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Toward Recognizing an International Human Right to Claim Innocence

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Since the 1990s, the innocence movement has grown out of a single project into a multinational movement that has exonerated scores of wrongfully convicted individuals. High-profile exonerations have inspired legal reforms around the world, among them a reevaluation of rules and procedures regarding the finality of a court's decision. In the last decade, nations have begun to formally recognize an individual's right — at any time — to raise post-conviction claims of factual innocence. Despite the recognition at the state level, no international human rights instrument fully recognizes the right to assert one's claim of innocence.

In their paper ***Closing International Law's Innocence Gap*** *(2021)*, Duke Law Professors **Brandon L. Garrett**, **Laurence R. Helfer**, and **Jayne Huckerby** call this omission international law's "innocence gap." The co-authors discussed the article at the conference "Toward A Human Right to Claim Innocence," hosted by NYU School of Law's U.S.-Asia Law Institute (USALI) in November 2022. Their panel was introduced by **Mark Godsey**, director of the Ohio Innocence Project, and moderated by **Luca Lupária**, director of the Italy Innocence Project. A description of the conference and all panels can be found on USALI's website; video recordings of each panel are also archived on USALI's YouTube Playlist.

A transcript of the discussion, edited here for style and clarity, follows.

MARK GODSEY: I want to thank everybody for joining today. My name is Mark Godsey, and I'm the director of the Ohio Innocence Project and the co-chair of the International Committee of the Innocence Network. I want to start off by thanking the US-Asia Law Institute at NYU Law and the Duke International Human Rights Clinic at Duke Law for joining this cause and making this conference possible. This is an effort that's been going on for a number of years from various leaders in the Innocence Network. The innocence movement, I guess you could say, began in the US, but in the last decade or 15 years or so there's been an increased interest around the world. Innocence Projects have sprung up on every continent.

There is now an entire network of Innocence Projects in Latin America called Red Inocente. There's an Innocence Network in Europe, one in Asia, and there are people doing this work in Africa. A real international community has been created, and one of the things we've all realized as this has gone global, and we've engaged in discussions about how we take this to the next step is that there's a real gap in international law. The United Nations has not spoken on this issue and it's something that could be very helpful in many different parts of the world in moving this cause forward. The panel today is going to be talking about this innocence gap in international law. The moderator is Luca Lupária. He is a full professor of criminal procedure at the University of Milan in Italy, and he serves as director of the Italy Innocence Project and president of the European Innocence Network.

He has written on various topics of criminal law and criminal procedure in Italy, is a very well-known and respected professor there and is a visiting professor at multiple American and European universities. He is also, as are many of these professors who are active Innocence lawyers, admit-

ted to the Italian Supreme Court and has done and continues to do ongoing legal work on criminal justice issues in Italy. At this time, I'd like to turn it over to Luca.

LUCA LUPÁRIA: Thank you, Mark. Good morning to all and welcome to this important meeting.

Mark has already introduced me very well, so I just want to underline how both the Italy Innocence Project and the European Innocence Network have been created with the fundamental help and assistance of Mark Godsey, whose contribution within this 'international movement' is pivotal.

The topic of this panel is crucial, in my opinion, for different reasons. Whoever happens to deal in his professional life with wrongful convictions at a certain point becomes fully aware of a fundamental circumstance: No matter how many technical and legal differences might exist between different legal systems, and no matter how peculiar a national judicial system may be, the issue of wrongful convictions has a global nature, and this phenomenon presents very similar factors that are truly common in every part of the world. I'm thinking, of course, about the contributing factors that are able to lead to wrongful convictions.

False confession can happen in Italy, as well as in the United States, as well as in Taiwan. Misidentifications by eyewitnesses occur in every country around the globe. Despite these indisputable similarities, international law has struggled with recognizing the phenomenon and foreseeing supranational legal instruments so far. This is why it is important to have with us today the three speakers who I'm going to introduce. The first who will take the stage is my very good friend and colleague, Brandon Garrett. Brandon is professor of law at the Duke University School of Law, where he directs the Wilson Center for Science and Justice. I think we can all agree that he is a giant in the field of criminal procedure, wrongful conviction, scientific evidence, civil rights, corporate crimes, and so on.

He's well known all over the world and his works are cited by courts, including the U.S. Supreme Court and courts abroad. Brandon is going to discuss the practical problems that wrongful conviction has exposed, and the national-level changes around the world in response.

BRANDON L. GARRETT: Thank you so much, Luca. It's so wonderful to gather with you all online. We hope to gather in person to talk more about the need to recognize an international right to claim innocence. I first started to think about this problem when I was learning from some of the projects around the world that Mark Godsey was describing. In every continent we now have Innocence Projects that have successfully proven innocence and exonerated people in very different legal systems, using very different tools. But what we've also started to see is that these wrongful convictions have much in common. They have exposed traditional rules of finality, which were often quite similar around the world, rules which tended to say that after one's conviction is final — after the appeal is done or any post-conviction procedure is finished — then the case is finished, even if one uncovers powerful new evidence of innocence.

In the United States, rules typically prevented reopening a case to consider new evidence of innocence after two or three years. There was an infamously demanding rule in Virginia, where I taught for some number of years. They had a 21-day rule: 21 days after the conviction, it was too late to bring in new evidence to supplement the record. That said, many countries — both civil and common law countries — had approaches that would permit an exceptional new appeal, a mechanism to bring in new evidence of innocence. Sometimes if there was a constitutional or human rights concern then exceptions were recognized to consider, in the interest of justice, new evidence of innocence. In other contexts, though, there really was no vehicle available. And so, we would see pardons, executive clemency, or entirely new approaches, like in countries that created innocence commissions or criminal case review commissions to reopen old cases.

Traditionally, courts were reluctant to reopen old convictions for evidentiary reasons. The thought was that witnesses' memories fade in days, if not months. The motivations of witnesses change over time. If you conduct a new trial five, 10, or 20 years later, witnesses may be deceased, police officers may have retired, and people's memories will no longer be reliable. The thought was that a new trial would be much less reliable than what happened at the time of the original trial. The evidence would basically degrade, people's memories fade, and physical evidence degrades. This fundamental model was shaken when DNA testing could be done 10 years, 20 years, and 30 years later, and the test results could be much more reliable than the memories of witnesses at the original trial. If the evidence was preserved, that DNA test could tell you a lot more about who committed the crime than an eyewitness could.

That revelation upset traditional notions of finality and courts started

to realize that there are other types of evidence that might be much more reliable years later than at the time of the original trial. So, what we started to see in countries around the world, in reaction to exonerations, was lawmakers and courts starting to reconsider these traditional rules of finality.

What I thought was particularly fascinating was that we saw this happen in countries with very different legal systems, all converging on a common problem that traditional rules of finality really didn't provide a sensible vehicle for raising new evidence of innocence. It was often in response to high-profile wrongful convictions that countries would adopt these legal reforms. We saw France changing its procedures for revision, both in 1989 and 2014, in response to high-profile wrongful convictions.

In the United Kingdom, we had lawmakers adopt appellate reforms in response to the Birmingham Six and Guildford Four cases to introduce a standard for unsafe convictions and to have a more flexible standard for bringing in new evidence of innocence. We had many states in the United States pass new statutes allowing people to obtain post-conviction access to DNA testing. We had two different revisions to statutes in Taiwan in response to high-profile DNA exonerations. We had an emerging approach in Canada where wrongful conviction investigations can now be submitted to a minister of justice to investigate, and now there's a new push to create an administrative agency, a criminal case review commission like what was created in the United Kingdom. There was the approach in the Netherlands in 2012 to permit new facts to be submitted to an attorney general to investigate.

What surprised me, given the diversity of national-level changes in response to wrongful convictions to develop more practically useful, more meaningful remedies when new evidence of innocence does surface, was that international law had very little influence on these changes. Many countries seem to be converging on the adoption of far more substantial remedies for wrongful convictions, but international human rights law seems to have very little to say about this.

That was a topic that I began to collaborate on with my wonderful colleagues, Larry Helfer and Jayne Huckerby, in an article that we titled *Closing International Law's Innocence Gap*. It just seemed like a historical accident that international human rights law recognizes fair trial rights, a right to an appeal, a right to a remedy, and a number of rights that touch on key protections that are important in criminal cases, but those international human rights provisions were drafted at a time when there was far more limited awareness of wrongful convictions. I thought this gap might just reflect an oversight, or attitudes in the time period before the era of DNA exonerations, before there was an international network of Innocence Projects, before some of the wrongful conviction scandals in countries ranging from the People's Republic of China to Taiwan, to France, to the UK, to Canada. We have countries around the world that have been rocked by high-profile cases that have been reversed due to new evidence of innocence. But these international human rights provisions predated the modern awareness that wrongful convictions can happen even in the most serious criminal cases.

And so, I want to turn things over to Larry and then Jayne to talk about our exploration of this gap and some of our initial thinking about the need to bring together groups like this to talk about strategies. Recognizing a new international human right takes hard work and thinking, and one of our goals at this conference is to learn lessons from other efforts to recognize international human rights. We want to understand what can go right and what can go wrong when one is trying to address this human rights gap regarding newly discovered evidence of innocence.

LUCA LUPÁRIA: Thanks a lot, Brandon. Your presentation was very interesting.

Laurence R. Helfer, professor of law and co-director of the Center for International Comparative Law at Duke University, has a privileged view also on the European legal system, since he's a permanent visiting professor at the Center of International Courts at the University of Copenhagen, Denmark, which awarded him with an honorary doctorate. Professor Helfer has been recently elected as a member of the UN Human Rights Committee from 2023 to 2026. He is going to speak today about a topic that in my opinion is crucial: the reasons why the existing international human rights regarding appeal, remedies, and compensation only touch on the problem of wrongful convictions, but still leave an important gap at the supranational level.

LAURENCE R. HELFER: Thank you very much, Luca, and thank you to the organizers. This has been an intellectual journey from the start. It was during a dinner conversation between Brandon, Jayne, and me when we first realized that there was something really worth exploring in this space. There are a tremendous number of important and impactful developments

at the national level, which Brandon has described and many of the participants in this conference have been involved in and contributed to, but it's equally striking that at the international level, the rights of defendants to assert post-conviction claims of innocence are insufficiently protected. And so, one of the things that the three of us tried to figure out is why that is the case and why we have what we call in our paper international law's innocence gap and how one might go about closing the innocence gap.

I'm going to spend a little bit of time talking about what the gap is, what its components are, and why some initial efforts are underway to attempt to close that gap. One of the purposes of this conference is to start thinking about how new rights in general are recognized and what the value of new rights at the international level might be. I'll say a few words about that at the end before turning things over to Jayne to discuss some of the different modalities for recognizing such a right, which is one of the topics we spend a lot of time on in the paper.

When I try to conceptualize or talk with colleagues about the fact that there is no internationally recognized right to claim innocence, it's kind of anomalous because — while quite a few human rights treaties at the global and the regional level recognize a range of extensive fair trial rights and appeal rights — we do not have any treaty in its text, interpretation, or implementation that fully and explicitly recognizes the right to assert a claim of factual innocence after a conviction. We see this gap as increasingly anomalous given how foundational innocence protection is at the national level, increasingly in different legal systems, and also in light of international human rights law's longstanding commitment to the presumption of innocence and to various criminal process and procedure guarantees. Indeed, it's fair to note that human rights treaties are incredibly specific in detailing those rights: such as the presumption of innocence, the right to a fair trial, the right to appeal. And there is extensive jurisprudence by regional human rights courts and UN treaty bodies and domestic courts on the contours of these rights, both in international law and at the national level.

There have been some interesting synergies between the international, regional, and national levels in that regard. International law provides a baseline of protections that have influenced a variety of legal systems around the world. Yet features that are central — or would be central — to meaningful review of post-conviction innocence claims at the national level are strikingly absent from existing international rights guarantees. For example, the bare obligation of governments to establish some mechanism for defendants to introduce fresh evidence of innocence on direct appeal or after a conviction is final does not exist explicitly in international law. In our paper, we go through a number of different national models — Brandon has touched on some of them — and we think those should inform the scope of the international right, including the obligation to establish such a mechanism.

What about the evidentiary standards that would be applicable in such a proceeding? Well, that too is largely underspecified and might vary depending on whether we're talking about a judicial mechanism, some sort of administrative body, or some other kind of fact-finding mechanism within the executive branch of government. All of that is missing. As are, thirdly, the obligation to provide adequate remedies to individuals whose innocence claims are upheld — be that release, compensation, or some other approach. Now I will say that there is, in a number of human rights treaties — including the International Covenant on Civil and Political Rights and a protocol to the European Convention on Human Rights — a right to compensation for miscarriages of justice. But this provision was added quite late in the drafting process, was controversial, and its meaning is obscure. It is also worth noting that this right to compensation is separate and freestanding from the lack of an obligation on states to create a mechanism that would allow individuals to challenge their convictions and sentences.

Before Jayne talks about how the innocence gap might be closed, I want to make two additional points. The first is that there is some evidence that the gap is already becoming noticed at the international level. It's not yet fully recognized, but in a fairly recent General Comment of the Human Rights Committee — which is the body that monitors state implementation of the Covenant on Civil and Political Rights — there was a recognition of an explicit link, for the first time, between wrongful convictions, post-conviction review, and the right to life. In its General Comment, which is an interpretive statement on the right to life, the Committee said that states must take all feasible measures to avoid wrongful convictions in death penalty cases, to review procedural barriers to reconsideration of those convictions, and — here's the most important point — to reexamine past convictions on the basis of new evidence, including new DNA evidence. This statement is not formally binding; it is an interpretation of the right to life, which is

binding. But the statement is noteworthy for moving beyond the procedural guarantees that might exist to support claims of legal innocence, for example, if there was some sort of defective trial in terms of the process that was followed.

So, there is a strong foundation for this right and there are a number of modalities for how it might be recognized. Before turning things over to Jayne, I want to say a bit about why we might see advantages to recognizing the right to claim innocence in international law. I think it's worth asking that question because we do have developments at the national level that have been quite impactful, albeit they do vary from region to region and country to country. But at the international level of recognition, there can be symbolic benefits, strategic benefits, normative benefits, and enforcement benefits to recognizing a new right.

The recognition of a right can serve as a catalyst for advocacy. It can reframe claims that would otherwise be based on the discretion or mercy of the government into normative entitlements that have a firmer foundation in the law. It can link to states' existing obligations under international law to take various steps relating to the criminal legal process. It can also provide potential opportunities for enforcement. Those opportunities might be directly before some of the courts, tribunals, and treaty bodies that I mentioned. But they can also be indirect, in the sense that national judges in many countries will often pay attention to normative developments that are occurring at the international level when they decide whether to recognize a right to post-conviction release and what its contours might be.

In sum, there is an enormous amount of work to be done in the practical implementation of this right. But, to understand how that might be occur, we first need to understand the different modalities by which the right could be recognized. I can think of no one better than my colleague Jayne Huckerby to talk about those issues and set the stage for our further discussion.

LUCA LUPÁRIA: Thank you, Laurence, for this very interesting speech. This right to claim innocence after a conviction would be important for all the Countries, including those in Europe, that do not have review legal tools aimed at recognizing wrongful convictions, or that foresee excessive filters to access appeal. Our last speaker for the day, Professor Jayne Huckerby, is clinical professor of law and inaugural director of the International Human Rights Clinic at Duke University School of Law. She frequently serves as a human rights law expert to international and regional governmental organizations and NGOs, particularly on gender, human rights, national security, and the nexus between trafficking and terrorism. Professor Huckerby is going to explain to us different possible strategies for rights' recognition, including lessons to be learned from other rights' recognition efforts.

JAYNE HUCKERBY: Thank you, Luca, and thank you to Brandon and Larry for setting up both the striking absence of the influence of international law on national developments in this space, but also the ways in which there are huge benefits to having international weight of a new right to claim innocence in ways that can really enhance a symbolic, expressive, strategic, normative, reinforcement capacity of a right to claim innocence.

My comments are going to focus on two areas, and they really are meant to be a preview of what will be a much more detailed conversation in our panels over the next two days. I'll keep them quite brief, but look forward to engagement on this with our audience. My two areas of comment are, first of all, to fit the right to claim innocence into the different typologies that we have for recognizing new human rights under international human rights law. Again, the backdrop here is to understand that adding a new protection to the canon of international human rights law is not something that's taken lightly for a variety of reasons, so my comments will tease out the two core pathways to recognition. Secondly, I will give a bit more detail about what some of the pushback can be on adding or recognizing a new human right, again, thinking through some of the strategic and normative questions that accompany arguing for a new human right to claim innocence.

On that first question of how we, as a very practical matter, recognize a new international human right under international law: essentially, there are two pathways that we think of for recognition, the derivative rights pathway and the standalone. They're quite different in terms of what is required from the international community to make a claim under either pathway.

The derivative pathway, as the name would suggest, is when you newly imply or derive a right from a set of existing, understood, and well-defined human rights guarantees. The idea here is that we work with the fully existing norms we have under international human rights law, but we read them differently. We read them differently in light of changed circumstances. We read them often more expansively to encompass new types of rights violations.

This pathway of derivative rights is, in many ways, a pathway that is a "safer, easier" pathway than trying to recognize a right to claim innocence as a standalone right. The reason why it's "easier and safer"— and I put those in quotes as it's not a fully easier path to pursue — is because you're working with an existing set of what we can sometimes call parent rights, the existing overarching rights, and we just help states understand how they can be expansively or differently applied. You're not trying to set up a new framework that states need to agree to. You're merely working with your existing norms and interpreting them in an expansive way. For example, as Larry foreshadowed and went through with us, there is some strong jurisprudence in human rights tribunals that provide a basis for our "derivative" approach to seeing a right to claim innocence, for deriving a new right to claim innocence. For example, we can get there via the right to life, the right to fair trial and appeal, the right to remedy, and the right to compensation for miscarriages of justice.

That's the derivative rights approach: taking an existing set of rights the state is bound by and reading them to get to the right protection that we want to get to. And that is also a little bit easier in this space too because, exactly as Brandon and Mark both laid out, the national recognition of the right to claim innocence is ahead of the international law recognition. Getting states on board with something they're doing already domestically is going to be less of a fight. That definitely was the case, for example, with the recent recognition of the right to a clean and healthy environment. A huge component of the ways in which the multilateral system was able to develop that human right was because it was already existing in national law, so it wasn't going to be a new set of obligations on states. The derivative rights approach was very much used in the right to new environment movement.

The second pathway is about recognizing a separate, freestanding, standalone right. It's more difficult as both a conceptual and a practical matter. Again, the reasons why it's more difficult are not difficult to understand. It does involve creating a new normative framework for states to abide by and states are always going to be resistant to the creation of a new standalone that they think is additional to their existing binding guarantees that they've committed to under international human rights law. If we're trying to get into this new standalone, freestanding right, we have a test — a quality control test — that really balances these two imperatives: on the one hand, not overburdening states and imposing new, unexpected human rights on them, but at the same time the need to understand that human rights law is evolving. It is meant to respond to changing circumstances. As Brandon mentioned, we have nine core international human rights treaties, but they're not fixed. We are meant to recognize that things change.

So, to strike a balance between those two imperatives — don't overburden states but also recognize that rights can change— we have this quality control test which comprises roughly five requirements. Again, the requirements look a little bit different in different spaces, but there are five overarching requirements. The first is that the new right must be consistent with existing rights, consistency meaning it's not repetitive and it clarifies meaningful redress. It must be fundamental. Again, that term is used differently across different instruments, but fundamental rights here implies that it is universal, that it is core, that it has a weight to the right, and that it's very, very meaningful.

The third requirement is that the new right must be precise. That's really important. Again, this is a real reflection of the needs of governments in this regard. It must be sufficiently precise in identifying rights holders, meaning, who is holding the right. Larry talked through the difference of if you're a rights holder compared to someone asking for a benefit. Precision is important in identifying who is a rights holder and who is a duty bearer, and precision in the scope of the content of the right itself. Something that we really spent a lot of time on, particularly led by Brandon and Larry, was really thinking through what is the content of a new right to claim innocence. How do you think about it being sufficiently precise so that it is consistent but also maps out for states parties and for impacted individuals how they can enforce the right?

So, the requirements so far are consistent, fundamental, precise, and enforceable. Again, reflecting Larry's point, a key reason why we think about rights benefits and might even go to the human rights framework is to enhance our enforceability regime. This means enforceability in the domestic space but also through regional and international mechanisms. Again, the precision and the enforceability requirement here tend to go hand in hand because part of enforceability is linked to clarity around understanding who is a rights holder, who's a duty bearer, and what the right you're talking about actually means. The final element is that the right enjoys broad international support. And again, you can see where

that criterion comes from. The idea is meant to be that we don't impose a right on the international community that is only supported by a slim contingent of that community. Again, here we're really aided by the fact that the right to claim innocence is so much more articulated at the national level than the international level.

So, the derivative pathway uses existing rights to read the right; the standalone pathway requires meeting this five-point quality control test. We argue that it's possible to get to the right to claim innocence via both pathways and we apply the different tests that are involved in that. We also really think about— and something that I'm looking forward to discussing in our conversation today and in the next two days — is what are the advantages and disadvantages of going each way. What do you gain if you go with derivative rights? What do you lose? What do you gain if you go standalone? What do you lose? We talk about these strategic questions around deriving the right versus seeing it as freestanding by thinking about things such as feasibility. How easy is it to do it? Again, it's going to be easier to do a derivative rights approach. But then the protection question becomes really important here. Even if it's easier to go via the derived rights approach, does it provide the protective mechanisms that we would want for a full right to claim innocence? As Larry pointed out very clearly, there are gaps in the current international human rights law framework that don't quite get us to resolving some of the normative gaps in international human rights law. So, we argue here that would be an argument for a standalone requirement.

There is something else we talk about that I think is particularly relevant for the transnational innocence movement in a way that's also very relevant for the right to environment, which is also a transnational movement and is very important. There's something in a standalone right that really recognizes the extraordinary social movements and the uniqueness of these social movements in securing these rights in the domestic spaces that can be really relevant here to emphasize the gravity of the right at stake.

That all being said, where do states object to questions of developing human rights? Not just states, frankly, but some progressive rights advocates as well. There can be a little bit of wariness around thinking through when you expand the human rights corpus. And I want to give a couple of heads-ups around the pushback that can happen in this space. You can definitely get concerns that when you add more to the human rights framework, you delegitimize existing guarantees. There's something about the idea that if you constantly expand human rights, you are weakening the corpus. There are also questions around whether we generate ambiguity in the normative content of the right. Part of the appeal of the human rights framework is it is sufficiently clear normatively but also enables states to develop a more particularized state practice. But if we keep adding rights, is there fuzziness around normative content? That was a big issue on the right to environment, so I think that'll be something that Larry will get into with his colleagues on Friday. We also have a colleague, Inga Winkler, who is an expert on how to recognize the right to water under international human rights law, which is not explicitly guaranteed in the international human rights instruments. You can get this pushback in those kinds of areas — more with economic, social and cultural rights, but I think it's important to think through in this regard too — around the idea that you're undermining core human rights, the idea that you're going against core rights guarantees.

I think that's going to be less of a pushback here because the transnational innocence movement has anchored so much of the analysis in this very classic rule of law, right to process, et cetera argumentation. But there can be a bit of a pushback on this idea that we've got the core rights already guaranteed, if you add more, you're diluting the human rights framework. A couple more things you will get, to anticipate in advance, include a worry about overloading the international and regional supervisory machinery. Again, the idea is that when you're bringing more rights you add more to the plate of adjudicatory bodies in those spaces. One thing that I don't think you will get in this space, but that definitely happens in many other new rights contexts, particularly rights around gender and rights around LGBTI rights, is the idea that new rights claims can mask very complex political questions in ways that circumvent legitimate domestic political debate. Again, I think the fact here that the right to claim innocence is being so much more recognized in the national debate and the international law is lagging might to some degree mute that critique. But it's important to recall that that is often a really big pushback here, that essentially, you're usurping domestic government's space. I have more to say, but I think may be important to stop at this point and engage in Q&A on this space. I'm looking forward to our ongoing conversation.

LUCA LUPÁRIA: Thank you, Professor Huckerby. I would like to open the debate by asking for questions. Mark?

MARK GODSEY: I would imagine that the situation the innocence community is in is similar to other groups. Take me, for example, as a domestic Ohio lawyer. I know how difficult it is to lobby the Ohio legislature for a new law, but I've learned how to do that. When we began talking about this issue, it was very overwhelming to me to the point where I hired a consultant and started reading books to understand the jargon. So, I guess my question is more toward Jayne. When you say the derivative right and then the standalone right when you're talking about the derivative right, what is the actual process by which that is recognized?
So, when *Roe v. Wade* was decided, lawyers went to the U.S. Supreme Court and said we can find these derivative things from due process, and they pulled different things together to say there's a right to privacy. So, who takes these derivative things and makes that decision? And then on the other hand, if you go to the standalone route, again I know what it's like to lobby the Ohio legislature, but what does that look like, and how long does it take? Those are some of my questions as we're just starting this off.

JAYNE HUCKERBY: It's a great question and not capable of a short answer but I will try and do the synoptic answer to it. We have a whole bunch of different sites by which we define the content of norms under international human rights law. Many different sites, but let me keep them big picture. We have the treaty monitoring bodies that are designed to monitor the implementation of each of the nine core international human rights treaties. For example, we have the Human Rights Committee monitoring the International Covenant on Civil and Political Rights — Larry Helfer is a member of the Human Rights Committee — we have the Committee on the Rights of the Child monitoring the Convention on the Rights of the Child, and so forth.

Every core human rights treaty has these treaty monitoring bodies. Then we have the UN Human Rights Council, which is an inter-state body. Within that body, you have many different procedures, but let me highlight probably the most important for this purpose of defining rights guarantees. You have a whole bunch of what we call independent mandates, both thematic and country-based mandates, that do work on this. And again, I'm going to explain how this all plays out in practice in one moment. But essentially within the Human Rights Council, you have these independent experts, but the Human Rights Council itself can adopt resolutions which are these "soft law" instruments that set out the content of human rights guarantees. So, you have the Human Rights Council and independent experts; the council itself votes on resolutions. Then, you have human rights content developed through the UN General Assembly as well. Again, there the mechanism can be through "soft law," in terms of adoption resolutions and so forth.

There's way more than this, but let's just give you the international system: treaty monitoring bodies, the UN Human Rights Council, both as itself and the independent experts within it, and the UN General Assembly. What you do when you're trying to develop a new normative content, either derived or standalone, is you think through where in that spectrum of different bodies can you get traction on developing the normative content of a right. So, for example, looking at the right to water, you go to the Committee on Economic, Social and Cultural Rights and you engage with them around ways in which they can help develop their content, primarily by the modality of what are called general comments or general recommendations which help explore the contours of a right.

But let me talk about the right to a healthy environment a bit more. One of the first key checks was to have a Special Rapporteur on the right to a healthy environment appointed. We have the first person who held that mandate, John Knox, speaking on Friday with Larry. His mandate was to establish, under international law, whether there is a right to a healthy environment. There was concern in the international community around whether this right existed, so they made a new thematic mandate and they appointed someone with that exact question. He wrote an extraordinary report, essentially going through and saying here are the ways you can derive a right to healthy environment from existing rights. He went through and talked about the right to water, the right to life, and said here are all the ways in which we can get there.

He also said that he thought you can get to a right to healthy environment via a standalone right, and he applied that five-quality control test that I mentioned. I think that might be a really good way to go forward here potentially, to try to get a Special Rapporteur appointed on this topic. And again, I'm shortening so many things here that I'm doing such injustice to the movement to give you an idea of the highlights. Then the right to a healthy environment movement decided that they would target the Human Rights Council for a resolution

establishing the right to a healthy environment. A resolution — for everyone for whom it is not very obvious what that is if you're not in this space — is like a two-and-a-half-page document. It's not long, but it is highly negotiated text in which you go through and say yes there is a right. There's all this preambular stuff and then the operative stuff in the resolution.

That resolution was heavily debated between states. And it's one thing that, Mark, you'll find will be I think one of the biggest challenges. I know that one of the big challenges in the right to a healthy environment space was that not every state agreed on what the right to a healthy environment should cover — particularly the French had certain concerns about what that should cover. You'll have a lot of back and forth because the idea is you want to get every state to agree to that resolution. You'll have some countries that might abstain, some that might say no, but you want to get the bulk on board. So again, the progression here was having a Special Rapporteur set out how it's derived and a standalone right, getting a resolution for the Human Rights Council, taking a bit of a loss, a bit of a hit on what you got in that resolution, which is part of the danger when you are doing a multilateral compromise because it's going to be the lowest common denominator among states.

Then what that community did is go and get a General Assembly resolution on the same topic. That was helped by having the Human Rights Council resolution. They would never have gone to the General Assembly first, that's a harder body to get traction on. So, they sequenced it: Special Rapporteur, then the Human Rights Council, Human Rights Council resolution establishing the right and saying it's derived from existing rights, and the GA resolution on the same point.

MARK GODSEY: I understand that progression, and that first is the Special Rapporteur report. That doesn't have any binding effect, it's just a stepping stone, and then —

JAYNE HUCKERBY: Thanks for clarifying that. The thing about any of this space, which can be very hard from the domestic space to understand, is that we don't really have anything that's fully binding. Not anything — Larry had a heart attack over in Copenhagen at me saying that! — that was me playing the devil's advocate to the extreme. We have a lot of soft law under international human rights law, we have both what we call soft law and hard law. The hard law is the treaties and the things that are binding on states parties, and we have soft law mechanisms, which — as the name would suggest — are not directly binding on states, but we can do a lot of work in this soft law area. It's a bit harder to change the hard law, but you can do a lot of work in the soft law. We often develop normative content in that soft law space.

Again, I think to be really clear, states don't just give you a go-pass on developing a soft law norm. There will be pushback on that. The states know that what happens in the soft law space is really relevant for them, that it gives more of a claim. If you can go to your domestic court and say there's a Human Rights Council resolution and GA resolution on this human right, it changes the way in which you can engage with the domestic mechanisms. That's one pathway. And then what you would also do behind the scenes, I didn't mention it, but a lot of work with the treaty monitoring bodies, anytime that an issue comes up that's relevant to your area, you would make a submission to the treaty monitoring body on this to show how the right to claim innocence is implicated in that as well. Larry, do you want to jump in and add what I've missed?

LAURENCE R. HELFER: You can see why having Jayne as part of this project is so important, because she understands all of the different modalities. Let me jump to the 40- or 50-thousand-foot level, Mark, and answer your question in a slightly different way. What you are really doing is creating a set of persuasive and presumptively legitimate interpretive templates, if you will, that civil society groups like the Innocence Networks can latch onto and use in their advocacy in a variety of ways. Within the United States, we have done an enormous amount to close off our legal system to most international influence. Happily, that is not entirely true, and it is certainly not true in most other countries of the world. So, I agree that if you were thinking about trying to persuade a legislator in Ohio, I'm not sure it would make any difference, except perhaps a negative difference, if you were to say that there is a recognized right to claim innocence at the international level. It might make a difference if you said, look, this treaty to which the United States is a party and which it reports on every year, supplements and reinforces the constitutional guarantees of due process at the federal and state level.

An international body, which has experience looking at legal systems including that of the United States, but also almost all other common law and civil law legal systems around the world, has come up with a set of recommendations regarding how to operationalize a principle that we hope

you, at least at the abstract level, think is important: that those who are factually innocence can have some kind of remedy for convictions that are wrongful. That's how I would phrase this argument in the United States. In many other countries, you have much more ability to actually show in one of the documents that Jayne has been describing that has gone through a process of being generated through an authoritative pathway. That's one of the things we're thinking about: what is the authoritative pathway that both at the governmental level, say the executive branch or administrative bodies, and the judicial level, where you can say this is how this right should be operationalized. That would be really impactful.

Now, I want to be very clear that these norms, as Jayne said — my small heart attack notwithstanding — whether they're hard or soft, don't self-actualize. They become meaningful because civil society and rights advocates take them up and use them to make meaningful legal and policy changes. But if they don't have the normative basis for that advocacy, their advocacy is going to be, all other things equal, less impactful. So what Jayne is describing is the different pathways both theoretically, normatively, and very practically, and I'm backfilling by saying here's how they might make a real difference.

JAYNE HUCKERBY: Larry, if I could just add to that — and Mark this I think also goes to your question about use domestically — there is a very significant bringing human rights home movement in the United States. We have a whole network, which explicitly is designed at figuring out this really tricky situation — it can vary across administrations, but it's overall the same — which is the US government has certain treaty obligations that it recognizes, but there are many things it doesn't recognize, including economic, social and cultural rights, the rights of the child, women's rights, and rights on enforced disappearances. These are treaties the US government refuses to be bound by under international law. There has been a real push in the bringing human rights home movement to use resolutions, to use a Human Rights Council resolution — for the right to water in Alabama, for example — there's a whole movement around that. There is a movement, particularly in the anti-racism movement in the United States, to use these different treaties and soft law instruments to hold the US to account. In the United States now, the local grassroots are just much more deliberate about using human rights soft law and hard law to get access to claims the US government otherwise denies.

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