission in 1998, the Commission adopted a resolution taking note of the Guiding Principles and also took note “with interest” of the decision of the Inter-Agency Standing Committee, which had welcomed the Guiding Principles and encouraged its members to share them with their executive boards, and to apply them in their activities on behalf of the internally displaced. See UN Commission on Human Rights, *Resolution 1998/50, Internally Displaced Persons*, 54th Sess, UN Doc E/CN.4/RES/1998/50 (1998).

²²⁰ *National institutions for the promotion and protection of human rights*, UNGA, 85th sess, UN Doc A/RES/48/134 (1993) at Annex [Paris Principles]; “International Guidelines on Human Rights and Drug Policy” (2019), online (PDF): <https://www.humanrightsdrugpolicy.org/site/assets/files/1640/hrdp_guidelines_2020_english.pdf>; “The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty” (2023), online: <<https://sharenetinternational.org/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>>.

the participants; and (3) the core output(s) generated by consensus-building. With respect to generated outputs, the chapters also engage **R2** by analyzing the extent to which the resulting documents adhered to the letter of the law or exercised creative interpretive license.

Additionally, they address **R3** evaluating the influence and impact of these outputs on the progressive development of international human rights law.

Since the selected case studies took place at distinct and crucial moments in the evolution of international human rights law, Chapters 3 and 4 also catalogue the extent to which these parameters of informal consensus-building have changed or evolved over time. The chapters therefore serve both *descriptive* and *comparative* functions. They *describe* the core features of a subset of informal consensus-building practices in international human rights law, and they draw on this detail to *compare* the initiatives over time and synthesize relevant broader trends in informal consensus-building as praxis.

Chapter 4 also juxtaposes the Siracusa Principles against the Paris Minimum Standards—a second informal consensus-building initiative that was concluded at almost the same time as the Siracusa Principles. Like the Siracusa Principles, the Paris Minimum Standards were initiated, developed, finalized, and endorsed through a process of consensus among renowned scholars and practitioners of international law—in this case, scholars and practitioners affiliated with the International Law Association. Similar to the Siracusa Principles as well, the Paris Minimum Standards sought to establish “those basic human rights which are nonderogable” even where “a bona fide declaration of a state of emergency has been made.”²²¹ Although the Paris Minimum Standards and the Siracusa Principles were adopted at near-identical historical junctures (the

²²¹ *Paris Minimum Standards*, *supra* note 23 at 1072.

former was adopted in 1985, the latter in 1984), the Paris Minimum Standards are seldom referred by international law practitioners, scholars, and advocates today. The chapter explores possible reasons for the growing prominence of the Siracusa Principles while the Paris Minimum Standards faded into obscurity.

2.2.1.4 Limitations of case study analysis

The case study method provides valuable insights into complex phenomena within their real-world contexts. However, it does not support causal explanations.²²² This dissertation therefore takes a posture of humility and agnosticism regarding definitive or direct relationships between the variables under study.

First, while the selected cases are illustrative, they do not capture the breadth of informal consensus-building initiatives. The dissertation deliberately focuses on well-documented and influential examples, necessarily excluding others that—despite their potential significance—have received less attention in the literature. Reliance on archival documents, grey literature, and secondary sources also introduces potential gaps and biases, as these sources may omit critical perspectives or important nuances in the reconstruction of events.

Second, the historical and contextual specificity of each case limits the generalizability of its findings. Each initiative unfolded within a distinct political, social, and legal environment that shaped its processes and outcomes. Accordingly, lessons drawn from one case may not be directly applicable to others, particularly those undertaken in markedly different settings or periods.

²²² Lisa Given, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks, CA: Sage Publications, 2008) at 68.

Finally, while the comparative framework employed here is useful for identifying broader patterns, it may inadvertently impose a narrative of linear progression or consistency that oversimplifies the dynamic and iterative nature of informal consensus-building as praxis. To address these challenges and complement the case study approach, this dissertation also incorporates insights from insider action research in Chapter 5. This additional perspective allows for a richer and more nuanced understanding of informal consensus-building.

Despite these limitations, the analyses presented in Chapters 3 and 4 constitute a novel contribution to the literature on constructivism and international law, particularly given the limited scholarly attention paid to understanding the mechanisms through which informal consensus-building initiatives are conceived, developed, and socialized.

2.2.2 Informal consensus-building in practice: an insider’s account of the *Principles and Guidelines on Human Rights and Public Health Emergencies*

Having analyzed past practices of informal consensus-building in international human rights law, **Chapter 5** draws on insider action research methodology to better understand, demystify, and enhance decision-making and consensus-building in future initiatives. Addressing most directly **R2** and **R4**, Chapter 5 describes the process that led to the consensus and adoption of the 2023 *Principles and Guidelines on Human Rights and Public Health Emergencies* (PHE Principles).

2.2.2.1 Action research methodology

At its broadest, action research refers to a family of methodological approaches that take “...a democratic and participative orientation to knowledge creation” and combine “action and reflection, theory and practice, in the pursuit of practical solutions to issues of pressing

concern.”²²³ Action research is “inquiry that is done *by* or *with* insiders to an organization or community, but never *to* or *on* them.”²²⁴ Shani and Pasmore further narrow this definition, describing action research as “an emergent process of inquiry in which applied behavioural science is integrated with existing organizational knowledge and applied to solve real-world problems.”²²⁵ Shani and Pasmore’s interpretation further emphasizes that action research is an evolving process, where interventions can shift the data, making it impossible to predict or control research outcomes, or to mark the endpoint of research.²²⁶

Central to broader and narrower definitions of action research is the practical relevance of knowledge generated. For Bradbury, action researchers typically begin a project with the question, “how can we improve this situation?”²²⁷ Three core principles are implicit to the work of an action researcher: first, the researcher must understand that the *self is relational*—the researcher lives in relationship with, and is influenced by, historical, social, emotional and cognitive spaces. Second, the researcher must anticipate that *systems seek wholeness over time*—that is, humans live in systems of interconnections and the aim of the action research is to remove obstacles to collaboration over time. Finally, the researcher must prioritize *the practical contribution* of research.²²⁸ For the purposes of the latter principle, a practical contribution may

²²³ Bradbury, *supra* note 29 at 1.

²²⁴ Kathryn Herr & Gary Anderson, *The Action Research Dissertation: A Guide for Students and Faculty* (Thousand Oaks, CA: Sage Publications, 2005), at 3.

²²⁵ Abraham B (Rami) Shani & William A Pasmore, “Organization inquiry: Towards a new model of the action research process” in DD Warrick, ed, *Contemporary organization development: Current thinking and applications* (Glenview, Illinois: Scott Foresman and Company, 1985), 438 at 439.

²²⁶ Abraham B (Rami) Shani, David Coghlan & Stefano Cirella, “Action Research and Collaborative Management Research: More than Meets the Eye?” (2012) 8 *International Journal of Action Research* 45 at 51.

²²⁷ Bradbury, *supra* note 29.

²²⁸ *Ibid* at 7.

be broadly construed, from personal or professional growth, to organizational and/or community empowerment, to macro-level emancipatory goals.²²⁹

The aim of action research, then, is not merely to understand or explain the world, but also to change it. It does so through ‘interventions’ in real-time social settings, which in turn feed into the design of future interventions, in cycles of action and reflection.²³⁰ Kurt Lewin is credited with producing the first English-language description of action research as a social science and methodological concept in 1946, articulating several of its key components, including cycles of ‘fact-finding,’ planning, and action.²³¹ These steps, reflected in **Figure 2**, have since evolved in the action research literature to encompass:

- (1) the development of a plan of action to improve what is already happening;
- (2) the taking of action to implement the plan;
- (3) the observation or evaluation of effects of the action taken; and

²²⁹ Herr and Anderson, *supra* note 224.

²³⁰ Katrin Dreyer-Gibney, David Coghlan & Paul Coughlan, “Power and Politics in New Service Development: An Insider Action Research Study” (2022) 35:2 *Syst Pract Action Res* 275 at 279.

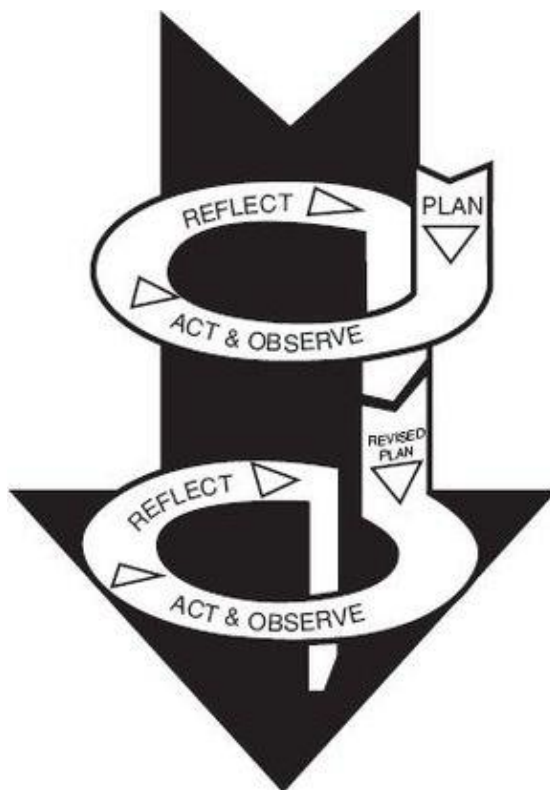
²³¹ Kurt Lewin, “Action research and minority problems” (1946) 2 *Journal of Social Issues* 34. Note, however, that a year before Lewin’s seminal article, John Collier, an American public servant and later professor of anthropology and sociology at City College in New York, had written about ‘action-research’ and ‘research-action’ in the context of his work leading the US Indian Administration and seeking to protect indigenous communities:

Imperfect action is better for men and societies than perfection in waiting, for the errors wrought by action are cured by new action. And when the people acted upon are themselves made true partners in the actions, and co-discoverers of the corrections of error, then through and through, and in spite of blunders or even by virtue of them, the vital energies are increased, confidence increases, power increases, experience builds toward wisdom, and the most potent of all principles and ideals, deep democracy, slowly wins the field.

See John Collier, “United States Indian Administration as a Laboratory of Ethnic Relations” (1945) 12:3 *Social Research* 265 at 298. *See also* Eric H Neilsen, “But let us not forget John Collier: Commentary on David Bargal’s ‘Personal and intellectual influences leading to Lewin’s paradigm on action research’” (2006) 4:4 *Action Research* 389.

- (4) the reflection and construction of meaning of these effects as a basis for further planning, subsequent action, and observation in successive cycles.

Figure 2 Dynamics of the action research cycle



Adapted from Kemmis, S & McTaggart, R, *The Action Research Planner* (Geelong, Vic: Deakin University, 1981)

2.2.2.2 Insider action research methodology

As Herr and Anderson note, the positionality of the action researcher exists on a continuum from *insider* to *outsider* in relation to the setting or practice under study.²³² *Insider action research* involves inquiry in which the roles of researcher and practitioner are merged in the same individual. In other words, the researcher is an “insider” to the context being examined.²³³

²³² Herr and Andersen, *supra* note 224, at 31.

²³³ *Ibid* at 32. Note that the concept of ‘insider’ action research is distinct from participatory action research. As Herr and Anderson note, participatory action research typically involves researchers who tend to be outsiders to the setting under study, working with insiders to a community. The aim to build collaborative forms of participatory action research that achieves equitable power relations or empowers communities.

This approach is commonly used in organizational development and management, where the researcher holds a formal position within an institution such as a school, hospital, or business. In these contexts, the aim is often to strengthen and improve cohesion, processes, and effectiveness within the organization.

Insider action research may be collaborative, involving other insiders, or it may take the form of *self-study*. The latter—also known as autoethnography, first person inquiry, self-study, or reflective practice—involves the researcher documenting their own personal or professional actions and mindfulness in relation to the practice or setting under study.²³⁴ In such works, the researcher (or autoethnographer) writes in first person, narrative form, using techniques of story-writing to communicate professional knowledge.²³⁵ Data for first-person action research often consists of journals or diaries that record the researcher's process and reflections.

2.2.2.3 Insider action research in this dissertation

Following the case study analyses in **Chapters 3 and 4**, **Chapter 5** features the findings of a three-year retrospective insider action research project. Between 2020 and 2023, I served as the primary convenor of an informal consensus-building initiative that brought together communities of practice in global health law and human rights law to achieve consensus on the PHE Principles. These principles offer a set of human rights-based guidelines tailored to public health emergencies, generating normative clarity and guidance for states and other stakeholders on how to respect, protect, and fulfill human rights during such crises.²³⁶

²³⁴ Deborah Reed-Danahay, *Auto/ethnography: rewriting the self and the social*, Explorations in anthropology (London: Routledge, 1997).

²³⁵ Herr and Anderson, *supra* note 224, at 34.

²³⁶ PHE Principles, *supra* note 31.

The initiative began with months of exploratory dialogue and culminated in a partnership between the Global Health Law Consortium (GHLC)—a research network of leading scholars in global health law—and the International Commission of Jurists (ICJ), an NGO that was instrumental to the development of the Siracusa Principles and remains a global advocate for the rule of law and human rights.²³⁷ The project proceeded through iterative action cycles of planning, action, observation, and reflection. Chapter 5 documents my autoethnographic account as an insider and partnership broker within this process.

While not formal organizations *per se*, communities of practice represent loosely constituted, self-governed networks of individuals united by shared interests, goals, and practices.²³⁸ These networks offer a rich site for insider action research, enabling the researcher to draw meaningful findings from active participation and leadership within the community. My dual role as a convenor and participant in the making of the PHE Principles offered a unique vantage point from which to analyze the interactions, negotiations, and collective decision-making processes that shaped the final principles.

By the project's conclusion in May 2023, the PHE Principles initiative had consistently engaged 34 experts in global health law and human rights law from academia, civil society, and international organizations, all of whom contributed to the drafting and adoption of the final text. In addition, the initiative gathered input from more than 100 individuals with localized expertise in relevant fields, including public health and human rights. The project unfolded through three

²³⁷ Roojin Habibi et al, “Reshaping Global Health Law in the Wake of COVID-19 to Uphold Human Rights” (2021), online (blog): <<https://www.hhrjournal.org/2021/06/reshaping-global-health-law-in-the-wake-of-covid-19-to-uphold-human-rights/>>.

²³⁸ David Coghlan & Mary Brydon-Miller, “Communities of practice” in David Coghlan & Mary Brydon-Miller, eds, *The SAGE Encyclopedia of Action Research* (Thousand Oaks, CA: SAGE Publications, 2014) at 136-137.

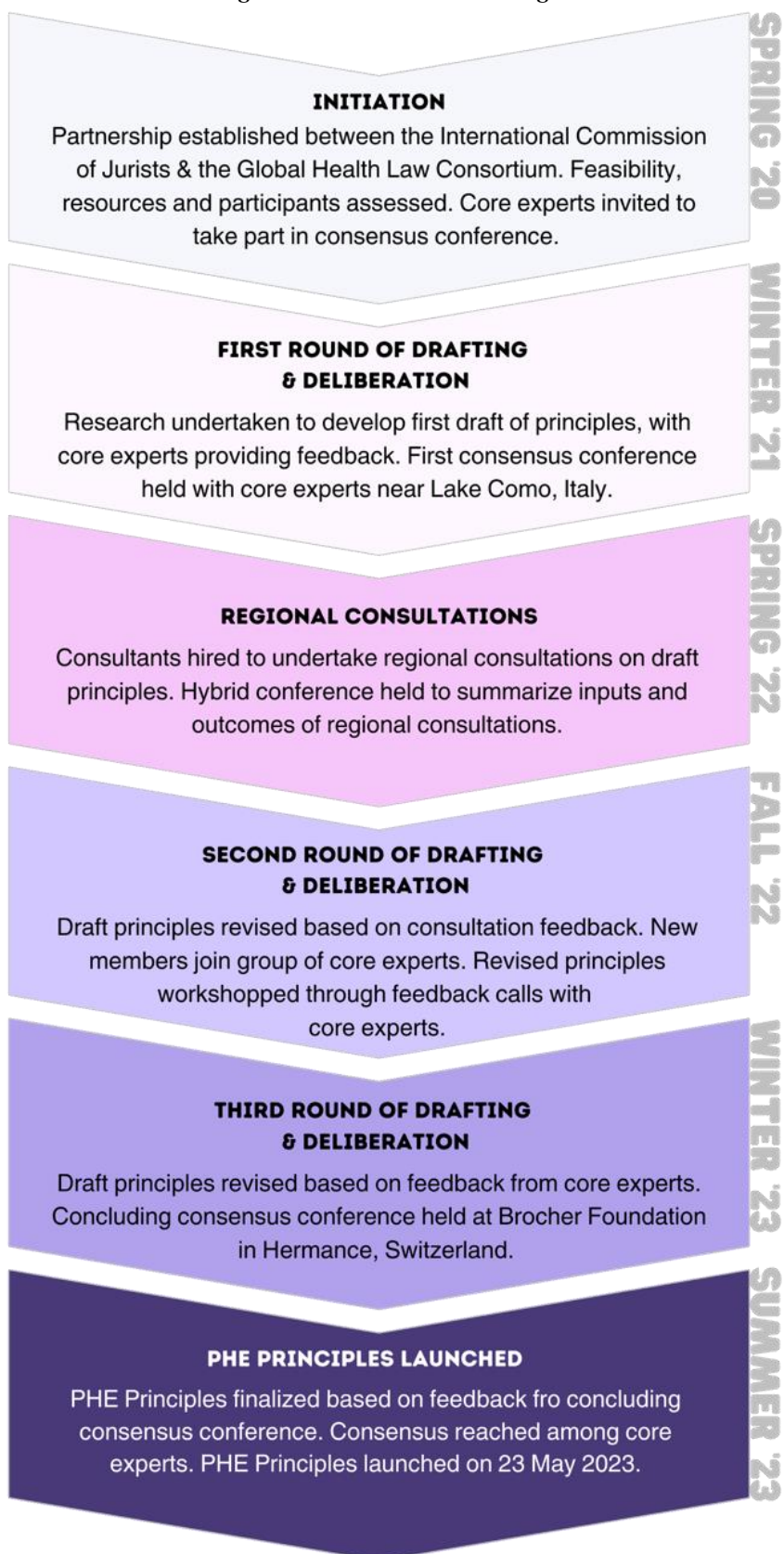
in-person consensus-building workshops and numerous virtual feedback calls with engaged experts, reflecting a deliberate and iterative approach to inclusive and participatory consensus-building. While Chapter 5 provides a detailed account of the making of the PHE Principles, a high-level timeline of the project is also shown in **Figure 3**.

This informal consensus-building process unfolded at a pivotal moment for the field of global health law. The COVID-19 pandemic catalyzed the international community's interest in strengthening global health security through legal reform. It also prompted distinct communities of practice, including those with expertise in public health, human rights, and related areas, to re-evaluate longstanding assumptions and reimagine legal frameworks.²³⁹ Breaking a longstanding hiatus in the development of binding instruments at WHO, the pandemic spurred the negotiation of not one but two legally binding international instruments under the auspices of WHO: amendments to the 2005 *International Health Regulations* (IHR) and a new pandemic agreement.²⁴⁰ A more detailed account of how these developments inspired and intersected with the making of the PHE Principles is provided in Chapter 5.

²³⁹ Roojin Habibi, “‘Someone call a global health lawyer!’: global health law as an emerging community of practice” (2024) 1:1 J Global Health L 71.

²⁴⁰ Gian Luca Burci, Adam Strobeyko & Daniela Morich, “Global Health Law Reforms: An Update on the Amended International Health Regulations and the Pandemic Agreement Negotiations” (25 July 2024), online (blog): <<https://www.asil.org/insights/volume/28/issue/7>>.

Figure 3 High-level timeline of the development of the *Principles and Guidelines on Human Rights and Public Health Emergencies*



For now, it is worth noting that these broader events created a fertile context in which the PHE Principles could emerge as a particularly viable informal consensus-building project. Other factors also contributed to making the PHE Principles a valuable lens through which to observe informal consensus-building in real-time. First, the project's recency and the deliberate effort to document each stage of the consensus-building process helped preserve the author's recollection of events, minimizing the risk of memory lapses. Second, the project's three-year duration, featuring multiple cycles of ideation, discussion, drafting, and feedback, offered an ideal opportunity to examine the practice of informal consensus-building through the lens of insider action research.

The PHE Principles project allowed *inter alia* for a closer examination of the material conditions that give rise to informal consensus-building practices, the key decision points and sites of social tension that may arise in consensus-building process, and the assumptions that are sustained throughout a project's lifespan. From a substantive point of view, the project also advanced this dissertation's focus on **R2** by interrogating whether the development of the PHE Principles simply resulted in an interpretation of the law as it stands (*lex lata*)—as such practices often purport to do—or whether it reached beyond the state of the existing law to interpret the law as it should be (*lex ferenda*). The profoundly unsettling global struggle against the COVID-19 pandemic as well as the international law reform projects that were triggered in its wake offered the drafters of the PHE Principles with a critical opportunity to rethink current norms. Both formal and less formal pathways for creating cohesion and remedying gaps in the legal framework on human rights and public health emergencies were discussed throughout the making of the PHE Principles. These discussions are further captured in Chapter 5.

As first-person inquiry, the insider action research in this dissertation juxtaposes a factual chronology of events with my own personal reflections, experience, and learning throughout the making of the PHE Principles. This work is recounted in cycles that involved constructing action, planning action, taking action, and evaluating action as illustrated in **Figure 2**.

A variety of sources, some spontaneously gathered and others intentionally so, informed the data behind this research and helped draw meaning from its findings. Such data included entries from my research diary and hand-written ‘field’ notes taken from both formal and informal meetings with team members and members of the communities that were involved in this initiative. I also reviewed personal correspondences with individuals who were internal to the project, as well as with individuals who learned about the project at the dissemination/knowledge mobilization phase. While these correspondences were not reproduced directly, they enabled me to re-anchor myself in events that took place and recall key decision-making moments over the project’s lifespan.

Ultimately, my status as an insider to the PHE Principles project enabled me to address **R4**. By the end of Chapter 5, I provide a series of recommendations that aim to improve informal consensus-building as ‘method’ in future research and advocacy in international human rights law. In all cases, the findings in Chapter 5 draw on my personal, first-hand account of the project. I do not claim to reflect what other participants believed, felt, experienced, or learned throughout the project.

2.2.2.4 Limitations and risks of insider action research in this dissertation

As practitioners of ethnographic research, action researchers aim to produce a “thick description” of social phenomena.²⁴¹ The goal is to undergo analyses of social life at smaller scales, enabling broader interpretations of culture and its structures. As Clifford Geertz famously observed, ethnographic researchers encounter:

...a multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular, and explicit, [and which the researcher must] first grasp and then render... at the most down-to-earth fieldwork levels of...activity: interviewing informants, observing rituals... writing his journal.²⁴²

In this spirit, insider action research involves drawing on the researcher’s own perspectives, experiences, and positionalities. Researchers embedded within professional or organizational settings are particularly well-positioned to conduct this type of inquiry. Their dual roles as practitioners and researchers afford unique insights and a deep understanding of the communities and the processes they study. Unlike detached observers, insider researchers participate directly in the dynamics under investigation. These positionalities are not fixed—they evolve throughout the research as the researcher reflects on, and is shaped by, the research process.

However, these overlapping roles also present challenges. The overlap between practitioner and researcher roles can become a source of persistent tension and bias. The researcher’s obligations to both the integrity of the research and the success of the practical

²⁴¹ Clifford Geertz, “Thick Description: Towards an Interpretive Theory of Culture” in Gerard Delanty & Piet Strydom, eds, *Philosophies of social science: the classic and contemporary readings* (Philadelphia, PA: Open University, 2003) at 310.

²⁴² *Ibid* at 314.

endeavor can complicate objectivity. While some degree of bias is inherent in insider action research, it must be acknowledged and critically examined rather than ignored.

In my own work on the PHE Principles, my role as the lead of the consensus-building endeavour offered a rare, front-row seat to the development of these principles. However, undertaking a transparent and unblemished accounting of their creation carries risks for the practical impact of the project itself. Highlighting the compromises, debates, and uncertainties that shaped the PHE Principles may weaken their utility as advocacy tools. Advocates often rely on the perception of such frameworks as definitive and robust to generate momentum and secure buy-in. As the case studies in Chapters 3 and 4 suggest, this may explain why past informal consensus-building initiatives outlined only briefly the processes that led to the development of consensus-building outputs. In field of international law that intersect with science and public health, stakeholders may also view the messiness of consensus-building as a limit to the objectivity, rigour, or neutrality typically associated with clinical consensus-based guidelines.

My role as a researcher was therefore also entangled with a personal and professional investment in the uptake and practical relevance of the PHE Principles to public health and legal communities. This dual interest may have shaped my interpretation of the process and its outcomes, potentially making it more difficult to recognize limitations or weaknesses in our approach. Below, I outline the efforts I took to mitigate (1) the risks of undermining the practical and advocacy impact of the PHE Principles; and (2) the risks of bias in the research process.

Mitigating risks to advocacy impact: I approached the risk of undermining the advocacy value of the PHE Principles with an understanding that a study on informal consensus-building processes in international human rights law would yield longer term benefits. Research on these processes can demystify how consensus-based interpretations of international law are developed

and show the value of participatory and iterative approaches to norm development. By documenting the challenges, trade-offs, and strategies involved in informal consensus-building, I hope to encourage communities of practice to probe more deeply on the how, when and why of efforts to legitimize human rights guiding principles. In so doing, I hope to provide a practical set of considerations and recommendations for others navigating informal consensus-building processes in the future.

Moreover, from the outset of their development, the PHE Principles were continually framed as a ‘living’ and ‘public’ document open to being revised and updated by any individual or group of individuals who might choose to take up that mantle in the future. This framing emphasized that the PHE Principles are neither static nor definitive but are meant to evolve over time as new challenges, insights, and contributors emerge. By positioning the PHE Principles as dynamic and open to revision, I sought to encourage a culture of continuous engagement and collective ownership. This perspective aligns with the broader ethos of human rights work, which thrives on adaptability and inclusivity to remain responsive to ever-changing social, political, and public health contexts.

Mitigating risks of bias: Action researchers have tools that can foster reflexivity, documenting their own positionality and evolving perspectives throughout the research process. Maintaining a research journal is one practical method for promoting reflexivity. A journal allows researchers to systematically record their choices and reflect on their consequences, both for themselves and for others involved in the research.²⁴³ In leading the development of the PHE Principles, I diarized a personal trail of thoughts, discussions, and dilemmas that I encountered in

²⁴³ Herr & Anderson, *supra* note 224 at 77.

the consensus-building process. As the first line of defense in mitigating bias, I drew on these candid reflections to help capture an accurate and unvarnished representation of the action research process.

Another valuable tool is the use of feedback from critical colleagues or a validation team.²⁴⁴ These trusted collaborators can help interrogate and course-correct the researcher's assumptions, methodologies, and interpretations. By fostering a collaborative process of critical reflection, such input serves to enhance the validity of the research and mitigate the influence of unexamined biases. The committee for this dissertation included two members (SJH & GLB) who were involved as experts in the PHE Principles consensus-building process, as well as one member (SB) who was not. This combination of participant/non-participant perspectives helped mitigate perceptions from the process that were mine alone, or that seemed illogical, unreasonable, or lacking a critical lens to an external reader.

In addition to reflexivity, another essential mechanism for mitigating bias is the use of multiples sources of research data. The synthesis of multiple data sources, methods, or perspectives helps ensure that findings are not overly influenced by the researcher's positionality within the action research process. This layered approach strengthens the reliability of the research and helps provide a more balanced interpretation of the data. In this dissertation, the case studies complemented the granularity of findings from insider action research through a higher level of abstraction on the eventual outcomes of such processes.

²⁴⁴ *Ibid* at 18.

2.3 Bringing together different methodological approaches through crystallization

This dissertation ultimately combines the findings generated from the case studies analyzed in **Chapters 3 and 4**, and the insider action research in **Chapter 5**, to delineate the practice of informal consensus-building in international human rights law. It also draws broader conclusions regarding how informal consensus-building initiatives can contribute to the progressive development of international law and articulates future research and practice agendas.

Several frameworks exist to combine different methodological approaches. Triangulation, as advanced by American sociologist Norman K. Denzin, is the combining of multiple research methods within a single study to address the limitation of relying on just one approach.²⁴⁵ While triangulation aims to further knowledge in interpretive research, it should not be confused with efforts to improve the validity and objectivity of empirical research—goals that triangulation may not necessarily achieve. What triangulation does contribute, however, is breadth, depth, and richness to the phenomenon under study, improving the quality of knowledge available in an interpretive research project.²⁴⁶

More recently, postmodernist scholars have deconstructed the positivist agenda that is implied within triangulation work. In her 1994 essay “Writing as a Method of Inquiry,” sociologist Laurel Richardson described ‘crystallization’ as a methodological approach and counter-metaphor that challenges positivistic assumptions that may underlie triangulation.²⁴⁷

²⁴⁵ Norman K. Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (London: Routledge, 2017) at 300.

²⁴⁶ Uwe Flick, *Doing Triangulation and Mixed Methods* (Thousand Oaks, CA: SAGE Publications, 2018) at 17.

²⁴⁷ Richardson builds on the metaphor of the crystal as a “postmodernist deconstruction of triangulation.” See Laurel Richardson, & Elizabeth Adams St Pierre, “Writing: A Method of Inquiry” in Norman K Denzin & Yvonna S Lincoln, eds, *The Sage Handbook of Qualitative Research*, 3rd ed (London: SAGE Publications, 2005).), at 934.

Instead of seeking a singular ‘truth’ by combining different methods (as triangulation does), crystallization embraces the complexity and multiple perspectives inherent in social phenomena. Richardson used the metaphor of a crystal to explain that, like a crystal, research can be viewed from many different angles, with each facet offering a unique perspective:

In triangulation, a researcher deploys "different methods"—such as interviews, census data, and documents—to "validate" findings. These methods, however, carry the same domain assumptions, including the assumption that there is a "fixed point" or "object" that can be triangulated.... Crystallization, without losing structure, deconstructs the traditional idea of "validity" ...[and] provides us with a deepened, complex, thoroughly partial, understanding of the topic. Paradoxically, we know more and doubt what we know. Ingeniously, we know there is always more to know.²⁴⁸

Unlike the fixed, two-dimensional nature of a triangle, Richardson’s crystal combines symmetry and substance with an infinite variety of shapes, transmutations, and angles of approach.²⁴⁹

Richardson’s ideas were innovative but rooted in the autoethnographic and ethnographic research community. In the years since Richardson’s seminal essay, Laura L. Ellingson has built on this scaffold, adapting crystallization as a methodological framework for qualitative research projects. Ellingson defines crystallization as combining:

...multiple forms of analysis and multiple genres of representation into a coherent text or series of related texts, building a rich and openly partial account of a phenomenon that problematizes its own construction, highlights researchers’ vulnerabilities and positionality, makes claims about socially constructed meanings, and reveals the indeterminacy of knowledge claims even as it makes them.²⁵⁰

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Laura L Ellingson, “Introduction to Crystallization” in *Engaging Crystallization in Qualitative Research* (Thousand Oaks, CA: SAGE Publications, 2009) at 4.

Crystallization encourages researchers to use a variety of knowledge production modalities to explore the multifaceted nature of human experiences. The goal is not to converge on a single conclusion, but to provide a richer, more nuanced understanding of the phenomenon under study by embracing its inherent complexity and partial truths.

The framework I use to combine methodological approaches in this dissertation tracks closely with Richardson and Ellingson’s concept of crystallization. My aim is not only to generate a thick description of the phenomenon of informal consensus-building through action research, but also to achieve depth through multiple case studies—offering a different form of analysis and organization of that phenomenon. Throughout the dissertation, I examine coherences and inconsistencies between the findings of each methodological approach, with a view to not only answering the research questions set out above (see **Section 2.1**), but also raising new ones. As Herr & Anderson note, “solid action research leads to a deepened understanding of the question posed as well as to more sophisticated questions.”²⁵¹

Ultimately, this dissertation seeks to produce knowledge that goes beyond the knowledge made possible by a single approach. Despite the proliferation of informal consensus-building initiatives over the past four decades, there is little in the way of methodological guidance or best practices for such initiatives.²⁵² This dissertation aims to produce generalizable knowledge that is transferable to future informal consensus-building practices in international law, while raising refining new questions through iterative cycles of planning, acting, observing, and reflecting.

²⁵¹ Herr & Anderson, *supra* note 224 at 86.

²⁵² Sepúlveda Carmona, *supra* note 184.

3 Practices of Informal Consensus-Building: A Case Study of the 1945 *Statement of Essential Human Rights*

3.1 Chapter introduction

The Siracusa Principles are but one example of the more widely observed practice of informal consensus-building in international law. Such initiatives typically lead to the development of interpretive principles or guidelines within a specific domain of international law. They are achieved through convenings oriented towards building consensus among groups of experts or members of a community of practice. Beyond the Siracusa Principles, informal consensus-building practices have led to principles and guidelines on a wide range of subjects across many fields of international law. The *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, for example, offer guidelines on states' human rights responsibilities beyond their borders,²⁵³ while the *Tallinn Manual on the International Law Applicable to Cyber Warfare* provides a comprehensive analysis of how existing international law applies to cyber operations.²⁵⁴ These and other informal consensus-building efforts have had varying degrees of influence on international law, shaping practice and scholarly discourse.²⁵⁵

Over the past seven decades, communities of practice have taken a range of approaches to informal consensus-building, producing outputs such as guiding principles, commentaries, and practitioner handbooks. Some subjects are more amenable to informal consensus-building than

²⁵³ Maastricht Principles on ETOs, *supra* note 197.

²⁵⁴ Michael N Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2d ed (Cambridge: Cambridge University Press, 2017).

²⁵⁵ Sepúlveda Carmona, *supra* note 184.

others. For instance, emerging legal challenges such as cyber warfare or climate change may benefit from a rapid, if informal, synthesis and clarification of applicable legal norms where the conclusion of new legally binding instruments is unlikely.

Conversely, areas with well-established legal frameworks might see less frequent but highly specialized consensus-building efforts, illuminating a niche point of contention in the law. Informal consensus-building practices lend themselves especially well to subjects with a rich and diverse normative landscape, spanning multiple legal instruments or domains of international law, where interpretive guidance is necessary to unpack the norms that lie at the intersection of these domains.

Despite the proliferation of informal consensus-building initiatives in recent decades, documentation on such initiatives is scarce and under-developed. In this chapter and the next, I delve into practices of informal consensus-building through a descriptive account of three prominent cases of informal consensus-building and their outputs: (1) the 1945 *Statement of Essential Human Rights* (**Chapter 3**); (2) the 1984 Siracusa Principles (**Chapter 4**); and (3) the 1985 Paris Minimum Standards (**Chapter 4**).²⁵⁶

In focusing on these cases of informal consensus-building, Chapters 3 and 4 catalogue three dimensions of each project. First, the chapters examine the *context* that gave rise to the initiative, including relevant social and political contexts, the purported legal problem and the substantive *content* addressed. The chapters aim to identify similarities in the substantive topics that selected cases have dealt with, drawing lessons for what this might mean more broadly for

²⁵⁶ “Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (The Abidjan Principles)” (2019) 8:1 International Human Rights L Rev Review 117–148.

those seeking to clarify, interpret, synthesize, or otherwise state the rules of international law through informal consensus-building exercises in the future.

Next, the chapters examine the communities of practice involved in these initiatives. Specifically, I examine *who* the participants were and *what* process they followed, in theory and in practice, to foster ‘consensus’. In many cases, as the chapters show, informal consensus-building was carried out without any blueprint or an attempt at referring to past examples or best practices in consensus-building. As a result, the concept of *consensus* cannot be understood uniformly across such practices and may mean very different things depending on the initiative and the participants involved. One aim of this dissertation is to offer a set of recommendations for those leading informal consensus-building practices.

Finally, the chapters document the *outcome(s)* emerging from such initiatives and pathways for their *dissemination*. The chapters catalogue how the initiatives described the normative outputs generated through their work (e.g., principles, guidelines, standards), how such outputs were presented (e.g., as a standalone report, a published academic article, or some combination thereof), whether they were taken up by any other bodies, and whether additional explanatory documents or other companion outputs accompanied the normative output. They also examine the extent to which these outputs purported to interpret or reflect international law or whether they acknowledged any efforts to extend beyond the existing letter of the law, advancing interpretations of what the law *should* be.

3.2 Context and content

3.2.1 A model international bill of rights

At the origin of the *Statement of Essential Human Rights* is the American Law Institute. The Institute traces its history back to the 1920s, with prominent American judges, legal scholars, and lawyers, including Elihu Root, William Draper Lewis, and George Wickersham, working to establish a permanent organization to “promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work.”²⁵⁷ Funded by an initial grant from the Carnegie Corporation, the Institute promoted some of the earliest examples of informal consensus-building on law through the development of ‘Restatements’ in various domains of both domestic United States case law and foreign relations law.²⁵⁸ Although the primary aim of restatements is to interpret the law “as it presently stands,”²⁵⁹ restatements also afford the legal community the opportunity to consider how the law would, or should, apply to future circumstances. In so doing, restatements codify interpretations of the law which can stretch the bounds of the written text or legal precedent. This interpretive flexibility is emphasized in the Institute’s dedicated Style Manual for reporters who are tasked with drafting restatements, noting that:

The official voice toward which the Institute aspires through its membership is that of an *informed consensus* of all components of

²⁵⁷ This founding mission remains a core purpose of the American Law Institute today. See American Law Institute, *Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* (Philadelphia, PA: American Law Institute, 2015) at 1.

²⁵⁸ *Ibid*

²⁵⁹ *Ibid* at 4.

the profession – practitioners, judges, and scholars – on what the law is, or should be, for a given subject.²⁶⁰

As introduced in **Chapter 1**, the American Law Institute initiated one of the earliest examples of informal consensus-building in modern international human rights law through its work in convening a committee of “as many of the different cultures of the world as possible” to “report how far they were in agreement on those rights which were essential to individual freedom.”²⁶¹ A key advantage of examining the development of this *Statement of Essential Human Rights* is the availability of a rich archival record and the remarkable efforts by the American Law Institute to preserve this contribution to the history of international human rights law. According to these archives, efforts to draft the Statement trace back to a series of war-time exchanges in the early 1940s between William Draper Lewis, the Institute’s first director, and Warren A. Seavey, the Harvard law professor who had served as Reporter for the Institute’s past ‘Restatements’ of the law. Their conversations reveal Seavey and Lewis’ mutual belief that enduring peace in a postwar world hinged on acknowledging and upholding the fundamental human rights of all individuals. Seavey, especially, deemed it crucial for the Institute to tackle the drafting of a document outlining “the minimum individual rights that every person should be entitled to under any government.”²⁶²

²⁶⁰ *Ibid* at 1.

²⁶¹ William Draper Lewis, “The Statement of Essential Human Rights by Representatives of the Principal Cultures of the World,” in *Proceedings of the American Philosophical Society*, vol. 89 (Philadelphia, PA: American Philosophical Society, 1945), 489 at 489.

²⁶² Michael Traynor, *The Statement of Essential Human Rights—A Groundbreaking Venture* (Philadelphia: American Law Institute, 2008) at 2. Note however that well before the 1940s, Lewis had begun tracing and translating a wealth of past initiatives that had sought to codify individual rights in international documents, including efforts led by the Institut du droit international (1929), the League of Nations (1933), the International Conference for the Maintenance of Peace in Buenos Aires (1936), and various intellectuals and professional associations, including the World Citizen Association (1941). For more on the transnational conversation on individual rights that preceded the Second World War, see Hanne Hagtvedt Vik, “The Statement of Essential Human Rights (1944)” in Arbeitskreis Menschenrechte im 20 Jahrhundert, ed. *Quellen zur Geschichte der*

Their ideas were given further currency following United States President Franklin D. Roosevelt's famous "Four Freedoms" speech on 6 January 1941, and the eight-point joint proclamation of war and postwar aims, the Atlantic Charter, issued jointly by Roosevelt and Winston Churchill in August 1941. By the end of 1941, the Institute was presented with a memorandum which set out its intention to draft

...a model International Bill of Rights for public education and for possible use in the peace settlement or post-war arrangements because [the Institute] believe[s] that the recognition of the minimum protection of the individual from arbitrary governmental action is essential if the peace established is to have a reasonable chance of permanency.²⁶³

The Executive Committee of the American Law Institute felt that the Institute was particularly well-suited to the task in part because of its membership, prestige and the Institute's "long experience in developing by group discussion statements of law, especially...experience in developing such statements by groups composed not merely of lawyers but of experts in other social sciences."²⁶⁴

Further, they wagered that such a timely and international project would help attract funding for the organization. There was, at the time, a growing sense among the elites of American society that the United States should take up a leadership role in establishing the future international order. Against this backdrop, the project had the added advantage of ensuring the American Law Institute's political relevance into the postwar future.²⁶⁵

Menschenrechte (2019) at 2; and more generally, Jan Herman Burgers, "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century" (1992) 14:4 Hum Rts Q 447.

²⁶³ Memorandum in re project model international bill of rights (6 December 1941) in *Statement of Essential Human Rights Archives* (Philadelphia, PA: American Law Institute Library) [1941 ALI memo] at 1.

²⁶⁴ Traynor, *supra* note 262 at 2.

²⁶⁵ Vik, *supra* note 262 at 2.

3.2.2 The *Statement of Essential Human Rights* takes on a life of its own

With seed funding from the Carnegie Foundation for International Peace, the Commonwealth Fund and the American Philosophical Society, Lewis was given the greenlight to lead the development of the Statement and set about inviting a drafting committee of “lawyers and political scientists representing most of the principal cultures of the world.”²⁶⁶ The selection and methods of work of this committee are further discussed in the next section.

When the project was complete nearly three years later, the *Statement of Essential Human Rights* spanned 18 articles and a Preamble calling for a future “world organization” that would “serve the individual human being.”²⁶⁷ The Statement held that states were responsible for ensuring an expansive set of rights and freedoms, including those freedoms typically associated with United States constitutional law, such as freedoms of religion, opinion, speech, assembly, association; freedom from wrongful interference; the right to a fair trial; freedom from arbitrary detention; a prohibition on retroactive laws, equal protection from arbitrary discrimination; as well as those rights that went beyond the United States legal landscape, including the rights to property, education, work, reasonable work conditions, food and housing, social security, and participation in government. In its final article, the Statement also included a general ‘limitations’ clause on the exercise of rights, clarifying that limits may be imposed “by the rights of others” and “by the just requirements of the democratic state.”²⁶⁸ A commentary to each

²⁶⁶ William Draper Lewis & John R. Ellingston, “Introduction,” (1946) 243 *Annals Am Acad Pol & Soc Sci* vii at x.

²⁶⁷ Draper Lewis et al, *supra* note 194 at Preamble.

²⁶⁸ *Ibid* at art 18. This limitations clause from the Statement would later inform and trigger robust debates on the limits of human rights norms at the San Francisco Conference in 1945 and in later negotiations towards the *Universal Declaration of Human Rights*. It would serve as a springboard towards the inclusion of Declaration’s limitations clause at art 29, para 2, with the latter in turn serving as the starting point for further limitations and derogations clauses in the ICCPR and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) three decades later. See Erica-Irene A Daes, *The Individual’s Duties to the Community and the Limitations on*

article followed the main text, setting out in short paragraphs the description and reasoning behind each article within the Statement.

While the American Law Institute spearheaded the initiative, the project's final output was more than what the Institute had bargained for. The Statement became the early battleground for many of the contentious debates that would continue for decades in the field of international human rights law. The advisers, for instance, disagreed regarding the scope and limits of political rights, with many refuting the 'universal' character of democratic rights and the claim that such rights applied to people in nations that were not governed democratically.²⁶⁹

More fundamentally, the group grappled vigorously with the question of whether social rights belonged to the category of 'essential human rights.' Some advisers, such as Manley O. Hudson, Harvard professor and judge of the Permanent Court of International Justice, questioned whether social rights could ever be implemented in practice.²⁷⁰ Seavey's dissent was the most vehement, and until the project's end he maintained that the Statement should have only consisted of procedural and negative rights.²⁷¹ Seavey's divergence from the Committee caused friction in his relationship with Lewis, with Seavey at one point lamenting the "wide intellectual gulf separating [them]".²⁷²

Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, UN Doc E/CN.4/Sub.2/432/Rev.2 (1982) at 70-71 ['Daes Report'].

²⁶⁹ *International Bill of Rights Project: Minutes of the Third Conference of the Advisers* (Skytop, Pennsylvania: American Law Institute, 1943).

²⁷⁰ Hanne Hagtvedt Vik, "Taming the States: The American Law Institute and the 'Statement of Essential Human Rights'" 7:3 *Journal of Global History* (2012) 461 at 478.

²⁷¹ Seavey lodged an explicit dissent in this regard in the final version of the Statement, which notes that "Warren A. Seavey is not in agreement with the essential character of the rights stated in Articles 11 to 15, relating to social rights." *Ibid* at 7. Correspondence between Lewis and Seavey at the final stages of the project also reveals a robust – and at times tense – discussion between the two colleagues, with Seavey opposing the dissemination of the Statement in the first place.

²⁷² Letter from Warren A. Seavey to William Draper Lewis (3 March 1944) in *Statement of Essential Human Rights Archives* (Philadelphia, PA: American Law Institute Library).

Still, the case for including social rights had energetic champions within the group. Wilfred C. Jenks, for instance, had accumulated significant experience in the standard-setting activities of the International Labour Organization (ILO), and avidly worked to build consensus on the matter within the group through legal research and drafting. Eventually most advisers, including American advisers, came to agree on the essential character of social and welfare rights, such as the right to education, work, conditions of work, food, housing, and social security.

Later reflecting on this split within the drafting committee, Lewis advocated for a contextual and teleological interpretation of human rights:

Human rights essential to freedom are not rights in a vacuum but rights in an existing world. At the end of the eighteenth century no one thought of inserting the right to work in our Constitution. The United States was then largely an agricultural community of land owners" on the eastern seaboard... Today we have changed all that. The number of those engaged in manufacturing exceed those in agriculture. They are in large part wage workers. There are no longer frontiers promising much to the pioneer. We the people of the United States looked at as one great society have changed... In view of these things all but one of the United States' citizens on the Committee were compelled to conclude as they looked on the world around them that social rights had as direct a bearing on freedom as the right to our own religious beliefs and political opinions.²⁷³

The Bylaws of the American Law Institute required the approval of a majority of the Institute's membership as well as the majority of the Executive Council prior to endorsement of any publication as an official document.²⁷⁴ Unsurprisingly, these fractures drifted the Statement away from the political convictions of the Institute's American membership and leadership. Unable to endorse any document that characterized social and welfare rights as 'essential' human

²⁷³ Draper Lewis, *supra* note 261 at 492.

²⁷⁴ 1941 ALI memo, *supra* note 263 at 8.

rights, the Institute distanced itself from the Statement by 1944.²⁷⁵ As discussed in **Section 3.4**, while the Institute did not prevent others from disseminating the Statement, great pains were taken to clarify the Institute's non-endorsement of the final draft.

As a consensus-building initiative, this fracture within the ranks of the drafters reflected the process that was established at the outset: one that insisted on substantial agreement between advisers on what constituted an 'essential' human right before envisioning whether or how the Statement may be used for the purposes of advancing the American Law Institute's objectives.²⁷⁶ In the next section, I turn to the participants involved, and process undertaken, in the making of the Statement.

²⁷⁵ Traynor, *supra* note 262 at 4.

²⁷⁶ *Ibid* at 3.

3.3 Participants and process

3.3.1 Participants

When the Executive Council of the American Law Institute approved the project to draft a model ‘international bill of rights’ in 1941, their decision was accompanied by a memorandum setting out in meticulous detail the methodological parameters that would guide the consensus-building effort. According to the memorandum, the bill of rights would be developed in five stages, led primarily by a group of 10 advisers composed of lawyers and “representatives of work in the political sciences and history,” not only from the United States but also from “western continental Europe and Latin America.”²⁷⁷ Two advisers would serve as reporters responsible for putting pen to paper and all advisers would be required to meet in the United States for plenary gatherings of the group.²⁷⁸ In the first stage, the group of advisers would be tasked with developing a preliminary first draft of the model bill of rights; a process that was estimated to take approximately 6 meetings and 8 months following the inaugural conference of the advisers.²⁷⁹ Lewis, as Director of the Institute, was to be “responsible...for the effective progress of the work...preside at all conferences of the advisers and...act as a clearinghouse for all correspondences relating to the work.”²⁸⁰

The second stage of the project would involve submitting the first draft of the bill to a group of 75 to 100 consultants representing “diverse disciplines and as many cultures as possible” for their comments and critique. The consultants would not be required to meet in the US, but instead would respond to a first draft, providing written responses to the draft. It was

²⁷⁷ 1941 ALI memo, *supra* note 263 at 4.

²⁷⁸ *Ibid.*

²⁷⁹ It is unclear on what basis these estimates were made.

²⁸⁰ 1941 ALI memo, *supra* note 263 at 5.

anticipated that approximately 80 percent of consultants who were approached would ultimately respond and provide their review of the draft.²⁸¹ The purpose of the larger group of consultants was two-fold: first, to serve as a form of ‘peer review,’ identifying blind spots that may have been inherent to the work of the group of advisers; and second, to stimulate the interest of a considerable group of important persons and “a feeling on their part that they had shared in the development of the completed work.”²⁸² A small number of consultants who had provided especially poignant remarks would be called upon to help produce the second draft of the model bill, together with the group of advisers—the third stage of this five-stage plan.

The fourth and fifth stage of the project would involve a review of the second draft of the model bill by the American Law Institute’s Executive Council and its membership, to satisfy the requirement in the Bylaws that any publication of the Institute be approved by both the Council and members present at a meeting of the members. The Institute contemplated that this would be “more than a formal matter,” and that the second draft would be expected to undergo revision following this thorough review by the Institute.²⁸³

Despite the detailed and carefully thought-out plan set out by the American Law Institute, the project followed a very different trajectory from the outset of its life cycle. Lewis, who was initially expected to play a secretarial and administrative role on the project as the Institute’s Director, became far more involved and personally invested, putting substantial time and effort into drafting the Statement as well as its onwards dissemination. His efforts to establish the group of advisers also deviated from the memorandum’s plan. Notwithstanding the American

²⁸¹ *Ibid* at 7.

²⁸² *Ibid* at 7.

²⁸³ *Ibid* at 8.

Law Institute's longstanding experience in developing consensus-based restatements of law, Lewis was wary of drawing solely or primarily on the Institute's United States membership to populate the drafting committee. He feared that the Institute was made up of "more or less conservative [American] lawyers with not much knowledge of world conditions" and set about populating the group of advisers (the drafting group) with jurists representing different geographic and cultural backgrounds, as well as experience across different sectors (further discussed below).²⁸⁴

The project's plan to submit the Statement to a review by a larger group of consultants also never came to fruition. Instead, the group of advisers would meet at intervals over the course of the next 18 months to advance iterative drafts of the Statement.²⁸⁵ Perhaps the greatest deviation from the original plan, however, was the anticipated output of the project. While the memorandum had contemplated a resulting 'model international bill of rights,' the real-world outcome of this project resulted in only a 'statement,' for reasons relating to the Institute's unwillingness to endorse the full content of the Statement, as further discussed in **Section 3.4**.

Lewis' hopes to establish a group of advisers representing many different countries and cultures in the world encountered some challenges in this wartime period. He reached out to renowned experts in international law and international organizations, as well as contacts in embassies and officers of international organizations. By September 1942, 17 individuals accepted the invitation to serve as advisers on the project, with Lewis acting as chairman of the

²⁸⁴ UPL, ALI, 6051, 27, Minutes of the special subcommittee, 10-12 December 1943, p. 1. *See also* UPL, CEMM, Executive Committee, 19 December 1942, p. 38 ff.

²⁸⁵ While the larger group of consultants was never established, Lewis did draw on the research assistance and support of some American Law Institute staff. The project's advisers also agreed to form sub-committees on specific issues (personal rights, political rights, social rights and property rights) arising with the drafting of the Statement, and some advisers assumed roles as leads or 'reporters' on these sub-committees.

group. Additional experts later joined the Statement's development, including George 'Leo' M. Barakat and K. C. Mahindra (the former was to represent 'Arabia' and the latter India), but latecomers made little tangible impact on the final draft.²⁸⁶ There were no advisers from the Soviet Union. Lewis was acutely aware of this gap and sought to rectify it by including Kenneth Durant, an American who headed the United States branch of the "Telegraph Agency of the Soviet Union," or simply TASS (a Soviet news agency).

3.3.2 Process

Unlike the more participatory process to develop recent consensus-based interpretations of international human rights law, diversity among the group of advisers who drafted the Statement was low even by Lewis' estimation (for the full membership of the drafting group, see **Table 1**). This was in part owing to the project's financial and practical constraints, with the group expected to meet frequently in the United States over 18 months to advance iterative drafts of the Statement. Inevitably, it also revealed the limits of Lewis' connection to international law communities of practice beyond North America and Europe. Most advisers to the project were American, with Europeans constituting the second largest group—though many European advisers also lived in the United States, having fled war in Europe. All but two advisers were born and raised outside of North America or Europe. All advisers held positions of high rank in academia, diplomacy, and non-governmental organizations but not all participants were jurists or lawyers by training.²⁸⁷ There was no woman in the ranks of those invited as advisers and the historical record does not suggest that this absence posed any trouble for either Institute's

²⁸⁶ Vik, *supra* note 270 at 467.

²⁸⁷ A substantial minority of participants had careers in law-adjacent or non-law professions (e.g., journalism, sociology, physiology, medicine and management).

leadership or the appointed advisers. Despite the foregoing, when the project was complete, public-facing documents usually presented the Statement as having been drafted by eminent experts from “most of the principal cultures of the world”²⁸⁸ and at times, specifically representing “Arabic, Austrian, British, Canadian, Chinese, French, pre-Nazi Germany, Italian, Indian, Latin American, Polish, and Spanish [countries or cultures]”.²⁸⁹

Table 1 Drafting group (advisers) of the *Statement of Essential Human Rights*

Name	Role and Affiliation(s)*
1. William Draper Lewis (Chair)	Jurist and educator. Director, American Law Institute
2. Ricardo J. Alfaro	Statesman and jurist. President of the Republic of Panama, 1931-32; Minister to the United States, 1922-30 and 1933-36.
3. George M. Barakat	Lawyer. President, Syrian and Lebanese-American Federation of the Eastern States.
4. Percy E. Corbett	Jurist and educator. With Institute of International Studies, Yale University; dean, Faculty of Law, McGill University, 1928-36.
5. Julio A. Del Vayo	Statesman and journalist. Foreign Minister of the Spanish Republic, 1936-39.
6. Noel T. Dowling	Professor of law, Columbia University.
7. Kenneth Durant	Journalist and authority on Soviet Russia.
8. John R. Ellingston	Sociologist. Special Adviser on Criminal Justice-Youth, American Law Institute
9. Hu Shih	Diplomatist and philosopher. Chinese Ambassador to the United States 1938-41.

²⁸⁸ Draper Lewis & Ellingston, *supra* note 266 at x.

²⁸⁹ Draper Lewis, *supra* note 261 at 489.

10. Manley O. Hudson	Jurist and educator. Judge, Permanent Court of International Justice since 1936.
11. C. Wilfred Jenks	Barrister-at-law of Gray's Inn, London. Legal adviser of the International Labor Office.
12. Charles E. Kenworthy	Lawyer. Judge, Superior Court of Pennsylvania, 1944-44.
13. Henri Laugier	Physiologist and statesman. Dean, Algiers University since 1943; Chief of Cabinet, Ministry of Education, France, 1936-37.
14. Karl Loewenstein	Lawyer and educator. Professor of political science and jurisprudence, Amherst College.
15. K. C. Mahindra	Industrialist. Head of India Supply Mission to the United States since 1942.
16. Roland S. Morris	Lawyer and diplomatist. United States Ambassador to Japan 1917-21.
17. John E. Mulder	Lawyer and educator. Professor of law, University of Pennsylvania.
18. Ernst Rabel	Jurist and legal writer. Founder and director, Kaiser Wilhelm Institute of Foreign and International Private Law in Berlin; formerly Judge, Permanent Court of International Justice
19. Ludwik Rajchman	Doctor of Medicine. Director, Health Section, League of Nations 1921-39; director, State Institute and School of Hygiene, Warsaw, Poland 1919-21.
20. David Riesman Jr.	Lawyer and educator. Formerly, pro. Lessor of law, University of Buffalo.
21. Warren A. Seavey	Professor of law, Harvard University since 1927; head of Law School, Pei Yang University, China 1906-11.
22. Angelo P. Sereni	Lawyer and educator. Formerly, professor of law, University of Ferrara, Italy.
23. Paul Weill	Vice-president, France Forever; counsel to the Ministry of the Interior, France, 1936.
24. Quincy Wright	Professor of International Law, University of Chicago.

25. George M. Wunderlich	Lawyer and educator. Associate-in-law, University of Pennsylvania Law School; prior to 1936 in private practice in Berlin, Germany.
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* Listed roles and affiliations are reproduced from the William Draper Lewis et al, *Statement of Essential Human Rights* (New York, NY: Americans United for World Organization, Inc., 1945).

3.4 Dissemination and outcomes

When the initiative to draft the Statement was first proposed in 1941, the American Law Institute anticipated that the project would lead to an “international bill of rights.”²⁹⁰ A bold dissemination plan was envisioned for the document, with the Institute as its chief driver. By setting up a drafting committee made of experts from outside of the US, however, the Institute ceded ideological control over the project and invited a degree of unpredictability in the final consensus—an eventuality the Institute may not have foreseen at the outset. As Lewis explained:

[w]hen the members of the Council realized what the document contained they also realized that the Institute could not wisely undertake to draft either a Statement of Essential Human Rights or an International Bill of Rights. Should they try to do either of these things the social rights would come up for discussion and their insertion or inclusion would become a question which in the United States would generate a political discussion, for which the Institute is unfitted.²⁹¹

The project had thus taken on a life of its own. With the American Law Institute withholding its endorsement, the fate of the Statement seemed uncertain. The Institute did not prevent others from disseminating the document and did in fact send the document onwards as a ‘report’ to its membership as well as to the project’s three funding organizations, for their consideration. Copies of the Statement, however, were in short supply and would not be

²⁹⁰ William Draper Lewis, “An International Bill of Rights” (1942) 85:5 Proceedings of the American Philosophical Society 445–447.

²⁹¹ Draper Lewis, *supra* note 261 at 491.

reprinted by the Institute.²⁹² A third-party NGO advocating for American engagement in international society—known then as “Americans United for a World Organization Inc.”—would ultimately take up the mantle of reprinting and distributing the Statement in the form of a pamphlet.²⁹³ The archival record is unclear on why or how this NGO came to be the Statement’s main distributor. By 1945, however, the NGO had published the Statement with a foreword explicitly stating that the American Law Institute had not *made* the Statement, nor did it approve or disprove of the document.²⁹⁴

Outside of the Institute, interest in the project grew rapidly. Acting in a personal capacity, Lewis embarked on a flurry of activity in the period immediately following the finalization of the Statement to disseminate the document as widely as possible among American law professionals and communities of practice. Archived letters reveal a frenetic campaign of correspondence with high-ranking officials and reputed jurists and diplomats across the country. On 15 February 1944, he forwarded a copy of the Statement directly to US President Roosevelt, describing the Statement as a legal manifestation of the ‘four freedoms’ and requesting a meeting to “have [the President’s] suggestions and advice as to how [the Statement] can best be used at home and abroad to further the principles expressed in the Atlantic Charter.”²⁹⁵ As word of the Statement

²⁹² In an era preceding the advent of the email, the limited stock of the Statement in hard copy form proved to be a major logistical barrier to its broad dissemination.

²⁹³ Draper Lewis et al., *supra* note 194. For a history of ‘Americans United for a World Organization Inc.’ see Andrew Johnstone, “Americans Disunited: Americans United for World Organization and the Triumph of Internationalism” (2010) *J Am Stud* 1.

²⁹⁴ *Ibid* at foreword.

²⁹⁵ Letter from William Draper Lewis to the President of the United States (15 February 1944) in *Statement of Essential Human Rights Archives* (Philadelphia, PA: American Law Institute Library). It is unclear whether the President granted Lewis an audience or phone call. The Secretary to the President responded to Lewis’ correspondence by relaying the President’s thanks and appreciation for a copy of the Statement. Even if the Statement had made an impression on Roosevelt, the timing was ill-fated: Roosevelt died scarcely one year later on 12 April 1945.

spread, Lewis' transmission began to go both ways—some received the Statement unsolicited, but others reached out to Lewis for a copy.

Lewis also took to academic forums to spread the gospel of the Statement. In November 1944, he presented the Statement at a meeting of the American Philosophical Society, one of the project's core funders.²⁹⁶ By the time his presentation to the meeting (and the Statement) was published in the society's proceedings in 1945, Dumbarton Oaks and the San Francisco Conference had both taken place. These events provided Lewis with a rare opportunity to reflect on the relevance of the Statement to historic UN-building processes. In an addendum to his presentation, he implied that members of the American Law Institute in attendance in San Francisco had used the Statement to advocate for the inclusion of human rights in the final draft of the UN Charter.²⁹⁷ The following year, as editor of a special issue on "Essential Human Rights" in the *Annals of the American Academy of Political and Social Sciences* (following the adoption of the UN Charter), Lewis appended copy of the Statement to the special issue.²⁹⁸ The issue's opening article, co-authored with his drafting group member John R. Ellingston, foresaw that "[n]o other and no less universal objective than the welfare and freedom and responsibility of the individual human being as such can carry the United Nations Organization over the economic, political, and ideological storms ahead."²⁹⁹ Lewis and Ellingston framed the

²⁹⁶ William Draper Lewis, *supra* note 261.

²⁹⁷ *Ibid* at 494. Lewis also noted that the draft Statement was being used by the Inter-American Juridical Committee which had been directed to draft "a Pan American Declaration of Rights," per Resolution IX of the Inter-American Conference on Problems of War and Peace at Mexico City in 1945. Preceding the *Universal Declaration of Human Rights*, this Declaration became the first general instrument of international human rights law and was eventually adopted at the Ninth International Conference of American States on 2 May 1948 in Bogotá, now known as the "American Declaration of the Rights and Duties of Man."

²⁹⁸ Committee Appointed by the American Law Institute, "Statement of Essential Human Rights," *Annals of the American Academy of Political and Social Science* 243 (1946): 18.

²⁹⁹ Draper Lewis & Ellingston, *supra* note 266 at x.

Statement as a “most careful attempt” to define such an objective, and “especially suitable to stimulate the discussion necessary to enable the peoples of the world to make up their minds as to what rights they consider indispensable.”³⁰⁰

Many of Lewis’ drafting committee members, including Seavey, Jenks, Karl Loewenstein, and Noel T. Dowling, joined as contributors to the *Annals* special issue on essential human rights. Serendipitously, several of the drafting committee members were also ‘in the right place at the right time,’ contributing to parallel human rights norm-building processes that may have drawn on (or conversely, inspired and influenced) the Statement and its preparatory works and discussions. In his role as Legal Adviser to the ILO, for instance, Jenks was the co-drafter of the *Declaration concerning the aims and purposes of the International Labour Organisation* (Declaration of Philadelphia), adopted by the General Conference of the ILO in Philadelphia on 10 May 1944.³⁰¹ The Declaration of Philadelphia, annexed to the ILO Constitution in 1946, restated the core principles of the Organization and centered its work on human (and in particular, social) rights, reviving the Organization after it had been dormant during the war period.

With the dissemination efforts above, it is not surprising that the Statement eventually found its way into the hands of those who worked in the nascent UN Human Rights Division and played a pivotal role in developing the *Universal Declaration of Human Rights*.³⁰² In April 1946, just as Eleanor Roosevelt was elected Chair of the Human Rights Commission, Lewis wrote

³⁰⁰ *Ibid.*

³⁰¹ *Declaration concerning the aims and purposes of the International Labour Organisation*, International Labour Conference, 26th sess (10 May 1944).

³⁰² Humphrey, *supra* note 195 at 29. Even Humphrey erroneously believed that the Statement was a document that had been “prepared” by the ALI, to the probable chagrin of the Institute and despite their best efforts to dissociate the ALI’s name from the Statement.

directly to the former First Lady urging her and the Commission to give consideration to the Statement “because [it] represents the agreement of responsible men from many nations as to what rights are essential to the freedom of the individual in our interdependent industrialised society.”³⁰³ The archival record is unclear on whether Lewis ever received a reply (or if Roosevelt critiqued the absence of women in the drafting the Statement). The *travaux préparatoires* of the *Universal Declaration of Human Rights*, however, reveal that it was Panama’s delegation at the San Francisco conference that formally introduced the Statement to the drafters in the Commission on Human Rights.³⁰⁴ Panama’s delegation included none other than Ricardo J. Alfaro, Panama’s former president, a legal expert and member of the group of advisers who drafted the Statement.

Reflecting on the drafting process years later, John Peters Humphrey, first director of the UN Human Rights Division and author of the first draft of the *Universal Declaration of Human Rights* wrote that:

...I had had practically no experience drafting documents. But since the Secretariat had collected a score of drafts, I had some models on which to work...With two exceptions, all these texts came from English-speaking subjects and all of them from the democratic West...The best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it...It had been drafted in the United States during the war by a distinguished group representing many cultures...³⁰⁵

³⁰³ Letter from William Draper Lewis to Eleanor Roosevelt (23 April 1946) in *Statement of Essential Human Rights Archives* (Philadelphia, PA: American Law Institute Library).

³⁰⁴ *Statement of Essential Human Rights Presented by the Delegation of Panama*, UN Economic and Social Council, E/HR/3 (26 April 1946).

³⁰⁵ Humphrey, *supra* note 195 at 29.

Humphrey borrowed full phrases from the Statement to draft articles 2, 3, 6, 7, 11, 15, 20, 22, 26, 30, 36, 41, and 42 of the first draft of the *Universal Declaration of Human Rights*.³⁰⁶ Later in his career, Humphrey would take part in another informal consensus-building initiative, this time spearheaded by the ICJ, which would result in the famous Siracusa Principles (see **Chapter 4**).

After a long and storied career in law, Lewis stepped down as Director of the American Law Institute in 1947, two years before his death in 1949.³⁰⁷ While the first international human rights treaties would take nearly two more decades to emerge, it may have been a comfort for Lewis to witness the formal adoption of a landmark *Universal Declaration of Human Rights*—not unlike the Statement in scope and ambition—by the UN General Assembly in 1948. The last great hope of Lewis’ career, a world organization grounded in the concept of human rights, had come to fruition. The Cold War was looming, however and with it a new struggle for the nascent field of ‘international human rights law’ was beginning. Two parallel informal consensus-building initiatives took shape against the backdrop of this new world: the Siracusa Principles and the Paris Minimum Standards. I turn to these cases of informal consensus-building in **Chapter 4**.

³⁰⁶ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999) at 6.

³⁰⁷ Owen J Roberts, “William Draper Lewis” (1949) 98:1 U Pa L Rev 1–3.

3.5 Chapter Conclusion

The above case study shows that those involved in developing the American Law Institute's *Statement of Essential Human Rights* were attentive to the independence of the drafting process and, to some extent, the diversity of the experts engaged. Consistent with Sepúlveda Carmona's determinants of legitimacy for human rights guiding principles (see **Section 1.3.5**), Lewis sought, with some success, to engage drafters who had independence from the Institute's membership. He also sought experts who could ostensibly represent diverse non-American geographic perspectives. At that time, no effort was made to seek gender balance.

Although a consensus-building plan was initially envisioned—drawing on the Institute's experience with restatements of American law—these plans were soon overtaken by the logistical and political pressures of the moment. The fractured nature of the consensus that ultimately emerged reflected the deepening ideological divisions that would shape the international human rights regime into the Cold War era and beyond. This case study highlights how the outcomes of informal consensus-building can diverge significantly from the initial goals of the convening organizations. Once underway, such projects may develop their own momentum, sometimes outpacing the expectations or comfort zones of their initiators.

Equally important to Lewis was not just the process, but the Statement's life after its development. He astutely recognized that those involved in drafting could also help disseminate the Statement through their networks in national and international fora. Consequently, many high-profile individuals in influential positions had access to the Statement at a pivotal moment: the founding of the United Nations and the early development of international human rights law. While the outputs of informal consensus-building are not "law" per se, and lack formal normative authority, the involvement of such individuals can lend them considerable weight in

norm- and institution-building efforts. The key takeaway is that participant selection in informal processes must be done carefully and strategically.

The Statement is now largely forgotten and relegated to the margins of international human rights law scholarship and practice. Formulated in general terms and before establishment of the UN human rights machinery and a robust body of jurisprudence, it was quickly eclipsed by the adoption of the *Universal Declaration of Human Rights* and subsequent international human rights treaties under the aegis of the UN and other regional bodies. Still, the Statement stands as a clear example of informal consensus building in international law—a bold undertaking by an interdisciplinary set of experts who sought to shape nascent human rights norms in a field still in formation. Perhaps more than any contemporary informal consensus-building initiative, the magnitude of the moment—a world made raw in the aftermath of WWII—emboldened the initiative and its participants with a license to build consensus towards *lex ferenda*, or what the law *should* be.

This chapter's account of the making of the Statement is necessarily incomplete. It draws on archival material, including correspondence, notes and memoranda from the digital archives of the American Law Institute's library, and primarily reflects the vantage point of Lewis, as Institute director, and the individuals with whom he corresponded and collaborated. These documents do not reflect or capture the perceptions or experiences of other participants in the process. As such, important inflection points or pieces of the story may be missing in the reconstruction of events. This limitation does not negate the case study's value but highlights the need to critically examine whose voices are preserved and whose are missing. Archival silences can reveal structural exclusions that shaped both the process and its outcomes, reminding us to approach informal consensus-building with attention to representation and legitimacy.

4 Practices of Informal Consensus-Building: Case Study of the Siracusa Principles and the Paris Minimum Standards

4.1 Chapter introduction

Featured in the opening chapter of this dissertation, the Siracusa Principles are among the most well-known and influential outputs of informal consensus-building. Originally published to interpret the limitations and derogation clauses of the ICCPR, an international treaty in force for less than a decade at the time—the Siracusa Principles sought to address a pressing legal dilemma: under what exceptional circumstances could human rights obligations be limited or suspended, and which human rights were subject to such restrictions?

Today, the Siracusa Principles are widely cited in advocacy, research, and practice by lawyers and non-lawyers alike. In some cases, they are even treated as synonymous with, or substitutive of, binding norms in international human rights law.³⁰⁸ Despite their widespread success, however, relatively little is known about how the Siracusa Principles were made. In contrast to the American Law Institute’s extensive online archives on the *Statement of Essential Human Rights*, archival records on the Siracusa Principles are fragmented across various sources. Digital archives of the ICJ, available through HeinOnline, contain some information on the process that led to the finalization of the Siracusa Principles. A more fulsome account is also housed at the Robert S. Marx Law Library at the University of Cincinnati. As repository for the “Papers of William J. Butler,” the library holds, among other documents, the former Chairman of the ICJ Executive Committee’s speeches, correspondence, and notes concerning the Siracusa

³⁰⁸ For a sample of experts citing to the Siracusa Principles, see notes 5 to 15.

Principles. Both the digital archives of the ICJ and the William J. Butler Papers at the University of Cincinnati were used in accessed in developing the foregoing case study.

Drawing on these digital archives, this chapter takes a closer look at the Siracusa Principles with a view to understanding the context that led to the initiative, the participants and the process involved in their making, and the strategies undertaken to promulgate them. The circumstances and normative landscape that gave rise to the Siracusa Principles differed in important ways from those that fostered the *Statement of Essential Human Rights*. The Siracusa Principles emerged from discussions that took place in the spring of 1983, in response to a wave of politically-motivated states of emergency that had been declared in Latin America and elsewhere.³⁰⁹ By this time, international human rights law had become a distinct field of international law, supported by a growing community of practice, including states, treaty-monitoring bodies, civil society, and academics.³¹⁰ As new international human rights treaties emerged, this community of practice began to coalesce around their implementation.

As this chapter shows, the making of the Siracusa Principles retained some features of the informal consensus-building practice used in developing the *Statement of Essential Human Rights*. For instance, the initiative involved experts with high international standing and a multi-pronged dissemination of the final output through academic and advocacy channels. Unlike the American Law Institute's chief stewardship of the Statement, however, the Siracusa Principles

³⁰⁹ See *Letter from Niall MacDermot to Cherif Bassiouni* (28 June 1983), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 309).

³¹⁰ Telling in this regard are the remarks of Humphrey, who in a 1974 speech to the American Bar Association, contrasted the year 1948 against 1974, and remarked that "there now exists a significant body of international law the purpose of which is to protect the rights of individual men and women even against their own governments. This is not only new law; it is a new kind of law." See John P. Humphrey, "The Revolution in the International Law of Human Rights" (1974) 4:2 *Human Rights* 205 at 208. See also Thomas Buergenthal, "The Evolving International Human Rights System" (2006) 100:4 *AJIL* 783.

were led by a *collective* of not-for-profit and academic human rights organizations working in partnership to steward the process.³¹¹

These organizations were part of a rapidly expanding transnational advocacy network that sought to influence the landscape of international human rights law and the domestic implementation of international norms.³¹² Together, they wielded a variety of advocacy strategies to achieve their objective. Then and today, one of the best-known of these organizations was the ICJ.³¹³ The interpretation of international human rights law through informal consensus-building quickly became one of the ICJ's most frequently used advocacy strategies.³¹⁴ The Siracusa Principles were first proposed by William J. Butler, acting in his capacity as Chairman of the ICJ's Executive Committee, as an initiative to develop "Principles of Derogation Under International Human Rights Treaties."³¹⁵

The ICJ, however, was not the only organization that sought to bridge an interpretive void in international law through informal consensus-building. In parallel to the work of ICJ and

³¹¹ Experts were convened by the International Commission of Jurists, the International Association of Penal Law and its affiliated International Institute of Higher Studies in Criminal Studies (now known as the 'Siracusa International Institute for Criminal Justice and Human Rights'), and the Urban Morgan Institute for Human Rights, based at the University of Cincinnati's College of Law in Ohio, United States.

³¹² Keck & Sikkink, *supra* note 22. See also Max Lesch and Nina Reiners, "Informal Human Rights Law-Making: How Treaty Bodies Use 'General Comments' to Develop International Law" (2023) 12:2 Global Constitutionalism 378.

³¹³ Jerome J Shestack, "Sisyphus Endures: The International Human Rights NGO" (1978) 24:1 NYL Rev 89 at 91.

³¹⁴ In 1972, then-Secretary-General of the ICJ, Niall MacDermot, wrote:

One of the most important activities of the International Commission of Jurists has been to translate the general principles of the [*Universal Declaration of Human Rights*] into detailed statements of legal principles and procedures acceptable and applicable in all parts of the world. This has been done by convening international conferences of lawyers representing the principal legal systems of the world to formulate in legal language the safeguards which are needed to give effect to basic human rights under the rule of law.

See Niall MacDermot, "The Work of the International Commission of Jurists," *Index on Censorship* 1, no. 3-4 (September 1972): 155-59 at 157.

³¹⁵ See *Letter from William J. Butler to Henry R. Winkler* (16 February 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 312).

its partners, the International Law Association had mobilized its membership to develop a set of standards, with these being finalized in 1984 as the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*—also known as the Paris Minimum Standards.

Although both initiatives drew on similar studies, norms, and communities of practice, the Paris Minimum Standards have received little attention in scholarship, practice, and advocacy. In documenting differences in the participants, processes, and dissemination strategies used, this chapter offers multiple plausible explanations for the widely different outcomes between the Paris Minimum Standards and the Siracusa Principles. In so doing, the chapter also delineates some of the markers of an ‘influential’ informal consensus-building initiative.

This chapter also highlights the strategic value of informal consensus-building initiatives for the NGOs that lead them. While transnational coalitions often frame their work as advancing universally recognized principles of international human rights law, political motivations frequently shape these efforts. Like the American Law Institute’s Statement—which was partly driven by a desire to attract further funding—such initiatives often serve the political priorities and funding imperatives of their host organizations. This dynamic was particularly evident in the case of the ICJ. As Howard B. Tolley reveals, the ICJ’s history reflects the interplay of political and economic factors that shaped its establishment and influenced its agenda from its founding through to the mid-1990s.³¹⁶

To understand the ICJ’s role in stewarding the development of the Siracusa Principles—and many other informal consensus-building efforts—it is essential to examine the organization’s origins and enduring mandate. The next section offers a brief overview of the

³¹⁶ Tolley, *supra* note 11.

ICJ's founding, drawing on Tolley's groundbreaking research on this topic and other relevant archival sources. This background sets the stage for a closer look at the unique circumstances that brought jurists together in a sustained community of practice, united by concern over the overuse and misuse of states of emergency to justify derogations from treaty-based human rights obligations.

4.2 Context and content

4.2.1 Origins of the International Commission of Jurists

The ICJ is an NGO “of leading judges and lawyers from around the world working to advance the rule of law and the realization of human rights for all.”³¹⁷ In the main it is composed of 60 judges and lawyers of high standing “from all parts of the world and all legal systems” who serve five-year terms as Commissioners.³¹⁸ Commissioners work actively to promote and implement human rights and are entrusted with helping the ICJ in the implementation of its programs, particularly where work falls within their area of expertise.³¹⁹ While Commissioners take part in the strategic vision of the organization and benefit from the prestige associated with their role, the day-to-day operations of the ICJ are run by staff in its Geneva-based international secretariat, led by a ‘secretary-general,’ as well as in satellite offices in Thailand, Belgium, Nepal and Tunisia. National Sections of the ICJ also work in affiliation with the international secretariat, but they operate with a high degree of independence. The National Sections may conduct research, organize events, and sometimes collaborate with other sections. Crucially, they contribute to local law reform efforts and provide the secretariat with updates from the frontlines.³²⁰ Through these activities, the National Sections help the ICJ maintain strong connections with the local legal profession.

Today, the ICJ focuses on promoting “the adoption and implementation of international human rights standards and other legal rules and principles that advance human rights and the

³¹⁷ International Commission of Jurists “About: Building a world based on human rights standards and rule of law”, online: <<https://www.icj.org/about/>>.

³¹⁸ *Ibid.* A subset of Commissioners also serve as the organization’s Executive Committee of the organization, providing policy direction to the organization in most cases.

³¹⁹ International Commission of Jurists, *International Commission of Jurists Statute* (Geneva: ICJ, 2012) at art 4.

³²⁰ MacDermot, *supra* note 314.

Rule of Law.”³²¹ The social and professional standing of the jurists who work with ICJ has granted the NGO unparalleled access to government leaders and legal organizations throughout its seven-decade history.³²² Although the ICJ currently functions as a non-political NGO, its origins are steeped in political and ideological tensions. The ICJ was born against the backdrop of the Cold War. Events that gave rise to the ICJ date back to an international congress of jurists held in 1952 in West Berlin (as it was then).³²³ The establishment of East Germany as a Communist Republic triggered a mass exodus to West Berlin. Among those who fled were jurists who formed “the Investigative Committee of Free-Minded Jurists from the Soviet Zone,” which focused on documenting instances of systemic injustice in areas under Soviet control.

Some American lawyers of German background took notice of the Investigative Committee’s work and funded an international congress of jurists in West Berlin.³²⁴ Outwardly, the purpose of this 100-delegate congress, hosted by the Investigative Committee, was to “contribute to the maintenance of the law as an entity,” determining the “minimum guarantees of legal order [that] make life worth living” and examining “whether those guarantees are realized in the countries behind the Iron Curtain.”³²⁵ In reality, however, the all-expenses paid congress was sponsored by the US Central Intelligence Agency (CIA) as a countermeasure to Soviet

³²¹ *Ibid*, art 33.

³²² Acting with relative autonomy, national sections of the Commission also operate around the world to further the mission, aim, and objectives of the ICJ.

³²³ The 106 voting delegates included 31 ministers and government officials, 32 professors, and 35 judges, counsel, and presidents of high courts. These delegates represented ‘free world’ countries and as well as refugee delegations. Overall, delegates joined from 43 countries, including Albania, Austria, Belgium, Brazil, Bulgaria, Canada, China, Czechoslovakia, Denmark, Egypt, Estonia, Ethiopia, France, Georgia, Germany, Great Britain, Greece, Iceland, India, Iran, Iraq, Ireland, Italy, Japan, Korea, Latvia, Lebanon, Lithuania, The Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Russia, Spain, Sweden, Switzerland, Thailand, Turkey, United States of America, and Uruguay.

³²⁴ Joseph T Thorson, “The International Commission of Jurists” (1957) 35:8 Canadian Bar Review 898–910 at 899.

³²⁵ International Commission of Jurists, *International Congress of Jurists, West Berlin 1952: Complete Report* (The Hague: ICJ, 1952) [1952 West Berlin Congress].

propaganda, which had hitherto supported NGOs with UN consultative status, such as the International Association of Democratic Lawyers, in spreading anti-American news and sentiment.³²⁶ The congress functioned as a people's tribunal, examining complaints of injustice that had allegedly taken place in Soviet areas. Although delegates from non-Western countries (e.g., India) attempted to raise complaints of injustice arising from racial discrimination in South Africa and the plight of independence for people living in colonized lands, these attempts were roundly resisted and ignored by the conference organizers.³²⁷

By the end of the congress, delegates voted on a resolution that found violations of “generally accepted principles of law by the administrative of the Soviet Zone” and established a “Standing Committee of the Congress” whose aim would be to further the work of the Congress.³²⁸ With the covert support of the CIA and elite American legal professionals,³²⁹ this Standing Committee would evolve into the ‘International Commission of Jurists’ in 1953, with its first headquarters based in The Hague, Netherlands (the ICJ would move to its current Geneva headquarters in 1959). National sections with a high degree of autonomy too were opened, with the first offices formed in Greece, Turkey, and Sweden.

From the outset, the ICJ distinguished itself from other advocacy organizations through a singular focus on promoting the rule of law and investigating abuses of the rule of law wherever they occurred. In its early days, the ICJ channeled this focus into a robust campaign in pursuit of

³²⁶ Tolley, *supra* note 11 at 28.

³²⁷ 1952 West Berlin Congress, *supra* note 325 at 107-108.

³²⁸ *Ibid* at 123.

³²⁹ A non-profit organization incorporated in the US state of Delaware, the American Fund for Free Jurists (AFFJ), was created and served as a conduit to channel funds to the nascent International Commission of Jurists. *See* Tolley, *supra* note 11 at 34. The International Commission of Jurists was one of many organizations receiving covert support from the CIA during this time period. As part of its Cold War strategy, the Agency supported some 200 organizations through privately funded foundations. *See* Tolley, *supra* note 11 at xiii.

governments that lay behind the Iron Curtain.³³⁰ Former CIA officer Philip Agee wrote in his memoir that the CIA hoped the ICJ would “produce prestigious propaganda of the kind wanted on such issues as violations of human rights in the communist bloc.”³³¹ Much of the NGO’s work in the 1950s lived up to this expectation.³³²

The CIA’s staunch anticommunist agenda (and its covert financial support) assumed a diminished role in the life of the ICJ by the 1960s, when public funding disclosures made it difficult for the organization to rely solely on US government funding while presenting itself as a *global* jurists network.³³³ By that point, however, the ICJ had already fostered contact with elite officials “in capitals throughout the world” and organized several all-expenses paid trips which welcomed “high court judges, bar association officers, government ministers, and eminent professors” to international congresses in Africa, Asia, Europe, and Latin America.³³⁴

By the 1960s, the Geneva headquarters of the ICJ had also become “an information clearinghouse,” boasting a 7,000 volume library and a 34-person team of staff.³³⁵ It stewarded three different publication outlets: the ICJ *Bulletin* reporting on legal developments within country settings, which ran from 1954 until 1968; a scholarly journal on the rule of law and

³³⁰ Tolley, *supra* note 11 at 39.

³³¹ Philip Agee, *Inside the Company: CIA Diary* (New York, NY: Farrar Straus & Giroux, 1975) at 62.

³³² In a 1955 publication ironically titled “Under False Colours,” the Commission launched a direct attack against the International Association of Democratic Lawyers (IADL), charging the IADL with “pursu[ing] aims which it does not openly manifest.” See International Commission of Jurists, *Under False Colours: A report on the character of the International Association of Democratic Lawyers* (The Hague: ICJ, 1955). The IADL would respond in-kind, issuing a pamphlet that attacked the origins of the Commission. See Tolley, *supra* note 11 at 39.

³³³ Tolley, *supra* note 11, at 100. In early 1967, US newspaper outlets began reporting on the channeling of CIA funds to private organizations. In February 1967, the New York Times published a piece in which it identified the American Fund for Free Jurists (AFFJ) as having received “hundreds of thousands of dollars” from agency conduit foundations. See Neil Sheehan, “Aid by CIA put in the millions; Group total up: A Wide Spectrum of Youth, Labor, Student and Legal Organizations Are Cited Aid by C.I.A. Is Put in the Millions as Total of Groups Grows” *The New York Times* (19 February 1967).

³³⁴ Howard Jr. Tolley, “Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting,” (1989) 11:4 Hum Rts Q 561 at 576-77.

³³⁵ *Ibid* at 577.

human rights, featuring legal developments as well as scholarly manuscripts on issues of interest to the ICJ from 1957 to 2001;³³⁶ and a quarterly newsletter, reporting on the activities of the organization to an ever-growing readership. Together, these initiatives positioned the ICJ at the forefront of international human rights advocacy and practice, elevating the prestige of those who became involved with the organization.

4.2.2 Shifting priorities in human rights advocacy

The ICJ shifted its focus from connecting with, and reforming domestic governments and countering communist regimes in Eastern Europe, to strengthening human rights law and institutions internationally under the leadership of its new Secretary-General, Seán MacBride. A former journalist, lawyer, Irish parliamentarian, and international civil society advocate, MacBride would spend the next 7 years building coalitions between the ICJ and other NGOs.³³⁷ This focus would continue into the tenure of his successor, Niall MacDermot, who led the organization at the time of the deliberations on the Siracusa Principles.

Despite these efforts to reorient ICJ's work towards broader agendas, the organization's US-led beginnings set the ICJ on a path-dependent course in which the NGO enjoyed international status and recognition, while finding a more natural home advancing its advocacy on civil liberties and the rule of law, than promoting global economic and social justice.³³⁸ The perception of close ties to American foreign policy also continued to cast a shadow over high-

³³⁶ The scholarly publication of the ICJ was initially titled "Journal of International Commission of Jurists" before being renamed to "Review: International Commission of Jurists."

³³⁷ Tolley, *supra* note 11 at 101-102.

³³⁸ In later years, the ICJ would come to conceptualize development as a crucial component of the rule of law – but critiques of the thinness of the rule of law as a tool for affirming positive rights prevailed, even after the Declaration of Delhi. *See for instance* Harvey, William B, "International Commission of Jurists: The Rule of Law in a Free Society: a Report on the International Congress of Jurists" (1961) 59:8 Mich L Rev 1286.

level decisions taken at leadership level. The draft minutes of the Executive Committee's meeting of 23 April 1983, for instance, showed then-President of the ICJ and judge of the International Court of Justice, Kéba Mbaye, voicing hesitation that the ICJ was the only human rights NGO named in a United States Congress program focused on defenders of democracy:

It was pointed out by [ICJ President] Mr. Kéba Mbaye that this project would inevitably be regarded with suspicion by the governments and peoples of the Third World; that we had for several years struggled to remove the suspicion that the ICJ was an instrument of US foreign policy, and to restore our standing and to obtain general acceptance as an independent and impartial organisation....it was unacceptable for the ICJ to be mentioned in the program without our permission.³³⁹

By the 1970s, the ICJ had successfully wielded a range of collaborative and confrontational advocacy strategies to influence the global and regional architecture of international human rights law. Since its earliest days, a core tool within the ICJ's advocacy toolbox had been the convening of leading jurists—in essence a community of practice—“representing the principal legal systems of the world” to discuss, clarify and/or draft human rights standards.³⁴⁰ The first project on its docket was a series of congresses to define in increasingly precise and complete terms the meaning of the rule of law. Conferences were held

³³⁹ The ICJ's Executive Committee meetings, in particular, reveal the extent to which such perceptions preoccupied its Commissioners. See *Draft minutes of the Meeting of the Executive Committee of the International Commission of Jurists held in Geneva, Switzerland* (23 April 1983), Cincinnati, Ohio, William J. Butler Papers (Box 9-1, folder 215).

³⁴⁰ MacDermot, “*supra* note 314.

in Athens in 1955,³⁴¹ New Delhi in 1959,³⁴² Lagos in 1961,³⁴³ Rio de Janeiro in 1963,³⁴⁴ and many other cities thereafter in pursuit of this initiative. These experiences extended the Commission's reach and inspired the initiative and process that led to the Siracusa Principles.

Several important legal developments also took place on the international stage in the 1970s and early 1980s which further set the stage for efforts to draft the Siracusa Principles. Closely related to its mission of defining and promoting human rights and the rule of law, the ICJ was acutely aware of the need to clarify and enhance understanding of the limits of human rights obligations set out under the freshly adopted international human rights treaties. The ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) both entered into force in 1976, with each Covenant including clauses recognizing certain limitations or restrictions to state human rights obligations.³⁴⁵ The ICCPR, in particular, codified flexibilities for the state to limit or derogate from human rights obligations under certain circumstances, or under states of exception or emergency.³⁴⁶

³⁴¹ *Bulletin of the International Commission of Jurists, No. 3*, by International Commission of Jurists (The Hague, The Netherlands).

³⁴² Norman S Marsh, *Rule of Law in a Free Society: A Report on the International Congress of Jurists in New Delhi, India*, (Geneva: ICJ, 1959).

³⁴³ International Commission of Jurists, *African Conference on the Rule of Law: Report on the Proceedings of the Conference*, (Geneva: ICJ, 1961).

³⁴⁴ International Commission of Jurists, *Executive Action and the Rule of Law: Report on the Proceedings of International Congress of Jurists, Rio de Janeiro, Brazil* (Geneva: ICJ, 1963).

³⁴⁵ See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR] at arts 4 and 8, and in ICCPR, *supra* note 2 at arts 4-5, 12, 14, 18, 19, and 21-22.

³⁴⁶ The human rights 'limitations' provisions of the ICCPR include arts 5(3) and 18(3) (which specifically refer to 'limitations') and arts 12(3), 19(3), 21, and 22(2) (which specifically refer to 'restrictions'). The derogation provision within the ICCPR is found at art 4. Note however that the European Convention on Human Rights had entered into force in 1953, and in 1978, the American Convention on Human Rights also entered into force. Both treaties contain similar derogation provisions, though some variations exist in the rights that are considered non-derogable under each treaty. See Organization of American States, *American Convention on Human Rights*, 22 November 1969, 1144, UNTS 123 (entered into force 18 July 1978) at art 27(1) [ACHR] & *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) at art 15(1) [ECHR].

Concurrently, a growing ‘epidemic’ of government attempts to consolidate power through states of exception and emergency emerged in various parts of Latin America and other countries throughout the world.³⁴⁷ Several key actors converged in their effort to respond to these crises and shed legal clarity on the meaning of the ICCPR’s human rights limitations and derogation clauses through research and advocacy. A flurry of scholarship began unpacking the derogation provisions within international human rights treaties.³⁴⁸ Civil society and UN-led efforts also produced a robust body of analysis. Four such analyses became the centripetal force that brought scholars and practitioners together in their shared goal of clarifying the limits of international human rights obligations in times of emergency and documenting violations of such limits when they occurred. These analyses were:

- (1) a comparative study on states of emergency led by the ICJ in 1983;
- (2) a study on limitations to, and derogations from, rights as permitted by the *Universal Declaration of Human Rights*, the ICCPR and the ICESCR, led by Erica-Irene A. Daes, special rapporteur of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (the “UN Sub-Commission”), the main subsidiary body of the former Commission on Human Rights.³⁴⁹

³⁴⁷ For the sake of clarity, the term ‘states of emergency’ will be used hereafter as a broader umbrella term connoting crisis powers linked to ‘exceptional’ circumstances of the state.

³⁴⁸ See for instance Rosalyn Higgins, “Derogations Under Human Rights Treaties” (1977) 48:1 Brit YB Intl L 281; Thomas Buergenthal, “To Respect and To Ensure: State Obligations and Permissible Derogations” in Louis Henkin, ed, *The International Bill of Rights : the Covenant on Civil and Political Rights* (New York, NY: Columbia University Press, 1981); Joan F. Hartman, “Derogation from Human Rights Treaties in Public Emergencies” (1981) 22:1 Harv Intl LJ 1; Stephen P Marks, “Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts” in Karel Vasak & Philip Alston, eds, *The International Dimensions of Human Rights* (Westport, CT: Greenwood Press, 1982).

³⁴⁹ Daes Report, *supra* note 268.

- (3) a study on states of exception by Nicole Questiaux, French diplomat and special rapporteur of the abovementioned UN Sub-Commission in 1982;³⁵⁰ and
- (4) a report by the International Law Association’s Enforcement of Human Rights Committee, leading to the “Paris Minimum Standards of Human Rights Norms in a State of Exception.”³⁵¹

The cumulative effect of these intersecting analyses was sustained attention by a global community of practice, made up of international human rights practitioners and scholars, on the issue of human rights limitations and derogations in states of emergency. These events, surveyed briefly below, provided the backdrop against which efforts to develop the Siracusa Principles began.

4.2.3 The International Commission of Jurists as member of growing a community of practice on human rights and states of emergency

4.2.3.1 The ICJ study on states of emergency

In one of the most ambitious studies in its history, the ICJ examined 22 countries which had experienced states of emergency in the 1960s and 1970s.³⁵² Experts from around the world were commissioned to develop case studies on these countries, outlining existing constitutional and legislative provisions for states of emergency, describing the circumstances and purposes of declared emergencies, and detailing actions taken and compliance with existing legislation.

³⁵⁰ Nicole Questiaux, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 35th sess, UN Doc E/CN.4/Sub.2/1982/15 (27 July 1982) [‘Questiaux Report’].

³⁵¹ Paris Minimum Standards, *supra* note 23.

³⁵² International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva: ICJ, 1983). The countries included in the case study were Argentina, Canada, Colombia, ‘Eastern Europe’ (Czechoslovakia, German Democratic Republic, Hungary, Poland, USSR, Yugoslavia), Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire.

Additionally, they were to report on any abuses, how an emergency was terminated or whether the emergency continued after the initial circumstances had ceased to exist. In addition to the case studies, questionnaires were circulated to 158 countries, with 34 ultimately responding and offering inputs on the legislation, procedures, and practices regarding states of emergency in those countries.

Although the study proved groundbreaking, its development was far from a straightforward endeavour for the ICJ. MacDermot struggled to gather and consolidate the research of all commissioned experts by the 1979 deadline set by the study's main funder, the US Agency for International Development (USAID). Recurring grant extensions were sought from the American funder, much to the dismay of Butler who had his sights set on larger USAID grants to fund further ICJ-related travel and meetings. In his March 1983 final report to USAID's Marilyn Zak, MacDermot wrote that the delays in the project resulted in four countries—Philippines, South Korea, Sudan, and Zimbabwe—having to be withdrawn from the study. He further noted that

[m]any of the country studies had to be re-written or substantially revised by members of the ICJ staff due either to the inadequacy of the papers submitted by the experts or to further developments in the country concerned which it was felt had to be covered.³⁵³

Through 480 pages of analysis published in 1983, ICJ's study concluded that "states of emergency...[happened] with surprising frequency throughout the world" and that "at any given time in recent history, a considerable part of humanity [had] been living under a state of emergency."³⁵⁴ The study also underscored the weaknesses and gaps in the applicable norms that

³⁵³ See *Letter from Niall MacDermot to Marilyn Zak* (25 March 1983), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 310).

³⁵⁴ *Ibid* at 413.

make up the international human rights system and called for “clear prospective guidelines as to what rights may be affected by a state of emergency rather than relying on retrospective review of the necessity of measures employed.” It emphasized the need for a special focus on “establishing more comprehensive guidelines as to those rights from which derogation should never be permitted.”³⁵⁵ The study went as far as noting that such guidelines might be:

...protocols to existing human rights treaties, a body of principles adopted by the UN or regional organisations, or an advisory statement or set of legal presumptions adopted by the bodies which supervise the present human rights treaties.³⁵⁶

The Siracusa Principles would not amount to any of the above but went some way towards filling the interpretive void identified in the study.

4.2.3.2 The Daes Report and Questiaux Report (the UN reports)

The ICJ study contributed to the works of a sprawling network of relevant UN, academic and civil society actors who were primed for the uptake of its findings. It notably received attention from a growing community of international human rights law experts, featuring in review articles that were published among others in *Human Rights Quarterly*, *Libertas-European Review*, *The International and Comparative Law Quarterly*, *The Sunday Observer (India)*, and *The Indian Express*.³⁵⁷ Crucially, the ICJ study also coincided with priorities of the UN Commission on Human Rights and its Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, which, in the ten years preceding the Siracusa conference, began

³⁵⁵ *Ibid* at 441.

³⁵⁶ *Ibid*.

³⁵⁷ International Commission of Jurists, *ICJ Report on Activities 1981-1985*, (Geneva: ICJ, 1986) at 23.

appointing special rapporteurs on mandates relating to the interpretation of human rights restrictions broadly speaking, and in the context of states of emergency in particular.

In 1974, the UN Sub-Commission appointed Erica-Irene A. Daes as special rapporteur on a study to examine “the individual's duties to the community and the limitations on human rights and freedoms under Article 29 of the Universal Declaration of Human Rights.”³⁵⁸ In 1976, shortly after Daes’ appointment, the study’s mandate expanded to accommodate the entry into force of the ICCPR and ICESCR. The final ‘Daes report’ undertook a prodigious, in-depth interpretation of the relevant limitations provisions within the Universal Declaration, as well as relevant limitations and derogations provisions of the ICCPR and the ICESCR, respectively.

This expanded scope meant that several of the study’s observations and recommendations were directly relevant to the drafting of the Siracusa Principles. These included the recognition of “basic principles” governing the framework of human rights limitations, such as legality, equality and non-discrimination, and proportionality; the requirements for the existence of a public emergency, and the bodies which are competent to declare it; and human rights from which no derogation may be permitted. In 1984, two years after the publication of her report, Daes would join the ICJ and its partners as an expert participant to the Siracusa conference.³⁵⁹

³⁵⁸ Daes report, *supra* note 268.

³⁵⁹ In the same year as the Siracusa conference (1984) and after her arduous work at the UN on the interpretation of limitations and derogations clauses in international human rights law, Daes went on to serve a more than 20-year mandate as founding chairperson and special rapporteur to the UN Working Group on Indigenous Populations. Among her many contributions in this role, she was one the main driving forces behind the development of the UN *Declaration on the Rights of Indigenous Peoples*. Her legacy and contribution across different areas of specialization within international human rights law illustrates the transient and revolving door nature of participation within specialized international law communities of practice. Community insiders may exit and transition to other communities of practice, and in doing so, transport their experiences, expertise, and beliefs to the next community of practice they take part in. For an account of Daes’ other important works, see Rosalyn Higgins, “Words of Personal Appreciation to Erica-Irene Daes: From Justice pending: indigenous people and other good causes” in *Themes and Theories* (Oxford: Oxford University Press, 2009) 985.

Parallel to Daes' work, French diplomat Nicole Questiaux was also appointed by the UN Sub-Commission in 1977 as a Special Rapporteur tasked with preparing a report on the implications for human rights of recent developments in the application of states of siege or emergency.³⁶⁰ While states were reluctant to furnish Questiaux with relevant information to compile her report,³⁶¹ MacDermot worked closely with Questiaux, supplementing her with interim copies of the papers the ICJ had commissioned and offering suggestions on the subject matter to include in her report.³⁶² Questiaux's report was completed and presented to the Sub-Commission at its 35th session in August 1982.³⁶³ In resolution 1985/37, the Economic and Social Council authorized the Sub-Commission to appoint a special rapporteur to gather and annually update the list of countries which proclaim or terminate a state of emergency, to study the human rights impacts of emergency measures, and to recommend measures for guaranteeing human rights during states of emergency.

4.2.3.3 The International Law Association's *Paris Minimum Standards on Human Rights in Human Rights Norms in a State of Emergency*

Despite being heralded as 'first of its kind,'³⁶⁴ the Siracusa conference was neither the only nor the first gathering of legal professionals which sought to interpret the conditions under which

³⁶⁰ *Resolution 10 (XXX) – The question of the human rights of persons subjected to any form of detention or imprisonment*, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 30th Session, E/CN.4/Sub.2/399 (31 August 1977).

³⁶¹ Questiaux Report, *supra* note 350 at para 12.

³⁶² International Commission of Jurists, *supra* note 357.

³⁶³ Questiaux Report, *supra* note 350. The Questiaux Report makes explicit reference to the work of the ICJ on page 22.

³⁶⁴ See the introductory note of the Siracusa Principles, published in pamphlet form by the American Association for the International Commission of Jurists and signed by the Association's president, William J. Butler: *The Siracusa Principles on the Limitations and Derogations Provisions in the International Covenant on Civil and Political Rights* (New York: American Association for the International Commission of Jurists, Inc., 1985) [Siracusa Principles – AAICJ].

human rights limitations and derogations were permissible in states of emergency.³⁶⁵ The International Law Association (introduced in **Section 1.3**) had been at the forefront of the earliest developments in the UN human rights architecture and parallel to the ICJ, also began examining the issue of states of emergency in international human rights law in the 1970s.³⁶⁶ The International Law Association's advocacy and analysis in this space may have predated the ICJ's, following the Association's 1976 Madrid Conference which established a "Sub-Committee on Regional Problems in the Implementation of Human Rights" (International Law Association's Sub-Committee) and its work to examine regional difficulties in the implementation of human rights.³⁶⁷ The International Law Association's Sub-Committee, chaired by Subrata Roy Chowdhury, a practitioner of the Supreme Court of India and Calcutta High Court, produced a series of three reports on states of emergency which were presented to International Law Association's conferences in Manila in 1978, Belgrade in 1980 and Montreal in 1982.³⁶⁸

These reports fostered a discussion that set the International Law Association's Sub-Committee on a process to formulate minimum standards of human rights in states of emergency. A preliminary draft of these minimum standards, prepared by Chowdhury, was circulated at the International Law Association's Montreal conference and discussed extensively

³⁶⁵ In a letter to Cherif Bassiouni, written on 28 June 1983, MacDermot acknowledged that a study on the "meaning of the derogations in the International Covenants on the grounds of 'national security' and 'ordre publique'" was already in progress at the International Law Association, but saw "no reason why we should not try to examine the question." See *Letter from Niall MacDermot to Cherif Bassiouni* (28 June 1983), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 309).

³⁶⁶ Christina M Cerna, "The ILA's Human Rights Committee and the Progressive Development of International Law" in Catherine Kessedjian, ed, *Au service du droit international Les 150 ans de l'Association de droit international* (Paris: Éditions Panthéon-Assas, 2023), 467.

³⁶⁷ International Law Association, *Report of the Fifty Seventh Conference of the ILA (Madrid Conference)* (London: ILA, 1976).

³⁶⁸ Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (Pennsylvania, PA: University of Pennsylvania Press, 1994) at 3.

by members in attendance.³⁶⁹ Feedback received on the draft, together with the insights of the ICJ's comparative study, the UN reports by Questiaux and Daes, and earlier academic scholarship, informed the next revision of the minimum standards. In the fall of 1984, months after the Siracusa conference, the final text of the Paris Minimum Standards were approved by resolution at the Association's 61st Conference (the Paris Conference). The resolution recommended that the Paris Minimum Standards be "transmitted by the Secretary-General" of the Association to:

- (a) the Secretary-General of the United Nations for submission, *inter alia*, to the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities;
- (b) the Secretary-General of the Council of Europe for submission to the organs set up by the European Convention on Human Rights;
- (c) the General Secretariat of the Organisation of American States for submission to the Inter-American court of Human Rights; and
- (d) the Secretary-General of the Organisation of African Unity for submission to the African Commission on Human and Peoples' Rights.³⁷⁰

In their final form, the Paris Minimum Standards comprised three overarching sections: (1) The declaration, duration, and control of an emergency; (2) emergency powers and the protection of individuals; and (3) a list of 16 non-derogable rights and freedoms. At several reprises, the Paris Minimum Standards went beyond the text contained within international legal instruments

³⁶⁹ Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London: Printer Publishers, 1989) at 6.

³⁷⁰ International Law Association, *Paris Conference Resolutions: Enforcement of Human Rights [Resolution No. 1 1984]* (London: ILA 1984) [Paris ILA report].

and exercised creative license in drafting the standards within it. This is most clearly illustrated by a closer examination of the 16 rights which are listed as non-derogable under the Paris Minimum Standards.³⁷¹ The right to a fair trial, for instance, is a non-derogable right under the Standards, even as Chowdhury acknowledged that the drafters of the ICCPR had explicitly excluded that right from the list of non-derogable rights entitlements under ICCPR's Article 4(2).³⁷² In defense of its inclusion as a non-derogable right within the Paris Minimum Standards, Chowdhury surveyed the Questiaux report, the Daes report, the ICJ study, and other pronouncements by the Human Rights Committee to ascertain the non-derogability of a right to a fair trial.

4.2.4 Launch of the Siracusa Principles project

In 1983, against the backdrop of these reports and events, Butler proposed that the ICJ lead on a project to develop "Principles of Derogation Under International Human Rights Treaties."³⁷³ Butler, who participated in the Siracusa conference while simultaneously at the helm of the ICJ's Executive Council and the American Association for the ICJ, had founded the Urban Morgan Institute for Human Rights at the University of Cincinnati scarcely five years before the Siracusa conference. As the first endowed human rights institute in the United States, Butler drew in part on fresh funding from the Urban Morgan Trust Fund to finance the Siracusa

³⁷¹ The 16 non-derogable rights under the Paris Minimum Standards are: the right to legal personality; freedom from slavery or servitude; freedom from discrimination; right to life; right to liberty; freedom from torture; right to a fair trial; freedom of thought, conscience, and religion; freedom from imprisonment for inability to fulfil a contractual obligation; right of minorities; rights of the family; right to a name; rights of the child; right to a nationality; right to participate in government; and right to a remedy. There are detailed non-derogable rights listed under each of these 16 articles.

³⁷² Paris ILA report, *supra* note 369 at 84

³⁷³ See *Letter from William J. Butler to Henry R. Winkler* (16 February 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 312).

conference.³⁷⁴ The now-defunct US Information Agency³⁷⁵ provided the majority of the funding for the week-long meeting.³⁷⁶

The Siracusa Principles and the Paris Minimum Standards drew on the same international treaties, *travaux préparatoires*, resolutions and declarations, jurisprudence, scholarship, UN documents, and NGO reports available in the 1980s. While the impetus and sources of these initiatives were similar, their ambition and underlying scope differed. The Siracusa Principles focused on the narrow task of only interpreting the limitations and derogation clauses within the ICCPR, with each of its principles tied directly to a provision of the ICCPR. The Paris Minimum Standards, on the other hand, were not tethered to a single instrument and set about the more ambitious task of articulating a *de novo* set of standards, inspired by a plethora of international and regional legal instruments, including the European Convention on Human Rights, the American Convention on Human Rights, and the Geneva Conventions of 1949 (as well as their Protocols).³⁷⁷ As I note later in this chapter, this larger normative sandbox may have complexified the final text of the Paris Minimum Standards and contributed to its minimal uptake by the legal community and beyond in the years and decades following their adoption.

³⁷⁴ Agreements were made between Butler and Dr. Henry Winkler, President of the University of Cincinnati, to contribute 40,000 USD from the endowment towards the conference. See *Letter from William J. Butler to Henry R. Winkler* (16 February 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 312). See also Tolley, *supra* note 334 at 581.

³⁷⁵ Records show that Butler was in active correspondence with USAID and the US Information Agency in seeking further funding for the work of the ICJ. The official mission of the US Information Agency was to “further the national interest by improving United States relations with other countries and peoples through the broadest possible sharing of ideas, information, and educational and cultural activities.” See 22 USC § 1461-1 (2000), online: <<https://uscode.house.gov/view.xhtml?req=granuleid:USC-2000-title22-section1461-1&num=0&edition=2000>>.

³⁷⁶ By July 1984, final budgeting for the meeting revealed that the US Information Agency provided 41,000 USD out of a total budget of \$69,000 USD for the meeting. See *Letter from William J. Butler to Bill Stetson, US Information Agency* (9 July 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 310).

³⁷⁷ See in general Chowdhury, *supra* note 369. Note that the working papers to the Siracusa conference also draw on other norms in the international human rights lawscape. However, the task of participants at the Siracusa conference was a considerably narrower one than that of the International Law Association’s Paris Minimum Standards.

4.3 Participants and process

4.3.1 Participants

The 1984 Siracusa conference, initiated by the American Association for the ICJ, was held at the Institute of Higher Studies in Criminal Sciences between 8 to 13 May 1984.³⁷⁸ Letters that Butler exchanged in preparation for the conference suggest that the organizers sought to host the conference “in a neutral site outside of the United States” in order to secure the participation of “representatives from the communist countries.”³⁷⁹ The challenges that Lewis experienced in involving experts from these countries in the development of the Statement lingered (see **Section 3.3.1**).

By that time, the ICJ had amassed substantial experience organizing expert committees to clarify and articulate human rights standards. It had also hosted conferences previously at the Institute of Higher Studies in Criminal Sciences. Invitations began going out in January 1984, and the conference was ultimately attended by a group of 31 “distinguished international lawyers” (for a list of conference attendees, see **Table 2**).³⁸⁰

While details about the decision-making process behind their invitations remain unclear, the ICJ was preoccupied to some degree by the geographical diversity of the group. In a letter sent to Butler in 19 January 1984, for instance, MacDermot tellingly asked whether a fourth

³⁷⁸ Siracusa Principles – AAICJ, *supra* note 364. There is an unexplained discrepancy in the archival record on the exact dates of the Siracusa conference. According to an ICJ quarterly newsletter from 1984, the conference took place between 8 to 13 May 1984. However, the Dutch note verbale of 24 August 1984, which presented the Siracusa Principles to the Commission on Human Rights, notes that the conference took place from April 30 to May 4, 1984. See Siracusa Principles Note Verbale, *supra* note 4.

³⁷⁹ See *Letter from William J. Butler to Henry R. Winkler* (16 February 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 312).

³⁸⁰ International Commission of Jurists, *ICJ Newsletter No. 21 - Quarterly Report (1 April - 30 June 1984)* (Geneva: ICJ, 1984).

individual from France should be invited or if “three frenchmen may be enough.”³⁸¹ Conference attendees were among the leading figures in a community of practice that had formed over the past ten years in international human rights law research, advocacy, and diplomacy, with particular expertise on the subject of human rights in states of emergency. Many of these participants had interacted with, or known about, each other’s works and had taken part in or contributed in some form to the key studies and UN reports outlined in **Section 4.2.3**.

Table 2 Participants of the Siracusa Conference (leading to the *Siracusa Principles*)

Name	Role(s) and Affiliation(s)*
1. Badria Al-Alwadhi	Professor of international law, Kuwait; Member, ILO Applications Committee.
2. Cherif Bassiouni	Professor of international law, De Paul University, USA; Secretary-General, International Association of Penal Law.
3. Hanna Bokor-Szego	Professor and Head of International Law Department, Hungarian Academy of Science.
4. Kevin Boyle	Professor of law, Ireland; Director, Irish Centre for the Study of Human Rights
5. William J. Butler	Attorney at Law, New York; Chairman, Executive Committee, International Commission of Jurists
6. Subrata Roy Chowdhury	Senior Advocate, Supreme Court of India; Chairman, International Law Association’s Sub-Committee on Regional Implementation of Human Rights
7. Gordon A. Christenson	Nippert Professor and Law Dean, University of Cincinnati College of Law, USA
8. Erica-Irene A. Daes	Professor of international law, Greece; Member, UN Sub-Commission on Discrimination and Minorities.
9. Alfredo Etcheberry	Advocate and Professor of international law, Chile.

³⁸¹ See *Letter from Niall MacDermot to William J. Butler* (19 January 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 311).

10. Heleno Claudio Fragos	Professor of law, State University, Brazil.
11. Hans Peter Gasser	Legal Counsellor, International Committee of the Red Cross, Switzerland.
12. Fabienne Goux	International Institute of Human Rights, France.
13. Joan Hartman (née Fitzpatrick)	Professor of international law, University of Washington, USA
14. Rosalyn Higgins	Professor of international law, United Kingdom.
15. John P. Humphrey	Former Director, UN Human Rights Division; Professor of international law, Canada.
16. PJG Kapteyn	Member, Council of State, The Netherlands; formerly Professor of international law, Leiden University, The Netherlands.
17. Alexandre Kiss	Professor of international law, Germany; Secretary-General, International Institute of Human Rights, France.
18. Richard B. Lillich	Professor of international law, USA; Chairman, International Law Association's Committee on Enforcement of Human Rights.
19. Bert B. Lockwood Jr.	Director, Urban Morgan Institute for Human Rights; Professor of international law, USA.
20. Niall MacDermot	Secretary-General, International Commission of Jurists, Switzerland.
21. Stephen Marks	Human Rights Officer, Ford Foundation, USA; formerly UNESCO staff member.
22. Andrzej Murzynowski	Professor of criminal procedure; Director, Institute of Criminal Law, Poland.
23. Daniel O'Donnell	Special assistant, Inter-American Institute of Human Rights, Costa Rica
24. Torkel Opsahl	Member, UN Human Rights Commission; Professor of international law, Norway.
25. B. G. Ramcharan	Special assistant to the director, UN Centre for Human Rights, Switzerland.

26. Michael Reisman	Professor of jurisprudence, Yale University, USA.
27. A. Rifaat Khafagy	Administrative Attorney-General, Egypt.
28. Klaus Samson	Coordinator for Human Rights Questions, ILO, Switzerland.
29. Manfred Simon	President de Chambre Honoraire, Cour d'Appel, France.
30. Mumtax Soysal	Professor of Constitutional Law, Turkey.
31. Toine van Dongen	Deputy Human Rights Coordinator, Ministry of Foreign Affairs, The Netherlands.

* Listed roles and affiliations are reproduced from "Participants at the Siracusa Conference" (1985) 7:1 *Human Rights Quarterly* 156.

Several participants were also eminent jurists already working with the ICJ as Commissioners. These included John P. Humphrey, who, as discussed in **Chapter 3**, drew inspiration from the *Statement of Essential Human Rights* in developing the first draft of the *Universal Declaration of Human Rights*. Other ICJ Commissioners included P.J.G. Kapteyn; Alfredo Etcheberry; Heleno Claudio Fragos; and Dr. Badria Al-Alwadhi.

Several individuals took part in the conference as heads of the co-sponsoring organizations: Butler, as Chairman of ICJ's Executive Council and President of the American Association for the ICJ, MacDermot as ICJ Secretary-General, Bert Lockwood as Director of the Urban Morgan Institute for Human Rights, and Cherif Bassiouni as founder and head of the conference venue, the Institute of Higher Studies in Criminal Sciences.

Most of the lead authors and rapporteurs from the pre-Siracusa analyses in **Section 4.2.3** were also engaged, including Daes who drafted the UN report on Article 29 of the *Universal Declaration of Human Rights*, Chowdhury who was lead drafter of the Paris Minimum

Standards, and Richard B. Lillich, who chaired the International Law Association's Committee on the Enforcement of Human Rights (within which the Sub-Committee and the mandate to draft the Paris Minimum Standards resided).

The Siracusa conference also included individuals in influential roles who could facilitate the dissemination of the eventual Siracusa Principles among UN entities. These participants included staff of international organizations, such as Klaus Samson, the first Coordinator for Human Rights Questions within the ILO, and Stephen P. Marks of the Ford Foundation, formerly staff at UNESCO. Government officials and diplomats with close connections to delegates of the Commission on Human Rights, such as Toine van Dongen of The Netherlands,³⁸² were also involved and their roles proved crucial to the eventual dissemination of the Siracusa Principles as an official document of the UN Commission on Human Rights in 1984 (described further in **Section 4.4**).

Although the vast majority of participants were men, six women were also in attendance. Among them were:

- Dr. Al-Alwadhi of Kuwait University, who later became the first female dean of the university's College of Law.
- Rosalyn Higgins, later a member of the UN Human Rights Committee (1984-1997) and eventually the President of the International Court of Justice;
- Hanna Bokor-Szego of the Hungarian Academy of Science and Member of the International Law Association's Committee on Enforcement of Human Rights ;

³⁸² As further explained below, this close connection to the Dutch government and its diplomats was likely crucial to the dissemination of the Siracusa Principles in the months immediately following the Siracusa conference.

- Dr. Daes who was Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and later chaired the UN Working Group on Indigenous Populations and served as a driving force behind the *UN Declaration on the Rights of Indigenous Peoples*;
- Fabienne Goux of the International Institute for Human Rights in Strasbourg, France; and
- Joan Hartman (née Fitzpatrick), Professor at the School of Law, University of Washington, and lead author of the working paper on derogations, published in the *Human Rights Quarterly* special issue on the Siracusa Principles (whom we will return to in **Section 4.4**).³⁸³

Overall, the Siracusa conference's participant list was more expansive and geographically diverse than that of the group of individuals who had developed the *Statement of Essential Human Rights*. Participants of the Siracusa conference joined from Austria, Brazil, Canada, Chile, Egypt, France, Greece, Hungary, India, Ireland, Kuwait, Netherlands, Norway, Poland, Switzerland, Turkey, United Kingdom, and the USA.³⁸⁴

However, unlike the interdisciplinarity of the experts who drafted the *Statement of Essential Human Rights*, which in addition to lawyers included professionals of a non-legal background (e.g., journalists, political scientists, and physicians), the Siracusa conference primarily featured jurists and professionals directly involved in the activities of the international legal community. This concentration of lawyers at the Siracusa conference may be a reflection of how well-developed the community of practice in international human rights law became by the 1980s. The *Statement of Essential Human Rights*, on the other hand, was drafted at the dawn of

³⁸³ Joan F Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision" (1985) 7:1 Hum Rts Q 89.

³⁸⁴ See Siracusa Participants, *supra* note 16.

the UN world order. Lacking access to a network of individuals with legal expertise in international human rights law, the American Law Institute was at once more open with respect to diverse areas of expertise that had bearing on their standards-developing exercise, and considerably more limited in the geographical and gender diversity of its invitees.

4.3.2 Process

The deliberative and consensus-building process adopted at the Siracusa conference was planned several months in advance. Conference participants were split into two committees or working groups, each led by a chair and a special rapporteur. Alexandre Kiss, Secretary-General of the International Institute of Human Rights in Strasbourg, France, served as rapporteur for the working group focusing on the limitations clauses of the ICCPR, while Daniel O'Donnell, who had led the ICJ's 1983 comparative study, acted as rapporteur for the working group on the ICCPR's derogation clause under article 4. Within each working group, the overall aims were to identify: (1) the legitimate objectives of these clauses; (2) the general principles of interpretation which govern their imposition and application; and (3) certain main features of the grounds for limitations or derogations.³⁸⁵

These separate deliberations shaped the final output of the Siracusa Principles, with the interpretive text being divided into two sections: the first examining the ICCPR's 'limitations' clauses—conditions that must be fulfilled by States that want restrict specific rights or liberties—and the other examining the ICCPR's 'derogation' clause, applicable in states of emergency.³⁸⁶

³⁸⁵ Niall MacDermot, ed, "The Siracusa Principles" in *International Commission of Jurists Review* (Geneva: International Commission of Jurists, 1986).

³⁸⁶ Siracusa Principles, *supra* note 1.

Archival records do not indicate whether there were significant divisions of opinion among the group of conference participants nor how long or extensively they were engaged prior to the conference. It is possible that the development of a large body of scholarship and UN reports on the topic of states of emergency had already primed and aligned the conference participants on the key parameters of debate. We do know, however, that time ran out for participants of the week-long Siracusa conference. Reports by the special rapporteurs of the conference reveal that certain subjects could not be addressed in depth. For instance, the concept of ‘arbitrariness’ remained unexplored by the Siracusa conference participants,³⁸⁷ and is recognized as a core gap within the Siracusa Principles today.³⁸⁸ Similarly, the notion of what constitutes a “democratic society” for the purposes of the ICCPR were left unresolved. Principle 21 offers only broad definition, stating:

While there is no single model of a democratic society, a society which recognizes, respects and protects the human rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights may be viewed as meeting this definition.³⁸⁹

Even the title of the Siracusa Principles was determined after the conference. Writing to the conference participants on 9 May 1984, MacDermot noted:

...we did not have time to consider the title to be given to the principles. Someone made the happy suggestion ‘the Siracusa Principles’. I have accordingly proposed the title: ‘The Siracusa

³⁸⁷ Kiss, *supra* note 181 at 16.

³⁸⁸ Ian Seiderman, *supra* note 28.

³⁸⁹ Siracusa Principles, *supra* note 1 at Principle 21. The term “necessary in a democratic society” appears across three limitations clauses of the ICCPR: arts 14 (on right to a fair trial), 21 (on right to peaceful assembly) and 22 (on freedom of association). Note that Lockwood et al examine this expression too in the Siracusa conference’s working paper on limitations. See Bert B Lockwood, Janet Finn, and Grace Jubinsky, “Working Paper for the Committee of Experts on Limitation Provisions,” (1985) 7:1 Hum Rts Q 35.

Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.”³⁹⁰

In the end, while there are notable departures from the text of the ICCPR, the Siracusa Principles largely reflect a conservative approach to legal interpretation rather than an exercise in creative expansion. The text is firmly anchored in the provisions of an existing international treaty. The discussions in Siracusa centered on legal dualities that remain contested in international human rights law today, such as the immediate enforceability of civil and political rights versus the progressive realization of economic and social rights.³⁹¹ Nevertheless, the Siracusa Principles remain one of the most recognizable examples of informal consensus-building in international law today. The next section examines the dissemination strategies that may have contributed to their enduring influence.

³⁹⁰ See *Letter from Niall MacDermot to the Participants at the Siracusa Meeting* (9 May 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 308).

³⁹¹ The Siracusa conference’s working paper on derogations, written by Hartman, explicitly notes that “...the division of the two sets of rights into two separate treaties emphasizes the immediately binding nature of civil and political rights in contrast to progressive implementation of programmatic economic rights” See Hartman, *supra* note 383 at 95.

4.4 Dissemination and outcomes

4.4.1 The Siracusa Principles: a classic on repeat

As Sepúlveda Carmona argues, the legitimacy of informal consensus-building outputs hinges largely on their validation through national and international forums, as well as their incorporation into key resource materials.³⁹² Such validation depends on dissemination and mobilization of consensus output(s), and in this regard, the Siracusa Principles closely followed and expanded on the multi-pronged approach taken by Lewis roughly two decades prior. As described in **Chapter 3**, Lewis had published, printed, and shared the *Statement of Essential Human Rights* through various channels, including as standalone pamphlets accessible to the public, in academic spaces such as conferences and special journal issues, through direct outreach to influential contacts in domestic foreign policy, and in the nascent UN human rights system. While the success of the Siracusa Principles cannot be credited to any single channel of dissemination, those who worked to share the principles adapted Lewis' approach and enhanced it by extending their reach to diplomats, government officials, academics, and civil society. As this section shows, a core enabler of this enhanced reach was the roster of individuals who took part in the Siracusa conference from the outset and became invested in its dissemination in the months and years that followed.

Efforts to disseminate the Siracusa Principles began almost immediately after the conference. The final text of the Siracusa Principles was published and printed in booklet form by the American Association for the ICJ.³⁹³ Simultaneously, the Siracusa Principles were featured in the seventh volume of *Human Rights Quarterly*—now one of the world's leading

³⁹² Sepúlveda Carmona, *supra* note 184.

³⁹³ 'Siracusa Principles – AAICJ', *supra* note 364.

multidisciplinary journals on human rights law.³⁹⁴ Published as a standalone special issue less than a year after the Siracusa conference, the Siracusa Principles were accompanied by legal commentaries drafted by Alexandre Kiss, the special rapporteur on limitations clauses,³⁹⁵ and Daniel O'Donnell, the special rapporteur on derogations clauses.³⁹⁶ The special issue also included the working papers that informed deliberations at the Siracusa conference, one drafted by Bert B. Lockwood and his law students on the ICCPR's limitations provisions, and another by Joan Hartman on the ICCPR's derogations provisions.³⁹⁷ A copy of the ICCPR and its Optional Protocols, the limitations provisions cross-referenced to the ICCPR,³⁹⁸ and a list of participants at Siracusa were also appended to the issue.³⁹⁹

A closer examination of the channels through which the Siracusa Principles were disseminated highlights the significant role played by attendees of the Siracusa conference, who had vested interests in promoting the adoption of the principles. Lockwood, also a participant to the Siracusa conference and author of one of its working papers,⁴⁰⁰ had joined as Director of the Urban Morgan Institute in 1979. By 1982, *Human Rights Quarterly* was an edited publication of the Urban Morgan Institute, with Lockwood as Editor-in-Chief.⁴⁰¹ The project's close ties to the

³⁹⁴ It is possible that *Human Rights Quarterly* did not enjoy the same degree of international recognition and prestige in 1985 as it does at the time of this dissertation's writing in 2024. Nevertheless, in a period where academic venues on international human rights law were dominated by jurists and legal scholars, the journal was established with the novel aim of making human rights law accessible to a wider, multidisciplinary audience. See Bert B Lockwood, "Richard Pierre Claude" (2011) 44:3 APSC 674.

³⁹⁵ Kiss, *supra* note 181.

³⁹⁶ O'Donnell, *supra* note 181.

³⁹⁷ Lockwood, Finn & Jubinsky, *supra* note 389; Hartman, *supra* note 383.

³⁹⁸ "Individual Limitation Provisions Cross-Referenced to the Covenant" (1985) 7:1 Hum Rts Q 155.

³⁹⁹ See Siracusa Participants, *supra* note 16.

⁴⁰⁰ Lockwood, Finn & Jubinsky et al, *supra* note 389.

⁴⁰¹ Note that *Human Rights Quarterly* was first published as *Universal Human Rights* in 1979, edited by University of Maryland's Richard Pierre Claude and housed at the division of behavioural and social sciences at the University of Maryland. In 1982, the faculty and students of the Urban Morgan Institute for Human Rights took over as the journal's academic editorial hub. Notwithstanding the academic institution responsible for editing the journal, Johns

Urban Morgan Institute, whose faculty and students continue to edit *Human Rights Quarterly* today, likely contributed to the rapid publication of the Siracusa Principles as a special issue in the journal.

The introduction of the Siracusa Principles before UN bodies may have had the biggest impact on the global influence and widespread use of the Siracusa Principles. In a note verbale addressed to the 41st session of the UN Commission on Human Rights in February/March 1985, P. H. Kooijmans, head of The Netherlands delegation, former President of the Commission, and future judge of the International Court of Justice,⁴⁰² requested that the Siracusa Principles be distributed to members of the Commission as a UN Document (E/CN.4/1985/4).⁴⁰³ Summary records of the Commission's 41st session reveal that Kooijmans spoke at length about the Siracusa Principles, giving high praise and underscoring the relevance of the Siracusa Principles to the work of the Commission.⁴⁰⁴ Presumably to strengthen the legitimacy of the Siracusa

Hopkins University Press has always been the journal's publishing house. See Richard Pierre Claude, "From the Editor," (1979) 1:1 *Universal Human Rights*: 1–2.

⁴⁰² Nico Schrijver, "A Portrait of Judge P. H. Kooijmans – A Passionate Advocate of the Rule of Law in International Affairs" (2014) 27 *Leiden J Intl L* 839.

⁴⁰³ Siracusa Principles Note Verbale, *supra* note 4, at 1. This was considered by MacDermot to be a significant advantage in dissemination efforts, as he wrote in a letter to Siracusa conference participants:

"I am glad to say that the Director of the UN Centre for Human Rights has agreed to circulate the document as a document of the UN Commission on Human Rights. This will ensure a wider distribution for it, than if it were a Sub-Commission document. It will be circulated as a UN document and not as an NGO document. I hope this will also ensure its expert translation into the other working languages of the Commission."

See *Letter from Niall MacDermot to the Participants at the Siracusa Meeting* (28 June 1984), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 308).

⁴⁰⁴ Kooijmans, per the summary records: "The adoption in 1984, by human rights experts from all over the world, of the so-called [Siracusa Principles] was of particular importance. The finding in principle 10 that whenever a limitation was applied it had to pursue a legitimate aim and had to be proportional to that aim was of great significance. With regard to specific limitation clauses, it was worth mentioning that 'public order' (principle 22) was defined as the sum of the rules which ensured the functioning of society; consequently respect for human rights was itself part of public order. Principle 32 stated that the systematic violation of human rights undermined national security and that, consequently, a State responsible for such violations should not invoke national security as a justification for measures aimed at suppressing opposition to such violation. His delegation suggested that the Centre for Human Rights should bring those principles to the attention of the members of the Human Rights

Principles, the note verbale explicitly stated that participants of the Siracusa conference included “professors, practitioners and other experts in human rights from *all* regions of the world [emphasis added].”⁴⁰⁵

As with the strategic move to disseminate the Siracusa Principles as a special issue, Siracusa conference attendees with close connections to the Commission on Human Rights were crucial in disseminating the principles within the UN human rights system. Toine van Dongen, a participant at the Siracusa conference, was notably also the Deputy Human Rights Coordinator of the Dutch Ministry of Foreign Affairs. He found the Siracusa Principles to be of such value that he secured his government’s sponsorship of the document before the Commission.⁴⁰⁶ Copies of both the *Human Rights Quarterly* special issue and the American Association for the ICJ’s booklet were shared with members of the Commission on Human Rights and the Sub-Committee.

Building on the success of the Siracusa project, the Dutch Government soon rallied behind the ICJ, the Urban Morgan Institute, and the University of Limburg (now Maastricht University) in The Netherlands to develop a new set of guidelines interpreting the limitations of economic, social, and cultural rights. This work culminated in the 1987 *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (the Limburg Principles), which were disseminated using strategies similar to those employed for the

Committee and the Sub-Commission.” See International Commission of Jurists, *ICJ Report on Activities 1981-1985* (Geneva: ICJ, 1986) at 25.

⁴⁰⁵ Siracusa Principles Note Verbale, *supra* note 4, at 1. As discussed earlier in this chapter, this assessment – while perhaps technically correct – was more than a minor misrepresentation of the diversity of the conference participants.

⁴⁰⁶ Tolley, *supra* note 334 at 581.

Siracusa Principles.⁴⁰⁷ A decade later, Maastricht University, through its newly established Centre for Human Rights, collaborated once again with the ICJ and the Urban Morgan Institute to develop the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, and again, adopted similar strategies in their deployment.⁴⁰⁸ Maastricht University has since collaborated on two other informal consensus-building initiatives: one on the 2011 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*⁴⁰⁹ and the other on the 2023 *Maastricht Principles on the Human Rights of Future Generations*.⁴¹⁰ Maastricht University's recurring role in these initiatives has become so significant that these documents are now sometimes referred to as Maastricht I, II, III and IV, respectively.

The introductory chapter of this dissertation already established the vast influence of the Siracusa Principles across legal and broader communities of practice. While the Siracusa Principles left a lasting mark on the study and practice of international human rights law in emergency contexts, not all initiatives of the same era achieved similar success. Notably, despite early recognition, the Paris Minimum Standards gradually faded in prominence. As I examine next, this waning influence may be the result of several choices in the process and dissemination of the Paris Minimum Standards which diverged in important ways from the Siracusa Principles.

⁴⁰⁷ Like the Siracusa Principles, the Limburg Principles were featured in a special issue symposium in *Human Rights Quarterly* and issued as UN document in a note verbale by the Dutch delegation to the Commission on Human Rights in 1987. See *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, Commission on Human Rights, 43rd sess, UN Doc E/CN.4/1987/17 (8 January 1987). See also *Limburg Principles*, *supra* note 197.

⁴⁰⁸ *Maastricht Guidelines on ESCR Violations*, *supra* note 197.

⁴⁰⁹ *Maastricht Principles on ETOs*, *supra* note 197.

⁴¹⁰ See "The Maastricht Principles on the Human Rights of Future Generations," online (microsite): <www.rightsoffuturegenerations.org>.

4.4.2 The Paris Minimum Standards: a one-hit wonder

Like the Siracusa Principles, the Paris Minimum Standards were also published in a prestigious academic journal soon after their final text was agreed upon by consensus through the International Law Association. In October 1985, this text was reproduced in the “Current Developments” section of the 79th volume of the *American Journal of International Law* in an article authored solely by Lillich.⁴¹¹ Four years later, Chowdhury also published an erudite monograph on “Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency,” which served both as an in-depth legal commentary to the Paris Minimum Standards, and more generally, as a treatise on the topic of states of emergency in international human rights law.⁴¹²

The Paris Minimum Standards were referenced in the same paragraph as the Siracusa Principles in the Human Rights Committee’s General Comment 29, adopted at the Committee’s 72nd session in 2001, which established guidelines that States parties to the ICCPR are required to respect during a state of emergency. Both the Paris Minimum Standards and the Siracusa Principles were also acknowledged a little over ten years later, when experts in international law, national security and human rights, convened by Article 19 and the International Centre Against Censorship met in South Africa to conclude another informal consensus-building initiative that led to the “Johannesburg Principles on National Security, Freedom of Expression and Access to Information.”⁴¹³

⁴¹¹ Paris Minimum Standards, *supra* note 23.

⁴¹² Chowdhury, *supra* note 369.

⁴¹³ Adopted in 1998, the Johannesburg Principles acknowledged “the enduring applicability of the [Siracusa Principles] and the [Paris Minimum Standards]” See “The Johannesburg Principles on National Security, Freedom of Expression and Access to Information” (1998) 20:1 Hum Rts Q Quarterly 1 [Johannesburg Principles]. Note, however, that the commentary to the Johannesburg Principles drew far more explicitly on the Siracusa Principles

Despite receiving some recognition within similar communities of legal scholars and practitioners,⁴¹⁴ however, the Paris Minimum Standards have gradually faded from use, eclipsed by the lasting influence of the Siracusa Principles. At the International Law Association's 79th conference in 2020, the interim report of the Committee on Human Rights in Times of Emergency lamented this anticlimactic outcome, noting that

...in retrospect, the efforts undertaken by the [International Law Association] in the 1980s to analyse and address the topic of human rights in times of emergency have, somewhat expectedly, not been able to provide a solution to all of the practical and theoretical challenges arising in connection with this still very topical issue.⁴¹⁵

On the Paris Minimum Standards, specifically, the report acknowledged that the standards “do not appear to have exercised a decisive influence on the subsequent practice and scholarly discussions on this issue [of human rights in times of emergency],” though they are “occasionally addressed in legal literature.”⁴¹⁶ Why did the Siracusa Principles and the Paris Minimum Standards encounter such different fates? I turn to this question next.

4.4.3 Siracusa and Paris: a tale of two consensus conferences

Over the years, the Siracusa Principles have been vernacularized and used by a broader and more interdisciplinary audience (see **Section 1.1**), while the Paris Minimum Standards are

than it did on the Paris Minimum Standards. *See in general* Sandra Coliver, “Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information,” (1998) 20:1 Hum Rts Q 12.

⁴¹⁴ *See for instance* the reviews of Chowdhury's monograph: Françoise J Hampson, “Review of Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency” (1990) 39:4 Int'l & CLQ 965; Susan Marks, “Review of Rule of Law in a State of Emergency. The Paris Minimum Standards of Human Rights Norms in a State of Emergency” (1990) 49:1 Cambridge LJ 160.

⁴¹⁵ Christina Cerna et al, “Committee on Human Rights in Times of Emergency: Interim Report - Developments in Standard Setting and Practice (1990-2020)” in *International Law Association: Report of the Seventy-Ninth Conference Held Online - Kyoto (29 November - 13 December 2020)* (London: ILA, 2021) at para. 7.

⁴¹⁶ *Ibid* at para. 8.

known to a thin stratus of international law scholars. While it is difficult to explain this discrepancy with certainty, I offer two hypotheses, informed by the case studies analyzed above.

First, although both texts emerged from practices of interpretive consensus-building, the relative simplicity of the Siracusa Principles may have facilitated their dissemination and uptake across a wider and more diverse array of communities, both within and outside the legal field. Whether materially in terms of page count, or more conceptually in terms of the straightforwardness of their mandate (to interpret certain provisions of the ICCPR), the scope of the Siracusa Principles was restrained. This limited interpretive scope was chosen from the outset, with MacDermot writing in 1983:

With regard to the subject matter to be discussed...we should concentrate on the International Bill of Human Rights. If we discuss the European documents, we shall presumably also have to discuss the Inter-American Convention and the African Charter, and this would spread the jam too thin for any in-depth discussion. People will, of course, be free to refer, for example, to the European jurisprudence if they wish.⁴¹⁷

The limited scope of the project, as well as the restrained number of experts who were involved in the consensus-building project, may have enabled the Siracusa Principles to be more easily agreed to, understood, and adopted not only by communities of practice in international law, but also by practitioners and researchers outside of the legal sphere. The Paris Minimum Standards, on the other hand, set about the loftier goal of interpreting the human rights obligations of states during states of emergency across a broad range international treaties and

⁴¹⁷ *Letter from Niall MacDermot to William J. Butler* (16 August 1983), Cincinnati, Ohio, William J. Butler Papers (Box 12-4, folder 309).

other legal instruments. It also did so within the full view and input of the International Law Association's vast membership.

Another factor that may explain the differential uptake of these two consensus-building initiatives is *how* the authorship of resulting standards was presented. It is nearly impossible to give an equal hand in drafting to all contributors of a collective work. Someone must inevitably take up the pen. However, the public domain contains no indication of those who penned the Siracusa Principles.⁴¹⁸ Even as a published article in *Human Rights Quarterly*, the Siracusa Principles were presented on their own, without authorship.⁴¹⁹ By contrast, the Paris Minimum Standards were attributed to identifiable lead authors from the outset of their development. Despite undergoing multiple rounds of feedback from the vast membership of the International Law Association, the central contributions of Chowdhury, as the drafter of the standards, and Lillich, as the chair of the Association's Committee on Enforcement of Human Rights, are consistently acknowledged in publications related to the Paris Minimum Standards.⁴²⁰

At least two reasons may explain the more successful dissemination and uptake of the collectively authored Siracusa Principles. First, attributing the output of consensus to a single or a select few authors accordingly concentrates the 'ownership' or 'stake' of that work in fewer hands, potentially missing an opportunity to elicit the support of those who participated in the consensus conference in further dissemination and promotion.⁴²¹ As surveyed in **Section 4.4.1**, a

⁴¹⁸ The same can be said of the Maastricht guidelines which the ICJ helped develop (Maastricht I, II, and III).

⁴¹⁹ As mentioned earlier, a list of conference participants was appended in a separate 'article' to the special issue, but no single individual was credited as being the primary author or drafter of the Siracusa Principles. The list of participants is reproduced in Table 2.

⁴²⁰ It is paradoxical that the Paris Minimum Standards are ultimately traced to two key individuals, as these standards underwent a more inclusive, deliberate, and lengthier consultation process than the Siracusa Principles.

⁴²¹ Both the Siracusa Principles and the Statement of Essential Human Rights benefitted from contacts who were 'at the right place at the right time,' holding positions of authority and influence or holding close association with people in positions of authority and influence.

core strength of the Siracusa Principles was its dissemination by the many influential individuals who were involved in its adoption conference in academic and diplomatic circles over time.

Second, outputs of informal consensus-building most resemble international legal norms when they are not associated with primary authors. Despite being products of intense negotiation, international treaties are never accompanied by an acknowledgment of *who* wrote them. The latter is related more fundamentally to the notion of *legitimacy* introduced in **Section 1.3.5** of this dissertation. Outputs of informal consensus-building may carry greater legitimacy when attributed to a collective of experts, rather than to individuals. This remains as true of international law as it does with other domains of professional expertise, such as medicine. The presentation of collective authorship (and no direct authorship) arguably imbues expert consensus with a sense of “mechanical objectivity” or—in the words of philosopher Thomas Nagel—the impression that they represent a detached “view from nowhere”.⁴²²

It is important to critically consider whether it is ethical to overlook the role individuals play in the creation of these informal consensus-building works. Transparency and accountability would certainly be enhanced if such initiatives explicitly acknowledged the individuals who led and shaped their development. Recent trends in informal consensus-building reflect a move in this direction, with many initiatives now making an effort to name those who participated in steering, drafting, or otherwise management of the process. At minimum, it has become more common to identify the members of the core steering group, drafting group, secretariat, or some

⁴²² As Nagel writes, “a view or form of thought is more objective than another if it relies less on the specifics of the individual’s makeup and position in the world, or on the character of the particular type of person he is.” See Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press, 1986) at 5.

combination thereof. The identification of a “chairperson” or lead figure has also become standard practice. The PHE Principles, discussed in **Chapter 5**, took this approach.

Moreover, the question of legitimacy in such initiatives has shifted over the years. While the authority of experts—individuals distinguished by their deep knowledge or extensive experience—was revered in the past, this reverence has increasingly taken a postmodern turn, questioning what qualifies someone as an 'expert.' Who gets to have a say in shaping these influential documents? Whose voices are included or excluded? I grappled with these questions firsthand while leading the development of the PHE Principles. This experience underscored the complexities of ensuring that diverse perspectives are represented while navigating the practical constraints that often accompany such processes.

There are no easy solutions to this dilemma. In many cases, the practical demands of completing an initiative, whether due to limited time, funding, or other factors, may ultimately outweigh the ideal of maximizing consultation, participation, and public input in the informal consensus-building project. This raises the question of whether the process, in its rush to completion, sacrifices the inclusivity that could enhance the legitimacy of the final outcome. As methods for informal consensus-building in international law continue to evolve, striking an appropriate balance between expertise, representation, and practicality will remain a fundamental challenge.

4.5 Chapter Conclusion

This chapter shows how the making of the Siracusa Principles as well as its subsequent dissemination contributed to the legitimacy and eventual ‘stickiness’ of the principles more than four decades later. The Siracusa Principles both built upon and diverged from earlier practices of informal consensus-building, notably those surrounding the *Statement of Essential Human Rights*. Like the Statement, the creators of the Siracusa Principles sought to develop an initiative with a focus on clear processes, as well as rigour, prestige, and geographic diversity among participating experts. In addition to geographic representation, women also began to take part in such efforts, albeit in relatively smaller numbers.

These small gains in gender and geographic diversity came at the expense of interdisciplinarity. Unlike the Statement, the Siracusa Principles took place during a period of rapid growth and activity for the field of international human rights law. By that point, prominent human rights treaties, including the ICCPR and ICESCR, had entered into force. To engage in this new field, technical expertise and professional rank became the defining criteria for inclusion at the informal consensus-building table. These criteria privileged jurists and narrowed the space for contributions from adjacent disciplines. They reinforced a legalistic mode of authority and reoriented the nature of the informal consensus-building exercise.

Despite these differences, the ICJ employed a knowledge mobilization strategy strikingly similar to that pioneered by Lewis and his colleagues decades earlier. Following the Siracusa conference, the Principles were published in booklet form and featured in a special issue of *Human Rights Quarterly*, accompanied by expert commentaries and working papers. Conference attendees with influential institutional affiliations played pivotal roles in this dissemination. In particular, a major boost to the legitimacy of the Siracusa Principles came from

their introduction to the UN Commission on Human Rights in 1985, championed by Dutch delegate P.H. Kooijmans and supported by participant Toine van Dongen. Their efforts led to the distribution of the Siracusa Principles as a UN document shared with key UN stakeholders, including states. This impactful dissemination strategy served as a model for later initiatives, including the Limburg Principles (1987) and the Maastricht Guidelines (1997), with Maastricht University emerging as a recurring hub in similar informal consensus-building initiatives—subsequently referred to as Maastricht I through IV.

The consolidation of international human rights law as a field also meant that, unlike the drafters of the Statement, the Siracusa participants faced a task that was more interpretive than imaginative in nature. The supervisory bodies of the ICECSR and ICCPR had yet to produce a substantial body of jurisprudence or general comments clarifying their interpretations of treaty text. Meanwhile, the proliferation of politically motivated states of emergency throughout the 1970s and 1980s galvanized a growing community of practice around the need to clarify how human rights obligations could be limited or derogated from in times of crisis. The central question was no longer what the essential human rights were, but how they should be interpreted and applied under specific circumstances. Contemporary practices of informal consensus-building, including the PHE Principles, have largely adhered to this model of limited interpretive flexibility in expert consensus statements on norms. This does not mean that legal imagination has vanished; rather, it is expressed subtly and is often only perceptible through careful doctrinal analysis.

This chapter also highlights how two informal consensus-building initiatives, despite emerging from similar contexts and involving overlapping expert communities, can follow markedly different trajectories. The Siracusa Principles and the Paris Minimum Standards both

responded to growing concerns around the legal regulation of states of emergency, yet their outcomes diverged significantly. One reason for this divergence lies in the scope of their ambitions. The Siracusa Principles maintained a focused mandate: to clarify the ICCPR provisions on limitations and derogations during national emergencies. In contrast, the Paris Minimum Standards undertook the far more ambitious task of formulating an entirely new set of minimum human rights standards applicable in such contexts. This expansive goal complicated the search for consensus. If the drafters of the Siracusa Principles navigated the consensus-building process like a sailboat—agile and unencumbered—those of the Paris Minimum Standards could only do so like a steamship, deliberate and constrained by the methodical workings of the International Law Association.

A second explanation for the enduring influence of the Siracusa Principles lies in how authorship and expertise were presented. While the Paris Minimum Standards were developed through an extensive and consultative process, the initiative ultimately traced back to the efforts of just two individuals. The Siracusa Principles, by contrast, reflected collective authorship, projecting the kind of neutrality and legitimacy typically associated with formal legal standards. This appearance of broad-based support, coupled with the backing of influential institutions and actors, may have further contributed to the Siracusa Principles' visibility and uptake in both scholarly and institutional circles.

At the same time, the Siracusa Principles were a product of their time. As the next chapter will illustrate, their relevance came under scrutiny during COVID-19. There were several challenges raised by the pandemic that the Siracusa Principles had not fully anticipated. First, the pandemic underscored the impact of public health emergencies on a broader spectrum of rights, extending beyond civil and political rights to economic and social rights. Second, it exposed

tensions between precautionary public health measures and the principle of proportionality, particularly in contexts marked by scientific uncertainty. Third, the global scramble for equitable access to medical countermeasures further disrupted traditional notions of national sovereignty in emergencies, raising questions about the emergence of a norm of international solidarity in times of shared crisis. Fourth and more broadly, the past four decades have seen the development of extensive jurisprudence in areas addressed by the Siracusa Principles, limiting their contemporary utility unless integrated with more recent legal developments.

This chapter has attempted to reconstruct the development of both initiatives through scholarly literature and archival sources. Nonetheless, significant gaps remain. Decades later, limited efforts have been made to systematically document the inner workings of informal consensus-building processes. This raises important questions: Would initiatives like these be recognized as legitimate today, particularly given the limited representation of women and historically underrepresented groups in their formulation? What considerations guide those who convene informal consensus-building initiatives? And how might these processes be improved in the future? I confronted these and other questions as an insider and lead of a recent informal consensus-building initiative that sought to build on the Siracusa Principles and address their gaps in the context of public health emergencies. This effort, which culminated in the PHE Principles, is discussed in the next chapter.

5 *The Principles and Guidelines on Human Rights and Public Health*

Emergencies: An Insider's Account

5.1 Chapter introduction

The cases analyzed above highlight areas of convergence as well as lessons learned in developing informal consensus on the meaning of norms in international human rights law. On paper, the practice of informal consensus-building in international law involves the convening of several dozen or so individuals who are considered ‘experts’ in a given field, and whose stated goal in reaching consensus is to authoritatively and comprehensively restate where the law stands on a normative gap or uncertainty in that field through consensus-based deliberations. While the process of consensus-building can last anywhere from a week to several years, the ultimate aim is to develop an output that will be viewed by broader communities of practice as an authoritative interpretation of the law and taken up by those who are empowered to implement or reform the law, as well as those who advocate for its application or improvement.

Yet as the preceding chapters illustrate, these practices are not merely neutral, apolitical, or scientific endeavours. From the moment an informal consensus-building initiative is conceptualized, substantive and procedural choices must be made that will shape the output of consensus and guide the life that output will have outside of the group of individuals who oversee its development. From a substantive perspective, while the outputs of informal consensus-building initiatives purport to merely ‘clarify’ or articulate existing international law, they frequently extend beyond established rules, leveraging interpretative flexibilities. Rarely is this creative license in interpretation explicitly acknowledged. Instead, convenors often position the consensus output as “reaffirming” or “restating” existing international law. This positioning

speaks to the need of ensuring that broader communities of practice in international law view the output as a legitimate and authoritative source of norm interpretation. To elaborate on and contextualize the consensus text, it is now common to include expert commentaries, which have grown increasingly detailed, sometimes spanning entire books.⁴²³

From a procedural perspective, the determination of who qualifies as an “expert” for the purposes of consensus-building is as much a strategic decision as it is an operational one. In earlier cases of informal consensus-building, it was common to convene people of high rank who had reached a pinnacle in their legal career and whose international renown would help promote the onwards dissemination of the consensus output to broader communities of practice. For this same reason, the involvement of officials whose work was squarely located in some domain of international law practice, such as staff of international organizations or legal advisers to state governments, was preferred. As the scholarly field of international human rights law became more established, participants were increasingly selected from the academic setting and strictly of legal training. Over time, concerns about diversity became more pronounced, with geographic and gender representation assuming greater importance in constituting these groups.

Because so little is written on informal consensus-building as practice, unpacking the context and processes in such initiatives, and determining whether such efforts met expectations of the convenors is in part a work of estimation. Archival materials rarely detail the myriad decisions—from the mundane to the significant—that shape these initiatives, such as determining the participants, delineating the project’s conceptual scope, defining what consensus means, and organizing processes conducive to agreement.

⁴²³ See Chowdhury, *supra* note 369.

To complement the earlier case studies, this chapter draws on my experience as an insider to an informal consensus-building process that unfolded largely during the COVID-19 pandemic (2020–2023). As previously noted, despite their historical importance, the Siracusa Principles proved inadequate in guiding states on human rights limitations and derogations during the pandemic. This informal consensus-building project sought to complement the Siracusa Principles by elaborating on a set of human rights guiding principles that would be applicable to the specific context of public health emergencies. The project culminated in the 2023 *Principles and Guidelines on Human Rights and Public Health Emergencies* (the ‘PHE Principles’) reproduced in **Appendix B** and published open access via the *Journal of Global Health Law*.⁴²⁴

As with the *Statement of Essential Human Rights*, Siracusa Principles, and the Paris Minimum Standards, what made the PHE Principles possible was a growing community of practice in global health law. In the next section, I survey the origins and growth of this community of practice.

⁴²⁴ See PHE Principles, *supra* note 31.

5.2 Global health law as an emerging community of practice

5.2.1 Origins of communities of practice in global health law

For more than a century, law has served as the “foundation for the public health activities of government.”⁴²⁵ International law, too, has historically played a role in governing some health matters, as governments sought to mitigate cross-border threats to public health through multilateral institutions and legal agreements. As international trade intensified in the 19th century, sovereign nations—primarily among the trading powers in Europe—sought to control exogenous threats to public health.⁴²⁶ While these early negotiations in international health law⁴²⁷ led to the first International Sanitary Convention and emphasized the need for cooperation and common standards to prevent the spread of infectious diseases, a central concern in diplomatic circles was less about improving global health than protecting “favored nations from the ‘grandes maladies epidemiques’ originating primarily in less favored ones.”⁴²⁸

Compounding this narrow focus of negotiations, these early diplomatic initiatives also revolved around a limited biomedical understanding of health. Their primary emphasis, informed by the emerging science of germ theory, was on the technical dimensions of disease prevention. Diplomats in these early sanitary conferences engaged regularly with scientists and health professionals, who spoke the language of science and public health, focused on the mechanics of

⁴²⁵ James A. Tobey, *Public Health Law*, 2nd ed (New York: The Commonwealth Fund, 1939). See also Frank Grad in his *Public Health Law Manual*, positing that ‘the field of public health is firmly grounded in law and could not long exist in the manner in which we know it today except for its sound legal basis.’ Frank P. Grad, *The Public Health Law Manual*, 2nd ed (Washington, DC: American Public Health Association, 1990).

⁴²⁶ Valeska Huber, “The Unification of the Globe by Disease? The International Sanitary Conferences on Cholera, 1851-1894” (2006) 49 *The Historical Journal* 453 at 476.

⁴²⁷ When juxtaposed against the term ‘global health law,’ the usage of ‘international health law’ in this article refers to international laws *stricto sensu* - that is legally binding agreements negotiated between sovereign states under the auspices of the WHO.

⁴²⁸ Marcos Cueto, Theodore M. Brown & Elizabeth Fee, *The World Health Organization: A History* (Cambridge: Cambridge University Press, 2019) at 16.

pathogen transmission across borders, and advocated for sanitary measures at border crossings to curb the spread of infectious diseases.⁴²⁹ The underlying (and still dominant) assumption in these interdisciplinary conversations was that incorporating public health and scientific tenets into these border measures was not only critical for safeguarding public health but crucial for facilitating international trade. This symbiotic relationship between scientifically driven health safeguards and international trade signified that protective measures could alleviate trade restrictions, yielding benefits for both spheres.⁴³⁰

The mainstreaming of *lawyers*' involvement in global health represents a more recent development, with its origins closely tied to the inception of the WHO and a growing understanding of the interconnectedness of population health around the world. With its mandate to “act as the directing and co-ordinating authority on international health work,”⁴³¹ WHO and its plenary body of member states, the World Health Assembly, were imbued with significant lawmaking authorities, including the authority to:

- Adopt conventions or agreements with respect to any matter within the competence of the Organization (Article 19);
- Adopt legally binding regulations that enter into force for all parties after a specified period of time (Articles 21 and 22);⁴³² and

⁴²⁹ Valeska Huber, “Pandemics and the Politics of Difference: Rewriting the History of Internationalism through Nineteenth-Century Cholera” (2020) 15 *Journal of Global History* 394 at 400.

⁴³⁰ David Fidler, “Trade and Health: The Global Spread of Diseases and International Trade” (1997) 40 *German Yearbook of International Law* 300 at 311.

⁴³¹ World Health Organization, “Constitution of the World Health Organization” in *Basic Documents*, 49th ed (Geneva: World Health Organization, 2020) [WHO Constitution] at art 2.

⁴³² Under Article 21 of the WHO Constitution, the World Health Assembly may adopt regulations concerning a subset of issues, including with respect to “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.” Importantly, regulations adopted under this provision are opt-out instruments, requiring WHO Member States to notify the Director-General of their wish not to be bound by the

- Issue recommendations with respect to any matter within the competence of the Organization (Article 23).

The advent of WHO forever changed global health law, not just by consolidating normative authority to an unprecedented degree but also by comprehensively defining health in the preamble of its Constitution as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” and articulating the first international recognition of the human right to health.⁴³³ WHO’s Constitution thus enabled WHO to engage in a wide range of health promoting agendas, including those shaped by the social, commercial, and environmental determinants of health.⁴³⁴ In theory, these authorities should have paved the way for rich and interdisciplinary linkages between international law and public health and a prominent role for the international lawyer working in global public health. As Taylor and others have pointed out however, unlike other comparable international organizations (such as the UN Environment Programme and the International Maritime Organization), such linkages have taken much longer to bear fruit at WHO, owing in part to an institutional culture dominated by a “conservative medical professional community.”⁴³⁵

It was only once the international community grappled with the profound interconnectedness of global health issues through several public health crises and civil society movements that a space for the global health lawyer gained momentum. The emergence of the

instrument within a stipulated period of time. In the absence of such notification, regulations will be automatically binding. *Ibid* at art 21.

⁴³³ World Health Organization, *supra* note 431 at preamble

⁴³⁴ Sharifah Sekalala & Roojin Habibi, “Global Health Law: Legal Frameworks to Advance Global Health” in Lawrence O Gostin & Benjamin M. Meier, eds, *Global Health Law and Policy: Ensuring Justice for a Healthier World* (Oxford: Oxford University Press, 2023).

⁴³⁵ Allyn L Taylor, “Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health” (1992) 18 Am J L & Med 301 at 303.

HIV pandemic, for instance, sparked a staggering interest in using international and national public health laws to respond to the pandemic, particularly as pre-existing legislative framework proved either inadequate or violative of human rights in their application to localized outbreaks.⁴³⁶ By the late 1990s, some legal scholars in international health law documented an “unprecedented burgeoning interest, meetings and activities related to national and international public health law.”⁴³⁷ The early 2000s saw discussions even within the WHO regarding the establishment of a prospective NGO, tentatively titled ‘Lawyers for Global Public Health’ (LGPH).⁴³⁸ Potential functions envisioned for this organization included legal analysis, capacity-building, pedagogy, expert guidance, and context-specific legal counsel. Though LGPH was never formalized, its conceptual essence gathered momentum across time. As I argue below, this trajectory paved the way for a constellation of research collaboratives, institutions, and professional networks, giving rise to evolving and dynamic communities of practice in global health law.

5.2.2 Who are the global health lawyers?

It is increasingly common for today’s professional specializing in health-related international law to self-identify as a lawyer who engages in global health law—or in other words, a global health lawyer.⁴³⁹ This term has gained traction, despite differing expert opinions

⁴³⁶ Lawrence O Gostin et al, “The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development” (2019) 393 *The Lancet* 1857.

⁴³⁷ Allyn L Taylor, “Globalization and Public Health: Regulations, Norms, and Standards at the Global Level, Background Paper for the Conference on World Health Cooperation,” Mexico City, Mexico (20 March - 1 April 1998).

⁴³⁸ The proposal for an NGO called ‘Lawyers for Global Public Health’ was explored in a background paper prepared by the WHO Scientific Resource Group on Globalization, Trade and Public Health which sought to examine ‘whether need for such an effort exists and, if so, what issues developing the concept into action might raise.’ See WHO Scientific Resource Group on Globalization, Trade, and Public Health, “Lawyers for Global Public Health” STU/H&T/2003.3 (Geneva: WHO, 2003).

⁴³⁹ A search for ‘global health lawyer’ on social media platforms (e.g., “X” and LinkedIn) will reveal the profiles of numerous professionals who take up the shorthand as a description of their position.

as to whether global health law constitutes a standalone ‘field’ of international law.⁴⁴⁰ At the core of it, only a few binding instruments are usually referenced in discussions of global health law. These include the *Constitution of the WHO* (1946), the *WHO Framework Convention on Tobacco Control* (2003) and the *International Health Regulations* (2005). At its broadest, however, this domain of law can encompass all principles, rules, norms, and decision-making procedures that shape the health of the world’s population.⁴⁴¹ Some even maintain that global health law is best understood as an *approach* to international law aimed “at placing human health interests on the same plane as other recognized interests,” such as security, economics, and trade.⁴⁴²

Having explored how global health law is conceptualized as a body of norms, actors, and institutions, and briefly traced its gradual development as a domain of legal practice and academic study, I now circle back to Adler's concept of a community of practice to ask if there is a discernible community of practice—or several—for ‘global health lawyers.’ While an empirical study is necessary to answer this query, a diverse array of recent research, advisory, teaching, and capacity-building endeavours point towards (1) a growing “community of people”

⁴⁴⁰ Brigit Toebes, “Global health law: defining the field” in Gian Luca Burci & Brigit Toebes, eds, *Research Handbook on Global Health Law* (Cheltenham, UK: Edward Elgar, 2018) 2; Lawrence O Gostin & Allyn L Taylor, “Global Health Law: A Definition and Grand Challenges” (2008) 1:1 *Public Health Ethics* 53.

⁴⁴¹ Steven J. Hoffman, “The Evolution, Etiology and Eventualities of the Global Health Security Regime” (2010) 25:6 *Health Policy & Planning* 510. It should be noted that a variation of this definition of “global health law” has also been advanced by some to characterize “international health law.” See Claude-Henri Vignes, “The Future of International Health Legislation” (1989) 40 *International Digest of Health Legislation* 16:

International health law is thus seen as covering all principles, rules, guidelines, or recommendations, irrespective of the terms used and whether binding or not, capable not only of protecting the individual or the community against disease but also of raising the level of health, provided that these provisions are generally accepted and applied by the international community.

⁴⁴² “Global Health Law Part II: Committees” (2018) 78 *Intl L Assn Rep Conf* 339 at 345.

who (2) engage in a “shared practice to develop, share, and maintain the domain of knowledge” known as (3) global health law.⁴⁴³

Since 2019, for instance, the GHLC (first introduced in **Section 2.2.2.3**) has been at the forefront of advancing global health law. The contributions of this “collaborative interdisciplinary research initiative”⁴⁴⁴ whose membership includes “independent international legal scholars focused on global health law”⁴⁴⁵ have taken various forms. The Consortium has hosted research meetings and consensus conferences on interpretation of core instruments of global health law,⁴⁴⁶ held bi-annual conferences focused on “building the field” of global health law,⁴⁴⁷ and hosted fireside chats with eminent figures, providing opportunities to engage in meaningful dialogues that contribute to a deeper collective understanding within this burgeoning field. More recently, the Consortium was engaged in interdisciplinary forms of normative codification, partnering with the ICJ to develop the PHE Principles (see **Sections 5.4 to 5.6**). Many members of the Consortium also contributed to the first edited textbook for students of the field.⁴⁴⁸

⁴⁴³ Adler, *supra* note 157 at 14.

⁴⁴⁴ Global Health Law Consortium, “The Global Health Law Consortium,” online: <globalhealthlawconsortium.org>.

⁴⁴⁵ Global Health Law Consortium, “Become a Member,” online: <<https://globalhealthlawconsortium.org/become-a-member/>>.

⁴⁴⁶ These meetings and conferences culminated in two consensus statements interpreting key provisions of a global health law instrument *par excellence*: the WHO’s 2005 International Health Regulations. See Roojin Habibi et al, “The Stellenbosch Consensus on Legal National Responses to Public Health Risks: Clarifying Article 43 of the International Health Regulations” (2020) 19 International Organizations L Rev 90; Margherita Cinà et al, “The Stellenbosch Consensus on the International Legal Obligation to Collaborate and Assist in Addressing Pandemics: Clarifying Article 44 of the International Health Regulations” (2020) 19 International Organizations L Rev 158.

⁴⁴⁷ See *for instance* the press release issued for the inaugural global health law conference delivered in 2019: Office of External Relations & Communications, “York University’s Global Strategy Lab, under the Direction of Professor Steven Hoffman, to Co-Host Two Global Health Law Conferences in South Africa in April” (2019), online (news): <<https://digitalcommons.osgoode.yorku.ca/ovations/324>> [<https://perma.cc/6PZ8-7F7X>].

⁴⁴⁸ Lawrence O Gostin & Benjamin M. Meier, *Global Health Law and Policy: Ensuring Justice for a Healthier World* (Oxford: Oxford University Press, 2023).

Looking beyond the academic endeavours of the GHLC, the broader international law landscape is witnessing the emergence of dedicated sections for global health law within professional associations and networks, a trend that signals the growing significance of the field to legal practitioners.⁴⁴⁹ Grassroots initiatives led by young practitioners and scholars have also begun to flourish, with the aim of democratizing access to global health law knowledge. These initiatives play a pivotal role in fostering inclusivity and accessibility, particularly among young and early career lawyers, thereby cultivating a diverse, engaged and self-sustained community of practice surrounding global health law.⁴⁵⁰

Adding to these professional and scholarly networks are the rising number of government agencies that house legal expertise or resources in connection with public and global health.⁴⁵¹ A significant concentration of those who work in such governmental roles find dual or later roles at prominent academic institutions. The O'Neill Institute for National and Global Health Law at Georgetown University stands as a hub that houses the world's largest concentration of researchers, students, and collaborators working across a diverse array of global health law issues.⁴⁵² Notably, since 2017, the O'Neill Institute has also operated a WHO Collaborating

⁴⁴⁹ To list only a few examples: The International Law Association's Global Health Law Committee; the European Society of International Law's Interest Group on International Health Law; and the American Society of International Law's Global Health Law Interest Group.

⁴⁵⁰ Chiamaka Precious Ojiako, for instance, hosts a regular 'Global Health Law and Policy Dialogue' room on clubhouse to foster Global North – South conversations: Chiamaka P. Ojiako, "You Have the Missing Piece(s) to the Global Health Puzzle" (5 January 2022) online (LinkedIn): <<https://www.linkedin.com/pulse/you-have-missing-pieces-global-health-puzzle-chiamaka-p-ojiako>>.

⁴⁵¹ The US Bureau of Global Health Security and Diplomacy, for instance, seeks to promote "international cooperation at the national, regional and multilateral levels to better protect the United States and the world from health threats." Though not exclusively composed of lawyers, legal expertise is a strong attribute in these government portfolios, whose work inevitably touches on domains of interest to global health law. See US Department of State, "Bureau of Global Health Security and Diplomacy" online: <<https://www.state.gov/bureaus-offices/secretary-of-state/bureau-of-global-health-security-and-diplomacy/>>.

⁴⁵² Lawrence O Gostin, Oscar A. Cabrera & Susan C Kim, "The O'Neill Institute for National and Global Health Law: Discovering Innovative Solutions for the Most Pressing Health Problems Facing the Nation and the World" (2010) 11 Minn J L Sci & Tech 383.

Centre (WHO CC) on National and Global Health Law whose terms of reference include supporting “the Organization’s efforts towards building capacity in areas of health-related law and human rights.”⁴⁵³ This collaborative partnership significantly contributes to the legitimization of global health law, granting it a status akin to well-established fields such as bioethics and health economics, which also benefit from similar institutional arrangements. It is also worth noting that two other WHO CCs, while not specifically referencing ‘global health,’ focus on the law and its applications in health: the WHO CC for Health Law and Bioethics at the Asian Institute for Health Law and Bioethics, Yonsei University,⁴⁵⁴ and the McCabe Centre for Law and Cancer, which serves as a WHO CC on Law and Noncommunicable Disease.⁴⁵⁵

These developments in research collaboration, networking, advisory services, and capacity-building reflect a broader trend towards the delivery of training in global health law or international health law in numerous educational institutions worldwide. Many of these institutions have taken steps to integrate global health law and related topics into their academic offerings, either by incorporating it as a distinct thematic course⁴⁵⁶ or by providing comprehensive LLM programs and immersive summer schools in the field.⁴⁵⁷ This educational reach extends beyond traditional law schools, encompassing faculties of public health, global

⁴⁵³ World Health Organization, “WHO Collaborating Centre for National and Global Health Law” (*WHO Collaborating Centres Global Database*), online:

<<https://apps.who.int/whocc/Detail.aspx?grqVAF4315NwR+YXh1ICCg==>>.

⁴⁵⁴ World Health Organization, “WHO Collaborating Centre for Health Law and Bioethics” (*WHO Collaborating Centres Global Database*), online: <<https://apps.who.int/whocc/Detail.aspx?S2hWGKUKddScX240HpCRrA==>>.

⁴⁵⁵ World Health Organization, “WHO Collaborating Centre for Law and Noncommunicable Disease” (*WHO Collaborating Centres Global Database*)

<<https://apps.who.int/whocc/Detail.aspx?rJCwyMnsulXYvKyFuTyEXw==>>.

⁴⁵⁶ For a brief, non-exhaustive list of such courses, see Habibi, *supra* note 239.

⁴⁵⁷ In 2023, at least two summer schools in global health law were hosted by two separate institutions: the University of Groningen and the University of Geneva.

health, medicine and international development, highlighting the interdisciplinary nature inherent to the teaching of global health law.⁴⁵⁸

Thus, today's "global health lawyer" can be found actively advising governments and international organizations, networking with their peers in field-specific conferences and gatherings, offering novel legal interpretations that contribute to the progression of the field, and educating aspiring legal professionals about the intricacies of practicing and researching global health law. By engaging in these activities together, global health lawyers are, in Adler's words, helping to "create, diffuse, select and institutionalize knowledge that becomes the background of new practices" within an emerging community of practice.⁴⁵⁹

With some important exceptions, legal training and interest in improving global health are shared characteristics of most global health lawyers surveyed in the foregoing section.⁴⁶⁰ We should be clear-eyed, however, about what such knowledge can and cannot do. The demand for global health law is driven in part by our evolving comprehension of the intricate interplay between health and various other domains of international law, encompassing areas such as environmental law, human rights law, trade law, digital technologies, and artificial intelligence, among others. Global health law may eventually face a 'paradoxical moment of fieldhood,' accompanied by pressure 'to reframe the field to include increasingly broad agendas and issues.'⁴⁶¹ Whether this pressure is perceived as a positive or negative development, it is

⁴⁵⁸ The author has personal knowledge of courses in global health law being offered to undergraduate students in generalized global health programs, graduate students in global health, graduate students in LLM and other law masters degrees, and as summer school courses. The caveat is that, at the time of writing, these offerings are primarily at institutions based in the Global North.

⁴⁵⁹ Adler, *supra* note 147 at 20.

⁴⁶⁰ Note however that there are many competent and influential experts who engage in global health law without formal legal training but with a rich depth of specific technical experience.

⁴⁶¹ Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'" (2008) 3 *International J Transitional Justice* 5 at 13.

incumbent upon those identifying as global health lawyers to cultivate a mindset of humility and continuous learning, recognizing the immense value in transcending disciplinary boundaries and seeking insights from other communities of practice to discern the societal, structural, commercial, economic, political, and environmental factors that influence health across different populations and underpin the system of present-day global health governance.⁴⁶²

Ultimately, we must guard against a one-size-fits-all approach to the purveyors of global health law since the terminology, standards of career progression, and even the foundational textbooks one encounters during legal education can vary significantly depending on one's place in the world. Accordingly, it would be premature to assert the existence of robust communities of practice for global health lawyers in *all* corners of the world.⁴⁶³ Furthermore, it remains uncertain whether all international lawyers uniformly recognize and categorize their work as falling under the purview of global health law, even where their work may overlap with those who would readily assert expertise in global health law matters.

Having said the above, it is worth noting first that communities of practice are a fluid and open concept, with “members’ shared sense of joint enterprise constantly being renegotiated,”⁴⁶⁴ and membership in a state of perpetual change. The foregoing therefore does not suggest that there is a single, fixed community of practice among global health lawyers, but rather several communities with some areas of practice which overlap and others which diverge and branch

⁴⁶² Alicia Ely Yamin, Stefania Negri & Roojin Habibi, “On Sea Monsters and Sandcastles: Revisiting International Legal Frameworks Regarding Public Health and Human Rights in Global Health Emergencies” (2022) 3 Yearbook of International Disaster Law 180. *See also* David McCoy et al, “Global Health Security and the Health-Security Nexus: Principles, Politics and Praxis” (2023) 8 BMJ Global Health e013067.

⁴⁶² Roberts, *supra* note 139.

⁴⁶³ This of course does not begin to address the structural barriers that students primarily in the Global South face in accessing educational opportunities in global health law. *See for instance* Shashika Bandara et al, “Imagining a Future in Global Health without Visa and Passport Inequities” (2023)3 PLOS Global Public Health e0002310.

⁴⁶⁴ Adler, *supra* note 147 at 14

out. Second, people may hold allegiances to other communities of practice (e.g., intellectual property law) even as they engage with practices in global health law on a specialized issue (e.g., access to medicines). Finally, even within global health law there are distinct sub-communities whose work rarely intersects (e.g., communities working on tobacco control and those working on infectious disease control). The focus of these groups may differ in material ways from one another, yet they will recognize and draw on some of the same resources (e.g., WHO's Constitution) considered to be part and parcel of global health law. Many recent course offerings also teach these branching subjects all under the umbrella of global health law.⁴⁶⁵

With this context in mind, communities of practice are active contributors to the life of international law.⁴⁶⁶ Serving as dynamic hubs of legal discourse and analysis, they collectively engage in the nuanced process of interpreting and applying legal principles to address contemporary challenges. It was against the backdrop of these burgeoning communities of practice in global health law that efforts to develop the PHE Principles became possible. I now turn to the context and setting that gave rise to the informal consensus-building project led by ICJ and the GHLC to develop the PHE Principles.

⁴⁶⁵ For an overview of subject matter that is frequently taught under the umbrella of 'global health law,' see Gostin & Meier, *supra* note 448.

⁴⁶⁶ As mentioned earlier, Brunnée and Toope's interactional theory of international law offers an account that seeks to explain the how legal norms are built, maintained and evolve through a robust practice of legality undertaken by communities of practice: Brunnée & Toope, *supra* note 122

5.3 Context of the PHE Principles

When the World Health Assembly adopted the IHR in 2005,⁴⁶⁷ the international community had just emerged from the grips of the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak. In a series of events not all that different from the early stages of the COVID-19 pandemic, isolated cases of pneumonia of unknown origin in Guangdong, China in late-2002 rapidly progressed into a localized outbreak and within weeks became a cross-border public health emergency. Although short-lived, the SARS outbreak catalyzed a recalibration of acceptable norms in international cooperation for infectious disease control and triggered “a norm cascade” towards revising IHR.⁴⁶⁸ In a press release announcing the revised IHR’s entry into force, former WHO Director-General Margaret Chan called SARS a “wake-up call” and affirmed that the IHR would help better prepare the world for the next pandemic.⁴⁶⁹

The PHE Principles emerged against the backdrop of a similar moment of reckoning in the global public health emergency prevention, preparedness and response. While SARS alerted countries of the need to strengthen obligations of information sharing, public health capacity building and coordination in implementing cross-border health measures, the COVID-19 pandemic underscored the need for strengthening principles of equity, solidarity, and the realization of human rights as these relate to the prevention of, preparedness for, and responses to public health emergencies. COVID-19 entrenched itself along well-known fault lines of social

⁴⁶⁷ World Health Organization, *International Health Regulations*, WHA 58.3, 2nd ed (Geneva: WHO, 2005) [IHR].

⁴⁶⁸ Sara E Davies, Adam Kamradt-Scott & Simon Rushton, *Disease Diplomacy: International Norms and Global Health Security* (Baltimore, MD: Johns Hopkins University Press, 2015) at 45.

⁴⁶⁹ World Health Organization, “International Health Regulations enter into force: New opportunity to respond to international public health threats” (14 June 2007), online (news release): <<https://www.who.int/news/item/14-06-2007-international-health-regulations-enter-into-force>>.

inequality within months,⁴⁷⁰ prompting the UN Secretary General Antonio Guterres to decry a parallel “pandemic of human rights abuses.”⁴⁷¹ Government measures to respond to the virus and its ever-mutating variants disproportionately discriminated against marginalized and disadvantaged people, such as persons living in poverty, precarious workers, gender minorities, the elderly, people without shelter, people living in congregate settings, migrants, racialized persons, and over time, people living in communities with limited or no access to safe and effective COVID-19 vaccines.⁴⁷² As academics and civil society began responding to the crisis, many looked to the Siracusa Principles, as well as existing general comments issued by UN human rights treaty bodies, for normative guidance.⁴⁷³ Yet some also began questioning the relevance of the Siracusa Principles to the COVID-19 crisis. As I explain below, perceived shortcomings of the Siracusa Principles provided the impetus for developing the PHE Principles.

5.3.1 Recognizing the shortcomings of the Siracusa Principles

Having recently concluded my role as drafter of a GHLC consensus statement on additional health measures that states are permitted to take in response to public health risks under Article 43 of the IHR (the “Stellenbosch Consensus on Legal National Responses to Public

⁴⁷⁰ See Esmé Berkhout et al, *The Inequality Virus: Bringing together a world torn apart by coronavirus through a fair, just and sustainable economy* (Oxford: Oxfam International, 2021).

⁴⁷¹ Antonio Guterres, “The World Faces a Pandemic of Human Rights Abuses in the Wake of Covid-19” *The Guardian* (22 February 2021), online: <<https://www.theguardian.com/global-development/2021/feb/22/world-faces-pandemic-human-rights-abuses-covid-19-antonio-guterres>>

⁴⁷² See International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses* (Geneva: ICJ, 2020).

⁴⁷³ The HIV Justice Network, “HIV Justice Worldwide Steering Committee Statement on COVID-19 Criminalization” (25 March 2020), online: <<https://www.hivjustice.net/news/hiv-justice-worldwide-steering-committee-statement-on-covid-19-criminalisation/>>; Sharifah Sekalala et al, “Analyzing the Human Rights Impact of Increased Digital Public Health Surveillance during the COVID-19 Crisis” (2020) 22:2 Health & Hum Rts 7–20; Ghebreyesus, Tedros, “University of Nottingham Human Rights Law Centre Annual Lecture 2020: Global Health and Human Rights” (11 December 2020), online (transcript): <<https://www.nottingham.ac.uk/hrlc/documents/annual-lecture/dr-tedros-uon-hrlc-annual-lecture-transcript.pdf>>.

Health Risks” or simply “Stellenbosch Consensus”),⁴⁷⁴ I drew on this work to draft a brief commentary with the Consortium entitled “Do not violate the International Health Regulations during the COVID-19 outbreak.”⁴⁷⁵ Published in *The Lancet* less than one month after the WHO Director-General determined a public health emergency of international concern on 31 January 2020,⁴⁷⁶ the commentary implored governments to respect the IHR in response to the rapidly proliferating new coronavirus.

Drawing on the Stellenbosch Consensus, the commentary called on government public health measures to adhere to: (1) scientific principles, scientific evidence and advice from WHO; (2) the principle of proportionality in public health decision-making; and importantly, (3) international human rights law, as required under Article 3(1) of the IHR, which specifies that the IHR must be implemented with “full respect for the dignity, human rights and fundamental freedoms of persons.”⁴⁷⁷ Regarding the third criterion, the commentary stressed that actions must “reflect the international law principles of necessity, legitimacy, and proportionality that govern limitations to and derogations from rights and freedoms.”⁴⁷⁸

⁴⁷⁴ Roojin Habibi et al., *supra* note 446. This ‘Stellenbosch Consensus’ was one of two consensus statements developed by the Global Health Law Consortium at a retreat in Stellenbosch, South Africa, in relation to interpretations of the IHR. The second consensus statement pertained to the interpretation of IHR Article 44 on “the International Legal Obligation to Collaborate and Assist.” See Cinà et al, *supra* note 446.

⁴⁷⁵ Roojin Habibi et al, “Do not violate the International Health Regulations during the COVID-19 outbreak” (2020) 395 *The Lancet* 664.

⁴⁷⁶ World Health Organization, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)* (30 January 2020), online: <<https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-%282005%29-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-%282019-ncov%29>>

⁴⁷⁷ IHR, *supra* note 467 at art. 3(1). Compliance with international human rights law is also implied under art. 3(2), which mandates that the implementation of the IHR “be guided by the Charter of the United Nations and the Constitution of the World Health Organization.” Both instruments reference human rights obligations of states.

⁴⁷⁸ *Ibid.*

Notably, and unlike many other professional groups that would soon weigh in on rights-based approaches to the pandemic, the commentary made no reference to the Siracusa Principles. This omission was deliberate: in 2019, during the Stellenbosch Consensus Conference in South Africa, several participants expressed caution about equating the Siracusa Principles to an international instrument or to customary international law shaping state obligations under international law.⁴⁷⁹ Additionally, and as further discussion in **Section 5.4.1.2**, while the Siracusa Principles made passing reference to the IHR, they lacked sufficient detail to address the unique challenges posed by public health emergencies, particularly in light of the threat posed by the scale, intensity, and duration of COVID-19 not only to health but to human rights more broadly.⁴⁸⁰

5.3.2 Making the case for a new informal consensus-building process

The *Lancet* commentary prompted a conversation that would eventually set the stage for a collaboration between the GHLC and the ICJ to develop the PHE Principles. Although the *Lancet* commentary was one of the first clarion calls to governments to heed their human rights obligations in emergency responses to COVID-19, the commentary drew critique from the ICJ. Senior leadership within the Geneva-based headquarters of the ICJ had read the commentary and in a virtual correspondence on 25 February 2020, Saman Zia-Zarifi, at the time ICJ's Secretary-General, noted that the commentary had failed to mention the Siracusa Principles as a source of constraint on state public health measures. The ICJ maintained that the Siracusa Principles

⁴⁷⁹ The outcome of this debate is reflected in the final text of the Stellenbosch Consensus: “Non-binding but authoritative, the Siracusa Principles explicitly call for ‘due regard’ to the IHR and foresee limitations to an ICCPR obligation on public health grounds where a state must take measures to deal with “a serious threat to the health of a population or individual members of the population’.” See Habibi et al, *supra* note 446 at 142.

⁴⁸⁰ Shortcomings of the Siracusa Principles are discussed in greater detail in Section 4.3.

amounted to customary international law. This exchange was the inception point of a three-year project that brought the ICJ and the GHLC into a partnership to develop the PHE Principles.

As I happened to be in Geneva during the publication of the commentary, I offered to meet with Zarifi and his team to explain the reasoning behind the Stellenbosch Consensus and the *Lancet* commentary more specifically.⁴⁸¹ On 12 March 2020, I joined Zarifi, as well as ICJ's Legal and Policy Director, Ian Seiderman, and Deputy Programme Director Livio Zilli, at ICJ headquarters to discuss the continued relevance of the Siracusa Principles in the ongoing pandemic. While various views were expressed on this point, there was general agreement that public health emergencies of global scale raised new concerns that had not yet been dealt with in depth by any formal or informal standards or guidelines. I proposed that the ICJ and the GHLC set about filling this normative gap by an expert consensus conference.⁴⁸² The ICJ expressed interest in this idea, and I committed to developing a concept note that would set out in greater detail the outlines of such a project for the consideration of both the GHLC and the ICJ.

On 20 April 2020, I shared a draft concept note for the project with the ICJ. The concept note defined the scope and method of work of the proposed project, set initial project milestones and timelines, and outlined the role of the GHLC and the ICJ as core partners in the development of the principles.

In making the case for the principles, the concept note argued that:

⁴⁸¹ As our exercise in Stellenbosch, South Africa, involved an interpretation of key provisions of the IHR using the rules of treaty interpretation derived from the *Vienna Convention on the Law of Treaties*, there was little dispute among conference participants that the Siracusa Principles did not amount to a formal source of international law.

⁴⁸² In particular, the discussion then was to develop “a legally robust set of human rights principles/standards applicable to cases of public health emergency and scientific uncertainty like COVID-19.” Personal communication, 13 March 2020 (email correspondence)

[t]he Siracusa Principles were adopted in 1984, against the backdrop of a world besieged by ‘epidemics’ of political unrest and the Cold War...In our era of global interdependence, significant threats to stability, peace and security emanate increasingly from phenomena that are either too small to see, such as emerging infectious diseases, or too diffuse to fathom, such as climate change. Plagued by scientific uncertainty and unknown risk, such global hazards exacerbate social inequalities and may even pose existential threats to humanity. The COVID-19 pandemic is emblematic of these challenges and brings into sharp focus the indivisibility and interdependence of civil, cultural, political, social and economic human rights and freedoms in the practice of global public health.⁴⁸³

On 19 May 2020, the ICJ and the GHLC formally agreed to collaborate in revisiting the “global legal framework on human rights during public health emergencies.”⁴⁸⁴ The ICJ had a special interest in channeling the outputs of this collaboration to also shed light on possible future processes to review the state of global health law, mainly the IHR at the time, in light of government responses to COVID-19.

The ICJ cannily foresaw that the scale, intensity, and endurance of the COVID-19 public health threat would create a window of opportunity for negotiations towards international law reforms for public health emergency preparedness and response. Following two years of negotiation within the Working Group on Amendments to the IHR, the World Health Assembly adopted crucial amendments to the Regulations at its 77th session in June 2024.⁴⁸⁵ A separate and ongoing process, led by an Intergovernmental Negotiating Body (INB) of WHO Member States, was established to adopt a WHO convention or other international agreement on pandemics (also

⁴⁸³ Unpublished memorandum.

⁴⁸⁴ Personal communication, 13 March 2020 (email correspondence), 19 May 2020.

⁴⁸⁵ World Health Organization, *International Health Regulations (2005)*, A/77/A/CONF./14 (Geneva 2024).

referred to here as the ‘pandemic agreement’) under Article 19 of the WHO’s Constitution. The agreement was formally adopted by the World Health Assembly on 20 May 2025.⁴⁸⁶

It remains to be seen whether such international lawmaking reflexes can strengthen ties between the usually distinct and separate domains of public health emergency response under international law and the obligations and standards typically governing states of emergency under international human rights law. The ICJ and the GHLC were both concerned with influencing these international law reform initiatives and facilitating a rapprochement of the two communities of practice. With respect to the pandemic agreement, an array of proposals were tabled on possible treaty content.⁴⁸⁷ While human rights proposals were featured in initial drafts of the agreement, owing in part to the joint advocacy between members of the GHLC and the ICJ,⁴⁸⁸ these references to human rights norms were gradually eroded and withdrawn in subsequent negotiating drafts, as increasingly contentious political disagreements regarding the operationalization of One Health and Pathogen Access and Benefit-Sharing took centre stage in negotiations.⁴⁸⁹ As for the IHR, an opportunity to strengthen human rights norms within an

⁴⁸⁶ *The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response*, World Health Assembly, 2nd special sess, SSA2(5) (1 December 2021). For the adopted agreement, see *Outcome of the Intergovernmental Negotiating Body to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response*, World Health Assembly, 78th sess, A78/10 (14 May 2025).

⁴⁸⁷ For an initial compilation of proposals tabled by WHO Member States, see Ana Beatriz Balcazar Moreno, Gian Luca Burci & Adam Patryk Strobejko, *Taxonomy of Substantive Proposals for a New Instrument on Pandemic Prevention, Preparedness and Response* (Graduate Institute: Geneva, 2022).

⁴⁸⁸ Tim Fish Hodgson et al, “Human Rights Must Guide a Pandemic Treaty” (20 November 2021), online (blog): <<https://www.hhrjournal.org/2021/11/human-rights-must-guide-a-pandemic-treaty/>>.

⁴⁸⁹ Clare Wenham & Mark Eccleston-Turner, “Will the pandemic treaty make it over the line?” (2024) *BMJ* 395. The report of the Review Committee regarding amendments to the International Health Regulations (2005) is also illustrative of this debate. Some proposed amendments favoured replacing “human rights” as overarching principles of the IHR under Article 3 with concepts such as “equity, inclusivity and coherence” and “common-but-differentiated responsibilities.” The Review Committee strongly advised that states avoid removing “human rights” as an overarching principle of the IHR, and this recommendation was retained in the final set of amendments adopted by the World Health Assembly. See Review Committee regarding amendments to the International Health Regulations (2005), *Report of the Review Committee Regarding Amendments to the International Health Regulations (2005)*, WHA Doc A/WGIHR/2/5 (2023) at 28.

amended set of regulations was ultimately circumvented by state preferences for principles such as equity and solidarity which had grown familiar to those who operated in the health domain during the COVID-19 pandemic but were less commonly used in international human rights communities.

Four years after the ICJ and the GHLC began working on the PHE Principles, international law remains largely fragmented on the contribution of human rights norms to public health emergency prevention, preparedness, and response.⁴⁹⁰ This does not negate the value of the partnership that led to the PHE Principles, however.

As the conclusion to this chapter suggests, the promise of the PHE Principles may in the end not lie in bringing about rapid and high-level change to the international law landscape. Rather, the impact of the PHE Principles may be at once more diffuse and longer term. First, they can build bridges between *communities* of people who work across different spheres of international law (e.g., international human rights law and global health law) with a shared interest in public health emergency prevention, preparedness, and response; second they offer a lens through which existing international laws can be taken up at domestic levels through judicial and other quasi-judicial proceedings; and finally, they offer a pathway for the *interpretation* of relevant law, taking particularly into account progressive developments in laws, standards, and jurisprudence.

Before discussing the making of the PHE Principles, it is necessary to more fully explain the interpretive advances this informal consensus-building process sought to bring. These interpretive advances are further detailed in the next section.

⁴⁹⁰ *Ibid.*

5.4 Why the PHE Principles?

As discussed in greater detail in a companion journal article to this dissertation, the proposal for an informal consensus-building effort to develop PHE Principles saw three areas where such a project could make particularly valuable interpretive contributions.⁴⁹¹

First, COVID-19 revealed a lateral, or horizontal, gap in the international legal frameworks governing public health emergency prevention, preparedness, and response. Before the pandemic, both the IHR and guidance from international human rights treaty monitoring bodies primarily focused on the impact of public health measures on human rights, especially in relation to civil and political rights. The contribution of internationally recognized economic and social rights, including the right to health, remained largely unarticulated at the international level. The PHE Principles sought to address this gap by explicitly clarifying how these often overlooked economic and social rights frameworks could strengthen future national and international efforts in public health emergency prevention, preparedness, and response.

Second, the PHE Principles sought to bridge a ‘vertical’ gap in the translation of international norms into frontline efforts to prevent, prepare for, and respond to public health emergencies and pandemics, particularly in situations characterized by high scientific uncertainty. The COVID-19 pandemic highlighted challenges in balancing evidence-based decision-making with human rights protections, particularly in justifying restrictive public health measures such as lockdowns. The PHE Principles sought to clarify the legal standards that could help ensure proportionality in emergency responses while empowering courts and policymakers to navigate public health crises more effectively.

⁴⁹¹ See Habibi, Fish Hodgson & Hoffman, *supra* note 29.

Finally, the discourse surrounding the COVID-19 pandemic suggested that new international principles, such as solidarity, were being referenced and relied upon with increasing frequency at the global level. The effort to develop the PHE Principles was in part a response to this shifting normative landscape. By closely listening to the discourse of states, international organizations, civil society, and academics, the initiative sought to capture and progressively interpret the principles deemed essential in shaping an effective and rights-based pandemic response. Each of these points are further detailed below.

5.4.1 Addressing horizontal gaps in international law: economic and social rights in public health emergency prevention, preparedness and response

Early in the informal consensus-building process, the ICJ and GHLC recognized that neither international human rights law, reflected in UN and regional human rights treaties and their monitoring bodies, nor global health law, as embodied in the IHR and various soft law instruments under WHO, had adequately articulated the role of economic and social rights, including the right to health, in public health emergency prevention, preparedness, and response. This omission left a critical gap in the legal frameworks governing public health emergencies, not only limiting their ability to promote equitable and rights-based responses but also reinforcing a narrow understanding of how the underlying determinants of health contribute to effective prevention and preparedness efforts.

5.4.1.1 Gaps in global health law

The 2005 IHR codifies a set of obligations that states came to understand as necessary for a globally coordinated response to infectious disease outbreaks in the aftermath of SARS.⁴⁹² These include obligations to promptly notify the WHO of all “events” which might constitute a public health emergency of international concern,⁴⁹³ to respond proportionately when public health risks arise in other countries, so as to avoid disincentivizing future transparent notification,⁴⁹⁴ and to “undertake to collaborate” with one another to develop and strengthen national public health capacities to prevent, detect and respond to outbreaks.⁴⁹⁵

While the obligation to build core public health capacities bears close semblance to elements of the right to health under Article 12 of ICESCR,⁴⁹⁶ the IHR does not reference internationally recognized economic and social human rights standards as such, nor does it appear to require states to collaborate extraterritorially in establishing the broader health care system needs in other countries, such as primary care and access to sexual and reproductive health services, which complement pandemic preparedness and response.

The contribution of economic, social and cultural rights to public health emergency prevention, preparedness, and response is largely absent from the instrument. Indeed, although the IHR recognizes the need for states to implement the instrument with “full respect for the dignity, human rights and fundamental freedoms of persons”⁴⁹⁷ and makes indirect reference to

⁴⁹² Pedro A Villarreal, Roojin Habibi & Allyn Taylor, “Strengthening the Monitoring of States’ Compliance with the International Health Regulations” (2022) 19:1 International Organizations L Rev 215.

⁴⁹³ IHR, *supra* note 467 at arts 6 and 7.

⁴⁹⁴ *Ibid* at art 43.

⁴⁹⁵ *Ibid* at art 44.

⁴⁹⁶ Brigit Toebe, Lisa Forman & Giulio Bartolini, “Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?” (2020) 22:2 Health & Hum Rts 99.

⁴⁹⁷ IHR, *supra* note 467 at art 3(1).

civil and political rights and freedoms across several provisions which deal with public health measures,⁴⁹⁸ it remains chiefly an instrument prescribing technical and operational legal standards for international cooperation in outbreak control.

5.4.1.2 Gaps in international human rights law

It is not only the IHR that adopts a narrow view of the contribution of economic and social rights frameworks to public health emergency prevention, preparedness, and response. The international human rights law regime itself, as understood by states and even some international human rights experts and practitioners, continues to favour civil and political rights over economic, social, and cultural rights. Despite the acknowledged interdependence of all human rights, economic, social, and cultural rights remain sidelined in the corpus of international human rights law.⁴⁹⁹

This remains especially true of international human rights norms relating to the proportionality of rights restrictions in times of emergency. As discussed in **Chapter 4**, the Siracusa Principles sought to interpret permissible limitations to, and derogations from, civil and political rights under the ICCPR to achieve an effective implementation of the rule of law during national states of emergency. While the Siracusa Principles make fleeting reference to both public health emergencies and an earlier version of the IHR,⁵⁰⁰ they do not provide situation-

⁴⁹⁸ *Ibid* at arts 17 (criteria for recommendations), 23 (health measures on arrival and departure), 31 and 32 (health measures related to the entry and treatment of travellers), 42 (implementation of health measures), 43 (additional health measures) and 45 (treatment of personal data).

⁴⁹⁹ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 2.

⁵⁰⁰ Siracusa Principles, *supra* note 1 at paras 25-26 reads:

Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

specific guidance beyond the mere reference to public health as a justification for rights restricting measures “specifically aimed at preventing disease or injury or providing care for the sick and injured.”⁵⁰¹ More fundamentally, the intended application of the Siracusa Principles is focused exclusively on limitations to, or derogations from, civil and political rights in response to the onset of public health emergencies, as opposed to emergency prevention and preparedness through the realization of economic and social rights.

The Siracusa Principles stipulate that a state party may take measures limiting and derogating from its human rights obligations under the ICCPR only “when faced with a situation of exceptional and *actual* or *imminent* danger which threatens the life of the nation [emphasis added]” as opposed to threats which are latent or perceived. In situations of man-made or natural disaster, some commentators have interpreted this to mean that derogation from certain rights may be warranted even before the calamity—such as a hurricane or an approaching radioactive cloud—has actually hit a particular territory,⁵⁰² and it is not difficult to imagine the exponential spread of a pathogen from epidemic to pandemic being considered such an imminent threat.

Moreover, the gravity of the situation must be one that threatens the “continuance of the organized life of the community.”⁵⁰³ Hartman has interpreted this to mean that “some fundamental element of statehood, such as the functioning of the judiciary or the legislature or

Due regard shall be had to the international health regulations of the World Health Organization.

⁵⁰¹ *Ibid* at para 25. See also Nina Sun, “Applying Siracusa: A Call for a General Comment on Public Health Emergencies” (23 April 2020), online (blog): <<https://www.hhrjournal.org/2020/04/applying-siracusa-a-call-for-a-general-comment-on-public-health-emergencies/>>.

⁵⁰² Emanuele Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters,” in Andrea de Guttry, Marco Gestri & Gabriella Venturini, eds, *International Disaster Response Law* (The Hague: TMC Asser Press, 2012) 323 at 332.

⁵⁰³ *Denmark, Norway, Sweden and the Netherlands v Greece* (1969), 12 YB ECHR 71 at paras 152–154 (European Commission on Human Rights).

the flow of crucial supplies must be endangered.”⁵⁰⁴ The derogation measure must be one of last resort, and cannot “*per se*” be justified by a country’s economic difficulties.⁵⁰⁵ Yet as elaborated by Sommario in relation to man-made or natural disasters, “the more unprepared and ill-equipped [s]tates are to deal with the consequences of a disaster, the easier it will be for them to claim that the ‘life of the nation’ is actually imperiled.”⁵⁰⁶

Human rights defenders, academics, international organizations, and WHO Director-General Tedros Adhanom Ghebreyesus have all looked to the Siracusa Principles in assessing the appropriateness of COVID-19 public health measures that limit human rights.⁵⁰⁷ As seen in the emergency response to COVID-19, however, the Siracusa Principles are by themselves inadequate in addressing many of the contemporary challenges engendered by global health emergencies.

Until recently, even international human rights standards on economic, social, and cultural rights frequently missed the mark in articulating the role that such rights can play in public health emergency prevention, preparedness, and response. For instance, the Committee on Economic, Social and Cultural Rights’ General Comment 14 on the right to health makes no reference to the IHR or to measures for pandemic preparedness.⁵⁰⁸ This omission is despite the fact that the ICESCR explicitly codifies an obligation for states to ensure the “prevention, treatment and control of epidemic... diseases” as a component of the right to health.⁵⁰⁹

⁵⁰⁴ Hartman, *supra* note 348 at 16.

⁵⁰⁵ Siracusa Principles, *supra* note 1 at para. 41.

⁵⁰⁶ Emanuele Sommario, *supra* note 502 at 333.

⁵⁰⁷ See *Section 5.3* at p.169.

⁵⁰⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)*, UN Doc E/C.12/2000/4 (11 August 2000) [General Comment 14].

⁵⁰⁹ *Ibid* at para 16; ICESCR, *supra* note 345 at art 12(c).

5.4.1.3 Linking economic and social rights to public health emergency prevention and preparedness

One of the fundamental weaknesses of norms within both the IHR and international human rights law is that legal standards are aimed primarily at providing guidance to states in reacting to already existing or impending emergencies, and not to contemplating prevention measures. Emergencies are approached as isolated events occurring outside of social, economic, and political contexts and devoid of systemic or structural causes.

At an early stage in the COVID-19 pandemic, the Committee on Economic, Social and Cultural Rights noted that “decades of underinvestment in public health services and other social programmes” have weakened services and programmes such that many are “ill equipped to respond effectively and expeditiously to the intensity of the current pandemic.”⁵¹⁰ Otherwise stated, resilience to public health threats is inextricably bound up with the social, economic, political, and environmental conditions in which people live and the distribution of power and resources across communities and countries.⁵¹¹

The Committee’s finding may explain why Italy’s affluent Lombardy province—with a health system that steadily marched towards privatization in the years prior to COVID-19—was so severely hit by the pandemic in early 2020 while other comparable regions weathered the emergency with less stringent public health measures.⁵¹² When a public health emergency strikes health systems and public institutions (e.g., schools and community housing) that have been

⁵¹⁰ UN Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, UN Doc E/C.12/2020/1 (17 April 2020) at paras 4 and 24.

⁵¹¹ See Sharifah Sekalala et al., “Health and Human Rights Are Inextricably Linked in the COVID-19 Response” (2020) 5 *BMJ Global Health* e003359.

⁵¹² Rossella de Falco, “Italy’s experience during COVID-19: the limits of privatisation in healthcare” (2021), online (policy brief): <<https://gi-escri.org/en/resources/publications/italys-experience-during-covid-19>>.

underfunded for years, restrictions on human rights become an urgent and foregone conclusion, instead of a question of proportionality deliberated through mechanisms of public accountability and debate.

It is here that the contribution of economic and social rights frameworks becomes abundantly clear. These frameworks require states to respect, protect, and fulfil human rights by taking positive measures to “facilitate”, “provide,” and “promote” access not only to health, services, goods, and facilities, but the full range of social determinants of health, including food, water, social security, and housing, in turn strengthening the resilience of communities to the potential shocks of pandemics and other public health emergencies.⁵¹³

Constrained by limited resources and time, states engaged in new international law reform initiatives in COVID-19’s wake have rarely shown interest in aligning legal standards from global health law with the full range of obligations, including economic and social rights obligations, enshrined in international human rights law.⁵¹⁴ In undertaking the development of the PHE Principles, we sought to foster such analyses, bringing together experts from

⁵¹³ See for example ICESCR arts 6 (the right to work), 7 (the right to just and favourable conditions of work), 9 (the right to social security), 11 (the right to an adequate standard of living), 13 (the right to education) and 15 (the right to enjoy the benefits of scientific progress and its applications). See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on science and economic, social and cultural rights*, UN Doc E/C.12/GC/25 (6 March 2020) [General Comment 25]; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work*, UN Doc E/C.12/GC/23 (4 March 2016); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health*, UN Doc E/C.12/GC/22 (4 March 2016); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19 on the right to social security*, UN Doc E/C.12/GC/19 (4 February 2008); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The right to water*, UN Doc E/C.12/2002/11 (20 January 2003); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12 on the right to adequate food*, UN Doc E/C.12/1999/5 (12 May 1999).

⁵¹⁴ It is worth noting that some Geneva-based academic and non-governmental organizations (e.g., Geneva Human Rights Platform, and the Graduate Institute), as well as some international organizations (e.g., UN Office of the High Commission on Human Rights and UNAIDS), made several attempts to engage diplomatic personnel within the UN human rights system and the World Health Organization to better integrate human rights considerations within the ongoing global health law reforms initiatives. In the end, however, states have seldom taken up recommendations from these briefings.

international to local levels to develop a contextualized understanding of the linkages human rights and global health law in relation to public health emergency prevention, preparedness and response.⁵¹⁵ More than simply developing new interpretations, however, we sought to contribute nuanced guidance on how to translate international standards to the frontlines of public health emergency preparedness and response, as discussed in the next section.

5.4.2 Addressing vertical gaps in international law: Translating norms from the international stage to the frontlines

The PHE Principles were also developed in response to the need for clearer guidance on the application of international human rights norms to the local realities of public health emergencies, particularly in contexts of deep scientific uncertainty. During COVID-19, uncertainty arose not only from our evolving understanding of the pathogen but also from debates over the most effective policy responses. While strict adherence to human rights law during emergencies is crucial, there is also a legitimate concern that overly rigid application could impede urgent public health interventions. In these moments, lawmakers and public health officials must have the latitude to act swiftly, while remaining accountable to human rights obligations.

The foregoing does not negate the need for guardrails to decision-making in times of public health emergency, however. As the Committee on Economic, Social and Cultural Rights observed during the COVID-19 pandemic, a rights-respecting response demands that emergency

⁵¹⁵ Cohen, *supra* note 202 at 465. Such interpretative analyses are also in line with the principle of systemic integration, cemented in the *Vienna Convention of the Law of Treaties*, which reads at Article 31(3)(c): “There shall be taken into account, together with the context... (c) any relevant rules of international law applicable in the relations between the parties.” See VCLT, *supra* note 38.

health responses rely on the best scientific evidence available.⁵¹⁶ A lack of certainty or conclusive data does not justify ignoring the evidence that is there.

Indeed, ICESCR guarantees the right to benefit from scientific progress and places an immediate obligation on governments to ensure that their policies and programs reflect “the *best available*, generally accepted scientific evidence.”⁵¹⁷ This requirement becomes especially important during health emergencies, when rapid access to accurate scientific information can determine whether an outbreak is contained or escalates into a global crisis.⁵¹⁸ Similar expectations are embedded in the IHR.⁵¹⁹

Despite these obligations, many governments faced serious challenges during the pandemic in determining which measures aligned with both science and human rights. One of the most contested strategies was the widespread use of “lockdowns.” In the context of COVID-19, lockdowns frequently involved compulsory measures that restricted the everyday social and economic life of entire populations in order to limit virus transmission.⁵²⁰ Such measures often included limitations on movement, curfews, bans on public gatherings, and the closure of schools, businesses, places of worship, and recreational venues.⁵²¹

Despite being presented as necessary for public health protection, the scientific basis for lockdown measures was frequently ambiguous or evolving. The uncertainty surrounding their effectiveness led to inconsistencies in policy choices both within and between states, and

⁵¹⁶ UN Committee on Economic, Social and Cultural Rights, *supra* note 510.

⁵¹⁷ ICESCR, *supra* note 345 at art 15(1)(b).

⁵¹⁸ See General Comment 25, *supra* note 513 at paras 52 & 82.

⁵¹⁹ IHR, *supra* note 467 at art. 43(2)(a)-(c); See also Habibi et al, *supra* note 446, at 59-60.

⁵²⁰ Najmul Haider et al, “Lockdown Measures in Response to COVID-19 in Nine Sub-Saharan African Countries” 5 *BMJ Global Health* (2020) e003319.

⁵²¹ *Ibid* at 3.

prompted numerous legal challenges over the proportionality and necessity of these restrictions.⁵²² Since then, hundreds of cases have emerged that challenge restrictive measures that were adopted under the broad ambit of the lockdown.⁵²³ In many instances, judicial review has opted for deference, assessing only whether government decisions were rational rather than engaging in more robust analyses of their necessity and proportionality.⁵²⁴ This trend was especially noticeable in the early stages of the pandemic, when courts and policymakers alike were navigating a landscape of scientific and legal uncertainty.⁵²⁵

However, human rights protections are inseparable from sound public health practice.⁵²⁶ Courts should be empowered to uphold rights even when doing so might constrain certain emergency responses.⁵²⁷ The reluctance of courts to fully engage with the human rights implications of broad emergency measures points to the urgent need for clearer legal standards.⁵²⁸ Clarifying the applicable human rights framework can help ensure that restrictive

⁵²² Tom Ginsburg and Mila Versteeg, “The Bound Executive: Emergency Powers during the Pandemic” (2021) 19 *International J Constitutional L* 1498.

⁵²³ University of Trento, *COVID-19 Litigation Open Access Database*, online (database): <<https://www.covid19litigation.org/case-index/database-charts>>.

⁵²⁴ See for example Safura Abdool Karim and Petronell Kruger, “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence” 11 *Constitutional Court Review* (2021) 533; Tom Hickman K C & Joe Tomlinson, “Judicial Review during the Covid-19 Pandemic” (2023) 27:3 *Edinburgh L Rev* 252; Martin van Staden, “Constitutional Rights and Their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa” (2020) 20 *African Human Rights LJ* 484 at 511.

⁵²⁵ See in general Fabrizio Cafaggi & Paola Iamiceli, “Uncertainty, Administrative Decision-Making and Judicial Review: The Courts’ Perspectives” (2021) 12:4 *European J Risk Regulation* 792.

⁵²⁶ Abdool Karim and Kruger, *supra* note 524; Jonathan M. Mann et al, “Health and Human Rights” (1994) 1 *Health & Hum Rts* 7 at 8.

⁵²⁷ Courts with more flexible procedures such as the dialogic approach adopted by the Indian Courts, might arguably fare better in emergency circumstances. See Gautham Bhatia, “COVID-19 and Courts Symposium: India: Covid-19, the Executive, and the Judiciary” (26 July 2021), online (blog): <<http://opiniojuris.org/2021/07/26/covid-19-and-courts-symposium-india-covid-19-the-executive-and-the-judiciary/>>; International Commission of Jurists, *Unprepared and Unlawful: Nepal’s Continued Failure to Realize the Right to Health During the COVID-19 Pandemic* (Geneva: ICJ, 2021).

⁵²⁸ Although there are some exceptions, see Timothy Fish Hodgson, “COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 1)” (8 December 2020), online (blog): <<http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-1/>>; Timothy Fish Hodgson, “COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2)” (8 December 2020), online

measures are proportionate and evidence-based, while also empowering courts to assess the legitimacy of government actions beyond mere rationality review.

This is where informal standard-setting initiatives led by communities of practice can add significant value. International law experts with deep contextual knowledge can help translate international norms into actionable guidance for policymakers, legislators, and courts, ensuring that public health measures remain grounded in human rights principles even in times of uncertainty. Though here I have focused on the assistance such guidance could provide to courts, it could also help inform the decision-making of legislators and policymakers tasked with assessing the best available evidence and deducing the legal and policy measures necessary and proportionate to protect public health, and by extension, to realize the right to health in the face of public health emergencies.

5.4.3 Codifying emerging norms at the intersection of global health law and international human rights law

5.4.3.1 The rhetoric of solidarity in the COVID-19 response

The COVID-19 pandemic also served as a catalyst of emerging norms in global health law and international human rights law. Throughout the informal consensus-building process, the PHE Principles would aim to capture some of these emerging norms through progressive interpretations of international law. Chief among these norms was the fluid and emergent norm of “international solidarity.”

As early as March 2020, the UN Secretary-General called on governments, academia, businesses, communities, and individuals “to act in solidarity in new, creative, and deliberate

(blog): <<http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2/>>.

ways for the common good and based on the core UN values that we uphold for humanity.”⁵²⁹ Shortly thereafter, the UN General Assembly adopted Resolution 74/270 (‘Global Solidarity to Fight the Coronavirus disease’) recognizing that the pandemic “require[d] a global response based on unity, solidarity and renewed multilateral cooperation.”⁵³⁰ Appeals to “solidarity” in the pandemic response, however, suffered from a general lack of conceptual clarity and precision in the law. More fundamentally, they masked the limits of the current international legal framework, in which “questions of global import are decided by economic and political criteria, and not in terms of human rights or the interests of other populations.”⁵³¹

The notion of solidarity manifests itself in a variety of ways depending on the epistemic framework in which it is deployed.⁵³² Under the UN Charter, Article 56 imposes a general duty on States to take “joint and separate action” for the achievement of *inter alia*:

- a. higher standards of living, full employment, and conditions of economic and social progress and development
- b. solutions of international economic, social, health and related problems; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.⁵³³

⁵²⁹ United Nations, *Shared responsibility, global solidarity: Responding to the socio-economic impacts of COVID-19* (New York: United Nations, 2020).

⁵³⁰ See *Global solidarity to fight the coronavirus disease 2019 (COVID-19)*, UNGA, 74th sess, UN Doc A/RES/74/270 (2020) GA Res 74/270. See also *COVID-19 Response*, WHA, 73rd sess, WHA Res 73.1.

⁵³¹ Guillermo E Estrada Adan, “From Cooperation to Solidarity: A Legal Compass for Pandemic Lawmaking” (3 November 2021), online (blog): <<https://blog.petrieflom.law.harvard.edu/2021/11/03/from-cooperation-to-solidarity-a-legal-compass-for-pandemic-lawmaking/>>.

⁵³² As Professor Obiora Okafor, past UN Independent Expert on the right to international solidarity noted, “the term [solidarity] poses a bit of a Rorschach test and the ink dots that together constitute it can mean different things to different people, depending on their mindset and goals.” See Obiora Chinedu Okafor, *Revised draft declaration on human rights and international solidarity - Report of the Independent Expert on human rights and international solidarity*, HRC, 53rd sess, UN Doc A/HRC/53/32 (2 May 2023) at para 18.

⁵³³ UN Charter, *supra* note 52 at arts 55-56.

Solidarity as international duty finds more fulsome expression and treatment in the corpus of international human rights law. At a general level, solidarity rights connote extraterritorial obligations of international cooperation and shared but also differentiated responsibilities of assistance across nations. To this end, the 1993 *Vienna Declaration and Programme of Action* recognizes “an increased and sustained effort of international cooperation and solidarity” as being essential to progress in human rights endeavours.⁵³⁴ The right to social security, as set out under Article 22 of the *Universal Declaration of Human Rights*, is further entitled to realization “through national effort and international co-operation” in accordance with the organization and resources of each state, and everyone is entitled to “a social and international order” in which rights and freedoms under the *Universal Declaration of Human Rights* can be fully realized.⁵³⁵

The ICESCR recognizes the broader role of the international community in realizing human obligations set out within it. Notably, Article 2(1) of the ICESCR generally calls on states parties to “take steps, individually and through international assistance and co-operation, especially economic and technical” with a view to achieving progressively the full realization of ICESCR rights, while specific provisions including Articles 11(2) on the right to be free from hunger, 15(4) on “benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific ... fields” and on the role of “international action for the achievement of [ICESCR] rights” further operationalize themes of cooperation and collaboration in fulfilling economic, social, and cultural rights.⁵³⁶

⁵³⁴ *Vienna Declaration and Programme of Action*, UN GAOR, World Conference on Human Rights, 48th Sess, UN Doc A/CONF.157/23 (25 June 1993), at preamble.

⁵³⁵ UDHR, *supra* note 83 at arts 22 and 28.

⁵³⁶ ICESCR, *supra* note 345 at arts 2(1), 11(2), 15(4), and 23.

On the right to health, in particular, the influential 1978 *Declaration of Alma-Ata* delivered at the International Conference on Primary Health Care expressed concern about the “existing gross inequality in the health status of the people particularly between developed and developing countries,” and added that an “acceptable level of health for all the people of the world...can be attained through a fuller and better use of the world’s resources, a considerable portion of which is now spent on armaments and military conflicts.” Moving beyond a focus on state obligations, the Declaration further urged:

...governments, WHO and UNICEF, and other international organizations, as well as multilateral and bilateral agencies, nongovernmental organizations, funding agencies, all health workers and the whole world community to support national and international commitment to primary health care and to channel increased technical and financial support to it.⁵³⁷

This framing of extraterritorial obligations relating to the right to health has been taken up and further developed in authoritative interpretations of the right to health as it is enshrined in the ICESCR, with General Comment 14 elucidating the “essential role of international cooperation and ... the commitment to take joint and separate action to achieve the full realization of the right to health.”⁵³⁸ Concretely, the Committee on Economic, Social, and Cultural Rights has interpreted the right to health as requiring states to “prevent third parties from violating the right in other countries,” “facilitate access to essential health facilities, goods and services in other countries wherever possible, and provide the necessary aid when required,” and “ensure that the right to health is given due attention in international agreements” as well as ensure that such

⁵³⁷ World Health Organization & United Nations Children’s Fund, *Declaration of Alma-Ata*, International Conference on Primary Health Care, Alma-Ata, USSR, 6–12 September 1978 at arts. II and X.

⁵³⁸ General Comment 14, *supra* note 508 at para 39.

instruments “do not adversely impact upon [it].”⁵³⁹ The Committee has further specifically underscored a “collective responsibility” with respect to addressing the spread of infectious diseases, denoting that “economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.”⁵⁴⁰

Solidarity has elsewhere been considered a principle of international law by the Human Rights Council, the 2000 UN Millennium Declaration,⁵⁴¹ and the former Independent Expert on Human Rights and International Solidarity, Rudi Muhammad Rizki, who underscored in his 2010 report that “international solidarity is ... essential to the international community’s pursuit of peace, sustainable development and the eradication of poverty.”⁵⁴²

International solidarity is thus typically conceptualized as extending beyond notions of charity, aid, international assistance and cooperation, and humanitarian assistance to incorporate, per the Human Rights Council, concern for:

... sustainability in international relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens, refraining from doing harm or posing obstacles to the greater well-being of others, including in the international economic system and to our common ecological habitat, for which all are responsible.⁵⁴³

⁵³⁹ *Ibid* at para 39; Since General Comment 14, the Committee on Economic, Social and Cultural Rights has expressly noted in General Comment 22 that “States that are in a position to do so must respond to [requests for international cooperation and assistance] in good faith and in accordance with the international commitment of contributing at a minimum 0.7 per cent of their gross national income for international cooperation and assistance.” See UN Committee on Economic, Social and Cultural Rights, *General Comment No 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) at para 50.

⁵⁴⁰ General Comment 14, *supra* note 508 at para. 40.

⁵⁴¹ Rudi Muhammad Rizki, *Report of the Independent Expert on Human Rights and International Solidarity*, HRC, 32nd sess, UN Doc A/HRC/15/32 and Corr.1 (5 July 2010) at paras 14-16; *United Nations Millennium Declaration*, UNGA, 55th sess, UN Doc A/RES/55/2, GA Res 55/2 (2000) at para. 6.

⁵⁴² Rizki, *supra* note 541 at para 6.8.

⁵⁴³ *Ibid* at para 58; See also UN Human Rights Council, *The Right to the Highest Attainable Standard of Physical and Mental Health*, Res 15/13, 15th Sess, UN Doc A/HRC/RES/15/13 (6 October 2010) at para. 2.

Past UN Independent Expert on Human Rights and International Solidarity mandate holders have sought to interpret the extent to which solidarity is a manifest legal obligation.

Rizki, for instance, defined international solidarity as:

The union of interests, purpose and actions among States and social cohesion between them, based on the interdependence of States and other actors to preserve the order and very survival of international society, and to achieve common goals that require international cooperation and collective action. Global solidarity encompasses the relationship of solidarity among all stakeholders in the international community.⁵⁴⁴

Drawing from the above, Rizki's successor, Virginia Dandan, characterized international solidarity as a "foundational principle underpinning contemporary international law"⁵⁴⁵ and parsed the concept into three distinct but related components: (1) preventive solidarity (or "collective actions to safeguard and ensure the fulfillment of all human rights"); (2) reactive solidarity (or "collective actions of the international community to respond to the adverse impacts of natural disasters, health emergencies, epidemic diseases and armed conflict, with the goals of alleviating human suffering, mitigating further damage and ensuring that the response complies fully and effectively with States' obligations"); and (3) international cooperation, (or the "premise that some states may not possess the resources or capacity necessary for the full realization of the rights set forth in international human rights treaties [and] States in a position to do so should provide international assistance, acting separately or jointly, to contribute to the fulfilment of human rights in other States").⁵⁴⁶ Her successor mandate-holder, Professor Obiora Okafor, later revised Dandan's draft declaration on the right to international solidarity,

⁵⁴⁴ *Ibid* at para 57.

⁵⁴⁵ Virginia Dandan, *Report of the Independent Expert on Human Rights and International Solidarity*, Human Rights Council, 35th sess, UN Doc A/HRC/35/35 (25 April 2017) at annex art 1(2).

⁵⁴⁶ *Ibid* at art 2.

recognizing, *inter alia*, that “international solidarity is essential in preventing and overcoming global challenges such as health emergencies.”⁵⁴⁷

5.4.3.2 Charting the path for global health law’s progressive development

The foregoing provides only a brief illustration of some of the myriad ways the notion of international solidarity manifests across regimes of international law and even within international human rights law itself. The evident lack of solidarity in practice—demonstrated by many national and international responses to COVID-19, and most strikingly by the failure or refusal to ensure equitable global access to vaccines—suggests the need for a deeper examination of the nature and scope of legal obligations arising from the notion of solidarity in public health emergencies.⁵⁴⁸ Such an inquiry may be essential to the further development of both global health law and international human rights law.

It is within these liminal normative spaces that communities of practice harnessing informal consensus-building can engage in particularly influential and progressive interpretations of the law to help address the complex challenges posed by public health emergencies. As I examine in the next section, in developing the PHE Principles, the ICJ and the GHLC sought to redefine solidarity as transcending and displacing notions of international assistance in international human rights law in favour of a spirit of cooperation, mutual interdependence, collective responsibility, and extraterritorial obligation that recognizes both individual actions

⁵⁴⁷ Okafor, *supra* note 532 at Annex I, preamble.

⁵⁴⁸ Obiora Chinedu Okafor, *International Solidarity in Aid of the Realization of Human Rights During and After the Coronavirus Disease (COVID-19) Pandemic: Report of the Independent Expert on Human Rights and International Solidarity*, Human Rights Council, 47th Sess, UN Doc A/HRC/47/31 (13 April 2021); Sharifah Sekalala et al, “Decolonising Human Rights: How Intellectual Property Laws Result in Unequal Access to the COVID-19 Vaccine”, 6 *BMJ Global Health* (2021) e006169; International Commission of Jurists, *Human Rights Obligations of States to Not Impede the Proposed COVID-19 TRIPS Waiver: Expert Legal Opinion* (Geneva: ICJ, 2021).

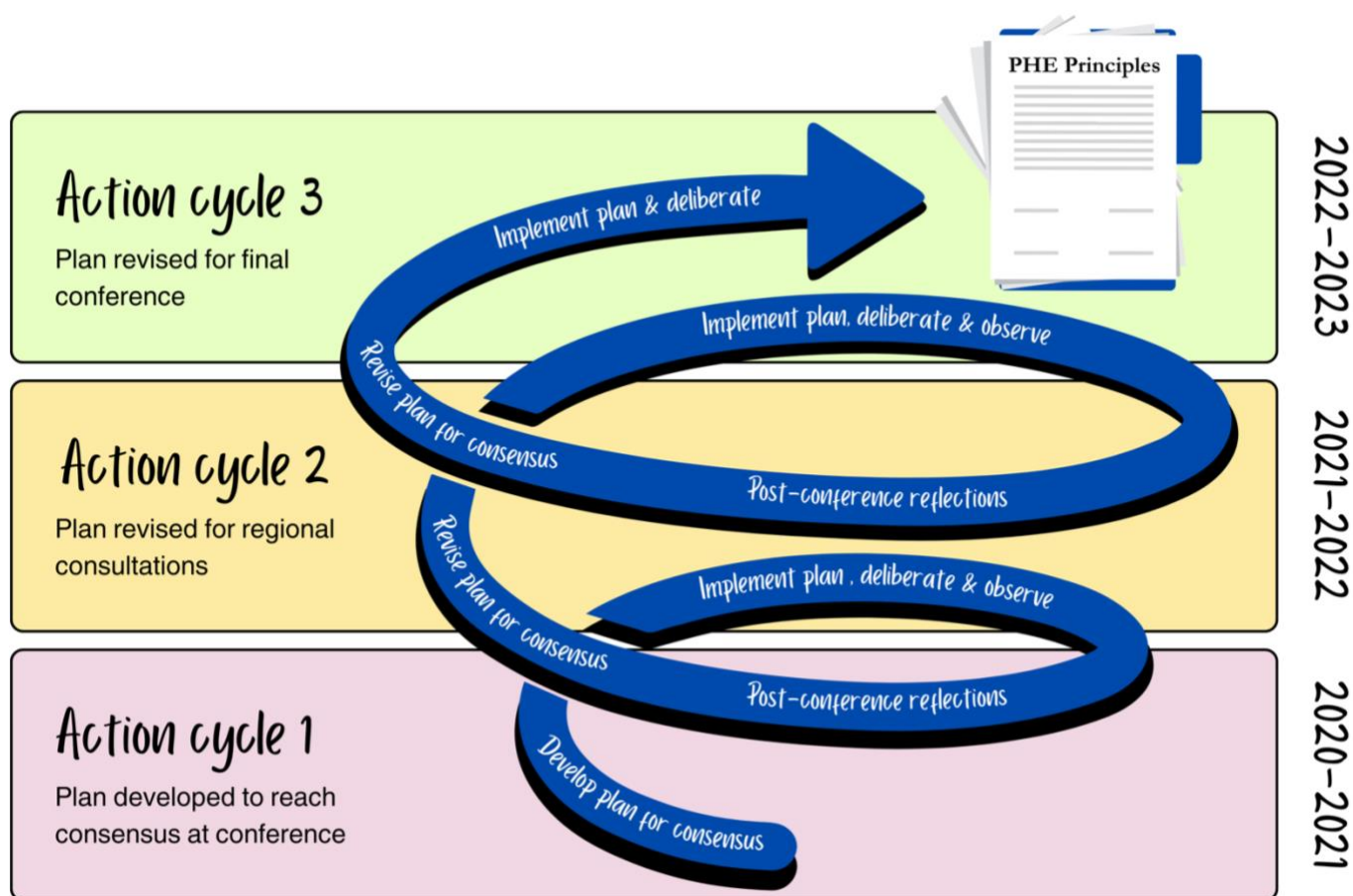
and omissions of states and non-state actors as possible threats to human rights in the global public health response.⁵⁴⁹

5.5 Developing the PHE Principles

The making of the PHE Principles unfolded across six phases from conceptualization to finalization, and five major drafts of the principles were developed in this process (see **Figure 3**).

Much like the development of the *Statement of Essential Human Rights* described in **Chapter 3**,

Figure 4 Development of the *PHE Principles* through action research cycles



⁵⁴⁹ Under the *Maastricht Principles*, extraterritorial obligations are: "... obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and obligations of a global character that are set out in the Charter of the United Nations and human rights instruments." See *Maastricht Principles on ETOs*, *supra* note 197 at paras 8(a) and (b).

the consensus-building process on the PHE Principles was not planned in this manner from the outset. Instead, three spiraling—and at times overlapping—cycles of planning, drafting, deliberation, and reflection underpinned the development of the PHE Principles (see **Figure 4**). The trajectory of the project shifted considerably as a result of these cycles, with workplan adjustments, additional funding and more team support being crucial to the project's finalization. As these action cycles progressed, the scope of the project also grew in complexity. This is represented by increasingly larger concentric circles in **Figure 4**.

As I describe below, this iterative approach to drafting and deliberation on the principles had the effect of shifting the goal post in reaching consensus. Below, I chronologically recount and examine the key events that took place in developing the PHE Principles, juxtaposing this account with my own reflections on the major dynamics at play in each stage. The steps in the making of the PHE Principles are conceptualized through the phases of the action research cycle shown in **Figure 4**.

5.5.1 First action research cycle (2021)

5.5.1.1 Planning for a 2021 expert consensus conference

As indicated above, the planning for this project began in May 2020 with subsequent months consisting of efforts to conceptualize the initiative and establish the parameters of a partnership between the ICJ and GHLC. Several individuals played a key role in operationalizing the partnership through an informal steering committee. On the GHLC side, I led the initiative with the support of a Global Strategy Lab research assistant, and the Chair of the GHLC. The GHLC chair position transitioned over the course of the initiative's inaugural year, starting with Professor Steven Hoffman (York University) in 2020 and later held by Professor Benjamin M. Meier (University of North Carolina at Chapel Hill) in 2021.

From the ICJ, senior leadership, including Zarifi and Seiderman, remained closely involved with the initiative. Soon after the ICJ agreed to join the initiative, Tim Fish Hodgson, who was the NGO's legal adviser on economic, social and cultural rights, was assigned to take a major frontline role in advancing the partnership from the ICJ Africa's base in Johannesburg. During the second action research cycle, Rocio Quintero Martinez from ICJ Latin America also became part of the team. This group remained at the helm of the initiative through to the third and final action research cycles.

Conceptually, both organizations broadly agreed that the underlying goal of the draft set of principles was to articulate what human rights frameworks offer to public health emergency prevention, preparedness, and response, and conversely, what public health principles and evidence contribute to the promotion and protection of human rights. With the early conceptual groundwork set, I facilitated a series of virtual meetings between the two organizations to identify the "Core Experts" who would be invited to participate in this consensus-building project. While we anticipated that achieving consensus would be an uphill battle, we still hoped to complete the project by the end of 2021. As the following account of the first action cycle in this project demonstrates, this was a significant underestimate.

The selection of Core Experts was guided by several considerations. In the first instance, we sought participants who had expertise in global health law, human rights law, the rule of law, and other related subject matter, with a focus on achieving broad geographic and gender diversity. The group of experts was also constituted with a view to including individuals who worked across sectors, including academia, civil society, and other international and regional fora. A critical objective was to facilitate the dissemination of the final consensus output to

broader audiences. Drawing from the ICJ's past standard-setting work, participants were selected for their connections to networks and communities that could amplify this goal.⁵⁵⁰

In total, 35 individuals—17 from the GHLC and 18 from the ICJ—were invited to the consensus conference in May 2021, with five ultimately declining the invitation. It was initially expected that the 2021 consensus conference would serve as the final step toward consensus. In reality, however, the 30 experts who took part in the 2021 conference (see **Table 3**) would only be the first cohort of individuals who participated in the initiative throughout its three-year trajectory.

This initial group of experts included individuals based at institutions in Canada, Chile, Germany, India, Japan, Kenya, South Africa, Switzerland, the United Kingdom, and the United States. Of the 30 participants, 15 were women. Professionally, 18 participants were primarily affiliated with academic institutions, nine worked in non-governmental organizations (Global Initiative for Economic, Social and Cultural Rights, ICJ, Amnesty International and Kenya Legal and Ethical Issues Network on HIV & AIDS) and three worked in either a staff or independent capacity (e.g., independent expert) at an international organization (UNAIDS, Office of the High Commissioner for Human Rights, and the UN Committee on the Rights of Children).⁵⁵¹

Those invited were seasoned and well-known experts on a wide variety of subject areas, including international human rights law, and especially the right to health and other social, cultural, and economic rights, global health law, including norms developed under the auspices of WHO, European Union law, social security law, political economy, global health governance,

⁵⁵⁰ See works described in Section 4.4.1 at 141-142.

⁵⁵¹ It should also be noted that several participants also held more than one affiliation, sometimes across sectors (e.g., academia and civil society).

and legal epidemiology. In keeping with past practices of informal consensus-building co-led by the ICJ, all but two participants were non-lawyers.⁵⁵² Both non-lawyer participants had extensive experience in global health and human rights advocacy.

Table 3 Participants of the 2021 ICJ-GHLC consensus conference on the *PHE Principles*

Name	Role and Affiliation(s)*
1. Judith Bueno de Mesquita	Lecturer and Co-Deputy Director, Human Rights Centre, School of Law, University of Essex
2. Gian Luca Burci	Adjunct Professor of international law, Graduate Institute of International and Development Studies
3. Luisa Cabal	Chief of Human Rights and Gender, UNAIDS
4. Danwood Chirwa	Dean and Full Professor, School of Law, University of Cape Town
5. Thana de Campos	Assistant Professor, Pontifical Catholic University of Chile
6. Christian Courtis	Senior Human Rights Officer, Office of the UN High Commissioner for Human Rights
7. Stéphanie Dagon	Professor, Faculty of Law and Faculty of Medicine, University of Geneva
8. Sara (Meg) Davis	Principal Investigator, Digital Health and Rights Project, Graduate Institute of International and Development Studies
9. Rossella de Falco	Right to Health Officer, Global Initiative for Economic, Social and Cultural Rights
10. Mark Eccleston-Turner	Senior Lecturer in Global Health Law, Kings College London
11. Timothy Fish Hodgson	Legal Adviser on Economic, Social and Cultural Rights, International Commission of Jurists – Africa

⁵⁵² One participant was an anthropologist by background and another participant was a public health activist and health systems evaluator.

12. Lisa Forman	Associate Professor and Canada Research Chair (Tier 2) in Human Rights and Global Health Equity, Dalla Lana School of Public Health, University of Toronto
13. Lawrence O. Gostin	University Professor; Founding Linda D. & Timothy J. O'Neill Professor of Global Health Law; Faculty Director, O'Neill Institute for National & Global Health Law
14. Anand Grover	Former UN Special Rapporteur on the Right to Health, Senior Advocate in the Supreme Court of India and Director, Lawyer's Collective (India)
15. Roojin Habibi	Research Fellow and PhD Candidate, Global Strategy Lab, York University
16. Steven J. Hoffman	Dahdaleh Distinguished Chair and Professor of Global Health, Law, and Political Science, York University; Director, Global Strategy Lab
17. Rajat Khosla	Senior Director of Research, Advocacy and Policy, Amnesty International
18. Allan Maleche	Executive Director, Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN)
19. Benjamin M. Meier	Professor of Global Health Policy, University of North Carolina at Chapel Hill
20. Stefania Negri	Associate Professor of International Law, School of Law, University of Salerno
21. Mikiko Otani	Chairperson, UN Committee on the Rights of the Child and former Chair of the Committee on International Human Rights of the Japan Federation of Bar Associations
22. Ravi Ram	Health systems evaluator and specialist, various organizations
23. Ian Seiderman	Legal and Policy Director, International Commission of Jurists
24. Sharifah Sekalala	Associate Professor, School of Law, University of Warwick

25. Magdalena Sepúlveda Carmona	Former UN Special Rapporteur on Extreme Poverty and Executive Director, Global Initiative for Economic, Social and Cultural Rights
26. Matiangai Sirleaf	Nathan Patz Professor of Law, School of Law, University of Maryland
27. Allyn L. Taylor	Adjunct Professor, School of Law, University of Washington
28. Pedro A. Villarreal	Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law
29. Alicia Ely Yamin	Lecturer and Senior Fellow, Global Health and Rights, Petrie-Flom Center for Health Law, Policy and Biotechnology; Senior Advisor on Human Rights and Health Policy, Partners in Health
30. Saman Zia-Zarifi	Secretary-General, International Commission of Jurists

* Listed participants are those who attended the conference either in-person or online. This list excludes invitees who ultimately did not attend the conference. Roles and affiliations are those that participants held at the time of the conference.

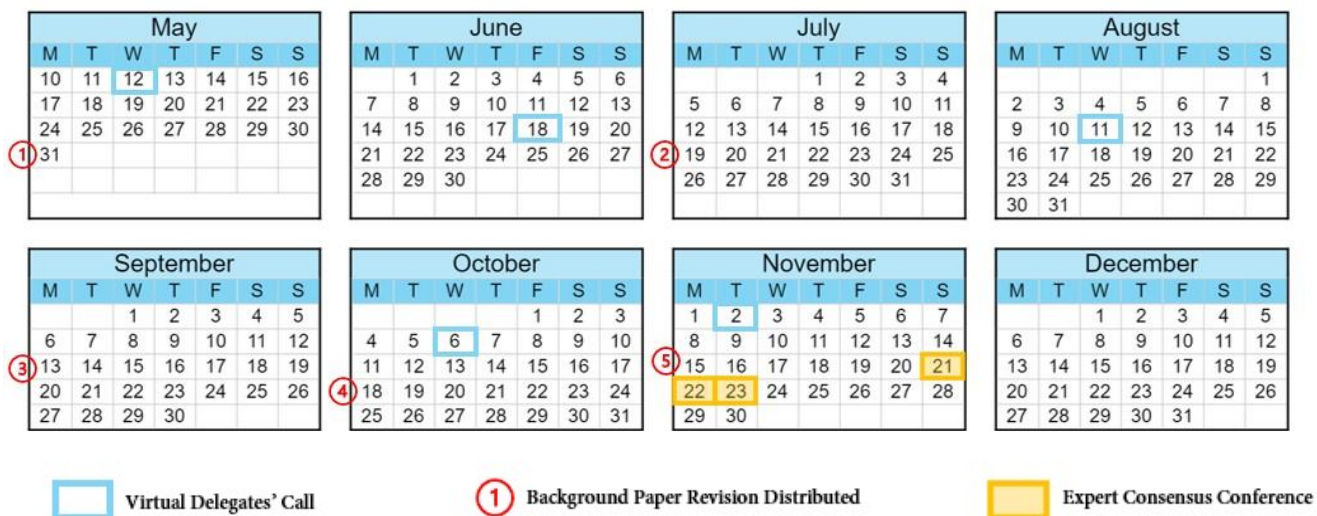
With the Core Experts confirmed, the ICJ and GHLC convened experts virtually for the first time on 12 May 2021. This meeting provided an opportunity for invited experts to connect with one another and meet the ICJ and GHLC team involved in the project. It also served as a forum for participants to ask clarifying questions about the initiative as well as express their own hopes and vision for the project.

Since I had brokered the partnership between the two organizations, I took the opportunity at this meeting to present a preliminary workplan outlining the project's timeline, culminating in an expert consensus conference scheduled on 22-23 November 2021 (see **Figure 5**).⁵⁵³ The

⁵⁵³ These conference dates were selected in part to avoid conflicting with American Thanksgiving (25 November), as well as with the 48th session of the Human Rights Council (13 September to 11 October) and the 2nd Special Session of the World Health Assembly in Geneva (29 November to 1 December). The latter event marked the formal start of pandemic treaty negotiations.

seven-month workplan included dates for the dissemination of iterative drafts of a background report that I would develop with the support of the research assistant, reviewed by the ICJ's staff, to set the context as well as summarize the normative underpinnings of a draft set of principles on human rights and public health emergencies. Between this first virtual meeting and the 2021 consensus conference, virtual feedback calls were scheduled with Core Experts in July, September, and October to solicit their input on iterations of the background paper, and eventually the draft principles.⁵⁵⁴ Our aim was to finalize the project by end of 2021.

Figure 5 Original workplan of the *PHE Principles* in 2021



I learned several critical lessons about laying the groundwork for informal consensus-building projects from this early experience. First, the workplan lacked essential details. It did not specify who would be responsible for drafting the principles, when the drafting process

⁵⁵⁴ The original workplan set virtual feedback calls on a bi-monthly basis in June, August, and October. Delays were an inevitable feature of the process to develop the *PHE Principles*. However, it also became clear that to match the differing time zones of participants, multiple feedback calls would need to be organized in the same month, at different times of day.

would occur, or how the project would transition from a background paper to a draft set of principles. The workplan also failed to account for the necessary resources—both financial and human—to achieve project timelines effectively, as well as time that would need to be spent seeking these resources (e.g., through grant applications).

I also came to understand the importance of establishing an engaged steering committee at the outset of such initiatives, made up of individuals from multiple organizations. Such a committee would enrich the decision-making, foster diverse perspectives, and build collective ownership in the outcome of consensus. I reflect on these lessons learned in the conclusion to this chapter.

These planning gaps were in part due to my own inexperience in organizing an initiative of this scale and nature. Leading a project of this complexity for the first time, I lacked a baseline understanding of the time and resources needed to foster meaningful discussion and achieve consensus among a group of highly engaged and insightful individuals with strong views on core subject matter of the principles.⁵⁵⁵ The feasibility of the project timeline would resurface during the feedback calls, highlighting the need to reassess and refine the workplan as the project progressed.

Nevertheless, as a first step in the project, I set about drafting a background paper to inform the consensus-building work of the Core Experts. In the next section, I provide a high-level overview of the next stage of this first action research cycle: the drafting of, and feedback on, the background paper and draft principles.

⁵⁵⁵ Although I had a targeted role in drafting an expert consensus statement in global health law—the *Stellenbosch Consensus Statement on Legal National Responses to Public Health Risks* described in Section 5.3—I had not overseen this initiative in an organizational or leadership capacity.

5.5.1.2 Implementation of plan towards the 2021 expert consensus conference plan

In virtual feedback calls from July to October 2021, I sought to finetune the research informing the drafting of the principles and to facilitate consensus on a draft set of principles at the consensus conference in November. The background paper grew in length and complexity over each successive set of feedback calls.

Background research on the principles: The first set of feedback calls with Core Experts was held between 19-21 July 2021.⁵⁵⁶ The aim of the meeting was to solicit feedback on the draft background paper that had been shared with participants ahead of the call. Although still incomplete, the background paper spanned 40 pages and was organized into three key topics that the eventual set of principles were expected to address:

- I. Scope and Foundational Principles;
- II. Responses to a Global Public Health Emergency; and
- III. Solidarity, Collective Responsibility and International Cooperation.

I invited participants to respond to four guiding questions throughout their interventions:

- Has the state of law been adequately described? How should it be strengthened?
- Where are the gaps or blind spots in the analysis?
- Are there inconsistencies in the analysis, or is further streamlining needed?

⁵⁵⁶ Feedback calls were scheduled at three different dates and times to accommodate the diverse time zones of the core experts. Participants were also invited to provide feedback in writing if they were not able to attend the feedback calls. Several participants opted to do both.

- What public health measures should be included that have not yet been analyzed?

Although targeted questions were asked, feedback during the calls and in writing covered a wide range of topics. Among other issues, participants discussed the scope and purpose of the project, the tensions and synergies between evolving public science and human rights norms in the context of public health emergencies, the relevance of norms from parallel regimes of international law (e.g., international disaster law and international humanitarian law), and the role of private actors in public health emergencies.

One foundational concern raised during these calls interrogated *which* standards of international law should guide the research and drafting of the principles. Early disagreements arose about the role of soft law in the consensus-building process, with general comments issued by UN human rights treaty bodies—particularly by the Committee on Economic, Social and Cultural Rights—provoking lively debate. Some participants argued that general comments, lacking universal state endorsement, should not be treated as authoritative sources of international law for the purposes of this exercise. Others contended that dismissing the authority of the Committee, given the provenance of their mandate on economic, social, and cultural norms from the UN Economic and Social Council, would undermine the broader UN human rights system.

Following the first feedback call, both the ICJ and GHLC agreed that further debate on this issue would be unproductive to the consensus-building process. While the matter remained unresolved during this first round of meetings, the concern prompted the co-organizers and I to explicitly adopt a progressive interpretive approach to international law in this project, rather than a conservative one. This marked the first point in the process where we established that

consensus on the principles would not necessarily mean unanimous agreement. We decided to clarify the interpretive approach taken in the PHE Principles in a separate preambular section of the draft principles that was retained through to the final draft of the PHE Principles.⁵⁵⁷

By the 2021 consensus conference, there was broad agreement that the principles should adopt a progressive approach to the interpretation of the sources of international law, incorporating soft law sources as needed to achieve this goal.⁵⁵⁸ A key takeaway from this experience is the critical importance of clearly articulating the interpretive approach and normative sources of an informal consensus-building process at the outset of the project to avoid potential derailments later.

During the second round of feedback calls, some participants observed that the background paper had become overly academic and called for a shift towards drafting the principles themselves. Discussions emphasized the need for a clear, concise, and authoritative document to provide practical guidance during crises and emergencies. The principles, they argued, should be straightforward and accessible, with supplementary academic documents or commentaries explaining the rationale behind each provision.

⁵⁵⁷ In the final version of the PHE Principles, the introduction contains a subsection dedicated to “interpretation and sources,” noting that:

As far as possible, the Principles affirm existing international law and correlative standards applicable to all States facing public health threats that may amount to emergencies. In providing clarity on the State’s obligations to realize civil, cultural, economic, political, and social rights in the context of public health emergencies, the Principles adopt a progressive interpretation to existing international legal standards. This approach includes, among other considerations, applying in alignment with the principle of *pro homine*, by which to the extent there may be a conflict between standards or their interpretation, those most protective of human rights should prevail.

⁵⁵⁸ It is worth noting that some ICJ staff also pushed back against the term ‘soft law,’ as they found it to be an umbrella term referring to many different norms that are not the same. In particular, the ICJ maintained that general comments are authoritative interpretations constituting a more detailed explanation of hard legal obligations, while soft law is generally taken to refer to standalone documents such as resolutions and declarations.

From this point forward, the focus of participant feedback would be on drafts of the principles themselves. Footnotes were included with each principle to indicate the normative source(s) informing their development. Initially envisioned as a companion document to the draft principles, I chose to gradually phase the background paper out of the consensus-building process. This decision reflected in part the practical constraints faced by a primarily two-person team, composed of myself and a research assistant, who were responsible not only for drafting the background paper and the principles, but also for managing the logistics and organization of the consensus conference. I also determined that the background paper, with its narrative form, had the potential to distract participants from the overall aims of consensus-building.⁵⁵⁹

Drafting the principles In August 2021, I began to develop a zero draft of the principles based on the framework of the background paper and the input it had received. The zero-draft proposed to organize the principles into five sections:

- I. An introductory/preambular section serving to explain the context leading to the PHE Principles and the interpretive approach espoused in their making;
- II. A section addressing the scope of application of the principles as well as pertinent definitions and key terms used;
- III. A section describing foundational and/or cross-cutting principles, such as rule of law, legality, equality, participation, and accountability;
- IV. A section describing the obligations necessary for ensuring effective preparedness, as well as responses to and recoveries from global health emergencies

⁵⁵⁹ Some feedback on the background paper noted that its narrative was overly "celebratory" and insufficiently reflective of the harm the COVID-19 pandemic inflicted on human life and health. While I acknowledged the validity of these comments, I concluded that they stemmed from the nature of using an "academic paper" as a consensus-building tool, rather than from the principles themselves, which were grounded in sources of law.

- V. A section addressing collective responsibility and extraterritorial obligations of international assistance and cooperation, as well as related emerging norms such as solidarity

While the exact title and content of these five sections would receive much feedback and undergo many changes throughout the initiative, this organization of the document would be largely retained through to the final draft of the PHE Principles.

In drafting the principles, I later learned the value of delegation and collaborative writing. It would have been far easier to organize a drafting committee and to delegate key sections or work to several willing consensus conference participants. This approach was taken in the latter half of the project and contributed to a strengthened sense of ownership and buy-in at the final Brocher consensus conference, further described in **Section** Error! Reference source not found..

Specific feedback on scope of the principles: The scope of the principles, as well as the definition of a ‘public health emergency,’ loomed large in feedback call discussions. The natural starting point in defining a public health emergency in the draft principles was the definition of a “public health emergency of international concern” (PHEIC) under the IHR. The Regulations define a PHEIC as an “extraordinary event” that (1) constitutes a public health *risk* to other states through the international spread of disease; and (2) potentially requires a coordinated international response.⁵⁶⁰ A “public health risk” is further defined as the “likelihood of an event that may affect adversely the health of populations, with an emphasis on one which may spread internationally or may present a serious and direct danger.”⁵⁶¹ Adopting an all-hazards model

⁵⁶⁰ IHR, *supra* note 467 at art. 1.

⁵⁶¹ *Ibid.*

akin to that in international disaster law, “disease” is broadly defined as “an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans.”⁵⁶²

Early in the drafting process, we determined that the IHR’s PHEIC definition was inadequate for the purposes of the principles. Post-crisis reviews of the 2005 IHR’s performance highlighted persistent challenges in interpreting and applying this broad, two-step PHEIC definition.⁵⁶³ Successive WHO Directors-General have also faced criticism for delays in declaring PHEICs.⁵⁶⁴ In the context of COVID-19, the Independent Panel for Pandemic Preparedness and Response heavily criticized the WHO for failing to declare a PHEIC promptly, urging the Organization to reverse its current bias towards inaction in favour of taking “precautionary action...on a presumptive basis, unless evidence shows that it is not necessary.”⁵⁶⁵

A bias towards business-as-usual, whether in the name of preserving global trade and the economy, or through the recognition of threats visible primarily to high-income countries, risks entrenching power imbalances that are fixtures of colonial approaches to global health.⁵⁶⁶ At the same time, while inaction in the face of public health threats can gravely endanger health and human rights, casting too wide a net on what constitutes a ‘public health emergency’ also risks

⁵⁶² *Ibid.*

⁵⁶³ Mark Eccleston-Turner & Adam Kamradt-Scott, “Transparency in IHR emergency committee decision making: the case for reform” (2019) 4 *BMJ Global Health* e001618.

⁵⁶⁴ David N Durrheim, Lawrence O Gostin & Keymanthri Moodley, “When does a major outbreak become a Public Health Emergency of International Concern?” (2020) 20 *The Lancet Infectious Diseases* 887.

⁵⁶⁵ Independent Panel for Pandemic Preparedness, “COVID-19: Make it the Last Pandemic” (2021), online (report): <<https://recommendations.theindependentpanel.org/main-report/>> at 52.

⁵⁶⁶ Matiangai Sirleaf, “White Health as Global Health” (2023) 117 *AJIL Unbound* 88.

enabling human rights abuses by legitimizing measures that could be mitigated or avoided entirely.

To refine our definition, we looked to examples from other domains of international law. Instruments in other domains of international law primarily focus not on the *likelihood* of an event but rather its *actualization*. For instance, the International Law Commission's *Draft articles on the protection of persons in the event of disasters* (2016) define "disaster" as:

a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.⁵⁶⁷

As explained in commentaries to the Draft articles, the International Law Commission sought to distinguish serious events that can be attributed to disasters from those associated with "political or economic crises."⁵⁶⁸ Further, the term "calamitous" is followed by two qualifiers that serve to establish a high threshold for the application of the Draft articles: first, the event (or series of events) must "result in a widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage..." and second, it must lead to the serious "disruption of the functioning of society." Notably, unlike the IHR, the Draft articles are not preoccupied by the transboundary nature—or *potential* transboundary nature—of an event.

⁵⁶⁷ "Chapter IV. Protection of persons in the event of disasters" *Report of the International Law Commission on the Work of its Sixty-Eighth Session*, UNGA, 71st Sess, Supp No 10, UN Doc A/71/10 (2016) at 13–17, 14.

⁵⁶⁸ *Ibid* at 22.

We also looked to the UN General Assembly's *2015-2030 Sendai Framework for Disaster Risk Reduction* (Sendai Framework), which similarly adopts an event-specific notion of a "hazard" as:

a potentially damaging physical event, phenomenon or human activity that may cause the loss of or injury, property damage, social and economic disruption or environmental degradation.⁵⁶⁹

Encapsulating hazards from the natural (e.g., geological, hydrometeorological, biological) to the human-induced (e.g., environmental degradation), and including "latent conditions that may represent future threat,"⁵⁷⁰ the Sendai Framework captures a wide range of risks that go beyond the core terms of the PHEIC under the IHR.

Unlike the IHR, the Sendai framework and other international instruments opt for a core focus on the *consequences* of an event. The 1998 *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations* ("Tampere Convention"), for instance, refers to a "disaster" as:

a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity and whether developing sudden or as a result of complex long-term processes.⁵⁷¹

⁵⁶⁹ *Sendai Framework for Disaster Risk Reduction 2015–2030*, UNGA Res 69/283, UNGAOR, 69th Sess, Supp No 283, UN Doc A/RES/69/283 (2015); *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters*, UNGAOR, 60th Sess, UN Doc A/CONF.206/6 (2005).

⁵⁷⁰ *Ibid*

⁵⁷¹ *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, 18 June 1998, 2296 UNTS 5 (entered into force 8 January 2005).

A near identical definition of “disaster” is found in the 2007 International Federation of the Red Cross and Red Crescent Societies *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (IFRC Guidelines).⁵⁷²

In contrast, human rights treaties typically contemplate emergencies through high thresholds such as the eventuality of a “public emergency threatening the life of a nation,”⁵⁷³ or a “public danger, or other emergency that threatens the independence or security” of the nation.⁵⁷⁴ The Siracusa Principles elaborate on this concept, describing a threat to the life of the nation as one that:

(a) affects the whole of the population and either the whole or part of the territory of the State; and

(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.⁵⁷⁵

From a public health perspective, the ICCPR’s threshold of a “threat to the life of the nation” is indeed a very high bar, as the life of the nation can continue even under serious health pressures. Authoritative interpretations argue that public health crises, insofar as possible, must be dealt with through the limitations regime, which still requires a public health or other enumerated legitimate purpose.⁵⁷⁶

⁵⁷² International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva: IFRC, 2007).

⁵⁷³ See for example ICCPR, *supra* note 2 at art 4; ECHR, *supra* note 346 at art 15; Council of Europe, *Revised European Social Charter*, ETS No 163, 3 May 1996 [ESC] at art 30. See also Paris Minimum Standards, *supra* note 23; Johannesburg Principles, *supra* note 413.

⁵⁷⁴ See ACHR, *supra* note 346 at art 27.

⁵⁷⁵ Siracusa Principles, *supra* note 1.

⁵⁷⁶ See for example United Nations Office the High Commissioner for Human Rights, *Reporting under the International Covenant on Civil and Political Rights: Training Guide* (New York & Geneva: UN, 2021) at 34: “The

From our review of the above, we concluded that human rights guiding principles should apply not only to emergencies that “threaten the life of a nation,” but also to events posing significant threats to human life, health, well-being, or societal functioning. As a starting point, our draft principles defined a “global health emergency” as

a newly emergent situation, which may be comprised of multiple events, and which poses a significant and substantial risk to human life, health and/or well-being and social institutions, and therefore requires a coordinated domestic and international response.

During virtual feedback calls, this definition sparked three broad categories of debate concerning the temporal, geographic, and material scope of a public health emergency for the purposes of the draft principles.

First, participants highlighted the definition’s narrow temporal focus on emergency responses, arguing that the principles should also address state responsibilities for prevention, preparedness, and recovery, drawing on economic, social, and cultural rights frameworks. Many noted that the extent to which states may be compelled to derogate from their human rights obligations in times of crisis depends in part on how prepared States are for the eventualities of a future public health crisis. However, expanding the principles to include preparedness and recovery introduced challenges in subsequent drafts, as the framework became more complex and less amenable to an efficient consensus-based outcome.

Second, participants questioned the definition’s use of the term *global health*, noting that it would exclude smaller-scale crises of a regional or domestic nature. Several participants emphasized that human rights principles should broadly protect human rights, regardless of the

clear preference is for States parties not to derogate from the Covenant rights if they are able to attain their public health or other public policy objectives by invoking the possibility of restricting certain rights...”

scale of the crisis. Some proposed substituting “global health” with “public health” to ensure the principles apply to all health crises, whether global, regional, or national. Nevertheless, all participants agreed that transboundary health crises engender unique challenges and legal obligations that perhaps would be more useful to discuss in a separate section of the principles, alongside public health emergencies of more limited geographical scope. This recommendation was taken up in the final PHE Principles, which came to address “Extraterritorial Obligations in the Context of Public Health Emergencies” in its last section.

Finally, participants asked how we might determine that a public health emergency exists in the first place. Almost all participants agreed that in order for the principles to be useful, the concept of a public health emergency required some material guardrails. In general, two key approaches were presented, with pros and cons shared for each approach:

1. A public health emergency is an event or situation which is "caused" by a disease or environmental event (the 'health as a catalyst' approach); or
2. A public health emergency is an event with health-related consequences, regardless of origin (e.g., war, famine, volcanic eruption or other form of natural disaster) (the 'health as a consequence' approach)

Participants pointed out that the second approach might be overly broad, encompassing any event that might impact public health and making it challenging to develop context-specific principles. For instance, the draft principles were not articulated with the unique dynamics of a climate crisis in mind. Moreover, since we lacked focused expertise in certain areas of international law, such as international humanitarian law, the group was reluctant to include war-induced catastrophes within the scope of the definition.

Regarding the first approach, participants emphasized the need to focus the principles on the actions of states during such emergencies and the possible impacts of those actions on human rights; that is, on whether the measure taken by the state is purported to be on the basis of the public health emergency. Participants also agreed that both state actions *and* omissions should be the focus of the draft principles, irrespective of whether there has been a formal emergency declaration or not. In other words, the determination of a crisis amounting to a public health emergency should not be left to states alone.

Ultimately, participants recognized that it would be difficult to elaborate on a "gold standard" definition of a public health emergency. They also noted that debates at that time were coloured by our experiences with COVID-19, but the next major public health event might look very different. As shown below, these debates culminated in a middle-ground approach in the final PHE Principles which defined a public health emergency as:

...a newly emergent situation or the intensification in scope and/or scale of an existing situation involving an illness or medical condition, which – irrespective of origin or source – poses or could pose an urgent and significant risk to human life, health, or the basic functioning of society and/or substantially impact the enjoyment or exercise of human rights in one or more States.⁵⁷⁷

In what would become an ongoing theme in the consensus-building process, participants agreed to contextualize what the principles could and could not address within accompanying legal commentary to be developed at a later stage.

⁵⁷⁷ PHE Principles, *supra* note 31.

5.5.1.3 The Mantello consensus conference (2021)

The first expert consensus conference took place on 22-23 November 2021 in Mantello, Italy. The conference was preceded by an informal ICJ-led conversation on the Siracusa Principles on 21 November, and an annual conference of the GHLC on 24 November.⁵⁷⁸ The conference agenda was organized into five substantive sessions, with each session recorded and moderated by an invited participant (see **Figure 6**). Ahead of the conference, participants were given the draft set of principles, as well as an ‘annotated’ version of the principles, with sources attributed to each principle in the footnotes. Following the conference, a consensus conference outcome report was shared, synthesizing the discussions that took place over the course of two days.

⁵⁷⁸ The informal discussion on the Siracusa Principles was informed by a working paper drafted by ICJ’s Legal and Policy Director, Ian Seiderman (*supra* note 28). The working paper remains unpublished at the time of writing this dissertation.

Figure 6 Agenda for the 2021 ICJ-GHLC Consensus Conference in Mantello, Italy

Time	Sat Nov 20	Sun Nov 21	Mon Nov 22	Tues Nov 23	Wed Nov 24
8		Breakfast	Breakfast & AV Check-In	Breakfast & AV Check-In	Breakfast
9		Opening & Agenda Overview	Intro to the Consensus Conference & Session 1: Framing & Scope of Principles Moderator: Steven Hoffman	Recap of Previous Day's Sessions Session 5: PHE Prevention & Preparedness Moderator: Rajat Khosla	
10		Welcome Event	Refreshments Break & COVID testing		
11		Refreshments & AV Check-In	Session 2: Framing & Scope of Principles cont'd Moderator: Steven Hoffman	Refreshments Break	
12		Session 1: ICJ Opening Remarks & Discussion on Revisiting the Siracusa Principles	Lunch	Session 6: PHE Response Moderator: Luisa Cabal	
13	Participant Arrival & Check In	Lunch	Session 3: Cross-Cutting Principles Co-Moderators: Meg Davis & Allan Maleche	Lunch	
14		Session 2: Revisiting the Siracusa Principles cont'd	Refreshments Break	Session 7: Extraterritorial Obligations Moderator: Benjamin Meier	
15		Refreshments Break	Session 4: Cross-Cutting Principles cont'd Co-Moderators: Meg Davis & Allan Maleche	Refreshments Break	
16		Session 3: Revisiting the Siracusa Principles cont'd & closing remarks by ICJ	Closing of Discussions	Session 8: Extraterritorial Obligations cont'd Moderator: Ian Seiderman	
17		Break (17h30 to 19h)	Break (17h to 19h)	Conference Closing Remarks	
19	Dinner	Dinner	Dinner	Break (17h30 to 19h) Dinner	Participant Check Out & Departure

Logistical considerations: Selecting a suitable venue for the event proved to be the first significant challenge for us. On one hand, we considered choosing a venue that would help participants avoid the typical visa and cost barriers associated with attending events in high-income countries, particularly in Europe and North America. We initially began planning to hold the event in Tunis, Tunisia, given the ICJ's office presence in the city. However, as the invite list expanded and the logistical complications of hosting an in-person event during the height of the COVID-19 pandemic became apparent, we determined that a larger and better-equipped venue would be necessary. After some research, we ultimately chose *La Fiorida*, an agricultural hotel located near Lake Como in Italy's Valtellina region as the host of the consensus conference. The venue provided a secluded and dedicated space for the conference, ensuring that participants could engage fully in discussions without outside distractions or exposure to the risk of large crowds in more populous localities.⁵⁷⁹

The conference was jointly funded by the ICJ and the GHLC, through its administrative home at the Global Strategy Lab, York University. A Social Sciences and Humanities Research Council of Canada Connection Grant, awarded to then-GHLC chair Professor Hoffman, offered part of the funding for the consensus conference. The other portion of the funding came from the ICJ's own budget.

To accommodate pandemic-related travel restrictions, the conference also allowed virtual participation, with nine participants joining online. In addition to facilitating Schengen visa approval processes for participants who required it, I worked closely with my research assistant to navigate pre- and post-conference COVID-19 testing requirements, as well as ensuring

⁵⁷⁹ For the duration of the conference, we were the only guests housed at *La Fiorida*.

treatment protocol and contingency plans in the event of illness during the conference.

Fortunately, no incident of illness arose during the conference.

Scope and framing of the principles: The opening session revisited themes initially discussed during earlier virtual feedback calls, focusing on the framing and scope of the draft principles. Some participants urged caution when drawing conclusions from ongoing experiences with the COVID-19 pandemic, noting the challenge of formulating definitive principles while the global pandemic remained active. Despite this, there was broad agreement that asserting the lessons learned thus far was a worthwhile endeavour, provided it was done with humility regarding the evolving nature of COVID-19.⁵⁸⁰ Participants acknowledged that this approach would not preclude future reassessments of the draft principles, even after their finalization. In fact, they concurred that revisions should be anticipated, drawing inspiration from the iterative and ‘living principles’ model of the Yogyakarta Principles and its subsequent updates.⁵⁸¹

As a post-script, less than a week after the consensus conference, the emergence of the Omicron variant led to renewed discriminatory and xenophobic travel bans, particularly targeting South Africa and other southern African nations. It also prompted the reimposition of stringent physical distancing measures globally and reignited debates around public health mandates. Notably, despite the growing need for vaccine equity, the Omicron variant exacerbated vaccine inequities. The race for booster doses to combat the variant intensified vaccine hoarding, further

⁵⁸⁰ We sought to incorporate lessons not only from COVID-19, but also past pandemics and epidemics, such as Ebola, Cholera, Dengue, Ebola, HIV and Zika, where inadequate adherence to effective public health policies and human rights obligations led to disastrous outcomes.

⁵⁸¹ The *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* have been periodically updated since their conclusion in 2006. See for instance O’Flaherty, *supra* note 207.

delaying equitable distribution. These events further emphasized the need for a strengthened focus on extraterritorial obligations in the draft principles.

Substantive feedback: The remaining sessions offered an array of substantive feedback on the draft principles. Below, I summarize three of the most crucial and consequential discussions that took place during the conference.

- (1) **From precautionary *principle* to precautionary *approach*** Participants observed that the precautionary principle, as it had been drafted, offered little in the way of guidance on the obligations that states have vis-à-vis the precautionary principle. The root of the problem was in part linked to the inherently fluid definition of the “precautionary principle.” On one hand, where great or irreparable harm may arise from certain action (as is often the case in environmental matters and the approval of new health products), the precautionary principle counsels inaction to avoid the risk of such harm. On the other, where harm may arise due to an external threat, the precautionary principle calls for action to minimize this risk. Participants agreed that it was important to address precaution in the draft principles, but some suggested softening the stakes associated with the precautionary principle and its fraught usage across regimes of international law by employing the term “precautionary approach” instead of “precautionary principle.”
- (2) **Emphasize the principle of solidarity** A key preliminary discussion among participants was the role of solidarity within both the Cross-Cutting Principles, and substantive sections of the draft principles. Most participants agreed that solidarity was a core principle to be cited within principles, and that it had conceptual merits that distinguished it from more familiar concepts of international cooperation and assistance in international human rights law. Solidarity prioritizes independence, self-sufficiency, and autonomy of

each state over notions of charity or assistance. Some considered solidarity a salient and standalone concept within the field of bioethics and various international treaties, even if the principle had not yet been integrated in the mainstream of international human rights law. The consensus within this discussion was to maintain solidarity and international cooperation as a joint Cross-Cutting Principle, and as a standalone principle within the extraterritorial obligations section of the draft principles.

- (3) **Role of non-state actors:** Participants had a robust discussion regarding the role of non-state actors during the COVID-19 pandemic, and whether these actors have contributed positively or negatively to global and national pandemic responses. The discussion centered on the role of for-profit organizations as well as private-public partnerships in the research, production, and distribution of lifesaving medical countermeasures, as well as in the provision of health services (e.g., in the context of privatized health care). A robust debate emerged regarding whether such actors held human rights obligations beyond those set out in leading soft law on the matter (e.g., due diligence and the duty to respect human rights). This debate permeated all stages of the action research cycle.

5.5.1.4 Post-conference reflections from the first action research cycle

Until recently, informal consensus-building initiatives in international human rights law primarily involved individuals with technical knowledge and expertise in human rights. The Mantello conference sparked a reflective discussion about this past practice in the consensus-building process—a discussion that marked the reflection phase of this first action research cycle. Participants questioned whose expertise should influence the formulation of principles and advocated for a broader consultation process to gather input from experts worldwide who have contributed to local public health responses to COVID-19. Some participants noted that the

imperative to consult more broadly was part of a global health-specific movement towards decolonizing the field.⁵⁸² Ultimately, all participants agreed that it was essential to reflect on the positionality of the experts convened in the initiative and maintain humility regarding what these principles could encompass. While seeking to enhance the process's legitimacy through engagement from diverse experts across different regions, participants emphasized the importance of reflecting on the limitations of these principles.

Prior to this discussion, neither the ICJ nor the GHLC had yet considered the possibility of further convenings to finalize the project, nor had they budgeted for this further work. It became clear from this opening discussion, however, that there would be need for a further process of regional consultation to build collective ownership in the draft principles. When it came to operationalizing this imperative, however, an array of diverging opinions emerged regarding *who* should be consulted and *how*. Some expressed a preference for the process to be inclusive through broader engagement with civil society organizations, while others favoured an expert-led process that engaged experts with more localized and regional levels of expertise in public health, law, and human rights. Some participants also proposed the idea of an expanded and more diverse 'drafting group' to oversee the drafting of the principles. Overall, this discussion initiated a new action cycle in the drafting process. Earlier plans to finalize the principles shortly after the Mantello conference had to be revised.

By coincidence, the Open Society Foundations, which had supported the early COVID-19 advocacy work of several NGOs, announced a rapid grant funding opportunity through their

⁵⁸² See for instance Seye Abimbola & Madhukar Pai, "Will global health survive its decolonisation?" (2020) 396:10263 *The Lancet* 1627.

“Emergency Powers Campaign.” The funding became available because of organizational restructuring within the Foundation during this period. The Foundation launched their call for applications to support further work under the campaign on 20 October 2021, with proposals due within seven days. As a prior grant recipient, the ICJ was eligible to apply, and I prepared an application on their behalf to support further work on the principles. Within the span of a week, I drafted a proposal budgeting 100,000 USD for further work on the principles in 2022. By October 27, the funding was approved.

As outlined in the second action research cycle (**Section 5.5.2**), this additional funding allowed us to revamp the consensus-building process in three ways: (1) by expanding the group of Core Experts involved in developing the principles; (2) by establishing a diverse drafting group to support further drafting of the principles; and (3) by conducting regional consultations to gather input from a broader group of relevant experts on the draft principles. It is worth noting that the serendipitous and robust nature of the funding we secured was available only because of the exceptional crisis of the moment. Broader and more inclusive consensus-building processes require generous funding and without such support, it may not have been feasible to integrate them into the process.

In sum, the Mantello conference ended without reaching consensus on the draft principles. Though robust, I left the conference somewhat deflated by the volume of work that remained in the project. However, the conference also acted as a springboard for collaborations among attendees, many of whom were part of separate communities of practice in global health law and human rights law. Over the following two years, these individuals worked to advocate for the inclusion of human rights language and for the alignment of the pandemic treaty with

human rights norms.⁵⁸³ Notably, several organizers and attendees became founding members of an advocacy group known then as the *Civil Society Alliance for Human Rights in the Pandemic Treaty*.⁵⁸⁴ While these collaborations were not solely aimed at advancing the drafting of the principles (and it would be an overstatement to claim that the conference was the sole source of these collaborations), the event brought together individuals from different communities of practice in international law, fostering connections that contributed to a shared advocacy agenda at a moment where that advocacy agenda had particular strategic importance.

The conference also took place against the backdrop of a pivotal moment in global health law. Less than a week after the conference, the World Health Assembly held a Special Session—the second such special session in its history—to consider the “benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and response.”⁵⁸⁵ Following this special session, WHO Member States agreed to initiate a formal process and establish an intergovernmental negotiating body to develop such an instrument. In my view, the overlap of our conference with this historic moment reinforced the significance of the discussions held in Mantello and provided an impetus for the continued development of the principles, despite the hard work that lay ahead. Since it was uncertain how quickly these parallel

⁵⁸³ For a subset of these collaborations, see for instance: Timothy Fish Hodgson, Magdalena Sepúlveda Carmona & Mike Podmore, “States Cannot Negotiate a Pandemic Treaty Alone” (2022), online (blog): <<https://www.bmj.com/content/377/bmj.o1281>>; Fish Hodgson et al, *supra* note 488; Benjamin M. Meier et al, “Advancing Human Rights in Pandemic Treaty Debates” (12 July 2022), online (blog): <<http://opiniojuris.org/2022/12/07/advancing-human-rights-in-pandemic-treaty-debates/>>.

⁵⁸⁴ COVID-19 Accelerator Platform, “Civil Society Alliance for Human Rights in the Pandemic Treaty,” online: <<https://covid19advocacy.org/civil-society-alliance/>>.

⁵⁸⁵ World Health Assembly, *Special Session of the World Health Assembly to Consider Developing a WHO Convention, Agreement, or Other International Instrument on Pandemic Preparedness and Response*, 74th sess, WHA Doc A74(16) (2021).

global health law reform would progress, we recognized that time was of the essence and rapidly set about planning for the second action research cycle, further described below.

5.5.2 Second action research cycle (2022)

5.5.2.1 Revisiting the consensus-building plan

Soon after the Mantello conference, I met with the Steering Group to develop a new plan for reaching consensus on the principles within the next 12 months. Our priority was making post-conference revisions to the develop the second draft of the principles. To facilitate these revisions, I prepared and disseminated a conference ‘outcome’ report, consisting of a summary of feedback received and proposed changes to the draft principles. While this report added to the team’s workload, it helped consensus-building in two ways. First, it enabled the Steering Group to process a high volume of feedback collected during the conference and establish a shared understanding of necessary revisions (i.e., build consensus on the feedback received). Second, much like responding to peer review in academic publishing, the report catalogued the conference feedback in a manner which set out how each post-conference edit to the draft principles corresponded to the feedback received. Core Experts reviewed the conference outcome report in March 2022 and were asked to flag objections and identify any discrepancies with their recollections of the discussions. To ensure transparency, we also workshopped the post-conference draft of the principles with the core group of experts prior to initiating the regional consultations.

In tandem with revising the draft principles, we also sought to improve the consensus-building process, in line with after-action reflections from the Mantello conference (see **Section 5.5.1.4**). We committed to several changes in the consensus-building process to broaden the diversity of participants who provided feedback on the draft principles, with a view to enriching

their content and focus. First, in response to the feedback that our group of Core Experts was lacking in diversity, we created a running list of individuals within ICJ and GHLC networks who could help enrich our analysis of the draft principles, bringing expertise from the academic, NGO, UN, and other IO sectors. We also asked the Mantello conference participants to populate this list with any additional experts who they believed would make important contributions to our initiative. In 2022, the following six individuals accepted our invitation to join the group of Core Experts: Luciano Bottini Filho, Aeyal Gross, Sam Halabi, Alexandra Phelan, Tsung-Ling Lee, and Brigit Toebes. New members were fully debriefed and invited to provide feedback on the draft principles.⁵⁸⁶ While the group of Core Experts grew, we also lost two experts, Mikiko Otani and Anand Grover, partly due to the extended project timeline.

Second, in response to recommendations from the Mantello conference, we established a formal Drafting Group with broader representation from among the Core Experts. Until this point, drafting had primarily involved a small group of the ICJ staff, the GHLC Chair, and myself, working informally as part of the Steering Group. While members of the Steering Group continued to hold the pen in drafting, all Core Experts were invited to join the drafting effort. Select members were directly encouraged to take part in this expanded Drafting Group.

Despite these efforts, few individuals expressed interest in taking on an active drafting role, underscoring the paradox of participation. Since informal consensus-building initiatives are often undertaken on the margins of professional and personal responsibilities, those who take part either have flexible schedules, institutional support, or sufficient resources to dedicate their time

⁵⁸⁶ While Rossella de Falco and Allan Maleche were not present at the final consensus conference in 2023, they rejoined the process following the conference, choosing to sign on to the final version of the PHE Principles.

to such endeavours. This dependency creates a systemic imbalance: while these processes strive for inclusivity and diverse perspectives, those who face intersecting systems of marginalization—due to their identities, professional roles, or geographic contexts—often have the least capacity to engage fully. This phenomenon, sometimes referred to as "time poverty," disproportionately affects individuals balancing multiple roles, such as caregivers, advocates, or those working in resource-constrained environments.⁵⁸⁷ It underscores the structural barriers that hinder participation, where the very individuals whose insights would most meaningfully shape the outcomes of such initiatives are often unable to contribute due to competing demands on their time and energy.

Finally, the Mantello conference mandated the Steering Group to undertake broader regional consultations on the draft principles. These consultations were to target the participation of experts involved in local responses to COVID-19, with a focus on human rights and public health. After regional consultations were done, it was understood that the Steering Group would return to the Core Experts with a high-level summary of feedback received and modifications to the draft principles based on the regional consultations. The aim was for Core Experts to deliberate and reach consensus on the principles once the regional consultations were completed. The regional consultations process is further outlined in the next section.

The overall effect of these three changes was to add complexity to the human dynamics of the consensus-building process, as illustrated in **Figure 7**. By the end of planning for the second

⁵⁸⁷ Elizabeth Hyde, Margaret E Greene & Gary L Darmstadt, "Time Poverty: Obstacle to Women's Human Rights, Health and Sustainable Development" (2020) 10:2 J Glob Health 020313.

action research cycle, the informal consensus-building process had attained a state of semi-permanence, and involved the following groups:

(1) ***The Steering Group***: Comprising of a small group of ICJ staff, the GHLC Chair, and myself.

The steering group organized consensus-building cycles, tracked progress, and facilitated the consensus-building process through monthly meetings.

(2) ***The Drafting Group***: Although I was primarily responsible for writing the early drafts of the

principles, ICJ staff and GHLC members took on a more prominent drafting role following

the first consensus conference. In 2022, we established a formal Drafting Group, made up of

members of the steering group and additional members from the core experts.⁵⁸⁸ This group

was responsible for revising the third and subsequent drafts of principles based on feedback

from Core Experts and regional consultations. This would remain the core group of

individuals involved in drafting the principles until project completion in 2023.

(3) ***The Core Experts***: Made up primarily of legal experts who were invited by the ICJ and

GHLC, and who remained engaged in the informal consensus-building initiative throughout

the life of the project. Core Experts provided feedback and direction on all drafts of the

principles with a view to achieving a consensus-based outcome;

(4) ***The Consultants***: Seven experts hired by the GHLC and the ICJ in 2022 to lead and gather

input from regional consultations in the following priority regions: Australia and New

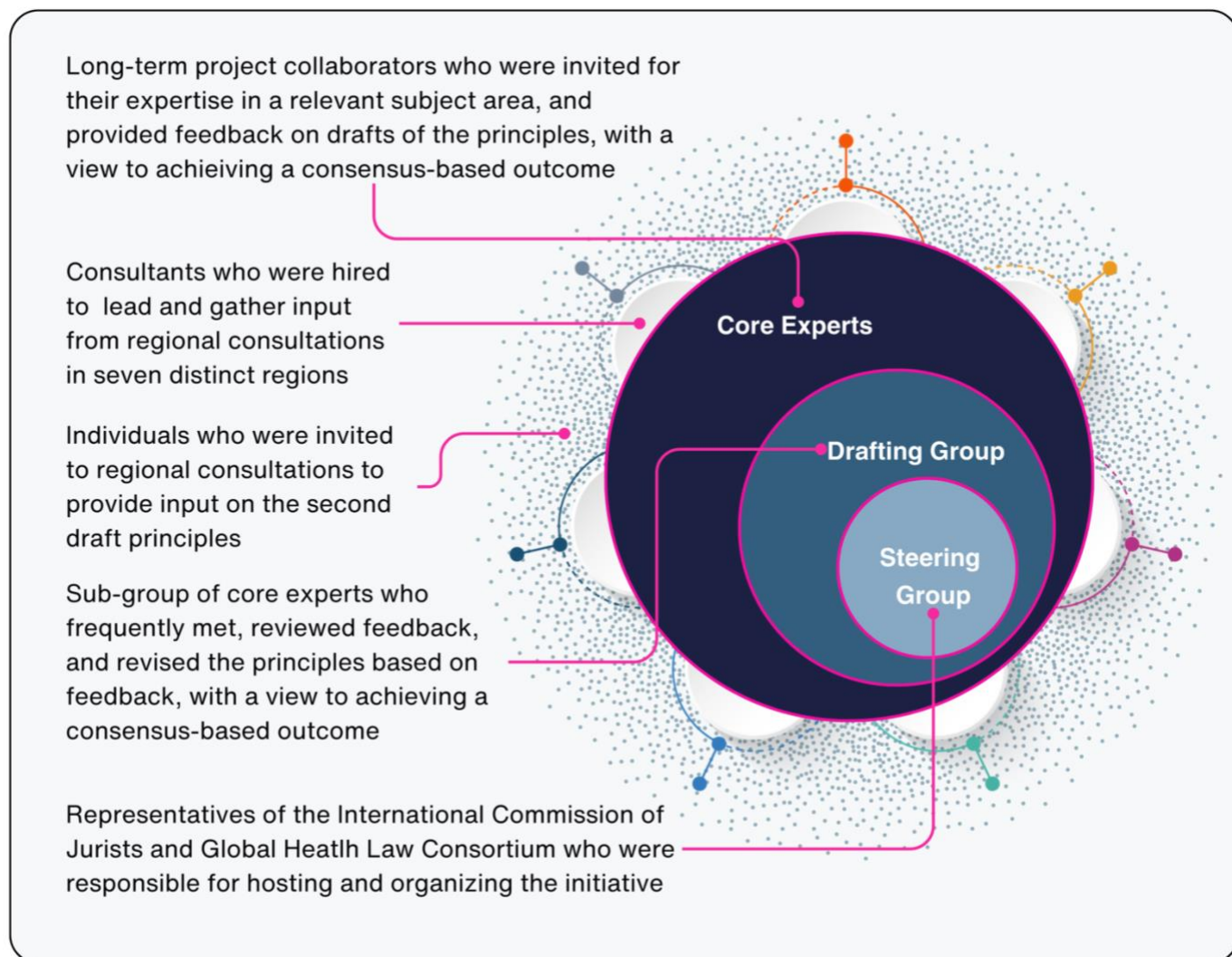
Zealand; East Asia, Central Asia and the Pacific Islands; Latin America and the Caribbean;

⁵⁸⁸ The drafting consisted of Timothy Fish Hodgson, Rocio Quintero Martinez, Ian Seiderman, and Sam Zarifi from the ICJ, as well as Luciano Bottini Filho, Judith Bueno de Mesquita, Benjamin M. Meier, Sharifah Sekalala and Pedro A. Villarreal from the GHLC.

Middle East and North Africa; North American and Europe; South and Southeast Asia; and Sub-Saharan Africa.

- (5) **Participants of regional consultants:** An interdisciplinary set of experts who worked primarily in local COVID-19 responses and who were invited to one of six regional consultations to provide input on the second draft of the principles on a one-time basis.

Figure 7 Participants involved in the development of the *PHE Principles*



5.5.2.2 Implementation of revised plan to undertake regional consultations

After developing the second draft of the principles and securing approval from Core Experts to proceed, the Steering Group began organizing regional consultations. Our primary aim in the regional consultations was to engage experts who were involved in community-level responses to COVID-19—either in a legal, advocacy, or public health capacity—and solicit their feedback on the post-conference draft of the principles. As with many other stages of the informal consensus-building process, I had little substantive guidance or past templates available for conducting broader consultations on the draft principles, especially within the constraints of a limited budget, tight timeline, technical subject matter, and during the peak of the COVID-19 pandemic. The virtual regional consultations were deemed to be a necessary, albeit pilot, addition to this informal consensus-building initiative. Cognizant of my positionality as an academic based in the Global North, and the limits of my own networks across the globe, I sought to hire consultants to undertake regional consultations.

We hired consultants to lead consultations in the seven geographic regions mentioned above: (1) Australia and New Zealand, (2) East Asia, Central Asia and the Pacific Islands, (3) Latin America and the Caribbean, (4) Middle East and North Africa, (5) North America and Europe, (6) South and Southeast Asia, and (7) Sub-Saharan Africa. We aimed to hire consultants who had deep knowledge of the right to health and other health-related human rights issues as they pertain to public health emergency preparedness and response. Consultants were also hired based on their connections to networks of academic experts, civil society, and community-led organizations actively defending human rights in their respective regions during the pandemic.

Furthermore, we prioritized candidates with prior experience in designing and facilitating virtual consultations that elicited actionable feedback and input from participants.⁵⁸⁹

Ultimately, we engaged consultants at various stages of their career development. Some consultants brought extensive experience and advanced skills but were navigating a career lull or gap, often due to the impact of COVID-19 or personal circumstances. Others were entering the field of professional consulting for the first time but demonstrated the requisite knowledge and skills to excel in this role. According to the terms of reference that I co-drafted with colleagues from the ICJ and GHLC, consultants were tasked with identifying suitable experts to take part in the regional consultations, preparing consultation agendas and materials, facilitating and leading the virtual consultations, and developing a final consultation report. To assist consultants in their work and enable the participation of non-Anglophone experts in the regional consultations, the Steering Group formally translated the second draft of the principles into French, Arabic, and Spanish.⁵⁹⁰ When asked by the consultant, I occasionally joined a consultation to provide participants with an overview of the draft principles. However, I largely remained in the background of the consultation process in an effort to foster trust and collective ownership in the project.

Consultants began preparing for regional consultations in the third quarter of 2022, with most consultations taking place in August 2022. As the consultation results were not intended for publication in an academic study, we did not insist that consultants use a standardized methodology to undertake their work. Instead, each consultant was given flexibility in organizing

⁵⁸⁹ Given budgetary limitations, all regional consultations were conducted virtually.

⁵⁹⁰ In the case of the Latin American consultations, we occasionally hired an interpreter to facilitate a two-way conversation between the participants and the members of the Steering Group who attended the consultation.

their consultation session(s), including determining the length and frequency of each session, the number of participants per session, and approaches for reaching out to suitable consultation participants. We offered this flexibility to accommodate the unique geographic, demographic and linguistic characteristics of each region, which could either facilitate or pose challenges for the consultation process. We also considered this flexibility essential to the security of participants in some regions, such as the Middle East, where a shrinking civic space and surveillance of internet activity threatened the safety of human rights defenders.

Overall, more than 100 experts were consulted in these virtual regional consultations, representing diverse areas of expertise including constitutional law, human rights, public health, and ethics, across academic, NGO, and professional sectors. The breakdown of participants by region included:

- 8 experts in Australia and New Zealand;
- 13 experts in East Asia, Central Asia and the Pacific Islands;
- 27 experts in Latin America;
- 6 experts in the Middle East and North Africa;
- 12 experts in North America and Europe;
- 16 experts in South and Southeast Asia; and
- 20 experts in Sub-Saharan Africa.

While the consultations yielded valuable feedback from participants, the hired consultants themselves were field experts with unique perspectives to contribute to the principles' development. Many consultants continued their involvement in subsequent drafting cycles and participated as observers in the concluding consensus conference held at the Brocher Foundation in Hermance, Switzerland, in January 2023 (see **Section 5.5.3.2**).

Consultants adopted a variety of approaches to identify relevant experts. In preparation for the Middle East and North Africa consultations, for instance, the consultant conducted an extensive desk review that, among other sources, involved reviewing lists of individuals who had applied to relevant UN Special Rapporteur mandates (e.g., health, freedom of expression), lists of faculty in critical academic institutions in the region (American University of Beirut, American University in Cairo, New York University Abu Dhabi, Birzeit University, and University of Jordan) as well as the backgrounds of international fellows/visiting scholars in Global North institutions with a strong health and human rights program in the region (Yale, Harvard, Columbia, Oxford, New York University, and SOAS University of London).

Similarly, consultants were given flexibility in developing suitable methods for collecting feedback during the consultations. Most consultations, typically lasting around two hours, were spread over two or more days to accommodate the different schedules of invited experts. In the North America and Europe consultations, for instance, the consultant organized group sessions with breakout groups, followed by plenary group discussions. Conversely, in the Australia and New Zealand consultations, the consultant combined group feedback with one-on-one interviews with experts whose insights were particularly relevant for the purposes of the principles. Many consultants also encouraged written feedback either as an alternative or a supplement to oral feedback, especially for participants who could not attend their scheduled sessions.

An expanded Drafting Group brought significant advantages to the normal consensus-building process, notably by fostering investment in the project's success among several of our Core Experts. This had implications in terms of increasing project access to more diverse sources of funding. Professor Sharifah Sekalala (University of Warwick), for instance, supported the regional consultations through a small grant available via the United Kingdom Research

Institute's (UKRI) Economic and Social Research Council (ESRC). In June 2022, just as regional consultations had begun, Professor Sekalala was awarded £ 9,810 from the ESRC. This grant enabled us to finance the convening of a two-day, in-person workshop of the consultants and the Drafting Group at the British Institute of Eastern Africa in Nairobi, Kenya.

This workshop, held on 6-7 September 2022, took place after the regional consultations were completed. It provided an opportunity for consultants and a small cohort of the Drafting Group to reflect on feedback gathered during the consultations. It also offered a forum for discussing key findings from the regional consultations, the implications of these findings for the principles, and revisions that would pave the way towards the third draft of the principles. In the aim of promoting transparency in the consensus-building process, we also encouraged Core Experts to attend the workshop virtually or in person where they were able to self-fund their travels to Nairobi.⁵⁹¹ The workshop helped cement a community behind the principles that extended beyond the core group of experts who had been engaged in this work for the past year. It served as a networking event for consultants from the seven regions engaged as part of the broader project and later provided career advancement opportunities for some.

Overall, the Consultants' workshop in Nairobi proved a very useful, if intensive, catalyst of the third draft of the principles. This third draft was shared with all Core Experts in November 2022. Yet it also added layers of complexity to the principles which had not been contemplated in earlier consensus-building discussions in the project. A snapshot of this complexity is captured in the next section.

⁵⁹¹ Among the core experts, Nerima Were, then-Deputy Executive Director at Kenya Legal and Ethical Issues Network on HIV and AIDS (or KELIN) was able to join and observe the workshop.

5.5.2.3 The Nairobi regional consultation workshop on the draft principles (2022)

By the time we held the Nairobi workshop in September 2022, the virtual regional consultations were completed in all seven regions, enabling consultants to present and discuss their findings. These consultations generated a wealth of input and rich, constructive criticism on the second draft of the principles. However, we needed to approach this feedback carefully, focusing on how it could meaningfully inform the third draft. In my opening remarks at the workshop, I emphasized that the goal was not to address every individual comment. Instead, our focus was on identifying recurring themes, areas of consensus, outlier recommendations, issues already addressed in the document, and whether proposed changes were minor or substantial. Overall, the Nairobi workshop resulted in a running table of 74 changes to be made to the second draft of the principles. These changes were shared with Core Experts in a revised third draft of the principles in November 2022.

Several key themes from the regional consultations significantly influenced the third draft of the principles. First, echoing comments made during the Mantello conference, many experts recommended that the principles explore the role of non-state actors, such as pharmaceutical companies, in greater depth, particularly with respect to their human rights obligations. Second, the consultation findings strongly recommended expanding on states' obligations with respect to the set of economic, social, and cultural rights that are likely to be impacted by public emergencies, such as the rights to work, housing, and education. In general, along with this suggestion, consulted experts emphasized the importance of centering the principles on the rights of people who are most at risk during public health emergencies. Precisely how to best address this point remained a subject of debate up until the final consensus conference. The Core Experts disagreed as to whether vulnerable or marginalized groups needed to be specifically listed or

referenced in the principles, or whether a broader reference to “marginalized groups” was sufficient.⁵⁹²

More generally, several experts we consulted found that the principles needed to depart more decidedly from a North American or liberal approach to human rights which tended to prioritize negative rights obligations and civil and political rights over economic and social rights. They called for greater attention to issues of unequal development between countries and the legacies of colonialism, highlighting the implications of such legacies for equitable pandemic response measures, such as access to medical countermeasures.

In this vein, a significant recommendation from the consultations was to refine the overarching principle of international cooperation by explicitly mentioning the principle of “common but differentiated responsibilities,” drawing inspiration from the international environmental law framework. This principle, which emphasizes that states have varying obligations based on their socioeconomic circumstances and historical contributions to the problem, has gained traction within the global health law community due to the pandemic treaty negotiations. Countries from the Global South, highlighting the stark disparities in access to medical countermeasures during the pandemic, strongly advocated for the inclusion of this principle in the draft treaty as a cornerstone of a more equitable and redistributive pandemic preparedness and response framework.⁵⁹³

⁵⁹² The third draft of the principles featured an annex listing over 20 marginalized groups. This annex was taken out in the final draft of the principles by consensus of the Core Experts who attended the final consensus conference at the Brocher Foundation.

⁵⁹³ See for instance, Alexandra L Phelan & Matiangai Sirleaf, “Decolonization of Global Health Law: Lessons from International Environmental Law” (2023) 51:2 *Journal of Law, Medicine & Ethics* 450.

Predictably, this position met resistance from the delegates of wealthier countries, who argued that certain responsibilities, such as information sharing to prevent pandemics, should remain universal and uncompromised. These opposing views created sharp political divisions, and the principle of common but differentiated responsibilities ultimately did not survive the intense and splintering negotiations surrounding the pandemic treaty.⁵⁹⁴ Similarly, despite its resonance with some experts during our consultations, the principle of common but differentiated responsibilities was not adopted as part of the final PHE Principles during the consensus conference at the Brocher Foundation.⁵⁹⁵ This outcome highlights the broader challenge of informal consensus-building initiatives that unite diverse communities of practice in international law. There are differing viewpoints on how to effectively support the decolonization movement within global governance. For some, existing norms and current practices, as outlined in the letter of the law, are not only inadequate—they are a core part of the problem.

An important aim of the consultations was to engage across disciplinary boundaries, particularly by involving health professionals such as physicians, nurses, and public health practitioners who had been involved in local responses to the COVID-19 pandemic. While we had translated the second draft of the principles into Arabic, French, and Spanish to enhance their accessibility, many of the non-lawyer participants still struggled to engage with the principles, finding its language too technical and verbose. This is the quintessential challenge of

⁵⁹⁴ K M Gopakumar, "WHO: Draft Negotiating Text of Pandemic Instrument Devoid of Deliverables on Equity" (4 April 2024), online (blog): <<https://www.twn.my/title2/health.info/2024/hi240404.htm>>

⁵⁹⁵ In addition to avoiding integrating within the principles concepts that had become fraught with political baggage, we also reasoned at the Brocher Foundation that the concept of international solidarity, as an emerging norm within the international human rights law regime, was sufficiently robust to capture the meaning behind 'common but differentiated responsibilities.'

including broader consultations in efforts to build consensus on the law. Experts who lack legal training may find the dense and jargon-heavy text difficult to navigate. For example, public health experts who had no prior exposure to human rights and global health law frameworks felt alienated by the specialized terminology (e.g., the respect, protect, and fulfill framework; a public health emergency of international concern) and legal nuances (e.g., the breadth of accountability mechanisms). Interdisciplinary consensus-building, particularly in subfields of international law, such as international human rights law which has grown in technical complexity since their nascent days when the *Statement of Essential Human Rights*, are not impossible but require careful planning and foresight. Towards the end of the second action research cycle, I reflected on these and several other limitations in the regional consultation process, outlined below.

5.5.2.4 Post-conference reflections from the second action research cycle

On balance, the practice of running consultations to broaden interdisciplinarity and diversity in informal consensus-building initiatives is laudable and worthwhile. As noted in **Chapter 3**, even as early as the 1940s the American Law Institute had planned to hire external consultants to capture blind spots in the consensus-building work of experts, though for reasons outlined above, this plan did not come to pass (see **Section 3.3.1**). However, incorporating consultations into the consensus-building process challenged us to manage a broader range of perspectives without compromising the simplicity, clarity, and coherence of the text.

Authors of consensus-based texts must grapple with the risk of having "too many cooks in the kitchen" in the drafting process. In shaping the next draft of the principles, we were acutely aware of the need to strike a balance between accommodating diverse viewpoints while building on well-established frameworks like the Siracusa Principles. While much of the feedback

sharpened the principles and improved their coverage of blindspots, other contributions introduced ambiguity and convoluted the language, particularly for non-legal audiences. For example, the push to include the concept of "common but differentiated responsibilities," a strong theme of regional consultations, became a rallying point to demand accountability and equity, even as its inclusion risked further politicizing the draft principles. While alternative concepts that were already in the draft principles, such as "international solidarity," might have adequately captured this sentiment, pandemic treaty negotiations under WHO's auspices had heightened the symbolic value of the principle.

A key lesson from this experience is the need for more time to ensure that consultations are inclusive, run smoothly, and generate informed and actionable feedback. The three-month consultation timeline proved too demanding for consultants. Additional time may have allowed the team to build iterative feedback to improve the principles in a more holistic manner. The timeline also posed difficulties for the ability of consultants to identify a diverse and inclusive cohort, build trust with their participants, and engage them meaningfully and iteratively. Many invited participants, particularly those unfamiliar with the consultants, drafting organizations, or the consultation process, hesitated to participate. The lack of clarity about the process and how their expertise was related to this work further dissuaded engagement.

The timing of consultations, which took place primarily in the month of August, also compounded these challenges. As we later learned, this period is marked by school closures, reduced workloads, and widespread holidays in many corners of the world, making it difficult to secure participation across various regions. Consultants noted that many experts were unavailable or unwilling to disrupt their vacations for an informal consultation.

Beyond logistical hurdles, some consultation participants doubted the efficacy of their contributions. A perception that the draft principles were already fixed may have diminished the motivation of some to engage. This sentiment was heightened by a broader backlash against international legal frameworks, skepticism toward human rights mechanisms, and doubts about their relevance to local contexts, particularly from experts who lacked legal training or resided in parts of the world where human rights abuses were a common fixture of daily life. For example, in consultations within the Middle East and North Africa region, many experts questioned whether international human rights initiatives could bring meaningful change to their communities or home countries, further diminishing their willingness to engage.

These challenges underscore the need for a more carefully planned, well-funded, and inclusive consultation process. Future efforts to integrate consultations in informal consensus-building processes should allow for an extended timeline to build trust, foster meaningful engagement, and ensure accessibility for diverse disciplines and regions. Moreover, addressing the language and structure of such principles to make them more inclusive and comprehensible to non-legal audiences is a prerequisite step to fostering genuine interdisciplinary collaboration and broader buy-in. Consultation materials should be revised to avoid overly technical jargon and to present objectives clearly, meeting experts ‘where they are’ and maximizing their accessibility and relevance to participants from varied backgrounds.

Moving forward, building stronger partnerships with local organizations and regional experts from the beginning of an informal consensus-building process could help further bridge gaps in trust and understanding, particularly in regions with heightened skepticism toward international frameworks. Finally, an iterative feedback mechanism, where participants from consultations can see how their input has shaped the final product, could foster a sense of

ownership and reinforce the legitimacy of the initiative. These measures, while not exhaustive, could help improve the inclusion of broader consultations in future expert-led informal consensus-building efforts.

5.5.3 Third action research cycle (2023)

5.5.3.1 Revisiting the consensus-building plan

In early 2022, as we planned virtual regional consultations, we also began exploring pathways to finalize a consensus-based draft of the principles in 2023. A funding shortfall following the regional consultations initially meant that a final in-person consensus conference with Core Experts was uncertain. We considered the possibility of hosting all subsequent consensus-building sessions virtually. However, a late-breaking opportunity arose to host an in-person workshop for this purpose at the Brocher Foundation, after completing the regional consultations.

Based in Hermance, Switzerland, the Brocher Foundation is a philanthropic organization dedicated to the study of medical developments in society.⁵⁹⁶ Among its key activities is supporting academic residencies and workshops on its premises with partial financial and in-kind support. In June 2022, we received confirmation that the Brocher Foundation had accepted our proposal, paving the way for a conference in January 2023.

Having learned lessons from our first and second cycles of consensus-building, we wanted to ensure that Core Experts had ample time to review and provide feedback on a pre-conference draft of the principles, prior to arriving at the final consensus conference. This was particularly important as the group of Core Experts had expanded since 2021, and new members had yet to

⁵⁹⁶ Fondation Brocher, "Our Mission" (n.d.), online (website): <<https://fondation-brocher.ch/home/our-mission/>>

contribute feedback in the group setting. While overseeing the regional consultations, we simultaneously prepared for a virtual feedback session on the third draft of the principles, which reflected input from the consultations.

Virtual feedback calls were held with Core Experts in November 2022. The calls generated in-depth engagement and feedback, and involved reviewing the changes made following regional consultations, while also ensuring that changes had sufficient legal grounding to facilitate consensus among Core Experts. In a sprint of revisions made by the Drafting Group after the calls (between December 2022 and early January 2023), a fourth draft of the principles, along with an agenda for the consensus conference (see **Figure 8**), was developed and shared with Brocher Foundation invitees on 6 January 2023. This fourth draft served as the basis for discussions at the final consensus conference at Brocher.

5.5.3.2 The Brocher consensus conference (2023)

The final consensus conference was held at the Brocher Foundation on 17-18 January 2023 and was attended by most of the Core Experts (see **Table 4**). Like the Mantello conference, planned sessions at Brocher were each moderated by one or two participant, and specifically by members of the Drafting Group.

This arrangement worked not only because it fostered collective ownership and buy-in, but also because each member of the Drafting Group had largely assumed the responsibility of revising a specific section of the draft principles. Consequently, as moderators, members of the Drafting Group were in an ideal position to explain the rationale behind revisions and address feedback during the final round of revisions after the conference.

Our aim at Brocher was to avoid reopening debates on broad, foundational questions such as the framing or scope of the principles. Likewise, we sought to avoid revisiting each section of

the fourth draft in detail, as had been necessary during the Mantello conference and in various virtual feedback calls since.

Table 4 Participants of the 2023 Brocher Foundation consensus conference on the *PHE Principles*

Name	Role and Affiliation(s)
1. Luciano Bottini Filho	Lecturer in Human Rights, Sheffield Hallam University
2. Judith Bueno de Mesquita	Lecturer and Co-Deputy Director, Human Rights Centre, School of Law, University of Essex
3. Gian Luca Burci	Adjunct Professor of international law, Graduate Institute of International and Development Studies
4. Luisa Cabal	Director, UNAIDS – Latin America and the Caribbean
5. Danwood Chirwa	Dean and Full Professor, School of Law, University of Cape Town
6. Thana de Campos-Rudinsky	Assistant Professor, Pontifical Catholic University of Chile
7. Christian Courtis	Senior Human Rights Officer, Office of the UN High Commissioner for Human Rights
8. Stéphanie Dagrón	Professor, Faculty of Law and Faculty of Medicine, University of Geneva
9. Sara (Meg) Davis	Principal Investigator, Digital Health and Rights Project, Graduate Institute of International and Development Studies
10. Mark Eccleston-Turner	Senior Lecturer in Global Health Law, Kings College London
11. Timothy Fish Hodgson	Legal Adviser on Economic, Social and Cultural Rights, International Commission of Jurists – Africa
12. Lisa Forman	Associate Professor and Canada Research Chair (Tier 2) in Human Rights and Global Health Equity, Dalla Lana School of Public Health, University of Toronto
13. Lawrence O. Gostin	University Professor; Founding Linda D. & Timothy J. O’Neill Professor of Global Health Law; Faculty

	Director, O'Neill Institute for National & Global Health Law
14. Aeyal Gross	Professor, Buchmann Faculty of Law, Tel Aviv University
15. Roojin Habibi	Research Fellow and PhD Candidate, Global Strategy Lab, York University
16. Sam Halabi	Professor, School of Health, Georgetown University; Director, Center for Transformational Health Law, O'Neill Institute for National and Global Health Law
17. Rachel Hammonds	Senior Human Rights Adviser, World Health Organization
18. Steven J. Hoffman	Dahdaleh Distinguished Chair and Professor of Global Health, Law, and Political Science, York University; Director, Global Strategy Lab
19. Rajat Khosla	Director, International Institute for Global Health, United Nations University
20. Tsung-Ling Lee	Associate Professor of Law, Taipei Medical University
21. Benjamin M. Meier	Professor of Global Health Policy, University of North Carolina at Chapel Hill
22. Stefania Negri	Associate Professor of International Law, School of Law, University of Salerno
23. Alexandra Phelan	Senior Scholar, Johns Hopkins Center for Health Security; Associate Professor, Bloomberg School of Public Health, Johns Hopkins University
24. Rocío Quintero Martínez	Legal Adviser, International Commission of Jurists – Latin America
25. Ravi Ram	Health systems evaluator and specialist, various organizations
26. Ian Seiderman	Legal and Policy Director, International Commission of Jurists
27. Sharifah Sekalala	Associate Professor, School of Law, University of Warwick

28. Magdalena Sepúlveda Carmona	Former UN Special Rapporteur on Extreme Poverty and Executive Director, Global Initiative for Economic, Social and Cultural Rights
29. Matiangai Sirleaf	Nathan Patz Professor of Law, School of Law, University of Maryland
30. Allyn Taylor	Adjunct Professor, School of Law, University of Washington
31. Brigit Toebes	Professor, Faculty of Law, University of Groningen
32. Pedro A. Villarreal	Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law
33. Nerima Were	Deputy Executive Director and Head of Programs, Kenya Legal and Ethical Issues Network on HIV and AIDS
34. Alicia Ely Yamin	Lecturer and Senior Fellow, Global Health and Rights, Petrie-Flom Center for Health Law, Policy and Biotechnology; Senior Advisor on Human Rights and Health Policy, Partners in Health
35. Saman Zia-Zarifi	Secretary-General, International Commission of Jurists

* Listed participants are those who attended the conference either in-person or online. This list excludes invitees who ultimately did not attend the conference. Roles and affiliations are those that participants held at time of conference.

As illustrated in **Figure 8**, our focus at Brocher was to address a select few issues that had proven challenging in earlier discussions through “in-depth group study” sessions. These sessions focused on resolving the following points of contention: (1) the extent and nature of human rights obligations attributed to non-state actors; (2) applicable extraterritorial obligations; (3) the balance between proportionality and precaution; (4) the realization of the right to health; and (5) what human rights frameworks offer for the upstream prevention of infectious diseases. Our aim at Brocher was to simplify and make the final text of the principles accessible to stakeholders in both legal and public health communities, while remaining faithful to the legal

underpinnings of each principle and the spirit of feedback received during regional consultations. We also aimed to reduce the dense word count of the fourth draft.

In addition to these substantive feedback sessions, we also built time in the agenda for overall group reflection and brainstorming. For example, the final in-depth study session sought to delineate the linkages between the principles and parallel efforts to reform global health law, including negotiations to amend the IHR and develop a new pandemic agreement. Given our proximity to Geneva, we were fortunate to be joined by individuals working with WHO as human rights and legal advisers. Their participation enriched the discussions, offering valuable perspectives on how to integrate the principles effectively within ongoing portfolios of work on the multilateral stage.

Ultimately, despite our best efforts, the Brocher conference also raised feedback that would require more than minor revisions to the principles.⁵⁹⁷ This time, however, the Steering Group could no longer plan for additional in-person consensus conferences. By the end of January 2023, COVID-19 had begun to recede from global attention as new international crises, such as the Russian invasion of Ukraine, became the center of international focus. For the ICJ, this meant that its senior leadership now had to shift focus from the pandemic response to human rights issues arising from the growing war-borne, humanitarian crisis in Europe.

In addition, the community of practice we had gathered to work on the principles also began to step into new professional roles. In 2023, Zarifi announced his plan to step down from helm of the ICJ. The move meant that any extensions in the project timeline would require the forging of new relationships within the NGO's senior leadership to ensure that ongoing resources

⁵⁹⁷ For lack of space, the details of these revisions were omitted from this account of the Brocher Conference.

(e.g., staff time and funds) would be committed to any further work on the principles. As the project lead, 2023 also marked a significant career transition for me, as I assumed the role of Assistant Professor at the University of Ottawa's Faculty of Law. This change meant that my schedule would soon be constrained by the demands of an academic position.

Overall, these developments, along with advancements in the negotiation of the pandemic agreement and the IHR amendments, made it imperative to strive for a final version of the principles by mid-2023. The last revisions to the PHE Principles thus took place from January 2023 to April 2023, with the final version shared virtually with Core Experts on 20 April 2023. They were given two weeks to either accept the fifth draft of the PHE Principles, and offer their endorsement of them, or to withhold from endorsement. Ultimately, all Core Experts who had been involved in the project through to 2023 endorsed the PHE Principles, reproduced in **Appendix B**. Many of the experts who took part in regional consultations, as well as the Consultants who led regional consultations also endorsed the Principles. For a final list of 'first endorsements,' see **Table 5**.

Figure 8 Agenda for 2023 ICJ-GHLC Consensus Conference in Hermance, Switzerland

Monday, January 16, 2023

- 11:00 – Arrival of guests checking in onsite
 16:00 – 17:30 Optional hike – *for guests staying onsite*
 19:00 Dinner at the Brocher Foundation – *for guests staying onsite*

Tuesday, January 17, 2023

WORKSHOP DAY ONE

- 09:00 – 09:15 **Welcome & opening remarks**
 Benjamin M. Meier, *Chair, Global Health Consortium*
 Sam Zarifi, *Secretary General, International Commission of Jurists*
- 09:15 – 09:45 **Principles overview, workshop objectives & expected outcomes**
 Roojin Habibi, *Principles Rapporteur*
- 09:45 – 10:45 **General group remarks & reflections**
 Moderated by Ian Seiderman & Tim Fish Hodgson
- 10:45 – 11:00 Refreshments
- 11:00 – 12:30 **In-Depth Group Study: Obligations of non-State actors in the context of public health emergencies**
 Moderated by Tim Fish Hodgson & Rocio Quintero
 See P&Gs Sections I, II, III, IV, V & VI
- 12:30 – 13:30 Lunch
- 13:30 – 15:00 **In-Depth Group Study: Extraterritorial obligations in the context of public health emergencies**
 Moderated by Benjamin M. Meier & Judith Bueno de Mesquita
 See P&Gs Sections II, III, VI
- 15:00 – 15:15 Refreshments
- 15:15 – 16:45 **In-Depth Group Study: Between proportionality and precaution in public health emergency preparedness and response**
 Moderated by Pedro Villarreal & Roojin Habibi
 See P&Gs Sections IV & V
- 16:45 – 17:30 **Closing questions & remarks**
 Moderated by Luciano Bottini Filho
- 19:30 **Dinner onsite at the Brocher Foundation**

WORKSHOP DAY TWO

Wednesday, January 18, 2023

- 09:00 – 09:30 **Day One Recap & Day Two Objectives**
Moderated by Sharifah Sekalala
- 09:30 – 10:30 **General group remarks & reflections**
Moderated by Sharifah Sekalala & Roojin Habibi
- 10:30 – 10:45 Refreshments
- 10:45 – 12:15 **In-Depth Group Study: Realization of the right to health in the context of public health emergencies**
Moderated by Judith Bueno de Mesquita & Tim Fish Hodgson
See *P&Gs* Sections IV
- 12:15 – 13:15 Lunch
- 13:15 – 14:45 **In-Depth Group Study: Human rights imperatives in the upstream prevention of public health emergencies**
Moderated by Alicia Ely Yamin & Luciano Bottini Filho
See *P&Gs* Sections IV
- 14:45 – 15:00 Refreshments
- 15:00 – 16:00 **In-Depth Group Study: Linkages between the Principles & global health law reforms**
Moderated by Gian Luca Burci & Lawrence O. Gostin
- 16:00 – 16:30 **Group reflections on the limitations of the Principles & critical perspectives**
Moderated by Rocio Quintero
- 16:30 – 16:45 Refreshments
- 16:45 – 17:30 **Mobilizing and disseminating the Principles & closing remarks**
Moderated by Ian Seiderman & Roojin Habibi
- 18:00 **Check out and departure via Shuttle to Gare Cornavin**
- 19:30 **Optional dinner at Auberge de Savièse**

Table 5 First Endorsements of the *PHE Principles*

Name	Institution
1. Safura Abdool Karim	Berman Institute of Bioethics, Johns Hopkins University
2. A. Kayum Ahmed	Human Rights Watch Mailman School of Public Health, Columbia University
3. Gabriel Armas Cardona	Independent
4. Cecilia Bailliet	UN Independent Expert on Human Rights and International Solidarity Faculty of Law, University of Oslo
5. Luciano Bottini Filho	Helena Kennedy Centre for International Justice, Sheffield Hallam University
6. Yogi Bratajaya	Independent
7. Judith Bueno de Mesquita	Essex Law School and Human Rights Centre, University of Essex
8. Gian Luca Burci	Graduate Institute Geneva
9. Luisa Cabal	Joint United Nations Programme on HIV/AIDS
10. Thana de Campos-Rudinsky	Escuela de Gobierno, Pontificia Universidad Católica de Chile
11. Johanna Cortés	Facultad de Jurisprudencia, Universidad del Rosario
12. Danwood Chirwa	Faculty of Law, University of Cape Town

13. Stéphanie Dagon	Faculty of Law and Faculty of Medicine, University of Geneva
14. Erika Dailey	Physicians for Human Rights
15. Sara (Meg) Davis	Centre for Interdisciplinary Methodologies, University of Warwick
16. Surya Deva	UN Special Rapporteur on the Right to Development Macquarie Law School, Macquarie University
17. Mark Eccleston-Turner	Department of Global Health and Social Medicine, Faculty of Social Science & Public Policy, King's College London
18. María Natalia Echevoyemberry	Petrie-Flom Center for Health Law, Policy Biotechnology, and Bioethics, Harvard Law School, Harvard University
19. Rossella de Falco	Global Initiative for Economic, Social and Cultural Rights
20. Tim Fish Hodgson	International Commission of Jurists
21. Lisa Forman	Dalla Lana School of Public Health, University of Toronto

22. Lawrence O. Gostin	Georgetown University Law Center, WHO Collaborating Center on Global Health Law and O'Neill Institute for National and Global Health Law, Georgetown University
23. Aeyal Gross	Buchmann Faculty of Law, Tel Aviv University
24. Roojin Habibi	Faculty of Law and Global Strategy Lab, University of Ottawa
25. Rachel Hammonds	London School of Hygiene and Tropical Medicine
26. India Haus	Independent
27. Verónica Hinestroza	Fair Trials & Omega Research Foundation
28. Steven J. Hoffman	Global Strategy Lab, School of Global Health & Osgoode Hall Law School, York University
29. Rajat Khosla	Institute on Inequalities in Global Health, University of Southern California
30. Tsung-Ling Lee	Graduate Institute of Health and Biotechnology Law, Taipei Medical University
31. Ton Liefaard	Leiden Law School, Leiden University
32. Benjamin M. Meier	Department of Public Policy & Gillings School of Global Public Health, University of North Carolina at Chapel Hill

33. Stefania Negri	Department of Legal Sciences (School of Law), University of Salerno
34. Uchechukwu Ngwaba	Lincoln Alexander School of Law, Toronto Metropolitan University
35. Obiora C. Okafor	School of Advanced International Studies, Johns Hopkins University
36. Alexandra Phelan	Center for Health Security & Bloomberg School of Public Health, Johns Hopkins University
37. Dainius Pūras	Faculty of Medicine, Vilnius University
38. Rocío Quintero Martinez	International Commission of Jurists
39. Ravi M. Ram	Madhira Institute
40. Sharifah Sekalala	School of Law, University of Warwick
41. Ian Seiderman	International Commission of Jurists
42. Livingstone Sewanyana	UN Independent Expert on the Promotion of a Democratic and Equitable International Order Foundation for Human Rights Initiative
43. Brianna da Silva Bhatia	Physicians for Human Rights
44. Magdalena Sepúlveda Carmona	Global Initiative for Economic, Social and Cultural Rights

45. Matiangai Sirleaf	Department of Epidemiology and Public Health, School of Medicine, and Francis King Carey School of Law, University of Maryland
46. Allyn L. Taylor	School of Law, University of Washington
47. Brigit Toebes	Groningen Center for Health Law, Faculty of Law, and Aletta Jacobs School of Public Health, University of Groningen
48. Sheila Varadan	Leiden Law School, Leiden University
49. Pedro A. Villarreal	German Institute for International and Security Affairs and Max Planck Institute for Comparative Public and International Law
50. Calvin Wai-Loon Ho	Faculty of Law and Centre for Medical Ethics and the Law, University of Hong Kong
51. Nerima Were	Kenya Legal and Ethical Issues Network on HIV and AIDS
52. Alicia Ely Yamin	Harvard University and Partners in Health
53. Saman Zia-Zarifi	Physicians for Human Rights

* Affiliations listed are as at time of endorsement (May 2023).

5.5.4 Launch and Dissemination of the PHE Principles

The final PHE Principles were introduced to the public for the first time on 23 May 2023 at the Graduate Institute of International and Development Studies, on the margins of the 76th World Health Assembly. The timing of the launch was particularly significant given the historical context of 2023. Both the Constitution of the World Health Organization, which enshrined the right to health, and the Universal Declaration of Human Rights which followed soon thereafter, date back to 1948. As such, 2023 marked the 75th year anniversary of international human rights and global health security framework as we know them today.

As with the *Statement of Essential Human Rights*, the Siracusa Principles, and the Paris Minimum Standards, members of the Core Experts played a key role in the early dissemination of the PHE Principles. Their efforts helped position the principles as a focal point in several high-profile events in 2023 and 2024, including:

- **Office of the High Commissioner for Human Rights (OHCHR):** in June 2023, Christian Courtis, who served as senior adviser at the OHCHR office in New York and a Core Expert on the PHE Principles, invited me to present the principles at a hybrid expert roundtable marking the 75th anniversary of the *Universal Declaration of Human Rights*. Attendees included UN agencies, diplomats, civil society organizations, and human rights experts.
- **Centre for Medical Ethics and Law (CMEL), University of Hong Kong:** in August 2023, I was invited by Professor Calvin Ho to a conference co-hosted by the CMEL on the governance of social listening in the context of serious health threats.

As my contribution to that conference, I presented on aspects of the PHE Principles that addressed misinformation and disinformation in public health crises.⁵⁹⁸

- **Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School:** As faculty at Harvard Law and a core expert on the PHE Principles, Professor Alicia Ely Yamin helped launch a digital symposium through the *Bill of Health* blog. Between 2023 and 2024, the symposium featured contributions from sitting justices, international civil servants, civil society representatives, academics, and UN special procedures mandate holders. Professor Yamin, Timothy Fish Hodgson (International Commission of Jurists), and I co-authored the opening and closing editorials of the symposium.⁵⁹⁹
- **University of Ottawa Faculty of Law Symposium:** on 8 December 2023, in commemoration of the 75th anniversary of the *Universal Declaration of Human Rights* and the WHO Constitution, I organized a full-day conference at the University of Ottawa on normative advances in health and human rights. The conference highlighted the practical relevance of the PHE Principles to further progressive development of global health and international human rights law.
- **Global Health Security Conference 2024:** in June 2024, Luciano Bottini Filho, Sheffield Hallam University Professor and a core expert of the PHE Principles, developed and led a hands-on workshop on the PHE Principles at the biannual Global Health Security Conference in Sydney, Australia. The workshop sought to socialize

⁵⁹⁸ “Governance of Social Listening in the context of Serious Health Threats—Conference (22-24 August 2023)”, online (agenda): <<https://cmel.hku.hk/events/governance-of-social-listening-in-the-context-of-serious-health-threats/>>.

⁵⁹⁹ Alicia Yamin, Timothy Fish Hodgson & Roojin Habibi, eds, *From Principles to Practice: Human Rights and Public Health Emergencies* (Boston, MA: Bill of Health Blog, 2024).

and concretize the PHE Principles among public health policymakers across countries, and especially those working in the Asia Pacific region.

In parallel, the GHLC and the ICJ worked to introduce the PHE Principles to the WHO Secretariat and states involved in negotiations for a WHO pandemic agreement and amendments to the IHR. Recognizing the relevance of the principles to the evolving human rights landscape, we also made a submission to the UN Committee on the Elimination of Racial Discrimination to support its development of a General Recommendation on the right to health.

The PHE Principles have also gained traction in policy and academic circles. In June 2023, a fortuitous connection between one of the Core Experts and a legal adviser to the Parliamentary Assembly of the Council of Europe (PACE) led to their inclusion in a draft resolution which was adopted by a majority of delegates and now is known as *PACE Resolution 2500: Public Health Emergency –The Need for a Holistic Approach to Multilateralism and Health Care*.⁶⁰⁰

Several scholarly papers released in the months after the launch also cited the PHE Principles,⁶⁰¹ and in 2024, they were published open access in the newly established *Journal of Global Health Law*, co-founded by core experts Pedro Villarreal, Brigit Toebes, Stefania Negri, and Mark Eccleston-Turner. At the time of writing, they have also inspired a forthcoming casebook illustrating how policymakers can apply the PHE Principles to real-world challenges. Dissemination efforts remain ongoing.

⁶⁰⁰ Council of Europe, PA, 2023 Ordinary Sess (Part 3), *Resolution 2500: Public Health Emergency: the Need for a Holistic Approach to Multilateralism and Health Care*, Text adopted (20 June 2023) [PACE Resolution].

⁶⁰¹ See for instance Rossella de Falco et al, “Assessing the Human Rights Framework on Private Health Care Actors and Economic Inequality” (2023) 25:2 Health & Hum Rts 125; Benjamin Mason Meier et al, “A Critical Juncture for Human Rights in Global Health: Strengthening Human Rights Through Global Health Law Reforms” (2023) 3:12 PLOS Global Public Health e0002663.

5.6 Chapter Conclusion

This insider's account delves into the intricate decision-making and organizational dilemmas that emerge during informal consensus-building processes. The development of the PHE Principles involved six phases and five major drafts. The process was iterative, comprising three spiraling cycles of planning, drafting, deliberation, and reflection. Initially, the process began with a group of 30 experts, carefully selected for their expertise and diverse backgrounds. Their convening at the 2021 Mantello conference marked the commencement of a three-year consensus-building initiative that drew on the methodology of past informal consensus-building practices while introducing innovative approaches, such as regional consultations.

By 2023, the final set of principles encompassed five sections, 28 principles, and far surpassed the Siracusa Principles in scope and ambition. The PHE Principles sought to engage more holistically with the human rights issues emerging from, and affecting, public health emergency prevention, preparedness and response. Having garnered endorsement from a preliminary list of 53 experts, the PHE Principles are, at the time of writing, gaining recognition among a growing network of academics, civil society actors, diplomats, and policymakers. However, their most immediate impact may lie in shedding light on the operational dynamics of informal consensus-building practices and offering insights that future initiatives may benefit from. To that end, several key lessons were gleaned from this process, which I outline below.

5.6.1 Conclusions on the making of the PHE Principles

First, the notion of who qualifies as an expert in informal consensus-building has shifted considerably since the time of the *Statement of Essential Human Rights*, the Siracusa Principles, and the Paris Minimum Standards. Today, expertise is understood in broader and more inclusive terms. It encompasses lived experience, interdisciplinarity, and knowledge from institutions well

beyond those based in the Global North. This understanding has implications for contemporary informal consensus-building initiatives. For instance, the Abidjan Principles, which were adopted on 13 February 2019 and sought to address the growing involvement of private actors in the education sector, engaged a majority of lawyers “to ensure the legal rigour and legitimacy of the text.”⁶⁰² However, education experts without formal legal training also contributed meaningfully to the drafting process. From the convenors’ perspective, this multidisciplinary roster of contributors was crucial to ensuring that all relevant issues arising in education were addressed, that all standards proposed were grounded in reality, and that the language in the Abidjan Principles was ultimately accessible to relevant policy makers and other stakeholders.⁶⁰³

We encountered similar dynamics in developing the PHE Principles. The evolving concept of expertise prompted us to introduce layers of consultation and input to the consensus-building process. The alternative of strictly limiting the principles’ development to a select group of 30 experts was untenable in the context of global health law and would have significantly compromised the perceived legitimacy of the final PHE Principles. The global health community as a whole is currently navigating a period of turbulence and reckoning with the legacies of colonialism and the ongoing coloniality permeating global health.⁶⁰⁴ Global health law, too, has been charged complicit in perpetuating ‘hermeneutic injustices’ arising from the interpretation and application of long-held (and often colonially derived) legal norms in global health.⁶⁰⁵

⁶⁰² See Aubry, De Koning & Adamson, *supra* note 216 at 10.

⁶⁰³ *Ibid.*

⁶⁰⁴ Abimbola & Pai, *supra* note 582. On the notion of ‘coloniality,’ see Anibal Quijano, “Coloniality of Power, Eurocentrism, and Latin America” (2000) 15 *International Sociology* 215. In relation to global health research specifically, see Caesar Atuire & Susan Bull, “COVID-19 Heightens the Imperative to Decolonize Global Health Research” (2022) 13 *Global Justice: Theory Practice Rhetoric* 60.

⁶⁰⁵ Eugene T. Richardson, “On the Coloniality of Global Public Health” (2019) 6 *Medicine Anthropology Theory* 101 at 104. Norms relating to the cross-border health measures in response to outbreaks are particularly relevant examples here.

Restricting those who can access ‘technical’ exercises in international law negotiation or interpretation limits the scope of issues that shape these exercises, and invalidates insights from people with lived experiences.⁶⁰⁶ Even practices as seemingly mundane as academic citations, authorship with local experts, or conference speaker invitations present opportunities to imbue new narratives and ways of thinking into informal consensus-building work.⁶⁰⁷ Rather than adhere to the traditionalist mindset that so often shapes the training of international lawyers, a practice of reflexive informal consensus-building, drawing inspiration from the decolonization movement in global health law, can help identify and counter institutionalized biases and structural inequities that persist in research, practice, advocacy, and pedagogy—and remain buried within our own psyche.⁶⁰⁸

Second, it might be misleading to characterize “consensus” or “unanimity” as the ultimate objective of informal consensus-building practices in international law. As we discovered throughout the various stages of feedback in this project, consensus-building is not merely about accumulating opinions or resolving disagreements. It is an active and often contentious process that involves navigating power dynamics, disciplinary differences, and competing

⁶⁰⁶ Waibel, *supra* note 137 at 161. In relation to international legal scholars, Gleider Hernández’ call to choose ‘legal vocabulary as a political tool’ is also instructive, *see* Gleider I Hernández, “The Responsibility of the International Legal Academic: Situating the Grammarian Within the ‘Invisible College’” in Jean d’Aspremont and others, eds, *International Law as a Profession* (Cambridge: Cambridge University Press, 2017) at 187. In relation to negotiations for a pandemic instrument, *see for instance*: Fish Hodgson, Sepúlveda Carmona & Podmore, *supra* note 583 and Roojin Habibi, Margot Nauleau & Courtenay Howe, “Pandemics Start and End in Communities: Why Civil Society Participation in the Governance of the Pandemic Accord Is Crucial” (2023), online: <<https://resourcecentre.savethechildren.net/document/pandemics-start-and-end-in-communities-why-civil-society-participation-in-the-governance-of-the-pandemic-accord-is-critical-short-summary/>>.

⁶⁰⁷ Seye Abimbola, “The Foreign Gaze: Authorship in Academic Global Health” (2019) 4 *BMJ Global Health* e002068.

⁶⁰⁸ Alicia Ely Yamin, “A Letter to Young and Future Leaders in Struggles for Health Rights and Social Justice” (16 December 2019), online (blog): <<https://www.hhrjournal.org/2019/12/a-letter-to-young-and-future-leaders-in-struggles-for-health-rights-and-social-justice/>>. On the practice of reflexivity in international law more broadly, *see* Julia Emtseva, “Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch Up with the Western International Lawyers” (2022) 23 *German LJ* 756.

epistemological frameworks. Certain voices inevitably carry more weight due to institutional affiliations, expertise, or geopolitical considerations, while others may be underrepresented, necessitating deliberate efforts to ensure inclusivity.

Despite our best efforts to enhance the inclusivity of informal consensus-building processes, the broader challenge of managing the iterative nature of the process became even more critical when dealing with a project with broad goals, such as developing a *de novo* set of principles, rather than narrow ambitions like clarifying the provisions of a single international treaty, as was the case with the Siracusa Principles. An inclusive consensus-building approach risks making the final product overly inclusive of all feedback received, potentially diluting the focus and practicality of the final outcome.⁶⁰⁹ The process demands patience, humility, and a willingness to embrace productive tensions rather than rushing toward premature agreement. In crafting the PHE Principles, our participants regularly revisited the project's scope, balancing the need to adhere to existing international law with the desire to break new ground and address structural biases. This was particularly evident in efforts to develop a suitable definition of a “public health emergency,” and in debates over including the contentious norm of a right to international solidarity as well as embedding the principle of common but differentiated responsibilities.

In response to this dynamic, while it is important to invite and hold space for productive tensions, those leading consensus-building efforts must also be willing to step into the fray and make decisions to help the group overcome impasses. This is particularly crucial in two ways:

⁶⁰⁹ As discussed in Chapter 4, this may have been one of the challenges faced by the Paris Minimum Standards compared to the Siracusa Principles

(1) the interpretive approach to be adopted in developing the principles; and (2) setting the project's scope.

In developing the PHE Principles, for instance, we made an early decision to adopt a progressive orientation in interpreting international law, favouring contextualist approaches and principles that prioritize interpretations that are most protective of human rights (i.e., guided by the principle of *pro homine*). We also had to set a limit on the scope of the project (for instance, by explicitly excluding public health crisis recovery), recognizing that it would not be possible to address all global health issues through a modestly funded (and time-bound) consensus-building initiative. Future efforts should confront these foundational questions early, and with the end users in mind. The consensus-based outcome that is most useful to a judge will differ markedly from one best suited to a public health physician. A clear vision of the audience, set by the organizers from the outset of an initiative, would help minimize challenges with developing a hybrid output that strives to be 'everything to everyone' at a later stage of development.

A third lesson learned in later stages of making the PHE Principles is that informal consensus-building requires careful planning from the outset. Establishing a flexible but functional governance structure early on, such as a drafting group, a steering group and/or a chairperson, is essential not only to balance ownership and drafting responsibilities but also to ensure a diversity of perspectives capable of generating creative solutions as feedback emerges. Equally important is the early involvement of a broad range of organizations, particularly those with access to distinct communities of practice and the ability to offer potential funding and dissemination opportunities to sustain and mobilize the project.

For example, the development of the Abidjan Principles was coordinated through a secretariat of five NGOs: Amnesty International, the Equal Education Law Centre, the Initiative

for Social and Economic Rights, the Global Initiative on Economic, Social, and Cultural Rights, and the Right to Education Initiative. Over a three-year period from 2016 to 2018, this secretariat convened a series of participatory, regional, thematic, community and online consultations, including in Bangkok, Kathmandu, Nairobi, Paris, Johannesburg, and Dakar. Drafts of the Abidjan Principles were prepared by a nine-person drafting committee led by Professor Ann Skelton (South Africa), with iterative drafts presented for feedback throughout the consultation process.

Setting a realistic timeline is also critical. While there may be an initial inclination to work within short timeframes to seize imminent advocacy opportunities, consensus-building efforts with broad ambitions often require years—not months—to reach completion. The iterative nature of the process demands that flexibility be built into the timeline, allowing for multiple rounds of revisions, stakeholder engagement, and adjustments in response to shifting political and institutional landscapes.

5.6.2 Personal reflections on the making of the PHE Principles

As an insider to the making of the PHE Principles, it behooves me to first describe my positionality with respect to the project. The initiative unfolded at a formative moment in my own career. I had gained some exposure to the idea of consensus-building in legal interpretation through my prior work on the Stellenbosch Consensus project. As an early career scholar and PhD student, however, the PHE Principles provided not only intellectual grounding but also a sense of purpose and urgency to my work, particularly at a time when the world was reeling from the COVID-19 pandemic.

From the outset, I recognized the potential impact of this project on my professional trajectory. I was deeply invested in seeing it through to completion, understanding that its

success could contribute to the progression of my own career in global health law. At the same time, one could say that I was unprepared for the inevitable critiques that come with spearheading a large-scale endeavor. The process of managing diverse expert opinions, navigating institutional politics, and ensuring the credibility of the final product required a level of strategic thinking and resilience that I was only beginning to develop. The project also grew in scale as time went on, and others began to take notice of the work and seek involvement. This project was my first real test in leading a somewhat high-stakes initiative, and with it came moments of self-doubt and growing pains.

The collaborative nature of the PHE Principles meant that I had to strike a balance between leadership and deference—knowing when to provide direction and when to step back and allow others to shape the discourse. I learned that effective consensus-building is not merely about harmonizing perspectives but about fostering an environment where productive disagreements can lead to sharper, more robust outcomes. I was fortunate to work alongside experts who, despite their stature in the field, remained committed to a genuinely collective effort and never raised my juniority as a roadblock to the consensus-building process. Their good faith engagement with my ideas, their willingness to challenge assumptions, and their support in moments of difficulty were invaluable.

One of the most challenging aspects of this project was reconciling my scholarly ideals with the pragmatic realities of drafting principles that would hold weight in legal and policy circles. The need for clarity, precision, and strategic framing often clashed with the desire to capture the full nuance of the issues at hand. I had to learn, sometimes the hard way, that intellectual rigour and practical utility are not always easily aligned. This tension required me to

grow not just as a scholar but as someone who aspires to bridge the gap between academic research and real-world impact.

Looking back, I see the making of the PHE Principles as a defining moment in my career. It was a process that urged me to grow, to confront my limitations, and to embrace the discomfort of leadership. While my role in the project was that of a coordinator, writer, and advocate, it was also that of a student learning from those around me and from the process itself. The PHE Principles will hopefully continue to shape conversations in global health law, but they have already profoundly shaped me.

6 Concluding Thoughts: The Legitimacy of Informal Consensus-Building as Praxis in International Human Rights Law

In his final address to the UN Commission on Human Rights in 2005, former UN Secretary-General Kofi Annan remarked that the “era of declaration is now giving way, as it should, to an era of implementation.”⁶¹⁰ By the turn of the millennium, the world had witnessed the heyday of treaty-making in international human rights law. In this emerging ‘era of implementation,’ the international community has come to rely not only on legal instruments, but on an expanding range of interpretive practices, from soft law declarations to expert guidelines, to translate abstract norms into concrete obligations and actions.

This dissertation focuses on one such practice: informal consensus-building. In international law, this refers to collaborative efforts among scholars, advocates, and practitioners—convened in their personal capacities and outside formal legal mandates—to articulate consensus-based interpretations of international norms in response to evolving political, economic, and social challenges. These initiatives are not mandated by formal international legal actors or instruments, do not produce binding or even formally recognized soft law instruments, and are frequently carried out under the auspices of civil society groups or academic institutions, as well as the experts invited by such organizations and groups. Yet, as this dissertation shows, their outputs can shape the future interpretation, application, and even evolution of international law in subtle but significant ways.

⁶¹⁰ Kofi Annan, “Secretary-General’s Address to the Commission on Human Rights” (7 April 2005), online: <<https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-the-commission-human-rights>>.

Drawing on Adler and Pouliot's account of practices as socially meaningful patterns of action,⁶¹¹ I have argued that informal consensus-building should be understood as a genuine legal practice in international human rights law. Through repeated and competent performance, it reinforces, refines, and occasionally reconfigures the legal discourses that govern international engagement. This argument was developed through the analysis of four key initiatives: three historical examples—the *Statement of Essential Human Rights* (1945), the Siracusa Principles (1984), and the Paris Minimum Standards (1990)—and one contemporary case, the development of the PHE Principles (2021–2024), in which I was directly involved. These cases illuminate the contexts, processes, and outputs of informal consensus-building, and together provide a framework for understanding its role in norm interpretation and development in international human rights law.

Chapter 3 examined the earliest case study in this dissertation: the storied effort to draft the 1945 *Statement of Essential Human Rights*. Spearheaded but later abandoned by the American Law Institute, the development of the Statement unfolded against the backdrop of a world at war, and eventually, a world being reimagined. Led by the Institute's first director, William Draper Lewis, the initiative sought to develop a consensus statement on 'essential human rights.' The prescience of Lewis and his collaborators in defining a field that had yet to take shape cannot be overstated. Though eventually abandoned and now largely forgotten in international human rights discourse, the Statement was a key source of inspiration in the drafting of the *Universal Declaration of Human Rights*. Its example illustrates the first major pathway through which

⁶¹¹ Adler and Pouliot, *supra* note 168 at 5.

informal consensus-building can reshape the law: to serve, in Oscar Schachter's terms, as "prelegislative" guideposts to the future shape of the law, before formal rules exist.⁶¹²

Yet it is less common for informal consensus-building practices to directly influence new developments in international law. More commonly, such initiatives help develop expert interpretations that clarify and apply existing international norms. As Chapter 4 shows, the proliferation of human rights treaties in the latter half of the 20th century cemented efforts of this kind. The development of the Siracusa Principles, led by William J. Butler as Chairman of the ICJ Executive Committee and Niall MacDermot as Secretary-General of the ICJ, and the Paris Minimum Standards, led by Subrata Roy Chowdhury and Richard Lillich as heads of relevant committees within the International Law Association, were both made possible because international human rights law had matured into a distinct field of study and practice. By this time, informal consensus-building initiatives were largely concerned with the application of human rights norms to real-world scenarios and—in the cases studied in Chapter 4—particularly the legal parameters of national states of emergency and exception.

Drawing on Thomas Franck's theory of legitimacy,⁶¹³ Magdalena Sepúlveda Carmona argues that the influence of informal consensus-building outputs is closely tied to their perceived legitimacy. This legitimacy imperative applies not only to the rules set out, but also the informal consensus-building process itself, and is present when, *inter alia* : (1) outputs are drafted and endorsed by independent, unbiased, and well-regarded experts; (2) the group of drafters and signatories reflects diversity in terms of a range of criteria, including gender, geographical

⁶¹² Schachter, *supra* note 93 at 224.

⁶¹³ Nagel, *supra* note 422.

representation, knowledge of different social and legal systems, and areas of expertise; (3) the rules set out are articulated in a rigorous and persuasive manner; (4) the guidance offered is practical and implementable; and (5) outputs receive subsequent validation through use in national and international forums, jurisprudence, and scholarly materials.⁶¹⁴ The case studies surveyed in this dissertation largely support the relevance of these legitimacy criteria.

Independence refers to the perceived autonomy of the initiative and its contributors. Although informal consensus-building initiatives are often convened by NGOs and academic institutions, they are typically framed as independent and impartial exercises leading to “expert legal opinions.” Experts are engaged in their personal capacities, often without compensation, to contribute both subject-matter knowledge and technical legal drafting skills, giving the process a sense of neutrality and minimizing the charge of political or moral bias. However, convening organizations may in the end disagree with final project outputs. Once underway, projects may develop a life of their own, sometimes outpacing the expectations or comfort zones of their institutional initiators. For instance, the *Statement of Essential Human Rights* ultimately diverged from the political sensibilities of its sponsor, the American Law Institute, leaving the dissemination of the work to independent drafters.

Diversity refers, *inter alia*, to the geographic, gender, legal system, and epistemic diversity of the individuals involved. As the case studies show, our understanding of diversity has evolved considerably over the decades surveyed in this dissertation (1945 to 2023). Since the time of the Statement, informal consensus-building initiatives have consistently aimed to convene experts from a wide range of regions. Ostensibly, this has served to integrate knowledge from different

⁶¹⁴ Sepúlveda Carmona, *supra* note 184 at 7; *See also* Cohen, *supra* note 202 at 468

legal systems as well as areas of expertise. However, in the years between the Statement and the adoption of the Siracusa Principles and Paris Minimum Standards, diversity increased with respect to gender but declined in terms of interdisciplinarity—as international human rights law matured into a more specialized field of legal practice. In more recent initiatives, the involvement of non-lawyers has regained significance, driven in part by postmodern critiques of expertise that question what it means to be an ‘expert’ in international human rights law and who holds authority to interpret what rights mean at the level where it matters most: the individual.

Rigour and persuasiveness refer both to the quality of research and analysis underpinning the outputs of informal consensus-building, as well as to how effectively they serve as persuasive interpretations of the law to broader communities of practice. These criteria are linked to the preceding ones, as they are informed in part by the calibre of experts involved, the time and resources available for thorough research, and the extent to which the expert consensus seeks to interpret and affirm *existing* law rather than reimagine it. The more progressive a consensus-based text aspires to be, the greater the burden of justification required for it to be persuasive. Producing a rigorous output is also typically more straightforward when the initiative’s ambition is narrow; for instance, engaging with specific legal questions such as the limitations and derogations provisions of a single treaty, as in the case of the Siracusa Principles, rather than attempting a *de novo* statement of the law, as in the case of the Paris Minimum Standards.

Practicality refers to the implementability of rules and principles set out in consensus-based outputs. The outputs respond to real needs and can be applied in real-world settings. Practical principles are those that can be used by a broad range of stakeholders and that reflect the capacities of those expected to apply them. They are simple, accessible, and easy to reference. This is most clearly illustrated by the divergent trajectories of the Siracusa Principles

and the Paris Minimum Standards. Although both arose from similar circumstances and sought to address similar subject matter, only the Siracusa Principles has withstood the test of time. Over the past four decades, the Siracusa Principles have had a profound impact on the work of UN human rights treaty bodies and special procedures, domestic courts, constitutional and international law reform projects, transnational civil society advocacy, and legal scholarship. The markedly different legacies of these two projects—despite their shared context—highlight the significance of both process and dissemination in determining the influence of informal consensus-building initiatives.

Finally, *validation* refers to the extent to which the outputs of consensus-building are recognized and adopted by states (including domestic and subnational actors such as courts), international and regional bodies, and broader communities of research, teaching, and practice. As noted above, practicality contributes to their uptake beyond the drafters and signatories. However, organizers will also often strive, from the outset, to involve experts in the consensus-building process whose voice will have impact in the post-development life of this work. The Siracusa Principles, for instance, were disseminated in high-level UN forums in part because the individuals who took part in the initiative were part of the delegation of The Netherlands and could lend the Siracusa Principles access to the diplomats working within the international human rights law system. The authority of informal consensus-building is not guaranteed in advance. Rather, it accrues through citation, repetition, and adoption by other actors in the field.

These legitimacy criteria are aspirational rather than guaranteed. As my insider analysis of the PHE Principles illustrates, trade-offs are inevitable. In Chapter 5, I recount in detail the context that gave rise to an imperative to develop a set of guiding principles on the human rights dimensions specific to public health emergencies. Recognizing the limitations of the Siracusa

Principles, the ICJ and GHLC came together to build upon this earlier work and develop a new set of principles tailored to the public health emergency context. From the outset, there was little blueprint for how to conduct informal consensus-building. I therefore sought to document the process as I experienced it, in the hope of offering guidance to others interested in undertaking similar initiatives in the future.

The PHE Principles were the result of a three-year iterative process encompassing six phases and five major drafts. The methodology combined established practices of informal consensus-building with novel elements such as regional consultations. The final principles significantly expanded upon the Siracusa Principles in both scope and ambition. Notably, they fostered a rapprochement of international human rights law and global health law, and fostered an understanding of public health emergency norms between these two fields by:

- (1) addressing horizontal gaps in international law, articulating how economic, social, and cultural rights frameworks apply to public health emergency prevention, preparedness, and response, and conversely, what global health law instruments such as the IHR contribute to the fulfilment of human rights obligations;
- (2) addressing vertical gaps in translating international legal norms into frontline responses, including unpacking fraught concepts such as precaution and proportionality; and
- (3) identifying emerging norms at the intersection of global health law and international human rights law, such as the international right to solidarity.

The development process also underscores the procedural tensions inherent in legitimacy-building efforts. Ensuring rigour often implies reliance on the highest levels of technical expertise. However, such a focus may exclude diverse voices, particularly from the Global South. Conversely, an inclusive process that privileges multivalence of expertise may face

challenges in achieving technical precision and practical usability. The definition of "expertise" itself thus becomes a site of contestation, influencing the perceived legitimacy of the final product.

Substantively, the PHE Principles grappled with a central question: should informal consensus-building merely reflect the law as it is, or should it also serve as a vehicle for the progressive development of international law? This tension was shaped by broader debates around the decolonization of global health and critiques of the normative foundations of global health security and how they failed to prioritize rights and justice in global responses to the pandemic. The Principles ultimately adopted a broad, holistic framework that extended beyond emergency response to include prevention and preparedness; an approach that increased the ambition and complexity of the project. Time will tell whether this ambition will enhance or limit the Principles' impact.

One final point bears emphasis: meeting a checklist of legitimacy criteria alone does not guarantee influence. Sepúlveda Carmona herself notes that the five criteria set out above constitute a non-exhaustive starting set of considerations. Equally crucial is the *timing* of an initiative, as the drafters of both the *Statement of Essential Human Rights* and the Siracusa Principles understood. Timing is often decisive, not only in terms of the uptake of consensus-based outcomes, but also in terms of the resources that may be available to support the initiative, and the individuals who may be willing to volunteer their time and expertise.

In the case of the PHE Principles, the opportunity arose in part because the COVID-19 pandemic unsettled longstanding assumptions and practices in global health law and international human rights law. Just as the pandemic catalyzed new international lawmaking initiatives, it also sparked the partnership behind the PHE Principles. Without the COVID-19

pandemic, the conversations that eventually led to this partnership, as well as the funding opportunities that supported the initiative, would never have arisen. While the Principles may not produce immediate changes to the international legal landscape, their longer-term influence lies in their ability to foster connections between distinct epistemic communities—such as those working in global health law and international human rights law—who share an interest in advancing rights-based approaches to public health emergency governance.

This dissertation is only the starting point for a broader research agenda on informal consensus-building: what these processes are, the value they bring to international legal practice, and how they shape—or fail to shape—norm development, interpretation, and application. Given the potential influence of such processes and outputs within international legal communities, future research should seek to better understand how prominent examples of informal consensus-building in international law have translated into real-world impact. It should also aim to develop tools—such as evaluation frameworks—that can support greater accountability and rigour in these processes.

Taken together, the case studies and research in this dissertation demonstrate that informal consensus-building is not peripheral to how we *do* international law but can be constitutive of it. As new crises and contestations challenge international law, informal consensus-building initiatives will likely play a growing role in shaping the contours of legal interpretation and practice. By shedding light on how these processes unfold, why they matter, and what makes them legitimate, this dissertation offers a conceptual and empirical foundation for future research and practice at the intersection of international law scholarship, practice, and teaching.

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Appendix A: Examples of Informal Consensus-Building in International Human Rights Law

Title of Document	Published	Convenor(s)
<i>Statement of Essential Human Rights</i>	1945	American Law Institute
<i>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</i>	1984	International Commission of Jurists, the International Association of Penal Law and its affiliated International Institute of Higher Studies in Criminal Studie, the Urban Morgan Institute for Human Rights (Cincinnati, USA)
<i>Paris Minimum Standards of Human Rights Norms in a State of Emergency</i>	1984	Committee on the Enforcement of Human Rights Law of the International Law Association
<i>Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights</i>	1987	International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights
<i>Turku Declaration of Minimum Humanitarian Standards</i>	1991	Human Rights Institute of Åbo Akademi (Turku/Åbo, Finland)

<i>Maastricht Guidelines on Violations of Economic, Social and Cultural Rights</i>	1997	International Commission of Jurists, the Urban Morgan Institute on Human Rights and the Centre for Human Rights of the Faculty of Law of Maastricht University (The Netherlands)
<i>The Johannesburg Principles on National Security, Freedom of Expression and Access to Information</i>	1998	Article 19 and the International Centre Against Censorship
<i>Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity</i>	2006	International Commission of Jurists and the International Service for Human Rights
<i>Global Principles on National Security and the Right to Information</i>	2013	Open Society Foundation
<i>Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights</i>	2013	Maastricht University and the International Commission of Jurists

<i>Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education</i>	2019	Amnesty International, Equal Education Law Centre, Global Initiative for Economic, Social and Cultural Rights, Initiative for Social and Economic Rights, and the Right to Education Initiative
<i>Principles and Guidelines on Human Rights and Public Health Emergencies</i>	2023	International Commission of Jurists and the Global Health Law Consortium
<i>Maastricht Principles on the Human Rights of Future Generations</i>	2023	Various

Appendix B: Principles and Guidelines on Human Rights and Public Health Emergencies

INTRODUCTION

The COVID-19 pandemic posed a grave threat to health systems worldwide and brought to light the precarious state of human rights in times of public health emergency. The rapid spread of the novel coronavirus exposed deep-seated inequalities within and between societies and magnified the suffering of those already marginalized, including women, girls and disadvantaged communities. Despite urgent and persistent calls to foreground human rights in COVID-19 responses from international organisations, human rights advocates and civil society organizations, human rights were too often neglected or violated in public health prevention, preparedness and response in nearly every country in the world.

In the face of the unprecedented challenges posed by COVID-19, a diverse group of expert jurists, scholars, and practitioners of public health and human rights united to clarify the principles and obligations of human rights in the context of public health emergencies. Recognizing the critical need for guidance on the matter, these experts engaged in three years of intensive collaboration and deliberation, culminating in the development of the Principles and Guidelines on Human Rights and Public Health Emergencies (the ‘Principles’). This wide-ranging and authoritative text represents an international consensus-based expert opinion on the most pressing human rights issues related to public health emergencies. It reflects the wisdom of a broad range of perspectives and experiences, and it provides a critical framework for governments, civil society, and other stakeholders to prioritize human rights considerations in the

prevention of, preparedness for, and response to public health emergencies, and in the recovery of health systems in the aftermath of public health emergencies.

While the Principles were developed against the backdrop of COVID-19, their applicability extends well beyond this pandemic. The Principles draw upon lessons gathered from past epidemics and pandemics, including Cholera, Dengue, Ebola, HIV and Zika, where inadequate adherence to effective public health policies and human rights obligations led to disastrous outcomes. In so doing, the Principles take a broad view of what might constitute a ‘public health emergency,’ recognizing that while such crises may vary in scope and in nature, safeguarding human rights remains not only a legal obligation, but vital to an effective public health response.

The Principles affirm that States have a degree of flexibility to respond to public health emergencies in a contextually appropriate manner, in line with existing international human rights law and standards. Equitable measures, taken individually and collectively, are essential for States to effectively prevent, prepare for, respond to public health emergencies, and to build resilient, equitable and sustainable health systems in their wake. Indeed, public health emergency prevention, preparedness, response, and recovery are integral parts of State obligations under international law, particularly concerning the right to health. However, the Principles also recognize the interdependence and interrelatedness of all human rights and should not be construed to suggest the supremacy or dominance of public health interests over other human rights obligations.

Focusing specifically on public health emergencies, these Principles are not intended to address the wider structural barriers in respect of the realization of the right to health and health-related rights. Future initiatives should aim to develop standards for the progressive realization of

human rights in all aspects of global health governance, and address the root causes of health inequalities among nations and communities, some of which are historically based. Nevertheless, these Principles emphasize the need for continuity in the realization of positive human rights obligations in the context of public health emergencies. In doing so, they broaden the focus beyond public health as a permissible ground for human rights derogation or limitation during emergencies.

Interpretation and sources

As far as possible, the Principles affirm existing international law and correlative standards applicable to all States facing public health threats that may amount to emergencies. In providing clarity on the State's obligations to realize civil, cultural, economic, political, and social rights in the context of public health emergencies, the Principles adopt a progressive interpretation to existing international legal standards. This approach includes, among other considerations, applying in alignment with the principle of *pro homine*, by which to the extent there may be a conflict between standards or their interpretation, those most protective of human rights should prevail. Accordingly, the Principles are substantially grounded in human rights, global health law principles, legal obligations under international law, and especially treaties arising from within the UN system. They are supplemented by the jurisprudence and commentary of regional human rights bodies, and related existing standards developed through expert consensus, including the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984) the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986), and the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2011).

The interpretive approach adopted in this text also extends to the monitoring and regulatory measures undertaken by the State to address the increasing influence of non-State actors in global health, and in particular corporate entities such as private healthcare providers and insurers, and manufacturers of health goods, facilities and technologies. In this regard, the Principles emphasize the State's positive, primary obligations and non-State actors' duties in relation to civil, cultural, economic, political, and social rights in the context of public health emergencies. The Principles also have relevance to the conduct of international organizations.

Nothing in these Principles should be interpreted as limiting, restricting, or undermining any of the respective obligations or responsibilities that States, international organisations, and non-State actors may have under human rights law and standards, whether these are contained in international, constitutional, or other national laws; or standards which are in conformity with international human rights law. Moreover, these Principles do not purport to comprehensively address all facets of a rights-based approach to public health emergencies, and do not supplant the need for tailored and case-by-case analyses. The Principles may, however, provide a foundation upon which future human rights norms in public health emergency prevention, preparedness, and response, and recovery emerge and evolve.

Acknowledgments

Developed in partnership between the Global Health Law Consortium and the International Commission of Jurists, the Principles are the outcome of collaborative engagement between more than 150 individuals from around the world, including international legal scholars and practitioners, human rights defenders, civil society advocates, public health researchers, health workers, and others bearing relevant insights and expertise.

The overall process to develop the Principles was led and overseen by Roojin Habibi, Assistant Professor at the University of Ottawa Faculty of Law, and a Steering Committee of the following people, who collaborated closely in organizing the consultations, synthesizing the inputs, conducting background research, and providing intellectual direction:

- Tim Fish Hodgson, Legal Adviser on Economic and Social Rights, International Commission of Jurists
- Benjamin M. Meier, Chair, Global Health Law Consortium & Professor, Department of Public Policy & Gillings School of Global Public Health, University of North Carolina at Chapel Hill
- Saman Zia-Zarifi, Executive Director, Physicians for Human Rights (formerly Secretary-General, International Commission of Jurists)
- Ian Seiderman, Legal and Policy Director, International Commission of Jurists
- Judith Bueno de Mesquita, Senior Lecturer and Co-Deputy Director, Human Rights Centre, Essex Law School, University of Essex
- Rocío Quintero Martinez, Legal Adviser, Latin America Programme, International Commission of Jurists
- Pedro A. Villarreal, Senior Research Fellow, German Institute for International and Security Affairs & Max Planck Institute for Comparative Public and International Law
- Luciano Bottini Filho, Lecturer, Helena Kennedy Centre for International Justice, Sheffield Hallam University
- Sharifah Sekalala, Professor, Faculty of Law, University of Warwick

The following distinguished experts co-authored the Principles from the first draft to all subsequent revisions, provided crucial peer review, participated and contributed to key international meetings and endorsed the final version of the Principles: Gian Luca Burci, Luisa Cabal, Thana de Campos-Rudinsky, Danwood Chirwa, Stéphanie Dagon, Sara (Meg) Davis, Mark Eccleston-Turner, Rossella de Falco, Lisa Forman, Lawrence O. Gostin, Aeyal Gross, Steven J. Hoffman, Rajat Khosla, Tsung-Ling Lee, Stefania Negri, Alexandra Phelan, Ravi M. Ram, Magdalena Sepúlveda Carmona, Matiangai Sirleaf, Allyn L. Taylor, Brigit Toebes, Nerima Were, and Alicia Ely Yamin.

The final text of the Principles was informed by several virtual and in-person consultations held from 2020 to 2023. In addition to regular virtual working sessions, key meetings took place at the following times and places:

- (1) An interim expert consensus conference held in hybrid form in Mantello, Italy, in November 2021 to deliberate on a first draft of the Principles;
- (2) Virtual regional consultations with human rights defenders, health workers and other experts with contextualized knowledge about the impact of public health emergencies in their communities;
- (3) A workshop of consultants who led the regional consultations held at the British Institute in Eastern Africa in Nairobi, Kenya in late 2022 to deliberate on the findings of regional consultations; and
- (4) A concluding workshop held at the Brocher Foundation in Hermance, Switzerland to finalize the Principles in January 2023.

Consultations were led by several health rights experts, including Gabriel Armas-Cardona, Luciano Bottini Filho, Yogi Bratajaya, Farnoosh Hashemian, India Haus, Sreenath

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Structure

These Principles span 28 paragraphs organized into five interrelated Sections. Each Section should be read in close conjunction with the other.

Section I defines key terms used as well as the scope of application of these Principles. Section II delineates overarching human rights principles and obligations that are essential to the realization of human rights in the context of public health emergencies and are of cross-cutting application throughout the Principles. Section III addresses human rights obligations that relate in particular to the prevention of, and preparedness for, public health emergencies. Section IV focuses on the human rights obligations that arise in preparation for, or response to, an imminent or ongoing public health emergency and includes considerations relating to the design and implementation of rights-based and evidence-informed public health emergency measures, and

the enforcement of such measures. Section V builds on previous sections, and expands on the extraterritorial human rights obligations of States in the context of public health emergencies.

I. GENERAL PROVISIONS

Definitions

For the purposes of this text:

Available resources refers to all of the following: (1) financial resources, human resources, natural resources, informational resources, technological resources and other resources; (2) resources which are held by the State and/or resources that are held, owned or operated by non-State actors; and (3) resources that States can mobilize, individually or collectively, through discharging of their obligation to seek or provide international cooperation, as adequate.

Equality and non-discrimination encompass non-discrimination, referring to the elimination of any distinction, exclusion or restriction on the basis of proscribed grounds of discrimination which impair or nullify the recognition, enjoyment or exercise of human rights by all; formal equality, requiring equality before the law for all and for States to eliminate discriminatory distinctions under the law; and substantive equality, embracing equality of opportunities and results, including positive measures to address systemic and root causes of disadvantage, and accommodate differences. In public health, substantive equality includes accommodating differences relating to individuals' health status and other axes of identity to achieve equal enjoyment of human rights in practice.

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

Health goods, facilities, services and technologies refer to goods, facilities, and services that may be needed to prevent, prepare for, respond to, and recover from, a public health emergency, as well as the technologies and the knowledge, relating directly to the production or improvement of such goods, services and facilities. Examples of the foregoing include vaccines, therapeutics, diagnostic tests, personal protective equipment and other medical devices, including both the final and intermediate products used to produce and/or administer them.

Health system refers to all organizations, people and actions whose primary intent is to promote, restore or maintain health. The health system includes efforts to influence the determinants of health as well as more direct health improving measures and measures related to the prevention of, preparedness for, response to, and recovery from, public health emergencies.

Public health emergency refers to a newly emergent situation or the intensification in scope and/or scale of an existing situation involving an illness or medical condition, which – irrespective of origin or source – poses or could pose an urgent and significant risk to human life, health, or the basic functioning of society, and/or substantially impact the enjoyment or exercise of human rights in one or more States.

Public health emergency prevention, preparedness, and response, and recovery measures (PPRR) refer to the necessary and appropriate measures taken at national, regional and international levels to prevent, prepare for, respond to, and recover from a public health emergency.

Solidarity is an emerging principle of international law that refers to the shared responsibility of States and non-State actors, including individuals, communities and organizations, to act together in support of others, to address common challenges and to achieve shared goals, including the full realization of human rights for everyone, regardless of where

they live or their individual circumstances. In the context of public health emergencies, solidarity entails the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals in prevention, preparedness, response, and recovery.

Scope of application

These Principles apply to States' obligations to respect, protect and fulfil human rights, and the responsibility of non-State actors to respect human rights, in public health emergency prevention, preparedness, and response, and recovery.

For the purposes of these Principles, the following acts and omissions must be attributed to the State:

- a) acts and omissions of non-State actors under the instruction or under the direction or control of the State; and
- b) acts and omissions of persons or entities which are not organs of the State, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in that particular instance.

II. OVERARCHING PRINCIPLES AND OBLIGATIONS

1. Universal enjoyment of human rights

- 1.1 All human beings are born free and equal in dignity and rights, and all human rights are universal, indivisible, interdependent, interrelated and mutually reinforcing.

- 1.2 In giving full effect to their obligations to respect, protect, and fulfil human rights, States enhance the effectiveness of their individual and collective efforts to prevent, prepare for, respond to, and recover from public health emergencies.

2. International solidarity

- 2.1 States, whether acting individually or collectively, have the duty to ensure that all individuals and peoples can, on the basis of equality and non-discrimination, participate meaningfully in, contribute to, and enjoy a social and international order in which their human rights can be fully realized.
- 2.2 In the context of a public health emergency, such a duty reinforces rights-based actions in accordance with obligations of international cooperation outlined in Section VI, including measures on technical and financial cooperation, and equitable access to health goods, facilities, services and technologies.
- 2.3 To give full effect to paras. 2.1 and 2.2, States should:
 - a. take account of different individual and collective needs and rights to achieve common goals; and
 - b. act to prevent the acts and omissions of non-State actors from harming efforts of international solidarity.
- 2.4 Non-State actors, including those whose activities have extraterritorial effects, have a responsibility to refrain from impeding international solidarity efforts.

3. Rule of law

- 3.1 States must guarantee the protection of human rights and public health through the rule of law.

- 3.2 The rule of law is a cornerstone of democracy and human rights. In addition to paras. 4 (equality and non-discrimination), 6 (transparency and access to information), 7 (meaningful and effective participation), and 8 (accountability and access to justice), the rule of law includes:
- a. the effective separation of powers within State governance and the independence of the judiciary and legal profession, as well as their accountability;
 - b. the principle of legality and legal certainty including that law must be stated with clarity and intelligible to those whom it concerns, and non-retroactivity of the law;
 - c. In the administration of justice, the right to a fair hearing by a competent, independent and impartial tribunal established by law; and
 - d. non-arbitrary, rational and evidence-informed use of power by all branches of government;

4. Equality and non-discrimination

- 4.1 States must take effective measures, individually and collectively, to guarantee equality and non-discrimination.
- 4.2 In particular, States must:
- a. guarantee equality under, and equal protection of, the law and adopt special measures to guarantee substantive equality;
 - b. eliminate discrimination on all prohibited grounds including but not limited to age; birth; colour; deprivation of liberty; descent; disability, including physical and mental disability; ethnicity; gender; gender identity or expression; health

status and co-morbidities; housing status; immigration status, Indigenous identity or status; language; locality or geography; national or social origin; nationality or citizenship; occupation; political or other opinion; property; race; religion or belief; sex; sexual orientation; socio-economic status; or other similarly relevant statuses;

- b. ensure that PPRR measures are non-discriminatory and based on clear and transparent criteria and procedures and adopted through participatory decision-making processes in accordance with paras. 7.1 & 7.2;
- c. take effective measures to ensure that non-State actors do not engage in, promote, or tolerate discrimination; and
- d. address intersectional and structural discrimination when designing and adopting all such measures.

5. Human rights duties relating to non-State actors

- 5.1 Across all PPRR measures, States must ensure that non-State actors do not, whether by their acts or omissions, impair the enjoyment of human rights. States must regulate and monitor engaged non-State actors to prevent them from impairing the enjoyment of human rights and provide for redress and accountability.
- 5.2 In particular, States' obligation to protect human rights in para. 5.1:
 - a. applies both to the regulation and monitoring of non-State actors operating in their national jurisdiction, as well as the regulation and monitoring non-State actors operating transnationally;

- b. requires that effective measures be taken prior to, during and in the recovery from public health emergencies, including through the review, amendment or enactment of laws, policies and practices relating to PPRR, in accordance with para. 13.1;
- c. requires States to take effective measures to ensure, including through regulation and monitoring, the compliance, cooperation and collaboration of all entities operating within the health system with their duty to respect human rights; and
- d. requires States to ensure access to effective remedies and reparations for abuses of human rights resulting from the failure of non-State actors to comply with their duty to respect or fulfil human rights in accordance with paras. 8.1 & 8.2.

5.3 Non-State Actors, particularly business enterprises and those exercising effective public authority, have:

- a. a duty to respect human rights in the context of a public health emergency by refraining from impairing the exercise or enjoyment of human rights and redressing adverse human rights impacts arising from or otherwise linked to their activities; and
- b. where relevant, a duty to contribute to the fulfilment of human rights.

5.4 In particular, non-State actors' duty to respect human rights:

- a. applies to both domestic and transnational entities, and in relation to the domestic and extraterritorial impacts of their activities;

- b. requires those entities operating within the health system, including private healthcare providers and insurers, and manufacturers of health goods, facilities and technologies, to:
 - i. comply with legal frameworks referred to in para. 13.1; and
 - ii. where relevant, proactively engage, collaborate and coordinate with States, individually and collectively, to ensure the full realization of health and human rights.
- c. requires non-State actors to participate in and/or initiate both State and non-State mechanisms designed to ensure the remediation of any adverse human rights impacts their activities may cause or contribute to.

6. Transparency and access to information

- 6.1 States must guarantee access to information, including health-related information and information concerning State policies to address public health emergencies.
- 6.2 In particular, States must:
 - a. ensure widespread, meaningful, and timely access to accurate and quality information without discrimination. In the context of a public health emergency, such information must include:
 - i. what is known and uncertain about the nature and scope of a public health emergency, the nature and probability of possible harm(s), measures that can be taken to avoid or mitigate the health threat;

- ii. relevant scientific, epidemiological and other available evidence, as well as statistical data disaggregated where possible and appropriate by demographic, social and other public health-relevant characteristics;
 - iii. details of the measures taken in preparation for, and response to, a public health emergency, and the basis for such measures, including public health mandates legally enforced by government, emergency budgets in force, public procurement contracts for health goods, facilities, services and technologies, public services offered, disrupted and suspended during a public health emergency, and restrictions to human rights; and
 - iv. any other information that is necessary for individuals and rights-holding groups within a State's jurisdiction to exercise their human rights and protect their health.
- b. ensure clear guidance and assistance to facilitate access to information in the context of a public health emergency, including by ensuring that:
- i. remote, virtual, online platforms do not lead to undue constraints or discrimination in access to information;
 - ii. any obstacles to such access for marginalized, disadvantaged and disproportionately impacted individuals and groups, including digital illiteracy and linguistic barriers, are removed; and
 - iii. reasonable accommodations are adopted to secure equal access to information to all persons without discrimination, including persons with disabilities.

- c. ensure the existence and functionality of independent oversight entities, mechanisms, or institutions to monitor and report on the right to access to information in the context of public health emergencies;
- d. take the necessary measures to facilitate access to information produced or held by non-State actors, particularly information on their operations and activities and possible human rights impacts or violations; and
- e. counter misinformation using human rights compliant mechanisms and tools in general, while fully respecting and ensuring the right to freedom of expression in particular, in accordance with para. 16.1(b).

7. Meaningful and effective participation

- 7.1 States must respect and ensure the right to meaningful and effective public participation in decision-making processes relating to PPRR at the international, regional, national, subnational, and local levels.
- 7.2 In particular, States must:
 - a. consult with and take into account the self-expressed needs, knowledge, expertise and perspectives of rights holders including those from disadvantaged and disproportionately impacted groups and people experiencing multiple forms of exclusion, as well as local communities, human rights defenders, legal professionals, health and care workers and medical personnel, experts and scientists from different fields; and

- b. guarantee effective and institutionalized public participation and deliberation mechanisms which are accessible to everyone without discrimination. Such mechanisms should:
- i. act to remove obstacles to participation that marginalized, disadvantaged and disproportionately impacted individuals and groups may face, including digital illiteracy and linguistic barriers;
 - ii. facilitate, incentivize, and empower effective participation in decision-making processes relating to PPRR through public awareness and capacity-building programmes on available participation mechanisms and the right to participation under international law;
 - iii. provide notice, as well as clear, timely, accurate and relevant information to the public within reasonable timeframes in advance of any such decision-making processes;
 - iv. accord due consideration to the observations and outcomes of public participation; and
 - v. once a decision has been made, inform the public in a timely manner of the grounds and reasons underlying the decision, including how the observations of the public have been taken into consideration.

8. Accountability and access to justice for those harmed by human rights violations and abuses

- 8.1 States must, individually and collectively, guarantee access to effective remedies and full reparation for victims and survivors of human rights violations and abuses committed by State and non-State actors in PPRR.
- 8.2 In particular, States must:
- a. ensure access to effective judicial and/or equivalent administrative remedies which are prompt and lead to a cessation of the violation and/or legally enforceable reparation in accordance with international human rights law and standards. In giving effect to this obligation, States must ensure that:
 - i. judicial remedies are always available for gross human rights violations; and
 - ii. reparation include, as appropriate, provision of services, recognition of benefits and entitlements, compensation, guarantees of non-repetition, rehabilitation, restitution and satisfaction.
 - b. in the limited instances during a public health emergency where access to judicial or equivalent administrative remedies may be immediately unavailable, including because they require prolonged adjudication, interim measures that are fit-for-purpose must be implemented to avoid irreparable harm until the situation can be fully and effectively adjudicated. Wherever necessary, free and effective independent legal assistance must be available;
 - c. ensure the availability and accessibility of procedures and mechanisms for the full and thorough monitoring and review of public policy measures, decisions, and outcomes in public health emergencies, and their compliance with human rights

obligations. These procedures and mechanisms should be established through a timely and holistic approach that engages political mechanisms, judicial and quasi-judicial fora, including courts, and administrative processes; and

- d. ensure accountability in the context of their territorial and extraterritorial human rights obligations in PPRR.

III. OBLIGATIONS RELATING TO PUBLIC HEALTH EMERGENCY

PREVENTION AND PREPAREDNESS

9. Obligation to strengthen and develop sustainable health systems

- 9.1 States must strengthen and develop a universal, resilient, functional, integrated, accountable, rights-based and people-centred health system for the entire population.
- 9.2 States must ensure that any measure taken to prevent, prepare for, or respond to a public health emergency that interferes with the functioning of the health system strictly observe the principles and obligations set out in paras. 15.1 & 15.2.
- 9.3 In giving effect to their obligations in para. 9.1, States must regulate and monitor the activities of non-State actors in the health system, including private healthcare providers and insurers, and manufacturers of health goods, facilities and technologies, to ensure they respect and, where relevant, contribute, to the fulfilment of the right to health and health-related rights.

10. Obligation to take positive measures to prioritize and mobilize resources for public health emergency prevention, and preparedness

- 10.1 To respect, protect and fulfil the right to health and health-related rights, States must take positive measures relating to the prevention of, and preparedness for public health emergencies on a continuous basis.
- 10.2 States must take deliberate, concrete and targeted measures to the maximum of available resources, to prevent and prepare for public health emergencies in public and private settings. In particular, States must:
- a. address the needs of marginalized, disadvantaged and disproportionately impacted individuals and groups, including by planning for measures aimed at eliminating structural discrimination and achieving substantive equality, in accordance with paras. 4.1 & 4.2;
 - b. promote and fortify scientific research as a common good, including with the allocation of adequate financial and human resources, and through the regulation and monitoring of private companies contributing to scientific progress or technological advances; and
 - c. invest in health systems that enable public health core capacities in accordance with the 2005 International Health Regulations and provide for the availability, accessibility, acceptability and quality of health goods, facilities, services and technologies.
- 10.3 To maximize available resources for effective public health emergency prevention and preparedness, the State should:

- a. where necessary, take effective measures to direct or otherwise regulate the use of privately held, owned or operated resources, particularly those resources held, owned or operated in private healthcare sectors within a State's jurisdiction; and
- b. coordinate with private actors, particularly those with resources held, owned or operated in the private healthcare sectors within the State's jurisdiction.

10.4 The obligation to contribute resources to the prevention and preparedness of public health emergencies at global and regional levels is commensurate with the State's maximum available resources.

10.5 Where the participation of private actors in the health system has been authorized by a State, that State must ensure, including through regulation and monitoring, that any such participation does not impair the enjoyment of human rights. Such participation does not relieve the State of its obligation to ensure that minimum essential levels of economic, social and cultural rights are enjoyed by individuals, particularly the most marginalized, disadvantaged and disproportionately impacted individuals and groups.

11. Obligation to ensure access to health goods, facilities, services and technologies

11.1 States must ensure that health goods, facilities, services and technologies, whether they are provided by the State or non-State actors, are accessible, affordable, ethically and culturally acceptable, of good quality, including evidence-based and medically and scientifically appropriate, and available to all without discrimination. In particular, States must:

- a. review and, where necessary, amend all laws, policies, and practices to ensure that they do not result in discrimination or other infringements of human rights; and
 - b. adopt measures to ensure substantive equality in access to preventive, curative, and palliative health goods, facilities, services and technologies, whether or not the provision of the foregoing is directly related to the prevention of, and preparedness for, public health emergencies.
- 11.2 Where the participation of private actors in the health system has been authorized by a State, that State must ensure, including through regulation and monitoring, that any such participation does not constitute a threat to rights in para. 11.1.
- 11.3 In implementing para. 11.1, States must also take proactive measures to improve the accessibility, affordability, acceptability, quality and availability of health goods, facilities, services and technologies necessary for PPRR.

12. Obligation to refrain from taking retrogressive measures against the right to health and health-related rights

- 12.1 In accordance with paras. 11.1, the State must:
- a. refrain from taking retrogressive measures that impair the enjoyment of the right to health and health-related rights, including those which reduce access to health goods, facilities, services and technologies not directly related to a public health emergency; and
 - b. refrain from taking retrogressive measures that have a significant negative impact on livelihoods, welfare, and the enjoyment of the minimum essential levels of economic, social and cultural rights.

- 12.2 If the adoption of retrogressive measures that reduce existing access to health and health-related rights is unavoidable, fully justify such measures with reference to their full range of human rights obligations, including by providing clear evidence that such measures:
- a. are necessary and unavoidable despite the full and effective use of the State's maximum available resources;
 - b. continue for only for the limited period during which they are strictly necessary.
 - c. have been taken only after a comprehensive examination of less restrictive alternatives, and full consideration that a failure to act would be even more detrimental to human rights; and
 - d. do not have a disproportionate or otherwise discriminatory impact on marginalized, disadvantaged and disproportionately impacted individuals and groups.

13. Obligation to ensure legal and policy preparedness for public health emergencies

- 13.1 States must ensure a coordinated, effective, and human rights compliant legal framework which operationalizes the overarching principles and obligations outlined in Section III, and the obligations detailed in this section, Section V and Section VI.
- 13.2 In particular, this legal framework should:
- a. specify budgeting for public health emergency prevention, preparedness and response;

- b. stipulate legal processes and standards for public health legal preparedness at national, subnational and local levels;
 - c. provide that all decision-making processes in PPRR are public, transparent, and subject to legal and administrative review, in accordance with paras. 6.2 & 8.2;
 - d. institutionalize public participation and deliberation processes, in accordance with paras. 7.1 & 7.2, and independent scientific review processes in accordance with para. 15.2(a);
 - e. take into account the health needs and rights of the whole population, including marginalized, disadvantaged and disproportionately impacted individuals and groups, as well as health and frontline workers;
 - f. provide for the potential deployment of social protection measures to mitigate and compensate for the impact of public health emergencies on livelihoods, welfare, gender-based violence, security, and the enjoyment of at least the minimum essential levels of economic, social and cultural rights; and
 - g. operate to ensure that measures purporting to protect or advance commercial interests do not serve to frustrate public health needs, including access to health goods, facilities, services and technologies.
- 13.3 States must ensure that the above legal framework aligns with their obligation to create an international enabling environment, as set out in para. 21.1, and takes into account the effects of the legal framework on international and extraterritorial PPRR measures. Such alignment should include intellectual property laws or rules and practices of drug regulatory authorities, and budgeting of sustained

investments in the just and equitable allocation of scarce resources in preventing, preparing for, and responding to, a public health emergency (para. 21.1(c)).

- 13.4 States should enact a national public health strategy and plan of action with a view to giving effect to this legal framework.

IV. OBLIGATIONS IN PUBLIC HEALTH EMERGENCY RESPONSE

14. General obligation to prioritize and mobilize resources in a public health emergency response

- 14.1 When faced with the imminent or ongoing public health emergency, States must:
- a. take extraordinary measures to the maximum of their available resources, giving priority to their allocation on public health;
 - b. provide for social protection measures, as envisaged in para. 13.2(f) to mitigate and compensate for the impact of public health measures on livelihoods, welfare, gender-based violence, security, and the enjoyment of the minimum essential levels of economic, social and cultural rights;
 - c. ensure that the necessary health goods, facilities, services and technologies to respond to the public health emergency are provided;
 - d. ensure that principles of non-discrimination and equal protection are applied in cases of unavoidable prioritization of scarce health goods, facilities, services and technologies;
 - e. maintain the availability of, and access to other health goods, facilities, services and technologies, including in particular those related to primary healthcare, as well as sexual and reproductive healthcare. Where a disruption to the foregoing

services may be unavoidable, it must be justified with regard to the considerations under para. 16; and

- f. implement legally enforceable measures, in accordance with para. 13.2(g), to prevent profiteering on health and health-related rights, including in respect of access to health goods, facilities, services and technologies.

14.2 The obligations in para. 14.1 complement and are cumulative to those in Section IV.

15. General obligation to ensure rights-based and evidence-informed public health measures

15.1 States must adopt rights-based and evidence-informed public health measures to prepare for and respond to, an imminent or ongoing public health emergency.

15.2 States must ensure that all public health measures taken pursuant to para. 15.1 are justifiable. A justifiable public health measure must be:

- a. based on a risk assessment grounded in scientific principles and scientific, epidemiological and other available evidence. To support compliance with this obligation, States must ensure that:
 - i. even where acting in the face of inconclusive scientific evidence, public health measures are grounded in scientific principles and the best scientific, epidemiological and other available evidence; and
 - ii. the review and synthesis of risk assessment in para. 14.2 (a) is undertaken by independent scientific advisory bodies or committees institutionalized within government and readily available, with balanced representation on

the basis of gender, diverse scientific opinions, approaches and practical experience across sectors, and an appropriate interdisciplinary balance.

- b. compliant with applicable human rights obligations;
- c. accompanied by special, targeted measures to mitigate the human rights harm(s) of such measures, in accordance with para. 13.2 (f);
- d. informed by public participation and deliberation mechanisms meeting the criteria set out in para. 7.2;
- e. subject to continuous, evidence-informed and deliberative review (see paras. 7.2, 15.2 (a) & 15.2 (d)) and lifted as soon as such review no longer supports having these measures in place, including due to the development of less restrictive alternatives.

16. Limitations and derogations to human rights during a rights-based and evidence-informed public health measure

- 16.1 Where States take measures pursuant to para. 15 that result in a limitation to human rights, such measures must be temporary, for a legitimate and specific public health purpose, and have strict regard for the principles of legality, necessity, proportionality, and non-discrimination. In addition:
- a. when a rights-based and evidence-informed public health measure results in limitations to freedom of movement, States must:
 - i. provide reasonable advance public notice of the decision to implement such a measure;

- ii. resort to the measure that would achieve the public health purpose, is necessary and is least restrictive to the enjoyment of freedom of movement;
 - iii. tailor the scope of the measure to the differential needs of the population, avoiding disproportionate burdens on marginalized, disadvantaged and disproportionately impacted individuals and groups; and
 - iv. ensure that any limitations to the right to return to one's own country is non-arbitrary, used as a measure of last resort, and accompanied by the provision of timely and effective assistance to affected individuals for the duration of the restriction.
- b. when a rights-based and evidence-informed public health measure results in a limitation to the right to freedom of expression, freedom of association and the right to peaceful assembly, States must:
- i. ensure that limitations are not used to harass, persecute, intimidate, or stigmatize persons from any particular sector of the population; and
 - ii. refrain from using such public health measures to silence disfavoured views, including those views that contest the necessity or legality of the measures themselves, or in any way impede the work of human rights defenders, health and care workers, journalists, insider informants (“whistleblowers”) or researchers.

16.2 Where States take measures pursuant to para. 15 that result in a derogation to human rights based on a state of emergency or similar state of exception, as provided under the International Covenant on Civil and Political Rights, the

European Convention on Human Rights, the American Convention on Human Rights or the Arab Charter on Human Rights, any such measures must meet a specific threat to the life of the nation, be pursuant to a publicly proclaimed state of emergency, be temporary, and have strict regard for the principles of legality, necessity, proportionality, and non-discrimination.

- 16.3 States may never derogate from human rights identified as non-derogable under the international treaties outlined in para. 16.2.

17. Limited application of a precautionary approach in the face of an imminent public health threat and absent or inconclusive scientific evidence

17.1 Where the risk assessment indicated in para. 15.2(a) is inconclusive, and a public health emergency could pose a serious risk of harm to human life or health, States may implement certain measures on the basis of precaution, provided that such measures:

- a. are the least restrictive precautionary measure to a public health threat that would achieve the appropriate level of health protection; and
- b. restrict human rights only in accordance with paras. 16.1 to 16.3.

17.2 The conclusion that the risk of harm in para. 17.1 is ‘serious’ must be made in light of a decision-making process which:

- a. involves public participation in accordance with paras. 7.1, 7.2 and 15.2 (d);
- b. is accompanied by a full and widely communicated justification, including the publication of the medical and public health rationale used to support the precautionary measure; and

- c. is subject to continuous, evidence-informed and deliberative reviews (see paras. 7.2, 15.2(a) & 15.2 (d)).

18. Obligations relating to public health measures of surveillance and data collection, including digital technologies

- 18.1 Where a public health measure pursuant to para. 15 involves surveillance and the collection, processing, storage or distribution of personal data, including through digital technologies, States must ensure that the measure is deployed for a legitimate and specific public health purpose, is temporary, and has strict regard for the principles of legality, necessity, proportionality, and non-discrimination.
- 18.2 In giving effect to their obligations in para. 18.1, States must ensure that adequate and effective human rights safeguards are implemented, taking care in particular:
 - a. to conduct human rights due diligence and entrench sunset clauses in law prior to the deployment of the measure;
 - b. to ensure that individuals are informed of their rights in respect of such measure, and how their personal data may be used. Where sensitive personal data is concerned, such data should be handled separately, and with the consent of the person subjected to surveillance;
 - c. to mitigate the impact of such measure on the right to privacy by ensuring that data collected is:
 - i. anonymized;
 - ii. the minimum data required for the public health purpose; and
 - iii. duly expunged when it no longer serves the public health purpose.

- d. to implement mechanisms for independent oversight and accountability, including through human rights impact assessments, and ensure access to effective remedies for all harms caused by the measure.
- 18.3 States must ensure, including through regulation and monitoring, that non-State actors involved in the design and deployment of the abovementioned surveillance or the collection processing, storage or distribution of personal data and information adhere to paras. 18.1 & 18.2.

19. Obligations relating to the enforcement of public health measures

- 19.1 States must limit the use of any enforcement of public health measures to the least restrictive means that would achieve a legitimate and specific public health purpose, having strict regard for the principles of legality, necessity, proportionality, and non-discrimination.
- 19.2 If non-compliance with public health measures is subject to administrative, non-custodial or other punitive but non-criminal measures, such as injunctive orders, penalties or fines or mandatory community service, States must ensure that such measures do not lead to economic hardship for the addressee of the measures and are subject to review by a judicial or other authority upon the request of the addressee.
- 19.3 The enforcement of public health measures through the use of police powers should be avoided to the extent possible. Police powers may only be used as a measure of last resort, and should only be resorted to when strictly necessary to achieve a legitimate and specific public health purpose and where less restrictive

means would be ineffective in achieving this public health purpose. If police powers are used, States should ensure that:

- a. clear guidelines are provided to State officials, including police officers, applying such powers in respect of:
 - i. the prohibition against the excessive use of force, and relevant international law and standards including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
 - ii. reasons for the application of such powers;
 - iii. the public health imperative for non-coercive measures;
 - iv. all applicable human rights standards and the imperative to avoid disproportionate burdens to marginalized, disadvantaged and disproportionately impacted individuals and groups.
- b. mechanisms are in place for mitigating instances of abuse by officials, including police officers, applying such powers; and
- c. effective remedies and reparations for rights violations by officials, including police officers, implementing such power, are easily available and accessible.

19.4 The enforcement of public health measures through the use of criminal sanctions should be avoided to the extent possible. Criminal sanctions may only be used as a measure of last resort, and should only be resorted to when strictly necessary to achieve a legitimate and specific public health purpose and where less restrictive means would be ineffective in achieving this public health purpose. If a criminal sanction is implemented, States must:

- a. refrain from applying the sanction in a disproportionate, discriminatory or excessive manner, avoiding in particular their harmful effects on marginalized, disadvantaged and disproportionately impacted individuals or groups;
- b. ensure that the sanctions is implemented only following full adherence to the rights pertaining to a fair trial from a competent, independent and impartial tribunal established by law, meeting all the guarantees of fair trial recognized under international law; and
- c. take effective measures to protect the health and safety of all persons deprived of their liberty as a result of the sanction, including through the guarantee of access to health goods, facilities, services and technologies, and where detention elevates the threat to public health, through the establishment of non-custodial alternatives to detention.

20. Obligations with regards to persons in custody and in institutions

- 20.1 States must ensure that all persons under their care and custody, and all persons in institutionalized settings, are guaranteed access to health goods, facilities, services and technologies, without discrimination and on the basis of free and informed consent, in accordance with para. 11.1
- 20.2 During a public health emergency, States must, in addition to para. 20.1, take all necessary measures to minimize or eliminate the public health threat to persons in institutionalized settings and in custody, with full respect of the Mandela rules, including through:

- a. the supervised early release and/or commute of both pre-trial detention and prison sentences, particularly when such measures are considered effective to prevent the spread of the illness or medical condition; and
 - b. the immediate transfer of persons to specialized institutions or to civil hospitals where specialized surgery or treatment is needed.
- 20.2 Where the participation of private actors in respect of the care of persons in custody and in institutions has been authorized by a State, that State must ensure, including through regulation and monitoring, that any such participation does not constitute a threat to entitlements in para. 11.1

V. EXTRATERRITORIAL OBLIGATIONS IN THE CONTEXT OF PUBLIC HEALTH EMERGENCIES

21. Extraterritorial obligations in the context of public health emergencies

- 21.1 In the context of a public health emergency, States have extraterritorial obligations that comprise:
- a. the acts and omissions of the State within or beyond its territory that may impact human rights beyond its territory, including in such contexts as where:
 - i. the State exercises authority or effective control; or
 - ii. where the State's acts and omissions bring about foreseeable effects on rights; or
 - iii. where the State is in a position to exercise decisive influence or otherwise take measures to realize rights, including on account of its capacities, resources and influence.

- b. obligations of a global character pertaining to public health emergency that are set out in the Charter of the United Nations, the Constitution of the World Health Organization, and other relevant instruments of international law, to take action, individually and collectively, to realize human rights universally.

22. Obligation to create an international enabling environment

- 22.1 States, individually and collectively, must take deliberate, concrete and targeted measures to create an international enabling environment for the universal realization of rights in PPRR including in the context of:
 - a. the elaboration, interpretation, application, implementation and regular review of multilateral and bilateral agreements as well as international law and standards;
 - b. bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation;
 - c. international mechanisms to ensure the just and equitable allocation of scarce resources during a public health emergency;
 - d. any other measures of individual States, or groups of States, in respect of their foreign relations, including funding and other forms of international assistance, that can contribute to the realization of health-related human rights; and
 - e. Reporting on domestic and extraterritorial PPRR under international human rights review procedures, international PPRR review procedures, and through the implementation of these procedures' recommendations.
- 22.2 The lack of international coordination on any element from para. 22.1 does not exonerate the State from giving effect to its separate extraterritorial obligations.

23. Obligation to refrain from causing harm to the enjoyment of human rights

- 23.1 During a public health emergency, the State must respect human rights in other States and refrain from acts and omissions that, without a good faith legitimate public health justification consistent with international law, create a real or reasonably foreseeable risk of nullifying or impairing the enjoyment of human rights extraterritorially.
- 23.2 In particular, the responsibility of the State is engaged where such nullification or impairment is a reasonably foreseeable result of its conduct.

24. Obligation regarding the use of sanctions and other coercive measures

- 24.1 States must refrain from adopting measures, such as embargoes, sovereign debt enforcement or other economic sanctions, which would result in nullifying or impairing human rights. In particular, States must:
- a. ensure that human rights obligations are fully respected and protected in the design, implementation and termination of any sanction regime; and
 - b. desist from the use of unilateral or multilateral economic measures or sanctions for trade in health goods, facilities, services and technologies in PPRR.
- 24.2 Where sanctions are targeted against individuals or entities reasonably considered to have engaged in serious human rights violations or other crimes under international law, these must be designed and applied in conformity with para. 24.1.

25. Obligation to provide international assistance and cooperation

- 25.1 States must act individually and collectively to provide international assistance in accordance with their capacity and resources, and in consultation, agreement and alignment with the strategies of the receiving State(s) to respect and protect human rights in PPRR.
- 25.2 In particular, States must act to remove or limit, through appropriate temporary or permanent measures, legal or non-legal barriers to the equitable access to health goods, facilities, services and technologies that are necessary for PPRR, in accordance with paras. 13.3 & 22.1. Such measures may include:
- a. the adoption of technology transfer agreements;
 - b. emergency use agreements;
 - c. other information sharing agreements and other arrangements for the just and equitable sharing of data and health goods, facilities, services and technologies; and
 - d. by collaboratively setting up capacities and infrastructure for PPRR.
- 25.3 Any measures creating legal barriers that hinder international cooperation and solidarity, including intellectual property laws or rules and practices of drug regulatory authorities, may only be undertaken in a manner that is compliant with the human rights obligations of States both within national jurisdiction and extraterritorially.

26. Obligation to seek international assistance and cooperation

- 26.1 When despite their best efforts, States cannot adequately ensure rights-based PPRR with resources available at the domestic level, States must seek international cooperation. In particular, States must:
- a. seek international assistance and cooperation from other States, the United Nations, other competent intergovernmental organizations and non-governmental organizations and entities, as appropriate;
 - b. ensure that cooperation and assistance is used towards realizing and does not violate human rights;
 - c. realize the right to the enjoyment of the benefits of scientific progress and its applications in PPRR, including through the adoption of technology transfer agreements, emergency use agreements, information sharing agreements and other arrangements for the equitable sharing of health goods, facilities, services and technologies, and by collaboratively setting up capacities and infrastructure for PPRR; and
 - d. ensure that conditions attached to financial assistance do not compromise the State's ability to protect human rights in the context of public health emergencies.

27. Obligation to regulate and monitor the extraterritorial activities of non-State actors

- 27.1 States must act individually and collectively, including through international organizations and agreements in accordance with para. 22.1, to ensure that the health goods, facilities, services and technologies provided by non-State actors are

accessible, affordable, acceptable, of good quality and available to all without discrimination.

- 27.2 States must effectively regulate and monitor non-State actors to prevent them from harming human rights, including by:
- a. taking administrative, legislative, judicial, investigative, and other measures to ensure that the responsibilities to realize human rights are not undermined by any treatment, including special protections afforded to the commercial interests of private actors;
 - b. taking any measures necessary to prevent interference with any other State's regulatory measures in accordance with the obligation to regulate and monitor;
 - c. taking any measures necessary to ensure combined, transnational or international regulation of non-State actors, including transnational corporations and other business enterprises, through effective and rights compliant global governance;
 - d. when necessary, taking measures to ensure the application of its jurisdiction to the extraterritorial activities of transnational corporations, or their parent or controlling company, where the company has its centre of activity, is incorporated, registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
 - e. providing for effective monitoring mechanisms and procedures for compliance with national regulations and human rights obligations;
 - f. providing for effective supervision of and penalties for non-compliance with regulations, including access to effective remedies and remedial mechanisms

provided by the State. Such penalties and remedies must not themselves impair the enjoyment of human rights; and

- g. obliging non-State actors, including business enterprises, to make provision for operational grievance mechanisms to allow for direct redress to victims of human rights abuses.

28. Obligations of intergovernmental organizations

- 28.1 Intergovernmental Organizations must create an enabling global environment for PPRR and the respect, protection and fulfilment of human rights in such efforts in accordance with their mandates, including through facilitating the equitable sharing of scientific information, technical cooperation, financial assistance, knowledge sharing, technology transfer.
- 28.2 Intergovernmental organizations must respect and not impair States' compliance with their international human rights obligations, and in the context of their mandates must support States to realize human rights in their PPRR efforts.
- 28.3 Individual States should comply with their international human rights obligations in the context of their membership of intergovernmental organizations, including in the exercise of voting rights and any other decision-making functions in intergovernmental organizations.