

HUMAN RIGHTS BRIEF

ARTICLES

- Pandemics and International Law: The Need for International Action**
CLAUDIO GROSSMAN 130
- 21st-Century Refugees: Uncovering the Human Rights Gap**
J. MAURICIO GAONA 138
- Toward Permanent Peace and Stability in Artsakh**
GEORGE S. YACOUBIAN, JR. 147
- Legislative Review of "The Transgender Persons (Protection of Rights) Act, 2019"**
AASTHA KHANNA AND DIVESH SAWHNEY 155
- Institutionalization and Torture of People With Disabilities in Mexico:
A Case for Holding States Responsible for Crimes Against Humanity**
PRISCILA RODRIGUEZ 167

STUDENT COLUMNS

- Who Decides "The Best Interests of the Child?": Strengthening Legal Protections
for Intersex Persons against Sexual- and Gender-Based Violence**
LUCETTE MORAN 177
- Tanzania Blocks Direct Petitions to the African Court on Human and Peoples' Rights**
BEN PHILLIPS 183
- The Unexpected Way Coal Mining in Zimbabwe's Hwange National Park
Is a Human Rights Violation**
LILY BARON 186
- Trapped at Sea: As Seafarers' Rights Erode During COVID-19 Pandemic,
Arbitration Mechanism May Offer a Path for Redress**
SHANNON QUINN 190
- How a Universal Definition May Shape the Looming Climate Refugee Crisis**
ALEXANDRA HARIS 194

HUMAN RIGHTS BRIEF

REGIONAL SYSTEMS

A Long Road or Dead End?: Justice for a Chilean General

JULIO A. SANCHEZ AND ANITA SINHA

198

Reforming the Legal Process: An End to Human Trafficking in Latin America

MIRANDA CARNES

201

Copyright © 2021 Human Rights Brief

Acknowledgements:

We would like to thank our advisor Professor Macarena Sáez and the Center for Human Rights & Humanitarian Law for their support. We are also grateful to the American University Washington College of Law for providing a legal education that empowers us to champion what matters.

The ideas, opinions, and conclusions expressed in the issue are those of the authors only, and do not necessarily represent the views of American University Washington College of Law and the Center for Human Rights & Humanitarian Law.

Visit Us:
Human Rights Brief
www.hrbrief.org

HUMAN RIGHTS BRIEF

VOLUME 24

SAMIRA ELHOSARY
KATE MORROW
Co-Editors-in-Chief

CORRIN CHOW
Managing Editor

CHRIS BAUMOHL
Executive Editor

ELENA GARTNER & MAYA MARTIN TSUKAZAKI
Senior Column Editors

HAILEY FERGUSON
Senior Articles & Partnerships Editor

NORA ELMUBARAK
Symposium & Education Editor

JULIO SANCHEZ
Regional Systems Editor

JULIANA CARVAJAL YEPES
Communications & Media Editor

KÜBRA BABATURK & LAUREN LAVARE
Podcast Editors

Deputy Editors

MADISON BINGLE
CASSADY COHICK
SIDNEY LARSEN

SCOTT BRENNWALD
MAIA DANNA
ADRIAN LEWIS
KRISHNA PATHAK

VICKY CHENG
SYDNEY HELSEL
KARLA MANZANARES

Staff

LILY BARON
RYANN CASTLEMAN
SABRINA DAVIS
LEILA HAMOUIE
JORDAN LUBER
THEA MONTEJO
RACHEL PETRO
ABIGAIL ROSENTHAL

YARA CALCANO
AUSTIN CLEMENTS
SARAH DEAN
ALEXANDRA HARIS
VANESA MARTINEZ-CHACON
LUCETTE MORAN
SHANNON QUINN
CAROLINE SISSON

MIRANDA CARNES
VALERIE COOK
SYDNEY DELIN
LAUREN KELLY
GAELLEN MOLINA
TYLER NOLLEY
ANDREA RODRIGUEZ BURKHARDT
KAILEY WILK

* * *

HUMAN RIGHTS BRIEF

SAMIRA ELHOSARY
KATE MORROW
Co-Editors-in-Chief

CORRIN CHOW
Managing Editor

CHRIS BAUMOHL
Executive Editor

ELENA GARTNER
MAYA MARTIN TSUKAZAKI
Senior Column Editors

HAILEY FERGUSON
*Senior Articles &
Partnerships Editor*

NORA ELMUBARAK
Symposium & Education Editor

JULIO SANCHEZ
Regional Systems Editor

JULIANA CARVAJAL YEPES
*Communications & Media
Editor*

KÜBRA BABATURK
LAUREN LAVARE
Podcast Editors

Dear Reader:

As we come to the end of an academic year that has been marked by unique challenges and prepare to hand off our dear publication to its next leadership team, we have been reflecting on the changing nature of the threat to human rights, while noting that some challenges are stubbornly stagnant.

In this issue, academics, professionals, and students explore the role that international legal systems can play in addressing pandemics. This issue then turns to modern versions of age-old problems: refugee rights and sovereignty. New technologies, varied conflicts, and climate changes require new solutions, or at least newly imagined ways of using our existing systems. In a time when the world is holding a magnifying glass to systems of oppression around the globe, a human rights-based approach is crucial in reaching agreements about disputed territory and ethnic conflict.

Yet, in addressing these large-scale global questions, we cannot ignore those individuals who have been historically erased or ignored by society. As India implements an imperfect law protecting the rights of transgender individuals, we see progress towards gender equality despite the law's shortcomings. In Mexico, we see that international systems are not always fit to address violations of individual rights, despite the modern human rights legal regime's attempt to bridge that gap. The Student Columns and Regional Systems articles continue on this theme — individuals are harmed, and legal systems should prevent the harm, or, at the very least, provide effective remedy for it.

The question we are left with is “what’s next?” While we do not have answers, we seek to find pathways to answers. Throughout this issue, we saw the need to evaluate systems and laws through a human rights lens, and we were inspired by the energy and imagination that we felt in each of the following articles.

We are grateful for your continued support as we all advocate for a world that is more just and more rights-respecting.

Sincerely,
Samira & Kate

Samira Elhosary & Kate Morrow
Co-Editors-in-Chief
Human Rights Brief

* * *

PANDEMICS AND INTERNATIONAL LAW: THE NEED FOR INTERNATIONAL ACTION

*by Claudio Grossman**

INTRODUCTION

On November 18, 2020, the Washington College of Law (WCL) and the Academy on Human Rights and Humanitarian Law co-sponsored an event, “Pandemics and International Law: The Need for International Action,” with the Centre for International Law, National University of Singapore; the School of Law, National University of Hanoi; the Autonomous University of Lisbon; Florida International University; the Inter-American Institute for Human Rights; and the WCL chapter of the International Law Student Association. The event was composed of two panels. In the first, five members of the International Law Commission (ILC) presented on their positions related to the creation of a convention on pandemics — specifically, Charles Jalloh, Nilüfer Oral, Nguyen Hong Thao, Patrícia Galvão Teles, and myself. In the second, five members of the WCL faculty — Kate Holcombe, Professor Diego Rodriguez-Pinzon, Professor Macarena Saez, Professor Diane Orentlicher, and Professor Padideh Ala’i — presented

on how pandemics impact their specific areas of expertise. Additionally, Lena Raxter acted as the Special Rapporteur for the conference.¹

This Article argues that, due to the experience of COVID-19, it is important that the ILC of the United Nations considers the adoption of a normative instrument whose purpose would be the regulation of pandemics — before, during, and after they occur. There is a compelling need to act, stressing prevention and common reaction by the international community when these scourges occur, and the existing normative framework has shown its incapacity to organize the type of global mobilization that pandemics require. This Article will first provide a brief background into relevant topics, and then it will summarize key issues noted during the November 18 conference. Lastly, it will conclude by providing a recommendation for further action.

I. BACKGROUND

The spread of disease knows no borders. As we witnessed during the COVID-19 pandemic,² the interconnected nature of our world means that disease outbreaks spread rapidly to every corner of the globe.³ Moreover, no matter how powerful and resourceful States are, no State can fully protect itself from the dramatic effects of pandemics.

Since the beginning of recorded time, diseases have made both humans and animals sick, causing

* Claudio Grossman is Professor of Law & Dean Emeritus, and R. Geraldson Scholar for International and Humanitarian Law, American University Washington College of Law; Member of the UN International Law Commission; Member of the Institut de Droit International (IDI); former Chair of the Inter-American Commission on Human Rights (IACHR). Professor Grossman would like to thank his Research Assistant, Lena Raxter, for her contributions to this article.

¹ Lena Raxter is a second year JD student at American University, Washington College of Law.

² A pandemic is a non-seasonal epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people. Heath Kelly, *The Classical Definition of a Pandemic is Not Elusive*, 89 BULLETIN WORLD HEALTH ORG. 540, 540 (2011).

³ See generally Hussein H. Khachfe et al., *An Epidemiological Study on COVID-19: A Rapidly Spreading Disease* 12 CUREUS (2020) (examining the rapid spread of COVID-19).

tremendous loss of life, inflicting enormous suffering, and generating social and economic disruptions. As early as 600 B.C.E., already infectious pathogens had been recognized for their impact on humanity.⁴ In the 1300s, the Black Death, also known as the bubonic plague — a disease caused by the bacteria *yersinia pestis* — killed an estimated one third of the world's population, making it the deadliest pandemic in the history of the world.⁵

Countless pandemics have “plagued” humankind.⁶ In the last twenty years alone, the world has experienced multiple epidemics⁷ and several pandemics — including SARS coronavirus,⁸ Dengue fever,⁹ Cholera,¹⁰ Ebola virus,¹¹ H1N1 Influenza,¹²

⁴ Stefan Riedel, *Biological Warfare and Bioterrorism: A Historical Review*, 17 PROC. BAYLOR U. MED. CTR. 400 (2004).

⁵ Richard G. Stearns, *An Appropriate Legal Framework for Dealing with Modern Terrorism and WMD*, in INTELLIGENCE AND HUMAN RIGHTS IN THE ERA OF GLOBAL TERRORISM 78, 83 (Steve Yui-Sang Tsang ed., 2006).

⁶ See GEORGE C. KOHN, ENCYCLOPEDIA OF PLAGUE AND PESTILENCE: FROM ANCIENT TIMES TO PRESENT (2002); JOSEPH P. BYRNE, ENCYCLOPEDIA OF PESTILENCE, PANDEMICS, AND PLAGUES (2008).

⁷ An epidemic is an infectious disease that spreads rapidly to a large number of people in different countries within a short period of time. See Centers for Disease Control and Prevention, *Lesson 1: Introduction to Epidemiology Section 11: Epidemic Disease Occurrence*, U.S. DEPT. OF HEALTH & HUMAN SERVS. (May 18, 2012), <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html>.

⁸ World Health Organization, *Severe Acute Respiratory Syndrome (SARS)*, https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1; James W. LeDuc & M. Anita Barry, *SARS, The First Pandemic of the 21st Century*, EMERGING INFECTIOUS DISEASES 10 (2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3329048/>.

⁹ World Health Organization, *Dengue and Severe Dengue*, https://www.who.int/health-topics/dengue-and-severe-dengue#tab=tab_1 (last visited Feb. 1, 2021).

¹⁰ World Health Organization, *Cholera*, https://www.who.int/health-topics/cholera#tab=tab_1 (last visited Feb. 1, 2021).

¹¹ World Health Organization, *Ebola Virus Disease*, https://www.who.int/health-topics/ebola/#tab=tab_1 (last visited Feb. 1, 2021).

¹² World Health Organization, *Pandemic (H1N1) 2009*, <https://www.who.int/csr/disease/swineflu/en/> (last visited Feb. 1, 2021).

MERS coronavirus,¹³ Zika virus,¹⁴ and HIV/AIDS.¹⁵ Currently, COVID-19 has thrust the world into a grave crisis,¹⁶ resulting in over two million deaths so far,¹⁷ millions infected,¹⁸ and the closure of national borders worldwide. The pandemic is inflicting tremendous economic damage and impacting everyone, but in particular the most vulnerable.¹⁹

II. INTERNATIONAL LAW AND ITS DEVELOPMENT

Beginning in the 1800s, states have recognized that national measures alone are not sufficient to limit the dire impacts of the spread of infectious disease, and consequently have taken measures to increase international cooperation and coordination for infectious disease outbreak response. Such efforts first began in 1851 when France helped organize the first International Sanitary Conference in response to a Cholera outbreak that spread from Asia to the Russian Empire.²⁰ The conference had the mandate to create a standardized quarantine regime which

¹³ World Health Organization, *Middle East Respiratory Syndrome Coronavirus (MERS-CoV)*, https://www.who.int/health-topics/middle-east-respiratory-syndrome-coronavirus-mers#tab=tab_1 (last visited Feb. 1, 2021).

¹⁴ World Health Organization, *Zika Virus Disease*, https://www.who.int/health-topics/zika-virus-disease#tab=tab_1 (last visited Feb. 1, 2021).

¹⁵ World Health Organization, *HIV/AIDS*, https://www.who.int/health-topics/hiv-aids/#tab=tab_1 (last visited Feb. 1, 2021).

¹⁶ World Health Organization, *COVID-19*, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Feb. 1, 2021).

¹⁷ According to Johns Hopkins University Coronavirus Resource Center, as of Feb. 1, 2021, there have been 2,229,601 deaths from COVID-19. Johns Hopkins Univ. Coronavirus Resource Center, *COVID-19 Map*, <https://coronavirus.jhu.edu/map.html> (last visited Feb. 1, 2021).

¹⁸ According to Johns Hopkins University Coronavirus Resource Center, as of Feb. 1, 2021, there have been 103,036,685 cases of COVID-19. Johns Hopkins Univ. Coronavirus Resource Center, *COVID-19 Map*, <https://coronavirus.jhu.edu/map.html> (last visited Feb. 1, 2021).

¹⁹ See *infra* Section IV.B.

²⁰ Anastasia Telesetsky, *International Governance of Global Health Pandemics*, 24 ASIL INSIGHTS 2 (Mar. 23, 2020), <https://www.asil.org/insights/volume/24/issue/3/international-governance-global-health-pandemics>.

could prevent the international spread of cholera, plague, and yellow fever.²¹ From 1851 to 1938, fourteen conferences were held, which resulted in the creation and later amendments of the International Sanitary Convention.²² In 1902, the Pan-American Sanitary Bureau — later renamed the Pan-American Health Organization (PAHO) — became the first international organization to specialize in international health.²³ Five years later, in 1907, the Office International d'Hygiène Publique (OIHP) became the first permanent health office tasked with ensuring that each State within the international community adequately responded to disease outbreaks.²⁴ Most importantly, after the United Nations was created in 1945, the World Health Organization subsumed the other organizations tasked with monitoring global health,²⁵ becoming the key international organization for global health issues.²⁶

III. THE WHO AND THE INTERNATIONAL HEALTH REGULATIONS

In 1969, the WHO replaced the International Sanitary Convention and Regulations with the International Health Regulations (IHR). The IHR was notable in that it obligated states to notify the WHO whenever an outbreak of cholera, plague, yellow fever, smallpox, relapsing fever, or typhus occurred within the state's territory.²⁷ However, the 2003 SARS outbreak caused the international community to question the effectiveness of health regulations that only required reporting and response

for specific disease outbreaks.²⁸ Consequently, the WHO updated the IHR in 2005.²⁹ Similar to other agreements and mechanisms, under the 2005 IHR, States are required to improve national surveillance, reporting, and response mechanisms for disease outbreaks. Moreover, the reporting and response obligations were expanded to include all infectious diseases outbreaks.³⁰

The 2005 IHR also included innovative approaches to promote human rights, recognized the role of civil society, and required compliance with the regulations unless a State opts out within the necessary time period.³¹ Of particular note, article 3 of the 2005 IHR specifically requires that States must respect the dignity, human rights, and the fundamental freedoms of persons when implementing the measures within the 2005 IHR. Articles 5 through 14 of the 2005 IHR require States to prepare for public health emergencies and coordinate when they occur, which includes information-sharing obligations. Articles 15 and 16 give the WHO Director General the power to recommend preventative measures to States. Article 32 requires states to “treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures.” Article 43 of the 2005 IHR expressly noted the importance of utilizing scientific evidence when crafting regulatory measures to respond to health emergencies. Lastly, the 2005 IHR stresses the importance of information sharing, as well as the imperative value of civil society, national and international medical associations, practitioners, scientists, and journalists in facilitating such information sharing.

²¹ NORMAN HOWARD JONES, SCIENTIFIC BACKGROUND OF THE INTERNATIONAL SANITARY CONFERENCES 1851-1938 11 (1975).

²² *Id.*

²³ *Id.* at 83.

²⁴ Alexa M. Stern & Howard Markel, *International Efforts to Control Infectious Diseases, 1851 to the Present*, 22 J. AM. MED. ASS'N 1474, 1474-79 (2004), <https://pubmed.ncbi.nlm.nih.gov/15383519/>.

²⁵ Telesetsky, *supra* note 20.

²⁶ The historical material and other concepts in this Article owe much to Professor Shinya Murase, who was appointed chair of the special committee created by the Institut de Droit International to make a proposal on Epidemics and International Law. The Author of this article was also a member of this committee.

²⁷ International Health Regulations art. 1, July 25, 1969, 1286 U.N.T.S. 390.

²⁸ Telesetsky, *supra* note 20.

²⁹ WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2005) (3d ed. 2005).

³⁰ *Id.*

³¹ Traditionally in international law, States must explicitly opt into an obligation before the State will be considered bound to abide by it. However, in the 2005 IHR, States are automatically bound by the obligations contained in the document, and may only be free from the obligations if the State explicitly opts out during the time period provided by the WHO.

IV. THE NEED FOR ACTION

As Patrícia Galvão Teles noted in her closing remarks for the conference, the evolution of international law is often reactive and accelerated by crises.³² While the developments noted above are significant, the experience of the COVID-19 pandemic demonstrates that they are insufficient to properly respond to global health crises. The current WHO regime lacks sufficient mechanisms to solve disputes, and it functions more as a system of recommendations than of binding obligations. Special funds provided by states might also impact the independence of the WHO, as such funds allow states to influence the priorities of the WHO. Additionally, pandemics impact a vast array of norms and legal regimes, and there is an urgent need of coordination for these to be effective.³³ Consequently, it is imperative that the international community comes together to address the deficiencies. This will require a thorough and realistic analysis of the experience of the international community during the COVID-19 pandemic and include the need of harmonization and coordination of different legal regimes. The international community must explore what can be done before, during, and after an epidemic to strengthen our collective ability to effectively respond to a health crisis. Lastly, it is important to remember the goals of such work: strengthening international cooperation, capacity building, protection of vulnerable groups, strengthening international norms, and addressing all the consequences of pandemics — not only the health issues.

A. An Inter-Connected Regime

International law has developed several separate frameworks, concepts, and principles, in all areas of the law, which address different facets implicated by a pandemic. In fact, substantive obligations relevant for epidemics are a part of almost every area of the law, including (but not limited to): peace and security; economic law; international trade and investment law; labor law; climate

³² For example, the creation of the United Nations was motivated by the end of the Second World War and the new post-Westphalian international world order.

³³ For example, intellectual property, trade, human rights, etc.

change; global health law; international financing law; international environmental law; intellectual property law — including access to medicine;³⁴ international sports law;³⁵ international maritime and air law;³⁶ international humanitarian law;³⁷ and human rights law. However, we do not have a single body of law that allows for needed international cooperation dealing with all the aspects involved. Moving forward, it is imperative for the international community to address this deficiency by seriously considering the need to develop a unified approach to prevent and react to pandemics, preserving the application of *lex specialis*³⁸ in areas that do not

³⁴ For instance, the distribution of pharmaceutical products, medicine, and vaccines may be restricted due to intellectual property rights. See Jorge L. Contreras et al., *Pledging Intellectual Property For COVID-19*, 38 NATURE BIOTECHNOLOGY 1146 (2020) (explaining that voluntary pledges to make intellectual property rights widely available may address the significant legal challenges related to intellectual property rights and access to medical treatment, equipment, and vaccines).

³⁵ For instance, many small and large sporting events — including the 2020 Olympic Games — have been cancelled or postponed due to the current COVID-19 crisis. Ahiza García-Hodges, Yuliya Talmazan & Arata Yamamoto, *Tokyo 2020 Olympics Postponed Over Coronavirus Concerns*, NBC NEWS (Mar. 24, 2020), <https://www.nbcnews.com/news/world/tokyo-2020-olympics-postponed-over-coronavirus-concerns-n1165046>.

³⁶ For example, in the beginning of the COVID-19 crisis, a cruise ship called the *Diamond Princess* had a large number of COVID-19 cases. The *Diamond Princess* was a flag ship of the United Kingdom, but the owner was a United States Corporation. While off the coast of Japan, a passenger began exhibiting symptoms of COVID-19; however, as a result of gaps in the existing maritime law regime, the Japanese government was uncertain whether it could exercise jurisdiction over the treatment of the passengers. See E.J. Mundell, *Diamond Princess Saga Began with One COVID Carrier*, HEALTHDAY NEWS (July 29, 2020), <https://www.webmd.com/lung/news/20200729/genestudy-shows-how-coronavirus-swept-through-the-idiadmond-princessi#1>.

³⁷ In particular, Common Article 3 of the Geneva Conventions, and the Additional Protocols I and II, establish obligations whose value cannot be excluded in case of epidemic.

³⁸ The concept of *lex specialis* derives from a Latin maxim that means “in the whole of law, special takes precedence over genus, and anything that relates species is regarded as most important.” This means that law directly on point takes precedent over general law. Dorota Marianna Banaszewska, *Lex Specialis*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Nov. 2015).

admit derogations beyond the limits prescribed by international law. This is necessary because of the existential challenge created by pandemics affecting all areas of human activities, and practically all areas of the law. However, the possibility of moving towards an interconnected system cannot ignore the need for *lex specialis* when it is appropriate. This includes the human rights obligations acquired by the international community, *for example*, the conditions necessary for declaring emergency situations; the rights that cannot be derogated; and the strict criteria necessary for the derogation of rights — necessity, proportionality, timeliness, and nondiscrimination.³⁹

B. Vulnerable Groups

The international community must sharpen obligations triggered by pandemics, including special measures to ensure non-discrimination and protection of vulnerable groups. As COVID-19 has demonstrated, global health emergencies have a disproportionate impact on vulnerable groups — including women, children, minorities, people with disabilities, the elderly, Indigenous peoples, LGBTQ+ communities, and more. The pandemic has also exposed the need to expand the category of vulnerable persons to include medical personnel;⁴⁰ individuals responsible for the essential functions of society;⁴¹ and the individuals working on the front line, dealing with the immediate aspects of the pandemic. People must be protected regardless of their race, ethnicity, nationality, class, religion, beliefs, gender, sexual orientation, language, age, health, or any other status. As such, States must guarantee human rights — including the rights to health, integrity, and life. In fact, the purpose of any instrument or steps designed to prevent and react against pandemics should be the protection of persons. This goal also has important legal consequences; for instance, in cases where issues

³⁹ U.N. Human Rts. Comm., *CCPR General Comment No. 29: Article 4: Derogations During A State Of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁴⁰ For example, doctors, nurses, medical technicians, hospital cleaners, and others working in the medical industry.

⁴¹ For example, the production, transportation and sale of food and medicines.

in interpretation emerge while defining the content of State obligations, the paramount goal of the protection of persons must be given great legal significance.⁴²

States must take positive measures to protect vulnerable populations to develop an effective regulatory and institutional framework to address the prevention and reaction to global health emergencies. Such measures would exercise the principle of non-discrimination and recognize the rights and obligations included in the Charter of the United Nations; the Universal Declaration of Human Rights; universal and regional human rights systems; and specialized conventions on human rights. As demonstrated time and again during the COVID-19 pandemic, the existence of the principle of non-discrimination alone is not enough to prevent violations from occurring. Effective compliance with the principles requires states to adopt specific measures — including training; allocation of resources; and identification of obligations as a consequence of any violations. The importance of training cannot be understated; moreover, the international community needs to create a culture that recognizes the humanity of all, and the collective commitments of all States — including implementing protective measures for those who are most exposed and vulnerable. Lastly, the international community must address the effects of containment efforts. Any efforts adopted by the community must address violations such as domestic violence resulting from quarantine, economic cooperation for underdeveloped countries that do not have capacity to recover, access to education, vaccines, medicine, and so forth.

C. Capacity Building

The international community should explicitly define the obligations for capacity building well before, during, and after pandemics. As the COVID-19 pandemic has shown, there is an urgent need for effective action to address the systems that are essential in responding to global health emergencies.

⁴² See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15 (May 28).

This pandemic has clearly demonstrated that such systems are insufficient or non-existent in many states; moreover, the lack of such systems not only affects the specific state but also the international community as a whole. Due to the globalized nature of our current world, access to vaccines, medicines and recognizing the importance of capacity building worldwide are necessary to ensure global health. Capacity building measures require much more than merely voluntary commitments. Similar to the protection of vulnerable persons, capacity building requires affirmative actions — including the creation of special funds, possibilities for rapid deployment of material and personnel assistance, personal, and so forth.

D. Travel Restrictions

Under the principle of state sovereignty, states are allowed to control entry and exit across their borders. As demonstrated in the COVID-19 pandemic, States have justified the imposition of entry and exit requirements and travel restrictions, including air travel and shipping, under this principle of sovereignty. However, the current status of international law shows a more complicated landscape. For example, there are obligations or duties of states that flow from norms involving nationality, refugee determinations, collective expulsions, and the prohibition of non-discrimination. Accordingly, any project designed to address pandemics should clarify the content the principle of sovereignty as it applies to the prevention and reaction against pandemics. In fact, all of the speakers at the conference recommended that any resulting legal instrument balance the principle of sovereignty with the aims of international cooperation. Our first goal is the protection of persons from the immediate effects of disease; our second is to protect persons from the side effects of global health crises. Only after the protection of peoples is ensured should the international community address protecting the State's sovereignty. Patrícia Galvão Teles noted this in her speech, explaining that international public health law must be focused on the protection of persons from pandemics, not just to protect affected states. Nguyen Hong Thao echoed this sentiment

by expressing that people must be at the heart of all development efforts so that no one is left behind.⁴³

E. Duty of States

As the law currently exists, there are few state obligations⁴⁴ and even fewer enforcement mechanisms for violating these obligations. Consequently, international law must clarify the questions of international responsibility and indicate what acts or omissions should be considered internationally wrongful acts. As Nguyen Hong Thao recommended during the conference, such duties could include the content and nature of a duty of international cooperation, including equitable access to vaccines, treatments, and protection and medical equipment.⁴⁵ Until there is a clear definition of the obligations and duties of States and the consequences which arise from violation, any project to implement greater State cooperation in addressing pandemics will not provide needed guidance for the action of the international community.

F. Friendly Settlement of Disputes

Whenever there are State obligations, there must be corresponding mechanisms for peaceful settlement of disputes.⁴⁶ Consequently, given the above, the international community must determine the responsibility and resulting liability of States and international organizations, the consequences of failing to comply, and the role of friendly settlement of disputes for resulting conflicts. This issue includes the consequences of failing to properly implement

⁴³ *Pandemics and International Law*, YOUTUBE (Nov. 18, 2020), <https://youtu.be/t-wcYGfv3-w> [hereinafter "Pandemics Conference"].

⁴⁴ Under the current system, affected States must implement necessary measures, and seek necessary external assistance, to prevent the spread of disease.

⁴⁵ Pandemics Conference, *supra* note 43.

⁴⁶ U.N. Charter art. 33, ¶ 1. The charter provides a list of these methods of dispute settlement, specifically, Article 33(1) states that, "[t]he parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

preventative and due diligence measures. Further, in clarifying this specific issue, the international community must clarify the proportionality of responsibility and immunity for States and international organizations. The issues of jurisdiction and standing must also be addressed in order to develop a comprehensive system that will allow the friendly settlement of disputes arising from global health crises.

G. The Sustainable Development Goals

Charles Jalloh brought up an important point: the impact of the pandemic on the implementation of the Sustainable Development Goals (SDGs), most particularly SDG-16: Peace, Justice, and Strong Institutions.⁴⁷ Under this SDG, the international community committed to implementing and promoting stronger and more resilient institutions. This obligation includes taking prompt and effective action to reduce the spread of infectious diseases while also ensuring social equality. In that sense, this topic ties into the overarching goal of protecting vulnerable people — by working together and reducing structural inequalities, the international community may limit the disproportionate burden of disease. This would not just be an investment in our common humanity, but would also help prevent, prepare for, and mitigate future pandemics.

V. THE ROLE OF THE ILC IN CREATING A REGULATORY FRAMEWORK

As stated at the Conference, it is imperative to stress the need for cooperation, prevention, and clearly identify the obligations of States, before, during and after pandemics, as well as the consequences that result from non-compliance with these obligations.⁴⁸ Further, as noted also during the conference, it is essential that the international community identifies dispute settlement mechanisms for issues arising between States. Additionally, the international community should clarify the meaning of the obligations contained within existing international law mechanisms that address global health crises. At the same time, the international community should

emphasize the fundamental importance of scientists in monitoring, research, and responding to health emergencies. Moreover, it is imperative that the scientific community — and civil society in general — are incorporated into the process of adopting and implementing any agreed upon legal framework.

To address the above issues while considering their complexity, a serious study of all the aspects implicated in a global health crisis requires international cooperation and action. The ILC is particularly well suited to undertake this task due to the diversity of its thirty-four members, elected by the General Assembly and representing all regions of the world, as well as the ILC's constant dialogue with the United Nations Member States through its institutional position in the United Nations. This is supported by the historic role played by the ILC, as demonstrated by the contributions of the ILC to the development of the building blocks of international law.⁴⁹

The ILC could work to identify, analyze, and determine the applicability of all the relevant sources and areas of law — including seeking harmonization and recognizing *lex specialis*⁵⁰ where necessary.⁵¹ In this vein, the ILC could identify the best and most acceptable methods for responding to pandemics. Ultimately, the ILC could conduct a comprehensive analysis that provides an overview of existing rules and identifies major problems arising from their implementation. This could include the constraints states face and the different methods developed by states to respond to pandemics.

The goal of this work would be to develop a unified legal document that comprehensively addresses every aspect of international law implicated by pandemics. The international community must focus on the absolute need for international cooperation in the protection of persons, ensuring that human

⁴⁷ Pandemics Conference, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ *E.g.* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

⁵⁰ *See supra* note 38 and accompanying text.

⁵¹ Such cases may arise in the areas of trade, the environment, human rights, and other areas of the law.

rights standards are protected, even in the event of emergencies. This includes the positive obligations that States maintain in respect to their general populations and vulnerable groups. The work should also be without prejudice to more favorable legal regimes for pandemics established in national, regional, or international systems.

VI. CONCLUSION

As Patrícia Galvão Teles noted at the conference, international law may be “one pandemic late” already since humanity has suffered because of a failure to develop a proper framework to prevent and respond to pandemics. This vacuum, without exaggeration, is an existential threat to humankind. It is essential that we do not wait for more pandemics before properly taking action. International law can simply not afford being “various pandemics late.”⁵² Consequently, it would be inexcusable if the international community does not create a legal and institutional regime that can properly address the issues raised by these scourges against humanity.

⁵² Pandemics Conference, *supra* note 43.

21ST-CENTURY REFUGEES: UNCOVERING THE HUMAN RIGHTS GAP

by J. Mauricio Gaona*

INTRODUCTION

Starvation, migrant smuggling, human trafficking, labor exploitation, detention, physical abuse, rape, gang and drug-cartel violence, psychological trauma, torture, abandonment, and dire humanitarian conditions are some of the most archetypical risks refugees and asylum seekers (including millions of children) encounter today. These risks are present not only in the countries migrants flee from but also in the countries they pass through and, increasingly, in host countries. Since its inception, however, refugee protection has focused mostly on the risks migrants face in their home countries, neglecting far more endemic risks affecting the security, human dignity, and wellbeing of forced migrants around the world.

The emergence of these risks in host countries raise pressing questions on legal gaps exposing refugees to human rights violations or, as I describe it, “the Human Rights Gap.” Yet no legal scholarship truly conceptualizes — much less categorizes — the practices and regulations fostering these risks. As such, the main inquiry of this Article is this: Does refugee protection consider the human rights risks that migrants, who are already fleeing persecution or conflict, encounter in the 21st century? If not, should modern refugee protection include such risks?

It is the contention of this Article that when the law no longer mirrors the purpose of its creation (protecting migrants), but rather the unintended

reality of its moral decadence (targeting migrants), the law thereby conceived loses its social institutional role while becoming a tool of oppression. When such an oppression subjugates the human dignity of the most vulnerable, the law becomes, in itself, the most powerful tool to foster human suffering.

Drawing on a novel classification of the risks that refugees encounter in the 21st century, this Article aims to expose — and hopefully will lead efforts to correct — critical legal gaps prompting State and non-State actors to neglect refugees’ most basic human rights and international legal protections.

This Article is divided in two sections. Section I concerns the security and human rights risks forced migrants encounter in their journey to safety while becoming refugees. Section II explores the risks refugees and asylum seekers confront once their claims in designated or intended host countries are decided.

I. EVOLVING RISKS: BECOMING A REFUGEE

Under international refugee law, once the preliminary legal determination of *subjective* (well-founded fear) and *objective* (persecution) elements is made, individuals forced to leave their home countries due to a credible fear of persecution and who, due to such fear cannot or are unwilling to return to their home countries, have the right to seek refugee or asylum protection.¹ Although this

* J. Mauricio Gaona is a Visiting Fellow at Harvard Law School (IGLP) and O’Brien Fellow at McGill Center for Human Rights (CHRLP). He holds a Ph.D. from McGill University (DCL, Faculty of Law), a Master’s degree in International and Comparative Law from University of California Los Angeles (LL.M., UCLA School of Law), a Master’s degree in European Union Law from Paris 2 Panthéon-Assas University (M2, Faculty of Law), and a law degree from University Externado. The author thanks professor and former United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau, for his insightful feedback. The author thanks as well professors Payam Akhavan, Asli Ü. Bâli, and Kevin Gerson for their outstanding support and interest.

¹ Convention relating to the Status of Refugees art. 1, opened for signature July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

rule of international law finds different applications and interpretations in domestic immigration law, international refugee protection conveys nonetheless a minimum level of human rights protection (human dignity) afforded by nation-states² and the international community³ to individuals fleeing persecution or conflict.

I use the term “security and human rights risks” to identify the risks 21st-century refugees face from the moment they are forced to leave their home country to the moment their protection claims are decided — which, I argue, extends to risks associated with their migratory status and journey for safety, along with their rejection and exclusion in host countries. These risks, in short, concern the security of the migrant from a multidimensional perspective circumscribed by a threefold agency threat: specifically, the *persecutor agent* (State or non-State actor) causing the person to migrate, *incidental agents* benefiting from the migrant’s precarious situation (migrant smugglers, human traffickers, drug cartels, illegal armed groups, terrorist organizations), and *settlement agents* (immigration authorities) whose practices, systems, and policies further endanger the wellbeing and security of migrants.

Becoming a refugee in the 21st century has become a security and human rights risk. This process exposes forced migrants not only to human rights violations such as sexual exploitation and human trafficking, but also to a myriad of security risks threatening

² Unlike the United States, several legal systems across the world have internalized the notion of “human dignity” either within the scope of equality rights or as a fundamental right. *See, e.g.*, Canadian Charter of Rights and Freedoms, s. 15, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter]; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law] art. 1, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last amended March 28, 2019) (Ger.) [hereinafter GRUNDGESETZ]; NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 24 (Japan); COSTITUZIONE [COST.] art. 3 (It.); CONSTITUTION OF IRELAND 1937 art. 40; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1.

³ *See* Refugee Convention, *supra* note 1, art. 13 (highlighting in its Preamble the international community’s commitment vis-à-vis refugee protection).

their physical, mental and moral integrity including torture, psychological trauma, and others.⁴ In fact, whether a migrant’s protection claim in a host country is granted or denied, these *evolving risks* emerge.

Evolving risks are the risks migrants face while becoming refugees. This includes both risks associated with the triggering event of persecution or the conflict forcing the migrant to seek protection abroad, and risks related to the transition that migrants experience from the moment they leave their home country to the moment they arrive at their intended or designated host country. In effect, under international refugee law, the term “refugee” does not require a formal declaration of refugee status for the migrant to be considered a refugee. Article 1 of the 1951 Refugee Convention states that the term refugee refers to “any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country defines a refugee as the individual.”⁵

Assuming that refugee protection is exclusively limited to the moment when such protection is granted would contradict what refugee protection aims to accomplish. Namely, protecting migrants against persecution — which begins neither with their arrival to their final destination nor when the protective status is granted or denied. I argue that denying refugee protection on the grounds that refugee status has not been granted would violate Article 31 of the Vienna Convention on the Law of Treaties,⁶ which requires treaties such as the Refugee Convention be interpreted “in good faith in

⁴ *See* UNITED NATIONS SUPPORT MISSION IN LIBYA, OFF. OF THE HIGH COMM’R FOR HUM. RTS., DESPERATE AND DANGEROUS: REPORTS ON THE HUMAN RIGHTS SITUATION OF MIGRANTS AND REFUGEES IN LIBYA 27-29 (2018) [hereinafter DESPERATE AND DANGEROUS].

⁵ Refugee Convention, *supra* note 1, art. 14.

⁶ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

A. Causal Risks

I define *causal risks* as the dangers that force individuals to migrate outside their home country and become refugees. These risks relate to the very elements preceding the legal determination on the migrant’s claim or status (well-founded fear and persecution).

Causal risks encompass a wide range of dangers connected to the type of persecution or conflict forcing the migrant to escape their home country — including non-State actors’ violence (e.g., gangs in El Salvador,⁷ guerrillas in Colombia,⁸ drug cartels⁹ in Mexico, terrorist organizations in Syria), State actors’ persecution (e.g., political repression in Venezuela,¹⁰ chemical attacks¹¹ in Syria), ethnic/religious conflicts (e.g., persecution of Muslims in Myanmar,¹²

⁷ See, e.g., Jonathan Watts, *One Murder Every Hour: How El Salvador Became the Homicide Capital of the World*, THE GUARDIAN (Aug. 22, 2015), <https://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place>.

⁸ See, e.g., *Refugiados Colombianos en Ecuador: No Regresarán*, DW (Sept. 22, 2016), <http://www.dw.com/es/refugiados-colombianos-en-ecuador-no-regresar%C3%A1n/a-19568279>.

⁹ See, e.g., Nathaniel Parish Flannery, *Is Mexico Really the World’s Most Dangerous War Zone*, FORBES (May 10, 2017), <https://www.forbes.com/sites/nathanielparishflannery/2017/05/10/is-mexico-really-the-worlds-most-dangerous-warzone/#726f3c0e5e3f>.

¹⁰ See, e.g., Jose Mauricio Gaona, *Dictatorship in Venezuela Will Soon Be Reality*, THE GLOBE AND MAIL (July 30, 2017), <https://www.theglobeandmail.com/opinion/dictatorship-in-venezuela-will-soon-be-reality/article35839985/>.

¹¹ See, e.g., Russell Goldman, *Assad’s History of Chemical Attacks, and Other Atrocities*, N.Y. TIMES (April 5, 2017), <https://www.nytimes.com/2017/04/05/world/middleeast/syria-bashar-al-assad-atrocities-civilian-deaths-gas-attack.html>.

¹² See, e.g., *Myanmar Wants Ethnic Cleansing of Rohingya – UN Official*, BBC (Nov. 24, 2016), <http://www.bbc.com/news/world-asia-38091816>.

persecution of Christians¹³ in Nigeria), and famine (e.g., Yemen, Somalia, South Sudan),¹⁴ overwhelming environmental impact (e.g., Bangladesh,¹⁵ Nauru¹⁶ island) as well as gender (e.g., women in Honduras)¹⁷ and sexual-orientation persecution (e.g., LGBTQ persecution in Russia).¹⁸

I contend that each one of these risks must be considered in order to properly determine refugee protection. *Causal risks*, in particular, are determined by the danger each migrant experiences. This means that the *objective-subjective assertion* of causal risks is circumscribed to the legal viability of the cause-event forcing migrants to leave (and not want to return) their home country. Under international refugee law, moreover, these preliminary triggering-effect conditions constitute the factual basis immigration authorities use to assess the legal viability of refugee and asylum claims.

¹³ See, e.g., Harriet Sherwood, *Christians Flee Growing Persecution in Africa and Middle East*, THE GUARDIAN (Jan. 13, 2016), <https://www.theguardian.com/world/2016/jan/13/christians-flee-growing-persecution-africa-middle-east>.

¹⁴ See, e.g., *UNHCR Says Death Risk from Starvation in Horn of Africa, Yemen, Nigeria Growing, Displacement Already Rising*, U.N. HIGH COMM’R FOR REFUGEES (April 11, 2017), <http://www.unhcr.org/news/briefing/2017/4/58ec9d464/unhcr-says-death-risk-starvation-horn-africa-yemen-nigeria-growing-displacement.html>.

¹⁵ See, e.g., *Bangladesh Listed as One of 7 Climate Change Spots*, DHAKA TRIBUNE (June 24, 2017), <http://www.dhakatribune.com/climate-change/2017/06/24/bangladesh-listed-one-7-climate-change-hotspots/>.

¹⁶ See, e.g., Ben Doherty & Eleanor Ainge Roy, *World Bank: Let Climate-threatened Pacific Islanders Migrate to Australia or NZ*, THE GUARDIAN (May 8, 2017), <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-allow-open-migration-for-pacific-islanders-threatened-by-climate-says-report>.

¹⁷ See, e.g., *5 Mil Mujeres Han Sido Asesinadas en Honduras Durante 11 Años*, LA PRENSA LIBRE COSTA RICA (July 11, 2017), <https://www.laprensalibre.cr/Noticias/detalle/116357/5-mil-mujeres-han-sido-asesinadas-en-honduras-durante-11-anos>.

¹⁸ See, e.g., Antoun Issa, *Why Russia’s Persecution of Its LGBTQ Community Matters*, HUFFINGTON POST (Apr. 19, 2017), https://www.huffpost.com/entry/why-russias-persecution-of-its-lgbt-community-matters_b_58f78163e4b0c892a4fb7452.

On the one hand, the danger migrants face must be established through an *objective legal standard*. That is, anyone facing similar events (persecution or conflict) would objectively appreciate the particular danger as imminent risk forcing the person to seek protection abroad. This *objective standard* relates to the factual persecution or conflict the migrant faces, which presupposes an objective connection between the event of persecution and the migrant's particular situation (*objective assessment*).¹⁹ This, in turn, requires the claimant to prove a "clear probability of persecution"²⁰ where the claimant is the intended target or a victim of conflict. It is worth noting that persecution grounds have been statutorily (race, religion, nationality, political opinion) and judicially defined (membership of a particular social group), while the grounds of persecution associated with conflict derive from well-known situations of danger portrayed as conflicts in modern society (e.g., civil war, famine, ethnic cleansing, religious persecution, gender discrimination). Still, refugees may also encounter other types of persecution based on their personal views or positions, the decisions they make, or the nature of the conflict they confront.

¹⁹ For example, the High Court of South Africa requires refugee claimants to prove "well-grounded apprehension of harm" showing no other satisfactory remedy. See *AI v. Director of Asylum Seeker Management* (Department of Home Affairs), 22059/18 [2019] ZAWCHC 114, South Africa's High Court (2019) at ¶¶ 25-27 (S. Afr.).

²⁰ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (setting forth a constitutional precedent on "clear probability of persecution" as the standard of proof on asylum claims in the U.S.); *Kwiatkowsky v. Minister of Emp't and Immigration*, [1982] 2 SCR 856 (Can.); *Singh v. Minister of Emp't and Immigration*, [1985] 1 SCR 177, at 9 (Can.) [hereafter *Singh*] (reaffirming *Kwiatkowsky's* constitutional precedent while holding "more likely than not" to be Canada's burden of proof on refugee protection). See also *Un'Analisi Giuridica: Valutazione delle Prove e della Credibilità nell'Ambito del Sistema Europeo Comune di Asilo*, EUR. ASYLUM OFF. SUPPORT at 40, 93 (2018) (asserting the objective nature of meaningful persecution facts or "fatti significative").

On the other hand, *causal risks* must further meet a *subjective legal standard* based on a well-founded and credible fear of persecution,²¹ which aims to facilitate a coherent connection between objective and subjective circumstances of persecution leading to the migrant's ultimate decision to seek protection abroad. In fact, the legal assessment that immigration officials make on refugee and asylum claims hinges on a critical disquisition concerning the migrant's perception, apprehension, plausibility, and account of persecution.²² This means that the migrant must connect the need to escape from and the unwillingness to return to their home country by showing how the persecution or conflict threatens the migrant in particular. Although this legal assessment may vary from one jurisdiction to another, the well-founded fear must be credible, timely, and factually and individually connected to the alleged persecution or conflict (*subjective assessment*). To that end, the triggering event of persecution must be such that anyone in the migrant's situation would have been forced to leave the country. The 1951 Refugee Convention²³ — and most domestic legal systems²⁴ — require connection between these two elements by imposing on claimants the need to prove that their "fear of persecution" is particularly related to the persecution from which they fled.²⁵

²¹ James Hathaway argues that the legal standard ("test") is exclusively objective as the fear is merely anticipatory (if returning), not psychological. See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* at 100-110 (2d ed. 2014).

²² See, e.g., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), Policy Memorandum 602-0162 (July 11, 2018) at 7.

²³ Refugee Convention, *supra* note 1, art. 1(A)(2).

²⁴ See, e.g., Immigration National Act of 1965 (INA), Pub. L. 89-236, § 101(a)(42)(A), 79 Stat. 911 (1965) (modified by Immigration Act of 1990, 8 U.S.C. § 1101(a)(42)(A)).

²⁵ See *Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009) (defining "particular social group"); *Matter of Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 2006) (introducing the concept of social visibility and legal connection); see also *Matter of Mogharrabi*, 19 I&N Dec 439, 441 (B.I.A. 1987).

B. Transitional Risks

I define *transitional risks* as those that forced migrants encounter from the moment they flee their home country to the moment their refugee status or asylum claims are granted. These risks are associated not only to logistical or economic limitations refugees often face in their journey for safety, but also to incidental risks arising out of increasingly dysfunctional and hostile systems of reception of refugees and asylum seekers in the 21st century.

I maintain that *transitional risks* may subject refugees and asylum seekers to unexpected or greater danger than they would otherwise face should a more organized system of reception be in place. This encompasses risks that refugees experience while confronting State and non-State actors before reaching their destination: specifically, violence,²⁶ kidnapping,²⁷ rape,²⁸ starvation,²⁹ torture,³⁰ and migrant-smuggling-related risks (e.g., sexual violence, torture, death).³¹ Migrant smuggling,

²⁶ See Mexico's Immigration Control Efforts, CONG. RSCH. SERV.: IN FOCUS at 1 (Feb. 2020), <https://fas.org/sgp/crs/row/IF10215.pdf> (reporting police corruption and abuses against migrants in Mexico).

²⁷ Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders – January-December 2018, U.N. HIGH COMM'R FOR REFUGEES 18 (2018), <https://data2.unhcr.org/en/documents/download/67712>, (reporting the kidnapping of refugees from East and Horn Africa while crossing the Eritrea-Sudan border).

²⁸ *Id.* at 19 (reporting cases of rape of Somali refugees by migrant smugglers in Libya); Juliana Oliveira Araujo et al., *Prevalence of Sexual Violence among Refugees: A Systematic Review*, 53 REV. DE SAÚDE PÚBLICA 10 (2019) (describing sexual violence against refugees based on a cross-referenced, bibliographic and global study).

²⁹ Migrant smugglers in Africa hold migrants in temporary locations where they face starvation. See DESPERATE AND DANGEROUS, *supra* note 4, at 27.

³⁰ *Id.* at 28.

³¹ *Id.*

in particular, has become one of the world's most profitable criminal enterprises.³²

The case of North-Triangle asylum seekers from El Salvador, Honduras, and Guatemala is illustrative. The territorial expansion of this region's two main gangs, MS-13 and Barrio 18, has forced women and children to leave these countries due to widespread violence.³³ On their arrival to the southern border

³² In 2017, migrant smuggling from the Northern Triangle to the United States generated up to 2.3 billion (USD). Human Smuggling and Associated Revenues, RAND CORP. 15 (xv) (2019), <https://www.rand.org/pubs/researchreports/RR2852.html>. In 2016, 2.5 million migrants were smuggled around the world generating returns between 5.5 and 7 billion (USD). See Global Study on Smuggling of Migrants 2018, U.N. OFFICE ON DRUGS & CRIME 9 (June 2018), https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf.

³³ Stephanie Nolen, *Menaced by Gangs, El Salvador's Children Are Running for Their Lives*, THE GLOBE AND MAIL (Aug. 25, 2015), <https://www.theglobeandmail.com/news/world/menaced-by-gangs-el-salvadors-children-are-running-for-their-lives/article26151568/> (explaining that refugees who evade these human trafficking networks must find migrant smugglers or "coyotes" in very dangerous regions); see Marc Champion, *Mexico Now World's Deadliest Conflict Zone After Syria: Survey*, BLOOMBERG (May 9, 2017), <https://www.bloomberg.com/news/articles/2017-05-09/mexico-now-world-s-deadliest-conflict-zone-after-syria-survey>. Moreover, those who survive the hazardous journey crossing tunnels, rivers, and deserts face discrimination and, if caught, detention; see *U.S. Detention of Families Seeking Asylum: A One-Year Update*, HUM. RTS. FIRST 3 (June 2015), <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.

of Mexico, however, many of these migrants³⁴ face abuse³⁵ and discrimination.³⁶

Other refugees face similar security risks across the world. For example, prostitution has proliferated across the Colombia-Venezuela border (Cúcuta)³⁷ as guerrilla groups have seized the opportunity to

³⁴ See Janna Ataiants et al., *Unaccompanied Children at the United States Border, A Human Rights Crisis that Can Be Addressed with Policy Change*, 20 J. IMMIGR. MINOR HEALTH 1000, 1000-10 (2018) (analyzing human rights implications concerning the treatment of unaccompanied children in the U.S. southern border).

³⁵ Human trafficking networks operating in Mexico (e.g., the “Meléndez” gang) are known to target migrants crossing rural areas near Puebla, Tlaxcala, Oaxaca, and Mexico City. *Atrapan a Jefe de Banda de Trata de Personas en Puebla y Tlaxcala*, MUNICIPIOS (Mar. 27, 2020), <https://municipiospuebla.mx/nota/2019-02-13/izucar-de-matamoros/atrapan-jefe-de-banda-de-trata-de-personas-en-puebla-y-tlaxcala> (Mex.).

³⁶ Attacks on asylum seekers on the move have been reported in Mexico, Brazil, Croatia, and Hungary. See *La Caravana de Migrantes Centroamericanos en Tijuana 2018-2019 – Segunda Etapa*, EL COLEGIO DE LA FRONTERA NORTE 22 (March 2019), <https://observatoriocolef.org/wp-content/uploads/2019/03/2o.-Reporte-Caravana-Tijuana.250319compressed1.pdf> (describing local officials’ and residents’ attitudes in Tijuana toward Central American migrants) (Mex.); Jackson Félix & Emily Costa, *Após Ataques de Brasileiros, 1,2 Mil Venezuelanos Deixaram o País, Diz Exército*, GLOBO BRASIL G1 (Aug. 19, 2018), <https://g1.globo.com/rroraima/noticia/2018/08/19/pacaraima-tem-ruas-desertas-apos-confronto-entre-brasileiros-e-venezuelanos.html> (Braz.); see also *Croatia: EU Complicit in Violence and Abuse by Police against Refugees and Migrants*, AMNESTY INT’L (Mar. 13, 2019), <https://www.amnesty.org/en/latest/news/2019/03/croatia-eu-complicit-in-violence-and-abuse-by-police-against-refugees-and-migrants/> (reporting Croatia’s police brutality against refugees and migrants crossing the so-called “Balkan route”); Marc Santora & Benjamin Novak, *Hungary’s Migrant Abuse Is ‘Matter of Urgency,’ European Agency Finds*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/world/europe/hungary-migrant-abuse-report.html>.

³⁷ See Anastasia Moloney, *Venezuelans Sell Sex and Hair to Survive in Colombian Border City*, REUTERS (June 10, 2018), <http://www.reuters.com/article/us-colombia-migrants-venezuela/venezuelans-sell-hair-and-sex-to-survive-in-Colombian-border-city-idUSKBN1J703B>.

recruit Venezuelan migrants crossing the border (Arauca).³⁸ Sexual violence against migrants also occurs in South Africa³⁹ and Europe.⁴⁰

II. EMERGING RISKS: BEING A REFUGEE

I define *emerging risks* as those intrinsically related to the legal status and condition of being a refugee in the 21st century, which I argue derive from the embedded effects of modern dehumanization⁴¹ and exclusion of migrants, refugees, and asylum seekers.⁴²

A. Status-Related Risks

Status-related risks refer to the risks arising out of the migrant’s expressed intent “to become a refugee” and the resulting immigration status (“refugee status”) leading to their prosecutorial treatment (confinement, detention). The prosecutorial treatment of migrants (detention beyond

³⁸ See *Fleeing Crisis, Some Venezuelans Are Recruited by Rebel Forces Fighting in Colombia*, NPR (Jan. 18, 2019), <https://www.npr.org/2019/01/18/685850399/fleeing-crisis-some-venezuelans-are-recruited-by-rebel-forces-fighting-in-colomb> (describing recruitment of migrants by illegal armed groups in Colombia).

³⁹ See Theresa Alfaro-Velcamp & Robert H. McLaughlin, *Rape without Remedy: Congolese Refugees in South Africa*, 6 J. COGENT MED. 1, 10, 15 (2019) (describing cases of rape of Congolese refugees in South Africa).

⁴⁰ See Gianna Robbers et al., *Sexual Violence against Refugee Women on the Move and within Europe*, WORLD HEALTH ORG. at 26-28 (2016).

⁴¹ See, e.g., Helen Davidson, *Australia’s Politicians Have Promoted Xenophobia: UN Expert*, THE GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/australia-news/2016/nov/18/australias-immigration-policies-have-promoted-xenophobia-un-expert>.

⁴² See Filippo Grandi, *Refugees Deserve Action and Investment, Not Indifference and Cruelty*, WORLD ECON. F. (May 24, 2016), <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-indifference-and-cruelty/>; Ashley Fantz & Ben Brumfield, *More than Half of the Nation’s Governors Say Syrian Refugees Are Not Welcome*, CNN (Nov. 19, 2015), <https://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html>.

administrative purpose)⁴³ often takes place in the host country, not for a crime the migrant committed but for the migrant's intent to become a refugee or asylum seeker in the host country. Some host countries are further criminalizing the very presence of migrants in their territory while portraying asylum claims as "illegal acts" punished by detention, exclusion, or summary deportation. I maintain that the systematic and institutionalized detention (*e.g.*, United States, Australia, Libya, Hungary, Greece, Serbia, Croatia) of refugees and asylum seekers constitutes a palpable expression of migrants' ongoing criminalization.⁴⁴ This criminalization (status/migratory intent), notwithstanding personal liberty concerns, violates both constitutional

⁴³ I argue that migrants are being prosecuted when their detention exceeds legitimate administrative purposes. Administrative detention takes place when the liberty of the person (or migrant) is restricted on reasonable, necessary, and previously regulated administrative grounds often related to State security or the need to ascertain the person's identity. Since this type of detention occurs rather preemptively and without a trial, its use constitutes an exception to the principle of liberty and security of the person protected under international law. *See* G. A. Res 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 19, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR]; African Charter on Human and People's Rights art. 6, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I/L/M/ 58 (1982) (entered into force Oct. 21, 1986); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, art. 5(1), Nov. 4, 1950, ETS 5 (entered into force Sept. 3, 1953); American Convention on Human Rights art. 7(1), Nov. 22, 1969 (entered into force July 18, 1978). Yet, when it comes to migrants (including children), prolonged detention is increasingly the rule. *See* Global Detention Project (data), GDP, <http://globaldetentionproject.org> (last visited Mar. 23, 2021). Nonetheless, some countries still circumscribe the detention of asylum seekers beyond administrative purposes to exceptional circumstances, *see, e.g.*, Convention Act 2004, Pub. Act 2004, no. 50, s. 200(1)(d) (assented to June 3, 2004) (N.Z.) (regulating the detention of asylum seekers in cases of false identity and national security threats).

⁴⁴ *See* Revised Deliberation no. 5 on Deprivation of Liberty of Migrants, U.N. HUM. RTS. COUNCIL — WORKING GROUP ON ARBITRARY DETENTION at 9-11 (Feb. 7, 2018) (stating that seeking asylum is a "universal right," for which irregular entry and stay in a country "should not be treated as a criminal offence").

protections under domestic law⁴⁵ and human rights protections under international law.⁴⁶

Detention of migrants and refugees is prevalent across the world.⁴⁷ In fact, *detention* is one of the most archetypical *status-related risks* refugees confront today. For example, though the average length of detention of migrants in Canada has decreased in the last few years (from twenty-six days in 2014-2015 to thirteen days in 2018-2019), the number of migrants in detention in this country increased 5.1% in the 2018-2019 fiscal year (8,781 migrants).⁴⁸ The United States, in particular, has built the world's largest detention system for migrants and asylum seekers.⁴⁹ The United States detains annually 316,391 migrants⁵⁰ including women and children; that is, an exponential growth rate of twentyfold from 1979 to 2019.

⁴⁵ *See, e.g.*, Canadian Charter, *supra* note 2, s. 7 (regulating the right to ["liberty and security of the person"]); Grundgesetz, *supra* note 2, arts. 2(2) and 11(2) (establishing ["the freedom of a person"] as an inviolable principle and its physical restriction to limited circumstances); S. AFR. CONST., 1996, art. 12(a), (b) and (e) (providing the ["freedom and security of the person"] while proscribing detention without just cause and trial, along with cruel punishment and inhuman treatment); *see also* CONSTITUCIÓN ESPAÑOLA art. 17(1), Nov. 29, 1978, BOE-A-1978-31229 (guaranteeing the ["right to liberty and security of the person"] to any person ["toda persona"], not just Spanish citizens). Likewise, the Constitution of Malaysia guarantees the liberty of the person based on the notion of personhood, not citizenship. *See* MALAYSIA FED. CONST. art. 5, Aug. 31, 1967 (stating the liberty of the person as a fundamental liberty while providing strict guidelines to prevent arbitrary detention).

⁴⁶ *See* UDHR, *supra* note 43, art. 3; ICCPR, *supra* note 43, art. 9(1).

⁴⁷ *See* Global Detention Project, *supra* note 43. In the United States, only asylum seekers entering legally are exempted from detention ["affirmative process"]. *Id.*

⁴⁸ *Annual Detention Statistics – 2012-2019*, CANADA BORDER SERVICES AGENCY (2020), <https://www.cbsa-asfc.gc.ca/security-securete/detent/stat-2012-2019-eng.html>.

⁴⁹ *See* Emily Kassie, *Detained: How the United States Created the Largest Immigrant Detention System in the World*, THE MARSHALL PROJECT (Sep. 2019), <https://www.themarshallproject.org/2019/09/24/detained>.

⁵⁰ *Id.*

Prolonged detention of migrants frequently occurs in dire humanitarian conditions. For instance, following a crackdown order on illegal migration, authorities in Thailand detained more than 200 asylum seekers from Vietnam, Cambodia, and Pakistan in 2019 (including more than fifty children separated from their parents).⁵¹ There are reports of prolonged detention (even for years) of Rohingya refugees in Saudi Arabia.⁵² Likewise, thousands of Venezuelan migrants have been denied asylum protection in Curaçao and imprisoned following government citation of “irregular migrant status.” In the process, detainees suffer gross human rights violations.⁵³

The reception of refugees and asylum seekers is also increasingly prosecutorial. For example, under Australia’s Migration Act, the police are authorized to question (§ 188) and detain (§ 189) non-citizens having no visa to enter or remain in Australia.⁵⁴

Another increasingly common *status-related risk* concerns the often-cited “crackdown” on refugees and asylum seekers. For example, police harassment and arbitrary detentions of Rohingya refugees in India⁵⁵ are forcing these refugees to leave India as they find themselves often unprotected within the

so-called *zero-line zone* along the India-Bangladesh border.⁵⁶ In Morocco, moreover, the crackdown on refugees (viewed as “illegal migrants”) has led to human rights violations, law enforcement abuses, and the gradual abandonment of thousands of sub-Saharan refugees.⁵⁷

B. Exclusion Risks

Exclusion risks refer to risks arising out of the social, legal, and cultural exclusion of migrants in host countries. These risks are externalized through local populations showing various forms of discrimination,⁵⁸ exclusion,⁵⁹ and violence⁶⁰ towards migrants. Here, notably, the socioeconomic exclusion of refugees constitutes a major *exclusion risk*.

⁵¹ WORLD REPORT 2019, HUM. RTS. WATCH 579 (2020), <https://www.hrw.org/world-report/2019/> [hereinafter HRW 2019].

⁵² Areeb Ullah, *Revealed: Hundreds of Rohingya Imprisoned ‘Indefinitely’ in Saudi Arabia*, MIDDLE EAST EYE (Nov. 13, 2018), <https://www.middleeasteye.net/news/revealed-hundreds-rohingya-imprisoned-indefinitely-saudi-arabia>.

⁵³ *Venezuelans Denied Protection in Curaçao*, AMNESTY INT’L at 11 (2018), https://www.amnestyusa.org/wp-content/uploads/2018/09/AMN_18_45_rapport-Curacao.pdf.

⁵⁴ Migration Act 1958, §§ 188, 189, Compilation no. 140 (compiled Aug. 12, 2018) (Austl.).

⁵⁵ See Ashley Starr Kineth, *India’s Rohingya Shame*, AL JAZEERA (Jan. 29, 2019), <https://www.aljazeera.com/indepth/>; see also Xinhua, *Return of Rohingya to Myanmar Delayed Yet Again*, CHINA DAILY NEWS (March 1, 2018), <http://www.china-daily-hk.com/articles/53/35/19/1519889549097.html>.

⁵⁶ Phelim Kine, *India’s Ominous Threat to Rohingya Muslim Refugees*, ASIA TIMES (Jan. 17, 2020), <https://asiatimes.com/2020/01/indias-ominous-threat-to-rohingya-muslim-refugees/>.

⁵⁷ *Morocco: Relentless Crackdown on Thousands of Sub-Saharan Migrants and Refugees Is Unlawful*, AMNESTY INT’L (Sept. 7, 2018), <https://www.amnesty.org/en/latest/news/2018/09/morocco-relentless-crackdown-on-thousands-of-sub-saharan-migrants-and-refugees-is-unlawful/>.

⁵⁸ See, e.g., Alfredo Corchado, *Central American Migrants Face Grueling Journey North*, DALLAS MORNING NEWS (2014), <http://res.dallasnews.com/interactives/migrantroute/>; see also Mohammed Sabour, *The Socio-Cultural Exclusion and Self-Exclusion of Foreigners in Finland: The Case of Joensuu*, in PAUL LITTLEWOOD ET AL., SOCIAL EXCLUSION IN EUROPE: PROBLEMS AND PARADIGMS at 219 (2017).

⁵⁹ See, e.g., Ignacio Correa-Velez et al., ‘We Are Here to Claim Better Services than Any Other:’ *Social Exclusion among Men from Refugee Backgrounds in Urban and Regional Australia*, 26 J. OF REFUGEE STUD. 163, 163-86 (2012) (proposing a different approach on resettlement of refugees based on social-exclusion study).

⁶⁰ See, e.g., HRW 2019, *supra* note 51.

Notwithstanding progress made towards the assimilation of refugees in some countries,⁶¹ the trend of *socioeconomic exclusion* of refugees and asylees is pervasive. In Greece, for instance, less than 15% of migrant children hosted on the islands of Samos and Lesvos and only one in two on the mainland have access to education.⁶² In South Korea, a petition signed by more than 700,000 citizens requested that the government review or eliminate the legal protection (상세 보기 [Visa-Free Policy]) accorded to Yemeni refugees⁶³ hosted on Jeju Island⁶⁴ — this notwithstanding, the Republic of Korea has been a party to the 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees since 1992.⁶⁵ Of the 480 asylum applications filed by Yemeni nationals in Korea in 2018, the government only granted two,⁶⁶ and of the 6,015 total asylum applications filed that year by all other nationals, the government only granted ninety-one.⁶⁷ This trend is found in Hungary as well,

⁶¹ E.g., Jordan's Migration Compact, HRW 2019, *supra* note 51 at 323; Canada's sponsor programs on refugees, *How Canada's Refugee System Works*, IMMIGR. AND REFUGEE SERV. (Nov. 27, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role.html> (Can.); Colombia's work permits for Venezuelan refugees, *Colombia Offers Work Permits to Hundreds of Thousands of Venezuelan Migrants*, REUTERS (Jan. 29, 2020), <https://www.reuters.com/article/us-venezuela-politics-colombia/colombia-offers-work-permits-to-hundreds-of-thousands-of-venezuelan-migrants-idUSKBN1ZS2YE>.

⁶² HRW 2019, *supra* note 51, at 231.

⁶³ See 청원내 ["PETITION"], 제주도 불법 난민 신청 문제에 따른 난민법, 무사증 입국, 난민신청허가 폐지/개헌 청원합니다 ["Petition for Abolition-revision of the Refugee Act, Visa-Free Entry, and Refugee Application Permission Due to the Illegal Refugee Application Issue in Jeju Island"] (2018), <https://www1.president.go.kr/petitions/269548?navigation=best-petitions> [petition contents under the title "청원내용"] (S. Kor.).

⁶⁴ *Id.*

⁶⁵ *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES (2020).

⁶⁶ Choe Sang-Hun, *Just 2 of More Than 480 Yemenis Receive Refugee Status in South Korea*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/world/asia/yemen-south-korea-refugees.html>.

⁶⁷ *Id.*

which granted asylum protection to only fifty-four claimants out of 3,119 in 2018.⁶⁸ Likewise, Japan, a signatory to the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees, only accepted seven asylum applications from Syrian nationals between 2011 and 2016.⁶⁹ In Turkey, the lack of proper documentation (*mülteci kayıt kartları* [refugee registration cards]) for Syrian refugees is affecting these migrants' mobility and ability to find jobs and integrate into the country's labor market, fostering their socioeconomic exclusion across Turkey.⁷⁰

Finally, one of the most palpable ongoing *exclusion risks* is *abandonment*. Reports on refugees deserted during the pandemic caused by COVID-19 have uncovered the state of indifference and neglect towards their security, human dignity, and well-being.⁷¹ To begin with, only very few countries have included within their vaccine distribution plans refugees and asylum seekers.⁷² Moreover, the lack of a coordinated international response to the pandemic,

⁶⁸ *Id.*

⁶⁹ See Atsushi Yamagata, *Conflicting Japanese Responses to the Syrian Refugee Crisis*, 15 THE ASIA-PACIFIC J. 3, 4 (2017).

⁷⁰ See Kermal Viral Tarlen et al., *The DOM The "Other" Asylum Seekers from Syria: Discrimination, Isolation and Social Exclusion*, KIRKAYAK KÜLTÜR at 29 (2019), <http://panel.stgm.org.tr/vera/app/var/files/t/h/the-dom-the-other-asylum-seekers-from-syria-report.pdf> (describing living conditions and exclusion of Syrian refugees in Turkey, Lebanon, and Jordan).

⁷¹ See *Amid COVID-19 Pandemic, Thousands Strained in Bay of Bengal 'Unable to Come Ashore'*, UN NEWS (May 6, 2020), <https://news.un.org/en/story/2020/05/1063402>; Ben Doherty et al., *Left with Nothing: Australia's Migrant Workforce Face Destitution Without Coronavirus Safety Net*, THE GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/australia-news/2020/apr/01/left-with-nothing-australias-migrant-workforce-face-destitution-without-coronavirus-safety-net>.

⁷² See *Dozens of Countries Have No Plan to Vaccinate Refugees against the Coronavirus. That Could Be a Fatal Flaw, Experts Warn*, THE WASH. POST (Jan. 30, 2021), <http://www.washingtonpost.com/world/2021/01/30/refugees-vaccine-covid-jordan/>; see also *Jordan Starts 'World First' Covid Vaccinations in Refugee Camp*, FRANCE 24 (Feb. 15, 2021), <http://www.france24.com/en/live-news/20210215-jordan-starts-world-first-covid-vaccinations-in-refugee-camp>.

the number of refugees and asylum seekers on the move,⁷³ and the supply deficiency of the vaccine in most host countries and refugee camps could make refugee populations across the planet the perfect target for COVID-19 variants' development⁷⁴ — which could further accentuate their institutional, legal, social, and economic exclusion.

CONCLUSION

There is a critical and defining legal gap in modern refugee protection concerning the evolving and emerging human rights risks that 21st-century refugees encounter. Extending from increasingly complex causes of persecution/conflict and treacherous journeys to prosecutorial treatment of migrants and criminalization of refugee status/intent, there is, moreover, a growing number of human rights risks affecting the security, human dignity, and well-being of refugees and asylum seekers across the world. This Article advances a novel conceptualization and classification on those risks.

Unfortunately, many of the dangers refugees nowadays encounter (transitional, status-related, and exclusion risks) are not considered in current international refugee law. What is more, both domestic and regional regulations and policies have become triggering events either fostering or accelerating these risks. Accordingly, this Article finds that the modern protection of refugees must acknowledge and progressively consider these risks in regulations, practices, and policies in order to

eliminate the greatest risk in today's world: being a refugee in the 21st century.

⁷³ See *Figures at Glance* (2020), U.N. HIGH COMM'R FOR REFUGEES (reporting 26 million refugees, 4.2 million asylum seekers, and 3.6 million Venezuelan migrants by the end of 2019), <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

⁷⁴ So far, COVID-19 variants — that is, random genetic replications/mutations of the virus known to be more contagious — have been found in England, South Africa, Nigeria, and Brazil, along with thousands of worrisome trails of mutation across the planet. For example, just one variant found in the United Kingdom in September last year known as “B.1.1.7” has already produced 23 mutations leading to an increase of contamination of 70%. See *Investigation of Novel SARS-CoV-2 Variant: Variant of Concern*, PUB. HEALTH ENG., Technical Briefing no. 5, at 3 (Dec. 1, 2020) [updated Jan. 14, 2021].

TOWARD PERMANENT PEACE AND STABILITY IN ARTSAKH

by George S. Yacoubian, Jr.

The Nagorno-Karabakh war is an ethnic, religious, and territorial conflict between Armenia and Azerbaijan over the disputed region of Artsakh, an Armenian enclave within Azerbaijan. The modern conflict began in 1988 when Armenians demanded that Artsakh be transferred from Soviet Azerbaijan to Soviet Armenia. The dispute escalated into a full-scale war in the early 1990s. A ceasefire signed in 1994 provided for two decades of relative stability, but escalations in April 2016, and most recently in October 2020, have renewed the antagonism.

More than 30 years have passed with no resolution, costing thousands of lives, millions of dollars, and unfathomable anguish. All interested parties have failed, including the competing nations, the international community, and the Armenian diaspora. In the current essay, I propose multiple potential solutions to the Artsakh conflict, with a permanent recommendation grounded in pragmatism and traditional peacekeeping principles. Armenia's withdrawal from the remaining areas of Artsakh, in exchange for renumeration from Azerbaijan, financial and military assistance from the European Union, and financial and logistical assistance from Azerbaijan, the European Union, and the United States with relocation of Artsakh Armenians to Armenia proper, would signal an end to unnecessary human suffering. As an Armenian living in the diaspora whose grandparents survived the 1915 Armenian Genocide, the inclination to cede territory that is inhabited almost exclusively by ethnic Armenians is anathema to me. That said, my personal

contempt for aggression against Armenia and fellow Armenians must be tempered by the international legal reality and the cumulative and overwhelming humanitarian crisis in the region.

“What you leave behind is not what is engraved in stone monuments, but what is woven into the lives of others.” ~ Pericles

I. HISTORICAL BACKGROUND

Armenia is a small, landlocked nation bordered by Turkey to the west, Georgia to the north, Iran to the south, and Azerbaijan to the east. The area stands at the crossroads of Europe, Asia, and Africa. While Armenia emerged as a democracy with the dissolution of the Soviet Union in September 1991, its modern history includes significant victimization by the Ottoman Empire,¹ which is critical to understanding the current conflict with Azerbaijan. By the 1800s, the once powerful Ottoman Empire began to decline. For centuries, Turkey spurned technological and economic progress while the nations of Europe had embraced innovation and become industrial giants.² While the Greeks, Serbs, and Romanians achieved independence, Armenians remained mired in the backward empire under the autocratic rule of Sultan Abdul Hamid.³

By the 1890s, young Armenians pressed for political reforms, calling for a constitutional government,

* George S. Yacoubian, Jr., has advanced degrees in Criminology and Criminal Justice, a J.D. from the Rutgers University School of Law, an LL.M. in Transnational Law from the Temple University School of Law, and an S.J.D. from the Suffolk University School of Law. He is a graduate student in the Department of Negotiation and Conflict Resolution at Columbia University and specializes in criminal defense law, international criminal law, and international child protection law. Direct all correspondences to George S. Yacoubian, Jr., 150 N. Radnor Chester Road, Suite F200, Radnor, PA 19087, george@yacoubian-law.com.

¹ RICHARD G. HOVANISSIAN, ARMENIAN GENOCIDE IN PERSPECTIVE 19-38 (1st ed. 1986).

² VAHAKN DADRIAN, WARRANT FOR GENOCIDE 39-45 (1999).

³ *Id.*

the right to vote, and an end to discriminatory practices.⁴ The Sultan responded to their pleas with brutal persecutions. Between 1894 and 1896, more than 100,000 inhabitants of Armenian villages were massacred.⁵ However, the end of the century brought significant deterioration to the Ottoman Empire and the Young Turkish revolution overthrew the old regime in 1908.⁶ That year, the Young Turks forced the Sultan to allow a constitutional government and guarantee basic rights.

While Armenians in Turkey were delighted with prospects for a brighter future, their hopes were dashed after three Young Turks seized full control of the government in 1913.⁷ This triumvirate — Mehmed Talaat, Ismail Enver and Ahmed Djemal — wielded dictatorial powers and concocted ambitious plans for the future of Turkey. The Young Turks adopted “a credo based on pan-Turanism, which alleged a prehistoric mythic unity among Turanian peoples based on racial origin to be implemented by ‘Turkification.’”⁸ Armenia’s historical homeland posed a challenge to the Young Turks’ goal to unite Turkic peoples, and it laid in the path of their eastward expansion plans.⁹

A dramatic rise in Islamic fundamentalist agitation throughout Turkey coincided with a newfound “Turanism, the nationalist ideology of the political party in power at that time — the Committee of Union and Progress (CUP), popularly known as the Young Turks.”¹⁰ The CUP aimed to unify people of Turkish origin, while those with cultural, political, and religious differences, like the Armenians, were targeted for extermination. Armenians had always been one of the best-educated communities within the old Turkish Empire, while the majority of Turks

were illiterate peasant farmers and small shopkeepers.¹¹ These uneducated subjects had no inclination toward political reform. While the Armenian community thrived under Ottoman rule, their Turkish neighbors began to resent their success. This resentment was compounded by suspicions that the Christian Armenians would be more loyal to Christian governments (that of the Russians, for example) than they were to the Ottoman caliphate.¹² The Young Turks exploited the religious, cultural, economic, and political differences between Turks and Armenians so that the average Turk came to regard Armenians as strangers among them.¹³ Taken collectively, the ethnic, economic, and religious differences between the Turks and Armenians facilitated the killings that began during, and were shielded by, the First World War.

When the First World War broke out in 1914, leaders of the Young Turk regime sided with Germany and Austria-Hungary. The outbreak of war provided the perfect opportunity to solve the “Armenian question.” By the end of April 1915, the stage had been set for the final solution to the Armenian Question. The decision to annihilate the entire Armenian population came directly from the ruling triumvirate of the Young Turks.¹⁴ Men, women, and children were escorted by Turkish soldiers to secluded areas and murdered outright.¹⁵ Those that were not killed immediately found death by deportation. Alleging acts of treason, “the Ottoman authorities ordered . . . the wholesale deportation of the Armenian population of the empire’s eastern and southeastern provinces.”¹⁶ By the time the killings had been completed, more than 1.5 million Armenians had been slaughtered, and the Armenian Question had been resolved in the eyes of the Ottoman leadership.

⁴ *Id.*

⁵ DADRAN, *supra* note 2, at 75-82.

⁶ JOSEF GUTTMANN, *THE BEGINNINGS OF GENOCIDE 5* (1965).

⁷ HOVANISSIAN, *supra* note 1; BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 210-38 (1961).

⁸ LEWIS, *supra* note 7.

⁹ DADRAN, *supra* note 2, at 93-101.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ HOVANISSIAN, *supra* note 1, at 19-38.

¹⁴ *Id.* at 55.

¹⁵ *Id.*

¹⁶ VAHAKN DADRAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* 15 (1995).

Shortly before the First World War ended in November 1918, the Young Turk triumvirate fled to Germany. To this day, the Turkish government disavows the attempts at racial extermination that have haunted Armenian survivors for more than nine decades.¹⁷ In May 1918, Armenia declared independence,¹⁸ but this freedom was short-lived due to territorial conflicts, war, and an influx of refugees from Ottoman Armenia. Armenia was annexed by Bolshevik Russia in March 1922,¹⁹ and remained a Soviet Republic until September 1991.

A. Region of Artsakh

Artsakh is located in Azerbaijan, about 170 miles west of the Azeri capital of Baku. Of the approximately 145,000 denizens, 95 percent are Armenians, and none are Azeri Muslims.²⁰ Following the First World War and the establishment of the Soviet Union, three states in the South Caucasus region were formed: Armenia, Azerbaijan, and Georgia.²¹ While Azerbaijan claimed sovereignty over Artsakh, the Allies decided that the ultimate status of Artsakh should be determined at the Paris Peace Conference.²² In March 1921, however, a treaty between Turkey and the Soviet Union established that Artsakh would be under the authority of the Azerbaijani Soviet Socialist Republic (SSR).²³ An intentional strategy implemented by Joseph Stalin

¹⁷ George S. Yacoubian, Jr., *Financial, Territorial, and Moral Reparations for the 1915 Armenian Massacres*, 4 WAR CRIMES, GENOCIDE, AND CRIMES AGAINST HUMANITY: AN INT'L J. 61 (2010).

¹⁸ *Id.*

¹⁹ Ronald Grigor Suny, *Soviet Armenia*, in THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES, VOLUME II: FOREIGN DOMINION TO STATEHOOD: THE FIFTEENTH CENTURY TO THE TWENTIETH CENTURY 350 (Richard G. Hovannisian ed., 1997).

²⁰ Amit Chhabra, *How to Mediate an Enduring Peace for Nagorno-Karabakh*, 40 FLETCHER F. WORLD AFF. 91 (2016); William R. Slomanson, *Nagorno Karabakh: An Alternative Legal Approach to Its Quest for Legitimacy*, 35 T. JEFFERSON L. REV. 29, 30 (2012).

²¹ Argam Der Hartunian, *Negotiation and Settlement in Nagorno-Karabakh: Maintaining Territorial Integrity or Promoting Self-Determination?* 7 PEPP. DISP. RESOL. L.J. 295, 297 (2007).

²² *Id.*

²³ *Id.*

granted Artsakh autonomous status in 1924. This strategy sought to prevent any one ethnic group from gaining enough power and autonomy to secede from the Soviet Union.

On February 20, 1988, the Soviet government passed a resolution requesting transfer of Artsakh from Azerbaijan SSR to Armenia SSR.²⁴ Azerbaijan rejected the request, and ethnic violence against Armenians, in Artsakh and throughout Azerbaijan, began shortly thereafter, continuing through 1990.²⁵ Following the Soviet Union's collapse in 1991, the region descended into chaos, and the next year the autonomous region of Artsakh declared complete independence.²⁶ By mid-1992, Armenians largely controlled the region of Artsakh, many of the Azeris had left, and the Lachin corridor, a land bridge from Artsakh to Armenia, was established.²⁷ By 1993, there were thousands of casualties and refugees on both sides.²⁸ In 1994, Azerbaijan and Armenia reached a cease-fire agreement whereby Artsakh was left in control of the Artsakh region and seven adjacent districts of Azerbaijan.²⁹

For three decades, multiple violations of the ceasefire have occurred.³⁰ Long-standing international mediation attempts to create a peace process were initiated by the OSCE Minsk Group in 1994, with the interrupted Madrid Principles being the most recent iteration.³¹ The latest escalation of the unresolved

²⁴ Slomanson, *supra* note 20, at 30.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Der Hartunian, *supra* note 21, at 298.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Nagorno-Karabakh Conflict*, COUNCIL ON FOREIGN REL.: GLOB. CONFLICT TRACKER (November 9, 2020), <https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict>.

³¹ Press Release, Org. for Sec. and Coop. in Eur. (OSCE) Minsk Grp., Statement by the Co-Chairs of the OSCE Minsk Group (Sept. 27, 2020).

conflict began on September 27, 2020, with an Azerbaijani offensive.³² In response to the clashes, Armenia and Artsakh introduced martial law and total mobilization,³³ while Azerbaijan introduced martial law and a curfew, later declaring partial mobilization on September 28, 2020.³⁴ The war has been marked by the use of chemical agents, deployment of drones, sensors, long-range heavy artillery and missile strikes,³⁵ state propaganda, the use of official social media to wage information warfare,³⁶ and the attacking of civilian populations, schools, and hospitals. Total casualties are estimated into the thousands.³⁷ Numerous countries and the United Nations (UN) called on both sides to deescalate tensions and resume meaningful negotiations.³⁸ A humanitarian ceasefire brokered by Russia, facilitated by the International Committee of the Red Cross, and agreed upon by both Armenia and Azerbaijan, came into effect on October 10, 2020. But this cease fire, and two subsequent

³² See Joshua Kucera, *As Fighting Rages, What is Azerbaijan's Goal?*, EURASIANET (Sept. 29, 2020), <https://eurasianet.org/as-fighting-rages-what-is-azerbajians-goal>.

³³ See *Nagorno-Karabakh Announces Martial Law and Total Mobilization*, REUTERS (Sept. 27, 2020), <https://www.reuters.com/article/us-armenia-azerbaijan-martial-law/nagorno-karabakh-announces-martial-law-and-total-mobilization-idUSKB-N26I08I>.

³⁴ See *Azerbaijan's Parliament Approves Martial Law, Curfews: President's Aide*, REUTERS (Sept. 27, 2020), <https://www.reuters.com/article/us-armenia-azerbaijan-curfew/azerbajians-parliament-approves-martial-law-curfews-presidents-aide-idUSKB-N26I00O>.

³⁵ See Alex Gatopoulos, *The Nagorno-Karabakh Conflict is Ushering in a New Age of Warfare*, AL JAZEERA (Oct. 11, 2020), <https://www.aljazeera.com/features/2020/10/11/nagorno-karabakh-conflict-ushering-in-new-age-of-warfare>.

³⁶ See Mansur Mirovalev, *Armenia, Azerbaijan Battle an Online War Over Nagorno-Karabakh*, AL JAZEERA (Oct. 15, 2020), <https://www.aljazeera.com/features/2020/10/15/karabakh-in-fowar>.

³⁷ See Bethan McKernan, *Trench Warfare, Drones, and Covering Civilians: On the Ground in Nagorno-Karabakh*, THE GUARDIAN (Oct. 13, 2020 1:00 AM), <https://www.theguardian.com/artanddesign/2020/oct/13/trench-warfare-drones-and-covering-civilians-on-the-ground-in-nagorno-karabakh>.

³⁸ See *UN Security Council Calls for Immediate End to Fighting in Nagorno-Karabakh*, FRANCE 24 (Sept. 30, 2020), <https://www.france24.com/en/20200930-un-security-council-calls-for-immediate-end-to-fighting-in-nagorno-karabakh>.

agreements to halt hostilities, were violated by Azerbaijan with additional killings. On November 9, 2020, Armenia's Prime Minister signed an agreement with the Presidents of Azerbaijan and Russia to end the war in Artsakh.³⁹ Under this agreement, Azerbaijan will retain control of land within Artsakh that it has already captured, and Armenia has agreed to relinquish adjacent land in these now Azeri-occupied areas.⁴⁰

Protecting the rights of the people of Artsakh is a major concern for Armenia. The Armenian population of Azerbaijan has been subject to persecution throughout the twentieth century, arguably rising to the level of genocide as defined by the Genocide Convention.⁴¹ If Artsakh falls back into the hands of Azerbaijan, there is a strong likelihood that the Armenians of the region would again be subjected to attempts at ethnic cleansing. The long history of discrimination against Armenians in Azerbaijan, coupled with the recent conflict and the alliance with Turkey, suggests that Azeri control of Artsakh would facilitate genocidal aggression against Armenians, again.

II. INTERNATIONAL LAW

Under international law, minority groups that qualify as "peoples" are entitled to self-determination, or the ability to freely determine their political fate and form a representative government.⁴² The principle of self-determination is grounded in the assumption that secession is necessary when the seceding people are oppressed or where the mother state's government has consistently failed to represent the people's interests. Article 1 of the

³⁹ See *Armenia, Azerbaijan, Russia Sign Deal to End Nagorno-Karabakh War*, AL JAZEERA (Nov. 9, 2020), <https://www.aljazeera.com/news/2020/11/9/armenia-pm-says-signed-painful-deal-to-end-nagorno-karabakh-war>.

⁴⁰ See *Armenia, Azerbaijan and Russia Sign Nagorno-Karabakh Peace Deal*, BBC NEWS (Nov. 10, 2020), <https://www.bbc.com/news/world-europe-54882564>.

⁴¹ Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

⁴² Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L. & POL'Y 373, 374 (2003).

UN Charter, which states that one of the purposes of the United Nations is, “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,”⁴³ and two UN declarations — the 1960 Declaration on the Granting of Independence to Colonial Countries⁴⁴ and the 1970 Friendly Relations Declaration⁴⁵ — have addressed self-determination. While UN Declarations are not binding international law, both envisioned self-determination as a matter of last resort.

The international community neither recognizes Artsakh as an independent state nor as part of Armenia.⁴⁶ Indeed, the European Union⁴⁷ and its member states, the UN,⁴⁸ the United States, and the European Court of Human Rights all recognize Artsakh as occupied Azerbaijani territory. This recognition is important because territorial affirmation by the international community would be persuasive if a legal argument were to be constructed in favor of formal annexation of Artsakh to Armenia. Here, however, few non-Armenian entities believe that Artsakh is part of Armenia, which suggests that the Armenian position is likely without moral or legal justification.

There is support that Artsakh is recognized as its own state entity. First, the Montevideo Convention on the Rights and Duties of States⁴⁹ established a standard definition of statehood under international law. Under Article 1 of the Convention, a state *should*

⁴³ U.N. Charter art. 1.

⁴⁴ G.A. Res. 1514, Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

⁴⁵ G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

⁴⁶ Brenda Shaffer & Yael Shaffer, *Is Psagot Drinking Alone? Application of the CJEU Psagot Judgment to Other Territories the EU Considers Under Occupation*, 11 GEO. MASON J. INT’L COM. L. 1, 2 (2020).

⁴⁷ *Id.* at 10.

⁴⁸ See G.A. Res. 62/243, at 5 (Mar. 14, 2008).

⁴⁹ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

possess the following characteristics: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.⁵⁰ Article 3 of the Convention represents the declarative theory of statehood,⁵¹ while “the political existence of the state is independent of recognition by the other states.”⁵² This theory of statehood stands in opposition to the constitutive theory of statehood, which holds that a state exists only when it is recognized by other states.⁵³ It is important to note that while Artsakh does have a permanent [Armenian] population, a defined territory, its own government, and presumably could enter into relations with other states, the Montevideo Convention is persuasive authority at best, given its regional focus and the fact that neither Armenia nor Azerbaijan are signatory parties.

Second, the United States has had an annual foreign aid appropriation earmarked directly for Artsakh for three decades.⁵⁴ Congress has allocated aid for general development and humanitarian purposes, such as infrastructure, agriculture, and medical projects.⁵⁵ Artsakh also receives aid *indirectly* from the United States. The United States is Armenia’s largest bilateral aid donor, with a significant portion of the annual Artsakh budget coming from direct Armenian appropriation.⁵⁶

Several conclusions can be drawn from these inconsistencies. First, more than three decades of recent military conflict indicate that the situation in Artsakh is both unique and complicated.

⁵⁰ *Id.* at art. 1.

⁵¹ HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 64 (2012).

⁵² Montevideo Convention on the Rights and Duties of States, *supra* note 49, at art. 3.

⁵³ TIM HILLIER, *SOURCEBOOK ON PUBLIC INTERNATIONAL LAW* 201 (1998).

⁵⁴ JIM NICHOL, CONG. RSCH. SERV., RL33453, *ARMENIA, AZERBAIJAN, AND GEORGIA: POLITICAL DEVELOPMENTS AND IMPLICATIONS FOR U.S. INTERESTS* 65 (2014).

⁵⁵ *Id.* at 42.

⁵⁶ See *U.S. Foreign Assistance Aid & Trade*, ARM. NAT’L COMM. OF AM., <https://anca.org/issue/u-s-foreign-assistance-aid-trade/> (last visited Mar. 12, 2021).

Additionally, the Artsakh territory is significant geopolitically as an example of democracy and self-determination within a state whose reputation is one of discord and violence. Finally, it is clear Artsakh is a political pawn to the United States, Russia, and Turkey. There is no dispute that an Artsakh conflict benefits Russia because favoring either Armenia or Azerbaijan would necessarily empower one to the dismay and disenfranchisement of the other. The United States, in turn, recognizes the need to empower democracy, with financial support being the most readily available mechanism. Moreover, it is not coincidental that the current Artsakh conflict was initiated by Azerbaijan, with the support of Turkey, to coincide with presidential elections in the United States and the intensification of the COVID-19 pandemic because the international community was distracted by these two globally critical events. Turkey's assistance to Azerbaijan now — two countries with shared geopolitical, ethnic, and religious histories — is no different than the Armenian Genocide committed under the guise of the First World War. The goal in 1915 was to expel Armenians from their ancestral homeland and create an Islamic state. Today, Armenia and Armenian-populated Artsakh are all that stand in the way of history repeating itself a century later.

III. DISCUSSION

Efforts at peacekeeping in Artsakh have been minimal. The first attempts by the Presidents of Russia and Kazakhstan in 1991 failed.⁵⁷ The Minsk Process, a protocol spearheaded by France, the Russian Federation, and the United States to find a peaceful solution to the Nagorno-Karabakh conflict, failed.⁵⁸ The Key West Talks established the parameters of an agreement in early 2001, but the settlement plan, which included the annexation of Artsakh by Armenia in exchange for a dedicated corridor linking Azerbaijan to Turkey,

⁵⁷ MICHAEL BOTHE, NATALINO RONZITTI, & ALLAN ROSAS, *THE OSCE IN THE MAINTENANCE OF PEACE AND SECURITY: CONFLICT PREVENTION, CRISIS MANAGEMENT AND PEACEFUL SETTLEMENT OF DISPUTES* (1997).

⁵⁸ Der Hartunian, *supra* note 21, at 311.

was wholeheartedly rejected by the governments of Armenia and Azerbaijan.⁵⁹ In 2006 and 2007, multiple meetings between the Presidents of Armenia and Azerbaijan failed, primarily because neither was willing to retreat from their requirement for annexation of the disputed territory.⁶⁰

The purposes of the United Nations are, “to maintain international peace and security, . . . to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”⁶¹ In addition, the United Nations is empowered “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”⁶² It has failed in its duty with respect to Artsakh. That three decades of conflict persist with no peace, no solution and, more importantly, no progress, overwhelmingly suggest that the governments of Armenia and Azerbaijan have equally failed their populaces. Moreover, support from the Armenian diaspora, unwavering and necessary in a humanitarian crisis, has been jingoistically reactionary rather than pragmatic.

There are multiple potential approaches to the Artsakh conflict. First, the international community can continue to do nothing, allowing military skirmishes to arise every few years, at the expense of humanity and an international mandate for peace. That more than thirty years have passed since the dissolution of the Soviet Union without any resolution suggests that the parties and

⁵⁹ *Id.*

⁶⁰ See Emil Danielyan, *Armenia, Azerbaijan Again Fail To Break Karabakh Deadlock*, EURASIANET (June 8, 2006), <https://www.refworld.org/docid/46f2586523.html>.

⁶¹ U.N. Charter art. 1.

⁶² *Id.* at art. 1(2).

the international community are content with complacency.

Second, Azerbaijan can relinquish the remaining Armenian-occupied portions of Artsakh and the Lachin corridor to Armenia, in exchange for financial remuneration. Given the recently signed peace agreement, and the likelihood, if not the certainty, of future invasions of post-conflict Artsakh by Azerbaijan, it is clear Azerbaijan has little incentive to permanently cede territory.

Third, Artsakh can petition the international community to become an independent state. A territory becomes a sovereign state when its independence is recognized by the United Nations. As the largest multilateral organization, its sanctioning of sovereign statehood is required for recognition. Clearly, however, for one territory, such as Artsakh, to become a new state, another already existing sovereign state, such as Azerbaijan, must lose some of its territory. Recognition of a new state essentially means legally recognizing the transfer of sovereignty over a territory from one authority to another. No international body, including the UN, can take away territory without the permission of the “host” state. To do so would violate the rules of the system of states.

Fourth, Armenia can withdraw from the remaining areas of Artsakh, including the capital of Stepanagert, in exchange for remuneration from Azerbaijan, financial and military assistance from the European Union, and financial and logistical assistance from Azerbaijan, the European Union, and the United States with relocation of Artsakh Armenians to Armenia proper. This arrangement would end the conflict permanently without future military intervention and additional human casualties, assist in the repopulation of Armenia proper, which

has seen significant migration during the past two decades,⁶³ and allow Armenia to focus its military and economic efforts solely on Armenia proper. Additionally, this exchange would reinforce to the international community that Armenia is committed to peace and stability in the region and secure Armenia’s borders with assistance from the European Union and the United States.

However, there are multiple disadvantages to ceding the remaining areas of Artsakh to Azerbaijan. Ethnic Armenians living in Artsakh would lose their homeland. For a population that has been victimized for more than a century, this would signify a substantial defeat. Further, the geographic buffer between Azerbaijan and Armenia would shrink, making Armenia more vulnerable to future Azeri and Turkish aggression. Turkey being involved in the current “peacekeeping process”⁶⁴ is laughable and only serves to demonstrate their intent to remain embroiled in this territorial dispute. Finally, there is no requirement or guarantee that Artsakh Armenians would relocate to Armenia proper. They could elect to relocate into the diaspora, which would contravene the goal of repopulating Armenia.

“Peacebuilding” is intended to prevent the escalation of violence when a conflict is just emerging or is in progress.⁶⁵ As such, peacebuilding includes actions to prevent conflicts and establish sustainable peace. As an Armenian living in the diaspora whose grandparents survived the 1915 Armenian Genocide, the inclination to cede territory that is

⁶³ See Aleksandr Gevorkyan, Arkady Gevorkyan, & Karine Mashuryan, *Little Job Growth Makes Labor Migration and Remittances the Norm in Post-Soviet Armenia*, MIGRATION POLY INST. (Mar. 17, 2008), <https://www.migrationpolicy.org/article/little-job-growth-makes-labor-migration-and-remittances-norm-post-soviet-armenia>.

⁶⁴ See *Turkey May Send Peacekeeping Forces to Nagorno-Karabakh, Talks Continue*, DAILY SABAH (Nov. 10, 2020), <https://www.dailysabah.com/politics/diplomacy/turkey-may-send-peacekeeping-forces-to-nagorno-karabakh-talks-continue>.

⁶⁵ Organisation for Economic Co-Operation and Development [OECD], *Guide Pour L'évaluation Des Activités De Prévention Des Conflits Et De Construction De La Paix [Guidance On Evaluation Conflict Prevention And Peacebuilding Activities]*, OECD Development Assistance Committee] (2008) (Fr.).

inhabited almost exclusively by ethnic Armenians is anathema to me. But my personal contempt for aggression against Armenia and Armenian soldiers must be tempered by the international legal reality and the cumulative and overwhelming humanitarian crisis. It is challenging for any nation to surrender territory that they believe is rightfully theirs. Land reflects a country's identity. Few, if any, Armenians *want* to surrender Artsakh. But practical, short-term secessions must sometimes be made when they have long-term advantages. Armenia needs closure, peace, and security. Ceding Artsakh in exchange for financial and military security from Western Allies may not be the ideal solution, but the alternatives, including continued military conflict tempered by sporadic ceasefire agreements, the displacement of Artsakh citizens, the institutionalization of children, and an unabating fear of aggression — fail pragmatism at a time when stability and accord should prevail.

LEGISLATIVE REVIEW OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

by Aastha Khanna and
Divesh Sawhney*

INTRODUCTION

Fifty Eight. Beyond the man-woman binary, there are as many as fifty-eight gender variants.¹ The

* Aastha Khanna (she/her) is a final year LL.B. candidate at Law Centre-I, Faculty of Law, University of Delhi, India. She has served as the Joint Secretary of Law Centre-I Students' Union (2018-19) and President of Women's Cell DUSU (2018-19). Her areas of interest include human rights, gender and feminist jurisprudence, criminal law, and constitutional law. She has been associated with various feminists campaigns and projects in India. She can be reached at aasthakhanna0204@gmail.com or <https://www.linkedin.com/in/aasthakhanna0204/>.

Divesh Sawhney (he/him) is a final year LL.B. candidate at Law Centre-I, Faculty of Law, University of Delhi, India. He is currently working as a Legal Researcher with Ricky Chopra International Counsels. He has a keen interest in the interplay of law, gender and human rights. He most recently worked on a human-rights-infringement matter preferred before the United Nations. He can be reached at divesh.sawhney2@gmail.com or <https://www.linkedin.com/in/divesh-sawhney-4546381b5/>.

The authors are grateful to Prof. (Dr) Ved Kumari, Vice Chancellor, National Law University, Odisha (India); Prof. (Dr) Ritu Gupta, Professor of Law, National Law University, Delhi (India); Ms. Arunima Shastri, Assistant Professor of Law, Kalinga University (India); and Mr. Ricky Chopra, Chairman and Chief Counsel, Ricky Chopra International Counsels for their valuable guidance, enthusiastic encouragement, and constructive critique of this paper.

¹ Aastha Khanna & Divesh Sawhney, *NALSA Judgment: Critique of the Indian Perspective Beyond the Adams-and-Eves Worldview*, GEO. U. UNDERGRADUATE L. R. (Aug. 25, 2020), <https://guulr.com/2020/08/25/nalsa-judgment-critique-of-the-indian-perspective-beyond-the-adams-and-eves-worldview/> (citing Arun Kumar and Anr v. Inspector General of Registration and Ors, (2019) SCC OnLine Mad 8779, ¶ 16 (India)). Following the policy of inclusivity, social media platforms like Facebook and Tinder now allow users to choose from 58 and 37 gender identities respectively while signing up.

expression “transgender” is an umbrella term for persons whose gender identity, expression, and orientation are incongruent with their biological sex. Although activists around the globe have put in tireless efforts, life for the transgender community continues to be odious when tested on the bedrock of human dignity. Arundhati Roy in her book, *The Ministry of Utmost Happiness*, highlighted the spells of insignificance and insecurity that a transgender person quietly endures:

In Urdu, the only language she knew, all things, not just living things but all things — carpets, clothes, books, pens, musical instruments — had a gender. Everything was either masculine or feminine, man or woman. Everything except her baby. Yes of course she knew there was a word for those like him — Hijra. Two words actually, Hijra and Kinnar. But two words do not make a language. Was it possible to live outside language??

The whole idea that individuals may amend their genders as per their whims and fancies is flawed as it fails to consider that it is the gender, as already tagged on us, which regulates our experiences, and not vice versa. It is the gender which chooses individuals and not the other way around.³ The insurmountable torment faced by transgender persons is not confined to state in the Global South such as India, rather it is something which is prevalent *in rem* including superpowers like the U.S.⁴ To the utter dismay of the transgender community,

² ARUNDHATI ROY, *THE MINISTRY OF UTMOST HAPPINESS* 12 (Penguin Books 2018).

³ Mari Mikkola, *Feminist Perspectives on Sex and Gender*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (May 12, 2008, revised Oct. 25, 2017), <https://plato.stanford.edu/archives/fall2019/entries/feminism-gender/>; Khanna & Sawhney, *supra* note 1.

⁴ Human Rights Campaign, *Understanding the Transgender Community*, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Mar. 28, 2021); Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an 'Epidemic'*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html>.

a matter captioned as *Ong Ming Johnson v. Attorney-General*⁵ from the High Court of Singapore recently dismissed a constitutional challenge to Section 377A of the Singapore Penal Code, which criminalizes homosexual acts between males. In doing so, the Singapore High Court rebuffed the Indian Supreme Court's monumental decision in *Navtej Singh Johar and Ors. v. Union of India*.⁶ In addition to the discriminatory decision in Singapore, Hungary has enacted policies that have been extremely harmful to the transgender community. Hungary's authoritarian government recently enacted legislation that ended all legal recognition of transgender people's existence. The pandemic has only exacerbated the struggles experienced by the transgender community in states where their rights have been curbed since legal status is vital to access aid.

In India specifically, there are two facets of recognition: one, constitutionality and another, reality. The Supreme Court of India earnestly refers to fundamental rights enshrined in Part III of the Constitution of India.⁷ The widely celebrated decision in *National Legal Services Authority v. Union of India (NALSA)*⁸ is an exemplary depiction: the Indian Supreme Court laid down the dogma

of gender autonomy and expression, noting the Yogyakarta Principles⁹ and Malta's law¹⁰ on the subject. The Indian Constitution rests on an anti-totalitarian principle, hence being a trans-person or a gender non-conforming (hereinafter GNC) adult is not an anomaly, but rather a reality that ought to be welcomed with an open psyche.

These principles of equality were impetus enough for theoretical constitutionality; however in reality, the transgender and gender non-conforming individuals face different facts of existence. Indian mythology has long exalted the transgender community as providential. But this ceremonially respected community has been abused, tormented, and ridiculed as comedy in Indian cinema.¹¹ Further, until December 5, 2019, India had no laws in place to combat the adversities faced by the transgender community, which has been languishing in the margins of society for decades.¹²

We must also consider the draconian Criminal Tribes Act, enacted by the British in India in 1871. This law deemed the transgender community as innately criminal. While the government repealed this Act in August 1949, seventy years later the Indian

⁵ *Ong Ming Johnson v. Attorney General*, (2020) SGHC 63 (Sing.).

⁶ *Navtej Singh v. Union of India*, (2018) 10 SCC 1 (India).

⁷ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, (India).

⁸ *Nat'l Legal Serv. Auth. v. Union of India*, (2014) 5 SCC 438 (India).

⁹ The Yogyakarta Principles addresses a broad range of international human rights standards and their application to SOGI issues. On 10 Nov. 2017, a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, *The Yogyakarta Principles plus 10*. The new document also contains 111 'additional state obligations', related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org.

¹⁰ *Gender Identity, Gender Expression and Sex Characteristics Act*, CAP. 540, (2015) (Malta).

¹¹ Pushpinder Kaur, *Gender, Sexuality and (Be)longing: The Representation of Queer (LGBT) in Hindi Cinema*, 7 AMITY J. OF MEDIA & COMM. STUD. 22 (2017); see also Sanjeev Kumar Sabharwal & Reetika Sen, *Portrayal of Sexual Minorities in Hindi Films*, 3 GLOB. MEDIA J. 1 (Jun. 2012) (India).

¹² M. Michelraj, *Historical Evolution of Transgender Community in India*, 4 ASIAN REV. OF SOC. SCI. 17-19 (2015), <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

government declared another innately discriminative provision: section 377 of Indian Penal Code.¹³ This provision criminalised homosexual acts between two consenting adults and prescribed life imprisonment, thereby denying the right of self-expression and sense of individuality and identity to a community in society — dire violation of Articles 14, 19, and 21 of the Constitution of India.¹⁴

The transgender community's decades-long struggle and endurance of societal atrocities has impelled the Parliament to finally legislate on gender parity vis-à-vis the transgender community and the gender binary.¹⁵ The equality of treatment model has been somewhat achieved by the struggle and resultant legislation; however, in reality, this is nothing but a facial parity because there are miles to cover before the community achieves equality of impact.¹⁶ A cliché dichotomy and wide schism between different gender identities persist today. Transgender constitutional jurisprudence is moving towards its second phase wherein it is time to demand a scrutiny of the impacts of legislation, policies, and welfare schemes on transgender people as a class. Indubitably, transgender persons' experience, values, and needs, to the extent that they differ from cisgender men and women, must also be embodied into the ethos of all institutions and the legal system. Thus, it is prudent to articulate areas where a legislative act related to gender parity must abide by, lest it be considered a failure. Jillian Weiss outlines these areas of note in her article published in the *Journal of Race, Gender, and Ethnicity*:

1) Laws regarding sex designation on government-issued identification, such

¹³ PEN. CODE § 377 (India).

¹⁴ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 14, 19, 21 (India).

¹⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40/2019) (India) [hereinafter *The Transgender Persons (Protection of Rights) Act*].

¹⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948), [hereinafter UDHR] ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

as birth certificates and driver licenses; 2) Name change laws that restrict a person's right to use a name stereotypically considered of the opposite sex; 3) Laws requiring or permitting sex segregation in public facilities, such as bathrooms and dressing rooms, educational settings, youth facilities, homeless shelters, drug treatment centres, foster care group homes, domestic violence shelters, and prisons; 4) Laws requiring or permitting sex discrimination in private settings, such as employment, sports, and assisted reproductive technologies; 5) Policies imposing restrictions or negative consequences on the right to transition or cross-dress, such as those imposed on youth, on divorced transgender parents, on adoptive parents, in workplaces, educational institutions, and prisons; 6) Exclusions for transgender persons in private and government health care; 7) Laws that restrict marriage and/or civil unions based on gender, including rights contingent on the validity of marriage such as intestate inheritance; right to sue for torts to a domestic partner, alimony, child custody, visitation and support; and insurance coverage. . . .¹⁷

By reviewing the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Rules, 2020, we hope to find any voids, lacunae, or inconsistencies with the present-day statutes, and the high law of the Constitution of India. This paper weaves through the provisions of the Act seriatim under the headings: Title, Definitions, Operative Sections, Offenses & Penalties and Conclusion. References to the Rules

¹⁷ Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 J. OF RACE, GENDER, & ETHNICITY 2, 3-5 (2010).

have been made wherever relevant. In the main, the paper is punctuated with suggestions, some hackneyed, some pristine, that may help to better this progressive piece of legislation.

I. TITLE (LONG AND SHORT)

The name “The Transgender Persons (Protection of Rights) Act”¹⁸ as it currently stands hints towards the Act being solely for the protection of the rights of the transgender community, along with their welfare. However, the Act not only protects the rights of the transgender persons, but also gives legal backing to their right to self-perceived identity and expression.¹⁹ As observed by the Supreme Court in *NALSA*, gender autonomy is a value that falls within the realms of Article 19(1)(a)²⁰ and Article 21.²¹ Additionally, the aim of the legislation is to afford autonomy to people outside the gender binary so they can choose their gender on the basis of their own perception.²² The legislation not only protects constitutional and legal rights, such as the right to expression, dignity, and personal liberty, but it also attaches a deeper connotation to these rights. Hence, “Gender Autonomy (Protection and Recognition) Act” would be more appropriate given the provisions of the Act.

The objective²³ of the Act is not only to protect, but also to provide for the formulation, implementation, and recognition of the rights of transgender persons. The central or lynchpin goal is the recognition of other genders and the establishment of a space for the third gender, not merely accommodation within the binary framework.

¹⁸ The Transgender Persons (Protection of Rights) Act, *supra* note 15.

¹⁹ *Id.* at § 4.

²⁰ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 19(1)(a) (India).

²¹ *Id.* at art. 21.

²² Long title of the Act: An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

²³ *Id.*

II. DEFINITIONS (SECTION 2)

The definition of “appropriate government” under section 2(a) of the Act includes the Central Government, State Government, and local authority.²⁴ The Indian Constitution establishes a unique three tier quasi-federal system of governance which includes a Municipal Government²⁵ and Panchayat²⁶ (a local government of villages)²⁷ in addition to the Central and State Government. To achieve the objectives of the Act, the inclusion of Municipality and Panchayat was imperative, and this has been duly acknowledged by the legislature under section 2(f) defining local authority.²⁸

Under section 2(c) of the Act, family is defined as “a group of people related by blood or marriage or by adoption.”²⁹ This is a narrow interpretation of the term, which is of great import. Family should be inclusive of immediate family as well as self-created family to align with the Yogyakarta principle: “right to found a family.”³⁰ This liberal understanding of family allows transgender persons to choose or create families from within their community when they are abused at home.³¹

An important aspect of inclusive education is gender sensitization, but it is missing from the definition of *inclusive education* under Section 2(d). Classes

²⁴ The Transgender Persons (Protection of Rights) Act at § 2(a).

²⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, part IXA, *amended by* The Constitution (Seventy-Fourth Amendment) Act, 1992 (India).

²⁶ *Id.* at part IX, *amended by* The Constitution (Seventy-Third Amendment) Act, 1992 (India).

²⁷ *Id.*

²⁸ The Transgender Persons (Protection of Rights) Act § 2(f).

²⁹ *Id.* at § 2(c), (“Family” means a group of people related by blood or marriage or by adoption made in accordance with law.)

³⁰ International Commission of Jurists, *Yogyakarta Principles – Principles On the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity* prin. 24 (Mar. 2007); *see supra* note 9 (background on Yogyakarta Principles).

³¹ Sixteenth Lok Sabha, Report on The Transgender Persons (Protection of Rights) Bill, 2016, 43 STANDING COMM. ON SOC. JUST. & EMPOWERMENT 1, 69 (July 2017).

concerning gender sensitization must be mandated for all students irrespective of their gender. The system of teaching and learning should be suitably adapted to meet the requirements of students having clarity about their gender identity and for those who are gender fluid.

Further, the definition of *persons with intersex variations* under Section 2(i) should replace cis-gender pronouns (his/her) with gender neutral pronouns, such as “their/zir,” to reflect the objectivity of the legislation.

The definition of “*Transgender Person*” under section 2(k) should be inclusive of all gender identities and orientation except for lesbian, gay and bisexual individuals.³² There are different variations under the umbrella term “transgender”; however, the definition specifically includes only four other communities: *Kinner, Hijra, Aravani* and *Jogta*.³³ Non-inclusion of gender non-conforming (“GNC”) persons is amiss. Also, various other gender identities such as *Iravanis, Khusras, Shiv Shakti, Eunuchs, Kothi, Nupa Maanba* and *Nupi Maanbi* from Manipur, and *Thirunangais* from Tamil Nadu (who may or may not identify themselves with the identities specified in the Act) should also be mentioned.³⁴ To ensure that the persons who fall outside the gender binary benefit from the Transgender Persons (Protection of Rights) Act, 2019, it is crucial to mention all transgender communities. Furthermore, the Act includes persons with intersex variation under the rubric of transgender persons.³⁵ This is a clear conflation of transgender persons with intersex individuals. It seems that the Act is conflating sex and gender, thus diminishing its capacity to understand the needs of transgender persons. Therefore, the definition should replace the word “means” with “includes.”

The Supreme Court of India in *NALSA* clarified that lesbian-, gay-, and bisexual- identifying individuals

³² *Id.* at 11.

³³ Nat'l Legal Serv. Auth. v. Union of India, (2014) 5 SCC 438 (India), ¶ 44.

³⁴ The Transgender Persons (Protection of Rights) Act § 2(k).

³⁵ *Id.*

are, at present, beyond consideration to be covered under the ambit of Transgender Persons, in the following words:

[t]he grammatical meaning of transgender, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to [transgender] community i.e. Hijra etc., as explained above.³⁶

By not defining terms like gender identity,³⁷ abuse, violence, and discrimination³⁸ the framers of the Act fail to bring out clarity to the contours of the Act. For instance, the terms like, “abuse” and “violence” are polysemic. By defining them in the Act, it would be easier for the enforcement agencies and courts to clamp down on the perpetrators.

III. OPERATIVE SECTIONS (SECTIONS 3-17)

Section 3, which prohibits discrimination against a transgender person, sets out a statutory right without

³⁶ Nat'l Legal Serv. Auth. v. Union of India & Others, 5 SCC 1, 40-1 (2014) (India).

³⁷ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 § 2 (Malta).

³⁸ The Rights of Transgender Person's Bill, 2014 (Bill No. XLIX of 2014) § 2(c) (India) (“Discrimination’ means any distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation.”).

a remedy, rendering that right impossible to exercise.³⁹ A duty has been cast upon individuals not to discriminate against transgender persons on the basis of their gender expression or identity. However, no enforcement mechanism or punishment has been prescribed for a breach or violation, which contravenes the deterrence theory of criminal jurisprudence.⁴⁰

Throughout history, transgender persons have asserted that “[they are] no ‘other.’ [they are] not a tree, [they are] not a bus, [they are] not a train, a dog or a cat. [They are] pe[ople]. [They] want [their] identity. [They are] transgender, a Hijra.”⁴¹ In every form and document, there should be a choice to mention the specific gender that a person identifies with, instead of “Others.”

Section 4 is progressive because it recognizes the right to self-perceived identity of all transgender persons.⁴² However, the rights that this section confers upon individuals are diluted by succeeding sections. In *NALSA*, the Supreme Court held that the right to gender identity was protected under Article 19 and Article 21 of the Constitution.⁴³ *NALSA* conceptualized gender on a spectrum and interpreted sex to include one’s gender identity in its decision: “Articles 15 and 16 prohibit discrimination

³⁹ The Transgender Persons (Protection of Rights) Act § 3 (The Transgender Persons [Protection of Rights] Rules, 2020, under Rule 11, provides that the appropriate government shall within two years from the date of coming into force of these rules shall formulate a comprehensive policy on the measures and procedures necessary to prohibit discrimination against transgender persons. Rules are available at <http://egazette.nic.in/WriteReadData/2020/222096.pdf>).

⁴⁰ The deterrence theory of punishment suggests that the punishment awarded to the offender should be such that it deters or discourages other people to commit such a crime. It aims to create a fear in the mind of the public. See also <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (last accessed on Mar. 26, 2021).

⁴¹ *We’re Not ‘Others’: Transgenders Demand EC Recognition as 3rd Gender*, FIRST POST (July 21, 2014), <https://www.firstpost.com/india/were-not-others-transgenders-demand-ec-recognition-as-3rd-gender-1627261.html>.

⁴² The Transgender Persons (Protection of Rights) Act § 4.

⁴³ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 19, 21 (India).

against any citizen on certain enumerated grounds, including the ground of sex. In fact, both of the Articles prohibit all forms of gender bias and gender based discrimination.”⁴⁴

The Act rests on the assumption that the gender binary is a norm and it lays out the two-step process of certification in order to be legally recognised as transgender. In *Justice (Retd) K.S.Puttaswamy v. Union of India*,⁴⁵ it was further noted that the right to privacy protected the freedom to make intimate decisions regarding personhood and autonomy, decisions that brooked minimum interference from the state. Life and personal liberty are inalienable rights, inseparable from a dignified human existence. Personal dignity, equality between human beings, and the quest for liberty are the foundational principles of the Indian Constitution, which shall not be shaken by laying down a certification process for a specific section of the society alone, the transgender community.⁴⁶

Section 4(2) states clearly that only *after* recognition under the provisions of the Act shall a transgender person have the right to their self-perceived identity.⁴⁷ In other words, the Act makes identity conditional upon identification instead of the other way round (as held in *NALSA*).⁴⁸

Therefore, it is evident that the scheme of Sections 4 through 7 is constitutionally flawed. The issuance of a revised certificate of gender binary — male or female — is contingent upon completing Sex Reassignment Surgery (“SRS”). This system unequivocally forces a transgender person to

⁴⁴ Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 56 (India).

⁴⁵ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

⁴⁶ The Transgender Persons (Protection of Rights) Act § 6.

⁴⁷ *Id.* at § 4(2).

⁴⁸ Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 76 (India) (The Supreme Court observed that gender identity is a person’s internal sense of being male, female or third gender. It is based on self-identification and not on medical or surgical procedure.)

undergo surgery if they hope to obtain certification of their self-perceived identity by the state. Transgender persons are, as per the combined reading of Section 6 and Section 7, required to undergo a surgery to be identified as per their lived gender, otherwise they would still be called transgender persons.⁴⁹

The Supreme Court of India in *NALSA* explicitly rejected an objective medical or pathological standard to determine an individual's gender, and recognised that "transgender" constituted its own, standalone gender for individuals who did not wish to associate themselves with either the male or female gender.⁵⁰ To summarise, under the current system in India, a transgender person can choose to be recognised as either male or female, or alternatively as transgender.

Sections 5 and 6 provide for recognition as "transgender" devoid of any medical procedure. But the process to receive a gender-binary certificate, which holds the legal significance that transgender individuals currently lack, is outlined under Section 7 and necessitates a medical procedure. While *NALSA*, on the one hand, recognizes a right to be recognized as "M," "F," or "TG" unaccompanied by any medical procedure, Section 7 provides for a "M" or "F" certificate only after medical procedure. And only by dint of this certificate can a transgender person avail themselves of state welfare schemes or reservation benefits, which they are entitled to.⁵¹

The current legislation reiterates that being cis-gender is the norm and being transgender is an exception. A conjoint reading of the Act and the rules suggests that a medical-intervention certificate from an institution — say, counselling, hormonal therapy, surgery — issued by a Medical Superintendent or Chief Medical officer of the institution is required to be annexed to the Application for change of gender

under Section 7. In contrast to this certificate-procuring requirement under the Act, Malta's law⁵² requires merely the signing of a declaratory public deed by a Notary, a public official. While Malta's provision sets a low bar for obtaining a correct gender certificate it is one of the most progressive systems in the world regarding freedom of expression. The right to gender identity under the Malta's law states that a transgender person is not required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies, or any other psychiatric, psychological or medical treatment.⁵³

Beyond the above discussion regarding the application procedure, the government has committed a folly in Form 3 of the Rules. Form 3 is the form of certificate of identity to be issued by the District Magistrate under rule 5 read with section 6 of the Act. This certificate uses titles like Shri (Mr.), Smt. (Mrs.), Ms. while certifying an individual as transgender person. This, yet again, evinces the society's parochial outlook toward gender-binary hegemony.

The Indian constitutional notion entails historical prejudices to level up chasms between communities today. Providing quotas or reservation for the historically-discriminated communities, in the Constitution itself, was one avenue to paper over the cracks. To this end, the founding members enshrined reservation for marginalised groups of women, Scheduled Castes/Scheduled Tribes⁵⁴ and other socially and economically backward classes. Reservation, with time, became a facet of equality and not an exception to it; therefore, in *NALSA*, the Supreme Court recognized the transgender community as a socially and educationally backward

⁴⁹ The Transgender Persons (Protection of Rights) Act §§ 6-7.

⁵⁰ Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, ¶ 76 (India).

⁵¹ Transgender Persons (Protection of Rights) Rules, 2020 (India), <http://egazette.nic.in/WriteReadData/2020/222096.pdf>

⁵² Gender Identity, Gender Expression and Sex Characteristics Act, 2015 § 4 (Malta).

⁵³ *Id.*

⁵⁴ Vishnu Gopinath, *Who Are the Scheduled Castes, Scheduled Tribes, OBCs ad EBCs?*, THE QUINT (Jun. 12, 2018), <https://www.thequint.com/explainers/scheduled-caste-scheduled-tribe-obc-ebc-sc-st-prevention-of-atrocities-act-explainer>.

class under Article 15(4) and 16(4) of the Constitution.⁵⁵ The ‘The Right of Transgender Persons Bill, 2014’ also stipulated a two percent reservation for transgender persons in education and employment. But, alas, the Act or the Rules make no mention of reservation for the transgender persons community. Drawing from the constitutional provisions, reservation is not simply something the government may do, but indeed, is obligated to do after identifying relevant sections of society that stand in need for them.

The right to an adequate standard of living⁵⁶ and the right to protection from poverty⁵⁷ recognized under Yogyakarta principles include access to the welfare regime. The doctrine of “Living Tree,” a Canadian law doctrine, describes the Constitution as a living document that continuously evolves over time.⁵⁸ The meaning of the Canadian Constitution may not be limited to the perspective of when it was adopted.⁵⁹ The change in social fabric of the state has given rise to the concerns which were not present seven decades ago. Absence of facilities such as transgender cells in police stations, separate frisking zones, special third gender or transgender ration cards, adoption of inclusive language and certain other fundamentals is appalling. All these basic facilities are necessary for a dignified life and absence of these violates Article 21 of the Indian Constitution, which subsumes the golden principle: “To Live is to Live with Dignity.”⁶⁰

Section 11 mentions the appointment of a complaint officer in every establishment.⁶¹ However, no

⁵⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 15, 16 (India).

⁵⁶ International Commission of Jurists, *supra* note 30.

⁵⁷ *Id.* at prin. 34.

⁵⁸ The doctrine of ‘Living Tree’ is a Canadian law doctrine describing their Constitution as a living document, which keeps evolving with the changing times. The meaning of the Constitution may not be frozen to the perspective when it was adopted.

⁵⁹ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, 324 (India).

⁶⁰ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949, art. 21 (India).

⁶¹ The Transgender Persons (Protection of Rights) Act § 11.

eligibility or qualification for such a position has been provided. Moreover, no duty of the complaint officer has been stipulated, hence the penalty for breach in duty has also not been provided. Along with duty, the legislation must also state the remedy in case the person appointed as complaint officer does not comply with the provisions of the Act. Although the appointment of a complaint officer is a welcoming step, the section fails to mention necessary structural changes for creating better, inclusive spaces and addressing problems of “otherization” of transgender persons.

We recommend that a complaint made to the complaint officer should be forwarded to the state or District commission, which also needs to be formulated, as explained later, for transgender persons within three working days (or any other suitable time frame) from the date of receipt of the complaint. There should also be provisions in place for the assignment of an officer or a reputed person or both from an NGO working for transgender rights to deal with the complaint and supervise any following proceedings.

Section 12 of the Act provides for the right to residence. Under Section 12(1), a transgender child can be separated from the parents or the immediate family only after an order of a competent Court.⁶² Notwithstanding, Section 317 of the Indian Penal Code concerns the exposure or abandonment of a child under twelve by a parent or guardian.⁶³ It stipulates imprisonment which may extend up to seven years.⁶⁴ The Transgender Persons (Protection of Rights) Act contains a substantive clause disallowing transgender children below the age of eighteen to be separated from their families, but lacks an enforcement mechanism because there is no associated penal provision if such law is violated.

⁶² *Id.* at § 12.

⁶³ PEN. CODE § 317 (India).

⁶⁴ *Id.*

The word “rehabilitation centre” in Section 12(3) of the Act should be replaced by “reasonable accommodation” or “self-created/self-chosen/self-founded family.” Requiring a transgender person to live in a rehabilitation centre would be an involuntary detention and non-intentional infringement of their fundamental right to personal liberty provided for under Article 21 of the Indian Constitution⁶⁵ and also the Yogyakarta Principles.⁶⁶ There is a complex web of relationships in the life of a transgender person; therefore, it is crucial to understand the connectedness and legislate accordingly.

The Parliamentary Standing Committee⁶⁷ raised concerns that the two options provided by the Bill would not guarantee protection in practice. Several transgender persons face significant abuse at the hands of their own families, who deny them the right to self-identify with a gender of their choosing, and restrict their gender expression.⁶⁸ The nature of the rehabilitation centres is also unknown. The Committee noted that several transgender persons choose not to live at home, but rather within transgender communities where they form an alternative network of friends and family.⁶⁹ By compelling transgender persons to either live at home or in a state-run rehabilitation centre, Section 13 of the Act seems to deny them the right to choose the community they wish to live in.⁷⁰ Deciding whether to live at home would be considered an essential choice relating to family, and by denying transgender persons the third alternative of living within a transgender community, the state is

⁶⁵ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 (India).

⁶⁶ International Commission of Jurists, *supra* note 30.

⁶⁷ Sixteenth Lok Sabha, *supra* note 31, at 11.

⁶⁸ *Many Transgender Community Members Battling Mental, Physical Abuse During Pandemic*, THE TRIBUNE INDIA (Aug. 30, 2020), <https://www.tribuneindia.com/news/nation/many-transgender-community-members-battling-mental-physical-abuse-during-pandemic-133734>.

⁶⁹ Sixteenth Lok Sabha, *supra* note 31, at 69.

⁷⁰ The Transgender Persons (Protection of Rights) Act § 13.

indubitably interfering with their “autonomy” as noted in the *Puttaswamy* case.⁷¹

We suggest that the Act should design provisions similar to Section 125 of the 1973 Criminal Procedure Code⁷² where minor transgender persons should have a right to maintenance from immediate family. In the case of transgender persons above the age of majority, the government should provide unemployment or a living allowance.

Although Section 13 in Chapter VI of the Act provides for inclusive education and non-discrimination policies at academic institutions, the provision has been rendered otiose since there is no penalty established for the perpetration of bullying or discrimination against transgender people in an academic space. The duty without a penalty in case of breach is like a toothless tiger. The Act should provide for specific remedies against bullying or singling out of transgender students. Educational institutions must formulate an anti-discrimination committee to monitor any form of discrimination against the transgender community such as the Expert Committee referred to in the Standing Committee report.⁷³ There must also be a provision for mandatory transgender/gender-neutral toilets in all public places.⁷⁴

Section 15 lists the healthcare facilities which the appropriate government shall provide in relation to transgender persons. However, under clause (a), separate centres for the transgender community will further stigmatize and isolate the community.⁷⁵ Ironically, the Act does not prevent but encodes discrimination. Apart from this, the Act should also provide for crisis counselling for transgender victims on the model of Rape and Crisis Intervention

⁷¹ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

⁷² CODE CRIM. PROC., 1973 § 125 (Act No. 2 of 1974) (India).

⁷³ Sixteenth Lok Sabha, *supra* note 31, at 7.

⁷⁴ Nina C. George, *Toilets: He, She, and Them?*, DECCAN HERALD (Nov. 26, 2019), <https://www.deccanherald.com/metrolife/metrolife-your-bond-with-bengaluru/toilets-he-she-and-them-780085.html>.

⁷⁵ The Transgender Persons (Protection of Rights) Act § 15(a).

Centres, counselling for mental health issues other therapies.⁷⁶ Adequate insurance covers for SRS will benefit immensely, too. Since harassment and gazing may also lead to mental health issues,⁷⁷ the government should ensure the setup of separate gender neutral washrooms and unisex dress codes. These facilities should follow Principle 13 (The Right to Social Security and other Protection Measures) and Principle 17 (The Right to a highest attainable Standard of Health) of the Yogyakarta Principles.⁷⁸

Section 16 and Section 17 under Chapter VII of the Act establish a National Council for Transgender Persons. The Council, a statutory body, will assess the impact of various policies and they are free to decide on the modalities.⁷⁹ However, the National Council is just a symbolic setup with no real power or capabilities. Being a high profile body, it would be rendered non-functional for the want of quorum. The Council is only afforded five representatives from the transgender community, posing a serious threat to the legitimacy of this body due to inadequate representation. Therefore, we suggest that a National Commission be set up with adequate representation from the transgender community, and preferably with the chairperson also from the transgender community. Powers of the Civil Court may be vested in this Commission for any issues in connection with the transgender community. A State or District Commission may be established as well, keeping in mind the population of transgender persons in each State or District.

⁷⁶ See Delhi Commission for Women, *Crisis Intervention Centres*, http://dcw.delhigovt.nic.in/wps/wcm/connect/lib_dcw/DCW/Home/Projects/CICs/; see also Sixteenth Lok Sabha, *supra* note 31, at 81.

⁷⁷ H. G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, *Suicide and Suicidal Behavior Among Transgender Persons*, 38(6) INDIAN J. PSYCHOL. MED. 505-09 (2016).

⁷⁸ International Commission of Jurists, *supra* note 30.

⁷⁹ Press Release, Ministry of Social Justice & Empowerment, National Council for Transgender Persons Will Assess Impact of Various Policies With Respect To Transgenders (Sep. 16, 2020) (India).

Such a commission may also provide free legal aid to transgender persons and help with mediation and conciliation. The Commission should also monitor and ensure robust police investigations in case of criminal offences committed against transgender persons and a report prepared by the Commission may be sent to special courts, which should exclusively be set up for offences committed against transgender persons and the judges would be trained in dealing with the issues.

IV. OFFENSES & PENALTIES (SECTION 18)

Section 18 under Chapter VIII of the Act provides the offenses and penalties which require our most sincere attention. If this section is not delineated appropriately at the time of its inception, the legislation would become an ill-conceived vision.⁸⁰ The legislature has failed to define the terms used in the section, making the list of offenses ambiguous and arbitrary. Also, the quantum of imprisonment and penalty are disproportionate to the gravity of offences.

Separate sentencing guidelines should be established for each type of abuse in accordance with the severity of the crime. Physical abuse harms the body of the victim, but sexual abuse tears the very soul of a person.⁸¹ Thus, they cannot be grouped together when it comes to sentencing recommendations.

The section should also include penalties for discrimination outlawed under Section 3 of the Act and for breach of duty committed by any public servant, such as the refusal to register a First Information Report⁸² or the refusal to provide medical help to the transgender person by a doctor.

⁸⁰ The Transgender Persons (Protection of Rights) Act § 18.

⁸¹ State of Punjab v. Gurmit Singh, 1996 SCC (2) 384 ¶ 21 (India).

⁸² First Information Report (FIR) is the earliest form and first information of a cognizable offence given to the police/officer-in-charge of the police station by the victim or witness or any other person having knowledge about the commission of the offence. See also, https://www.humanrightsinitiative.org/download/1456214633FIR_14-1-16.pdf (last accessed on Mar. 26, 2021)

Statistically, “52% of [transgender people] are facing harassment from the police. 70.3% are not confident to face the police, and . . . 96% do not raise complaints against violence because of their gender identity.”⁸³ According to a Right To Information application,⁸⁴ there is not even a single case of sexual crime, registered in thirteen of sixteen districts in Delhi over the past two years. These two pieces of information conspicuously reason out the hardship faced by the visibly invisible transgender community in seeking help from public authorities

The sentencing guidelines in offences against Scheduled Castes or Tribes⁸⁵ may be mirrored with regard to transgender persons. The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989⁸⁶ (“SC/ST Act”) may prove to be helpful in this regard. The SC/ST Act provides for an aggravated measure of punishment when an offense is committed against a member of the community for the sole reason of the victim belonging to the community. Such a provision of meting out aggravated punishments to perpetrators who commit crimes against transgender persons only because of their gender identity and expression will go a long way in solidifying the object of the Act.

CONCLUSION

Apart from the provisions laid down in the Act, there is a pivotal need to confer other civil rights on the transgender community like the right to marriage,⁸⁷

⁸³ DEPT. OF SOCIAL JUSTICE, GOVERNMENT OF KERALA, State Policy for Transgenders in Kerala (2015) (India).

⁸⁴ Right To Information Application, Registration No. DE-POL/R/E/20/01726/5, applicant: Aastha Khanna (Mar. 14, 2020) (India).

⁸⁵ Vishnu Gopinath, *Who Are the Scheduled Castes, Scheduled Tribes, OBCs ad EBCs?*, THE QUINT (Jun. 12, 2018), <https://www.thequint.com/explainers/scheduled-caste-scheduled-tribe-obc-ebc-sc-st-prevention-of-atrocities-act-explainer>.

⁸⁶ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No. 33 of 1989) (India).

⁸⁷ Aastha Khanna, *From Gender Binary to Gender Spectrum: Recognition to Cis-Trans Marriage in India*, SCC ONLINE (Feb. 6, 2021), <https://www.sconline.com/blog/post/2021/02/06/from-gender-binary-to-gender-spectrum-recognition-to-cis-trans-marriage-in-india/>.

adoption, and succession as the Parliament of Pakistan has granted to the transgender community.⁸⁸

Transgender lives are no longer footnotes in law books; their identities are no longer uniformly bound to surgical requirements in India.⁸⁹ As principles of equality and dignity move in the forefront of legal thinking, transgender people are not an afterthought anymore.⁹⁰ The fate of the transgender community has undoubtedly been ameliorated by legislative intervention.

Article 19 read with Article 21 the Constitution of India confers an infrangible right to freedom of expression, which conspicuously encompasses gender orientation and preference.⁹¹ Paradoxical as it may seem, the law is only a spurious claim if not accepted by the public at large. Through looking back at how norms have evolved from the past when being transgender was an ostensible anomaly, it is clear that people’s perspective of gender autonomy and recognition is key. Even today, if we are unable to alter this perspective, the empowering rationale behind the legislation will not only be torn, but left in tatters.

Transgender people should be able to live with dignity without discrimination and have equal access to education, employment, health care facilities. According to the 2011 national census, there were 480,000 transgender people in India and the gendered law failed to recognize and protect them from living a life of misery and disgrace.⁹²

⁸⁸ The Pakistan Transgender (Protection of Rights) Act, 2018 (Pak.).

⁸⁹ Khanna & Sawhney, *supra* note 1.

⁹⁰ Cole Thaler, *What Does It Mean to Be Real? Transgender Identity and the Law*, 27 GPSOLO MAG. 26, 29 (2010).

⁹¹ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 art. 19, 21 (India).

⁹² NATIONAL CENSUS REPORT (2011) (India), <https://censusindia.gov.in/2011Census/pes/Pesreport.pdf>.

Though legislative intervention, keeping in mind the doctrine of non-retrogression,⁹³ affirmative steps are taken toward ensuring the recognition and welfare of transgender persons. However, there are many snags, as highlighted by critics, which need government's consideration; otherwise such legislation may well be a glove that ill fits the hand it was tailored for.

The rather contemporary Transgender Persons (Protection Of Rights) Act, 2019 is yet to pass the constitutional muster on the touchstone of Articles 14, 15, 16, 19 and 21 of the Indian Constitution⁹⁴ since a matter captioned *Swati Bidhan Baruah v Union Of India*⁹⁵ is currently pending before the Supreme Court. The final judgment in the matter will serve a great deal in addressing the loopholes discerned in detail throughout this analysis of the Act. It would be prompt, for all it's worth, to quote the Supreme Court itself — “[l]egislation should not be only assessed on its proposed aims but rather on the implications and the effects.”⁹⁶ This legislation is a

beginning to the end of the dilemma of a transgender person's life, beautifully expressed by Arundhati Roy:

*She, who never knew which box to tick, which queue to stand in, which public toilet to enter (Kings or Queens? Lords or Ladies? Sirs or Hers?) She, who knew she was all wrong, always wrong. She, augmented by her ambiguity.*⁹⁷

⁹³ The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise. *See also, supra* note 7 at ¶¶ 188-89.

⁹⁴ BHĀRATĪYASAMVIDHĀNA [CONSTITUTION] Nov. 26, 1949 (India).

⁹⁵ Writ Petition(s) (CIVIL) No(s). 51/2020 (India) (Swati Bidhan Baruah, Assam's first transgender judge, has challenged the constitutional validity of the Transgender Persons (Protection of Rights) Act, 2019. The Petitioner seeks for the Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a) and 18(d) of the Act as unconstitutional. In addition, they pray for the Court to issue a Writ of Mandamus that directs Centre and State Governments to provide reservations for transgender persons in public employment and education, as directed by the Court in NALSA); *see also Swati Bidhan Baruah v. Union of India* (2020) WP(C) 51.

⁹⁶ *Anuj Garg v. Hotel Assoc. of India* (2008) 3 SCC 1, ¶ 44 (India).

⁹⁷ Roy, *supra* note 2..

INSTITUTIONALIZATION AND TORTURE OF PEOPLE WITH DISABILITIES IN MEXICO: A CASE FOR HOLDING STATES RESPONSIBLE FOR CRIMES AGAINST HUMANITY

by Priscila Rodríguez*

INTRODUCTION

Can the institutionalization of people with disabilities in Mexico constitute a crime against humanity? To answer that question, this article first outlines how Mexico's institutionalization of people with disabilities is a grave and systemic violation of international law, then addresses the definition of crimes against humanity and whether that definition is met under the International Criminal Court's Rome Statute. In the discussion, we acknowledge that while the definition is met in the case of Mexico, the definition for crimes against humanity under the Rome Statute is for the purposes of individual criminal responsibility and not State responsibility. This raises an issue that requires further analysis: the need for a specialized forum to allow for States to be held collectively responsible for such crimes on a large scale, including, for example, the Committee on Rights of Persons with Disabilities and other treaty bodies.

I. INSTITUTIONALIZATION OF CHILDREN AND ADULTS WITH DISABILITIES IN MEXICO

For the past twenty years, Disability Rights International (DRI) has written five reports regarding the situation of persons with disabilities in institutions in Mexico.¹ For these reports, DRI visited over one hundred institutions in over a dozen states across Mexico where thousands of children and adults with disabilities are detained in dangerous conditions and subjected to atrocious abuses that amount to torture.²

The primary reasons for institutionalization in Mexico are the State's failure to provide community-based services and support necessary for people with disabilities to live in the community, coupled with an over-reliance on institutions as the only option for children and adults without support networks. People with disabilities without families willing or able to support them are relegated to languish in institutions without hope of returning to the community. Children with disabilities may have loving families but without support, many parents

* Priscila Rodríguez is the Associate Director at Disability Rights International (DRI). Since 2012 she has worked with DRI, documenting violations against persons with disabilities in institutions in Mexico and around the world, has published several reports, and led litigation efforts in regional and international human rights bodies to seek redress for these violations.

¹ Disability Rts. Int'l, *Mental Health and Human Rights in Mexico*, (Sept. 2000) [hereinafter *DRI Mental Health and Human Rights in Mexico*], <https://www.driadvocacy.org/wp-content/uploads/Human-Rights-Mental-Health-English.pdf>; Disability Rts. Int'l, *Abandoned and Disappeared*, i, vii (2010), <https://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf>; Disability Rts. Int'l, *No Justice*, 1, 5 (July 22, 2015), https://www.driadvocacy.org/wp-content/uploads/Sin-Justicia-MexRep_21_Abr_english-1.pdf; Disability Rts. Int'l, *At The Mexico-US Border And Segregated From Society*, 1, 5 (May 2019) [hereinafter *DRI At the Mexico-US Border*], <https://www.driadvocacy.org/wp-content/uploads/MEX-Report-May-2019.pdf>; Disability Rts. Int'l, *Crimes Against Humanity: Decades of Violence and Abuse in Mexican Institutions for Children and Adults with Disabilities* (Oct. 2020) [hereinafter *DRI Crimes Against Humanity*], <https://www.driadvocacy.org/wp-content/uploads/Mexico-2020-ENG-web.pdf>.

² These include public psychiatric hospitals, private institutions for children and adults with disabilities, migrant shelters, and drug rehabilitation centers, among others.

of children with disabilities are often forced by child protection services to place their children in institutions.

The institutionalization of people with disabilities is in violation of Article 19 of the Convention on the Rights of Persons with Disabilities³ (CRPD or Convention), which guarantees the “right of all persons with disabilities to live in the community with choices equal to others.”⁴ As established by the Committee on the Rights of Persons with Disabilities (CRPD Committee), “Article 19 entails civil and political as well as economic, social and cultural rights and is an example of the interrelation, interdependence and indivisibility of all human rights.”⁵ In the case of children with disabilities, the CRPD Committee has established that the “core” of the right to live in the community under Article 19 necessarily entails a right to live and grow up in a family (Article 23).⁶

For both children and adults, institutionalization in Mexico leads to other grave human rights violations. DRI reports⁷ spanning twenty years have found that people placed in institutions are:

- Unable to make even the most basic choices over their lives (recognized as the right to legal capacity under Article 12 of the CRPD).
- Subjected to abuses that amount to nothing less than torture, including situations where people are tied down

³The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by Mexico on December 17, 2007.

⁴Convention on the Rights of Persons with Disabilities ¶ 7, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3. [hereinafter CRPD].

⁵CRPD *supra* note 4 (adopting a comment on Oct. 27, 2017 on living independently and being included in the community).

⁶Eric Rosenthal, *The Right of All Children to Grow Up with a Family under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes*, 25 BUFF. HUM. RTS. L. REV. 65, 75 (2019) (describing the development of the right to family under international law and summarizing research findings on the need and ability of all children to grow up in a family).

⁷DRI *Mental Health and Human Rights in Mexico*, *supra* note 1.

in painful positions for days, months and even years and placed in prolonged isolation.⁸ DRI has also found that girls and women with disabilities frequently face sexual abuse, rape, and forced sterilization to cover up abuses — practices that can also amount to torture. People are also forced to live in filthy inhuman and degrading conditions of detention.⁹

- Denied access to essential medical care and exposed to grave instances of medical negligence that put their life at risk.¹⁰
- Detained indefinitely without the possibility of being reintegrated to the community and without access to rehabilitation and habilitation services.
- Left exposed to life-threatening dangers due to the lack of human rights oversight.

⁸Eric Rosenthal and Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19 HUM. RTS. BRIEF 3 (2012).

⁹See DRI *Mental Health and Human Rights in Mexico*, *supra* note 1.

¹⁰This has become painfully obvious in the context of the pandemic caused by COVID-19, which has particularly affected people in institutions, particularly people with disabilities. Danny Hakim, *‘It’s Hit Our Front Door’: Homes for the Disabled See a Surge of Covid-19*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-disabilities-group-homes.html?referringSource=articleShare>; David Henderson et al., *Mortality Associated with COVID-19 Outbreaks in Care Homes: Early International Evidence*, LTC (Feb. 1, 2021), at 1, https://ltccovid.org/2020/04/12/mortality-associated-with-covid-19-outbreaks-in-care-homes-early-international-evidence/?subscribe=success#blog_subscription-3; Robert Booth, *Half of Coronavirus Deaths Happen in Care Homes, Data from EU Suggests*, THE GUARDIAN (Apr. 13, 2020), <https://www.theguardian.com/world/2020/apr/13/half-of-coronavirus-deaths-happen-in-care-homes-data-from-eu-suggests>; Oriol Güell, *Residencias y Hospitales Concentran los Nuevos Contagios por Coronavirus*, EL PAÍS (Apr. 11, 2020), <https://elpais.com/sociedad/2020-04-10/residencias-de-mayores-y-hospitales-acaparan-la-mayoria-de-nuevos-contagios-del-coronavirus.html>; Farah Stockman et al., *‘They’re Death Pits’: Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html>.

In some cases, authorities have reported extremely high death rates in institutions.¹¹ Exact death rates in Mexican institutions are hard to pin down because there is no national requirement that all deaths be reported or that independent death investigations be conducted. Indeed, any form of effective oversight or protection is impossible because state or national authorities are not required to report on the number of people who are detained. In some states, DRI has found that state authorities tolerate and openly send people with disabilities to private institutions that are entirely unregulated — lacking any form of oversight, monitoring, or quality control.¹² Throughout Mexico's mental health and disability service system, people detained in institutions are often under the *de facto* guardianship of the institution's director and unable to access justice and legal recourses to challenge the abuse and detention they are subjected to.

II. “SYSTEMIC AND GRAVE” STANDARD

The jurisprudence of the CRPD Committee,¹³ the Committee on the Rights of the Child (CRC Committee)¹⁴ and the Committee on the Elimination

of all Discrimination Against Women (CEDAW Committee)¹⁵ concur that, for a violation to be considered as “systemic,” it must be demonstrated that the violations are not random events but part of a pattern, ingrained in structural policies and legislation. For a violation to be considered “grave,” the Committees agree that it must cause “substantial harm”¹⁶ to the victims, taking into account the scale, prevalence, nature, and impact of the violation(s).

The CRPD Committee has furthered the “grave” standard by saying that “grave” violations lead to “further segregation, isolation and impoverishment”¹⁷ of persons with disabilities. In 2020, the CRPD Committee published a report on a public inquiry it carried out on the institutionalization of people with disabilities in Hungary.¹⁸ In its report it recognized this standard and stated that a determination regarding the gravity of violations must take into account the “scale, prevalence, nature, and impact of the violations found.”¹⁹

In the case of Hungary, the CRPD Committee found grave violations under the Convention because the system of institutionalization “profoundly affect[ed] the lives of a substantial number of persons with disabilities, particularly discriminating against persons with intellectual or psychosocial disabilities, perpetuating segregation and isolation from society.”²⁰

¹¹ At “El Batán” psychiatric facility in the State of Puebla, for example, authorities report that 100 of approximately 300 detainees dies in one year from the misuse of psychotropic medication.

¹² DRI *At the Mexico-US Border*, *supra* note 1, at 10.

¹³ Comm. on the Rights of Persons with Disabilities, Inquiry Concerning Hungary Under Article 6 of the Optional Protocol to the Convention, U.N. Doc. CRPD/C/HUN/IR/1, ¶¶ 106-109 (2020) [hereinafter CRPD Inquiry Concerning Hungary].

¹⁴ Comm. on the Rights of the Child, Inquiry Concerning Chile Under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, U.N. Doc. CRC/C/CHL/IR/1, ¶¶ 110-12 (2020) [hereinafter CRC Inquiry Concerning Chile].

¹⁵ Comm. on the Elimination of Discrimination against Women, Inquiry Concerning Kyrgyzstan Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/OP.8/KGZ/1, ¶ 86 (2018); *see also* Comm. on the Rights of Persons with Disabilities, Inquiry Concerning Spain Carried Out by the Committee Under Article 6 of the Optional Protocol to the Convention, U.N. Doc. CRPD/C/ESP/IR/1, ¶¶ 78-80 (2018); CRC Inquiry Concerning Chile, *supra* note 14.

¹⁶ CRPD Inquiry Concerning Hungary, *supra* note 13.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 107.

¹⁹ *Id.*

²⁰ *Id.*

In its reports over the past two decades, DRI has documented how the system of institutionalization in Mexico profoundly affects every aspect of the lives of tens of thousands of children and adults with disabilities detained in institutions. People with disabilities in institutions are effectively stripped of their rights; they are unable to exercise them as they are indefinitely locked away and abused, including their right to challenge their detention and access legal recourses to stop the abuse they are subjected to. Several studies show how institutionalization in itself is traumatizing for persons with disabilities and particularly for children, leading to intense suffering and trauma with a long-lasting negative impact.²¹

The suffering, abuse, and helplessness that people with disabilities face amounts to “substantial harm” and leads to “further segregation, isolation and impoverishment.”²² Particularly in the case of children with disabilities, the system of institutionalization “perpetuates children’s marginalization and vulnerability by negatively affecting their lives, security, best interests, family life, integrity, education, human development, [and] well-being.”²³ Thus, the system of institutionalization in Mexico should be considered “grave” under the CRPD Committee’s jurisprudence.²⁴

In relation to the term “systemic,” the CRPD Committee stated that it “refers to the organized nature of the acts leading to the violations and improbability of their random occurrence.”²⁵ This Committee has indicated that “the existence of a legislative framework, policies and practices

²¹ John Williamson & Aaron Greenberg, *Families, Not Orphan-ages* 6 (2010) (Better Care Network, Working Paper, 2010); Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. OF ORTHOPSYCHIATRY 219, 220 (2014); U.N. Off. of the High Comm’r on Hum. Rts., *The Rights of Vulnerable Children Under the Age of Three: Ending their Placement in Institutional Care* 19 (2011), https://europe.ohchr.org/Documents/Publications/Children_under_3.pdf

²² CRPD Inquiry Concerning Hungary, *supra* note 13, ¶ 109.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* ¶ 108.

that, by intent or through impact, adversely or disproportionately affect persons with disabilities constitute[s] systematic violations of the Convention.” The Committee has also stressed that “discriminatory or structural patterns against persons with disabilities based on impairment constitute systematic violations.”²⁶

In the case of Hungary, the Committee found systematic violations of the rights of persons with disabilities in institutions considering they were “widespread and habitual.” These violations were the result of “deliberate patterns of structural discrimination entrenched in legislation, policies, plans[,] and practices, including resource allocation.”²⁷ In Mexico, the institutionalization of children and adults with disabilities is widespread, affecting tens of thousands of persons with disabilities.²⁸ It is mainly a result of the generalized failure of the Mexican State to create alternatives to institutions in the form of community-based support and services. This lack of community-based services coupled with an over reliance on institutionalization for any child or adult with disability in need of support, has led to the institutionalization of thousands.

The system of institutionalization is entrenched in Mexican legislation, policies and practices. In Mexico, there are thirteen states that have passed mental health laws after Mexico signed and ratified the CRPD. Each of these mental health laws allows for the involuntary detention of people with disabilities.²⁹ The General Health Law (hereinafter “LGS” for its Spanish acronym) and the Mexican Official Standard NOM-025-SSA2-2014 for the provision of health services in medical-psychiatric hospital integral care units (hereinafter NOM-025) establish that the person or “his/her” representative

²⁶ *Id.*

²⁷ *Id.*

²⁸ DRI *Crimes Against Humanity*, *supra* note 1, at 17.

²⁹ Disability Rights Int’l, *Alternative Report by Mexican Civil Society Organizations*, 10 (2014-19), <https://www.driadvocacy.org/wp-content/uploads/Joint-Shadow-Report-CRPD-Jul2019-FINAL.pdf>

has the right to “informed consent,” except in cases of “involuntary admission.”³⁰ The law basically states that people who do decide that they do not want to be admitted are an exception and the right to informed consent does not apply to them. Limiting the right to informed consent to cases of “voluntary” admission effectively invalidates this right. Thus, the Mexican legal framework continues to allow the involuntary detention of persons with disabilities in institutions, contrary to what the CRPD establishes.

Furthermore, the Mexican government continues to invest in institutions and, by doing so, to perpetuate institutionalization. The Ministry of Health allocates about 1.6% of its budget to mental health with 80% allocated to the operation of psychiatric hospitals.³¹ Psychiatric institutions across the country continue to receive federal and state funding. The near exclusive reliance on in-patient care — as reflected in part by where the government invests public resources — demonstrates that the government relies on a segregated, institutional model of care.

In the case of children, the systemic nature of the violation is consistent with what the CRC found to be the standard in the case in Chile. There, the CRC found systemic violations due:

both to the continued existence of a protection system underpinned by the State’s charity-based approach and paternalistic outlook and to persistent inaction and failure to change laws, policies and practices that, as several official reports had made clear, led to continual infringements of the rights of children and adolescents in the care of the State.³²

³⁰ *Id.*

³¹ Information provided by officials from Mexico’s Ministry of Health. Lauren Ahern et al., *Crimes Against Humanity: Decades of Violence and Abuse in Mexican Institutions for Children and Adults with Disabilities*, DISABILITY RTS INT’L 14, <https://www.driadvocacy.org/wp-content/uploads/Mexico-2020-ENG-web.pdf>

³² CRPD Inquiry Concerning Hungary, *supra* note 13, at 16.

Mexico has maintained a similarly paternalistic system and failed to change laws despite twenty years of DRI’s effective international public exposure³³ and the very strong findings and recommendations of the CRPD Committee and the Inter-American Human Rights Commission. The segregated, abusive, and dangerous system of institutionalization in Mexico is not an isolated or random event, rather, it is the result of legislative and policy violations and omissions on the part of the State to fully guarantee the right of tens of thousands of children and adults with disabilities to live in the community, in accordance with Article 19 of the CRPD and thus, it is a systemic issue.

III. CRIMES AGAINST HUMANITY ANALYSIS

Traditionally, crimes against humanity have been considered in the context of armed conflicts where large numbers of people are subjected to severe crimes including murder, rape, extermination, enslavement, and deportation, among others. In this context, we recognize that framing the widespread and systemic institutionalization of people with disabilities in Mexico as a crime against humanity is a cutting edge and new argument that comes with many challenges. The main challenge is to understand whether this practice rises to the level of a crime against humanity, which we aim to address in this analysis.

Under the Rome Statute, a “crime against humanity” is configured when one of the acts recognized under the Statute is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”³⁴ Four main criteria need to be met in order for a crime

³³ See Michael Winerip, *The Global Willowbrook*, N.Y. TIMES MAG. (Jan. 21, 2000), <https://www.nytimes.com/2000/01/16/magazine/the-global-willowbrook.html>; Randal C. Archibold, *Abuses Found at Mexican Institutions for Disabled*, N.Y. TIMES (Nov. 30, 2010), <https://www.nytimes.com/2010/12/01/world/americas/01mexico.html>.

³⁴ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

to recognized as a crime against humanity: 1) an intentional act, 2) recognized by the Rome Statute, 3) that constitutes an attack directed against any civilian population, and 4) it is widespread *or* systematic

A. *Intentional Act*

For a crime against humanity to be established, an element of intentionality must be shown. Under the definition of the Rome Statute, the intent requirement for liability is “knowledge of the attack.”³⁵ In the case of institutionalization in Mexico, Mexico has been repeatedly on notice regarding the grave violations committed in institutions and how its system of institutionalization is contrary to international law and causing great harm and suffering to thousands of people with disabilities.³⁶ Yet Mexico has taken no action to remedy the situation and chooses to act to further to further endanger people with disabilities by funding and expanding its system of improper detention.

In 2014, the CRPD Committee called on Mexico to “urgently define a strategy for the deinstitutionalization of persons with disabilities, including specific time frames and assessment measures.”³⁷ In institutions, the CRPD Committee found that women with disabilities were being sterilized and noted a particularly abusive case of girls and women in a private institution called *Casa Esperanza* documented by DRI. The Committee noted that at this institution “forced or coerced sterilization is recommended to, authorized or performed on girls, adolescents and women with disabilities.”³⁸ It also found “alarming the fact that human rights violations, such as physical restraint

³⁵ *Crime Against Humanity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/crime_against_humanity (last visited March 24, 2021); see THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 306 (1999).

³⁶ See *infra* notes 38, 40 and accompanying text.

³⁷ Comm. on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Mexico, ¶ 44, U.N. Doc. CRPD/C/MEX/CO/1 (Oct. 27, 2014) [hereinafter CRPD Mexico Concluding Observations].

³⁸ *Id.* at ¶ 37.

and placement in isolation, are committed against persons with disabilities interned in psychiatric hospitals and may even amount to acts of torture or cruel, inhuman or degrading treatment.”³⁹ Finally, the Committee expressed its concern that “the mechanisms designated for the prevention of such situations do not offer effective remedies.”⁴⁰

That same year, Juan Mendez, then UN Special Rapporteur on Torture, carried out an official visit to Mexico and, in relation to institutions “received credible information about poor conditions at other public and private psychiatric centers, including poor hygiene, insanitary conditions, substandard medical care, the use of prolonged restraints, and treatments or internments that do not meet international standards of informed consent.”⁴¹ The Special Rapporteur drew “the Government’s urgent attention to the deplorable conditions at the Social Assistance and Integration Centre that he visited in the Federal District.”⁴²

In 2015, in its report on the Human Rights Situation in Mexico, the Inter-American Commission on Human Rights (IACHR) highlighted:

the situation faced by persons with disabilities deprived of their liberty in long stay non-penal institutions. In this respect, pursuant to information available to the Commission, violations of the right to life and physical integrity, segregation for life, prolonged use of physical restraints and solitary confinement, isolation rooms and cages and overmedication, have been documented. The alarming situation of people with disabilities in long-stay institutions such as the

³⁹ *Id.* at ¶ 31.

⁴⁰ *Id.*

⁴¹ Juan Mendez (Special Rapporteur), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/28/68/Add.3, ¶ 75 (2014).

⁴² *Id.*

Centers for Assistance and Social Integration (“CAIS”) in Mexico City has been referred to by the UN Special Rapporteur on Torture, and by the Human Rights Commission of the Federal District (CDHDF).⁴³

In relation to the forced sterilization of women with disabilities in Mexico, the IACHR indicated that it received information that:

girls and women with disabilities are forcibly sterilized in several Mexican institutions. . . . The Commission notes . . . that the United Nations Committee on the Rights of Persons with Disabilities has determined that forced sterilization constitutes a violation of the right to personal integrity and it has expressed its concern regarding the practice of forced sterilization in the institution *Casa Esperanza* in Mexico City.⁴⁴

Given the CRPD’s strong findings and recommendations and those of the IACHR and the former UN Special Rapporteur on Torture, combined with DRI’s six reports over twenty years, all of which has been extensively covered by the media, the government of Mexico has long been on notice regarding the grave abuses that are being committed in institutions.

Despite this, Mexico has not taken any meaningful action to end this system; rather, it has continued to institutionalize people with disabilities and to allocate resources to the very institutions where their rights are being egregiously violated. It has also taken no action to remedy the abuses against people in institutions. In the *Casa Esperanza* case, the Mexican government transferred the survivors to other abusive institutions, after which at least two *Casa Esperanza*

⁴³ Inter-Am. Comm’n H.R., *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II, Doc. 44/15, ¶ 350 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf>

⁴⁴ *Id.* ¶ 351.

victims died and one continued to suffer sexual abuse.⁴⁵ By fostering a system of institutionalization with the knowledge that it is in violation of international standards and it causes great suffering to the people with disabilities subjected to it, Mexico is showing the level of intentionality required by the Rome Statute.

It is not enough for Mexico to argue that it is institutionalizing persons with disabilities for “therapeutic” or “protection” purposes. Former UN Special Rapporteur on Torture, Manfred Nowak, has made clear that the stated intent of a health care professional to provide treatment is no defense of a practice that meets the other elements of torture. “This is particularly relevant in the context of medical treatment of persons with disabilities,” said Nowak, “where serious violations and discrimination against persons with disabilities may be masked as good intentions on the part of health professionals.”⁴⁶

When there is a long-standing pattern of practices, and a failure to correct them after repeated international condemnation, it is reasonable to infer that authorities engaging in such practices intend the natural harmful consequences of their actions and are motivated by discriminatory animus, rather than by a legitimate therapeutic purpose.

B. Act Recognized by the Rome Statute

Among the “acts” enumerated and recognized by the Rome Statute are “inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁴⁷ As argued above in the analysis on the “grave and systematic standards,” institutionalization in itself causes great suffering. In Mexico, institutionalization leads to grave violations of other rights recognized under international law. Some of these grave violations may amount to

⁴⁵ See *supra* notes 1-2 and accompanying text.

⁴⁶ Manfred Nowak (Special Rapporteur on Torture), *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 49, U.N. Doc. A/63/175 (July 28, 2008).

⁴⁷ Rome Statute, *supra* note 34, at art. 7.

torture, including the use of prolonged restraints, isolation,⁴⁸ and forced sterilization on women with disabilities.⁴⁹ Institutionalization in itself can constitute torture. According to Juan Mendez, former UN Special Rapporteur on Torture, “inappropriate or unnecessary non-consensual institutionalization of individuals may amount to torture or ill-treatment as use of force beyond that which is strictly necessary.”⁵⁰

Mendez also found that institutionalization is particularly harmful for children, given the emotional neglect children are likely to experience in institutions.⁵¹ Institutionalization can also lead to a disability given the psychological damage children are exposed to. The former UN Rapporteur on the Right to Health recognized that institutionalization of children is in itself a threat to the right to health.⁵² Thus, it can be argued that institutionalization is an act that causes great suffering and serious injury to body and mental health, particularly in the case of children.

C. Attack Directed Against Any Civilian Population

The Rome Statute establishes that an “‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁵³

⁴⁸ Juan Mendez (Special Rapporteur), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 63, U.N. Doc. A/HRC/22/53 (2013).

⁴⁹ Convention on The Rights of Persons with Disabilities, *Concluding Observations on the Initial Report on Mexico*, ¶ 37, U.N. Doc. CRPD/C/MEX/CO/1 (2014).

⁵⁰ Mendez, *supra* note 41, at ¶ 70.

⁵¹ Juan Mendez (Special Rapporteur), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 56, U.N. Doc. A/HRC/28/68 (2015).

⁵² Paul Hunt (Special Rapporteur), *Economic, Social, and Cultural Rights: The Right of Everyone To The Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health*, ¶ 90-93, U.N. Doc. E/CN.4/2003/58 (2003).

⁵³ Rome Statute, *supra* note 34, at art. 7.

International war tribunals have determined an attack does not need to happen in the context of war or conflict; instead, an “attack” is an “unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. . . . An attack may also be non-violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner.”⁵⁴ Taken literally, no physical violence is necessary for an attack, “but merely multiple instances of any conduct on the list, pursuant to a state policy.”⁵⁵

As established in subsection (2), the institutionalization of persons with disabilities is an unlawful act of the kind enumerated by the Rome Statute and it happens against a civilian population, in this case persons with disabilities. With regards to the criterion of “multiplicity” and “pursuant to or in furtherance of a State or organizational policy” standards, they are addressed in the following section.

⁵⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 581 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 70 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 205 (Jan. 27, 2000); Prosecutor v. Semanza, Case No. ICTR-97-20, Judgement and Sentence, ¶ 327 (May 15, 2003).

⁵⁵ Gerald L. Neuman, *What Counts As A Crime Against Humanity?*, HARV. INT’L L. J. (2019), <https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/>.

D. Widespread or Systematic

The Rome Statute requires that the attack be either widespread *or* systematic, not both.⁵⁶ Though it is not required that the system of institutionalization in Mexico be both widespread and systematic, it satisfies that criteria. The concept of “widespread” has been defined by international tribunals as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁵⁷ Institutionalization of persons with disabilities happens at a wide scale, affecting tens of thousands of victims who are indefinitely detained by the State and with the knowledge of the State. In the case of children, the Head of Mexico Child’s Protection System estimated that up to 140,000 children could be in institutions.⁵⁸ Mexico, however, has no clear statistics on the number of children and adults in institutions, disaggregated by disability and gender, despite calls from the CRPD Committee for these statistics to be collected.⁵⁹

⁵⁶ Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 579 (Sep. 2, 1998) (“Customary international law requires only that the attack be either widespread or systematic.”); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 68 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 203 (Jan. 27, 2000); Prosecutor v. Semanza, Case No. ICTR-97-20, Judgement and Sentence, ¶ 328 (May 15, 2003); Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Trial Judgement, ¶ 439 (May 16, 2003); Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgement, ¶ 123 (May 21, 1999); Prosecutor v. Bagilishema, Case No. ICTR-95-1A, Judgement, ¶ 77 (June 7, 2001); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17, Judgement and Sentence, ¶ 804 (Feb. 21, 2003).

⁵⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 580 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 69 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 204 (Jan. 27, 2000); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17, Judgement and Sentence, ¶ 804 (Feb. 21, 2003).

⁵⁸ Disability Rights Int’l, *supra* note 29, at 3.

⁵⁹ CRPD Mexico Concluding Observations, *supra* note 37, ¶ 59-60.

The International Criminal Tribunals have defined the concept of “systematic” as:

thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.⁶⁰

As stated previously, the system of institutionalization is the result of the generalized failure of the Mexican State to stop investing in institutionalization and allocate the necessary resources to create alternatives to institutions in the form of community-based support and services. This pattern of investment in institutions instead of on community services shows a policy on the part of the State to maintain a system of institutionalization of persons with disabilities and as such, the “systematic” element is met.

CONCLUSION

The system of institutionalization of persons with disabilities satisfies the elements embedded definition of crimes against humanity. In the case of Mexico, the grave and systemic violations affect tens of thousands of persons with disabilities in Mexico through a widespread system of institutionalization that intentionally causes great suffering and mental and psychological harm to children and adults with disabilities.

While the Mexican State is responsible for its system of institutionalization of people with disabilities and as such, must be held accountable, this Article recognizes that the legal definition of crimes against humanity is found only in the Rome Statute and the Rome Statute defines crimes against humanity

⁶⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 580 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 69 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 204 (Jan. 27, 2000).

for purposes of the International Criminal Court's subject-matter jurisdiction. In other words, the definition of crimes against humanity is for the purpose of individual responsibility and there is no parallel definition of Crimes Against Humanity for the purpose of State responsibility under international law, as is the case with genocide and war crimes. This raises an issue of great importance that requires further analysis: the need for a specialized forum to allow for States to be held collectively responsible for such crimes on a large scale, including, for example, the Committee on Rights of Persons with Disabilities or other treaty bodies.

WHO DECIDES "THE BEST INTERESTS OF THE CHILD?": STRENGTHENING LEGAL PROTECTIONS FOR INTERSEX PERSONS AGAINST SEXUAL- AND GENDER-BASED VIOLENCE by Lucette Moran*

This summer, the Ann & Robert H. Lurie Children's Hospital of Chicago "bec[a]me the first hospital in the United States" to publicly apologize for its part in the "abusive" practice of "cosmetic genital surgeries on intersex infants."¹ The hospital announced it would end these nonconsensual and "irreversible"

* Lucette Moran is a J.D. Candidate at American University Washington College of Law (2021) and a M.A. in International Affairs Candidate at American University School of International Service (2021). She is a member of the Human Rights Brief, Administrative Law Review, and WCL International Refugee Assistance Project. During her final year in law school, she is also serving as a student attorney in the WCL Immigrant Justice Clinic.

¹ Kyle Knight, *First US Hospital Pledges to End Intersex Surgeries: Historic Apology a Step Toward Respect for Bodily Autonomy*, HUM. RTS. WATCH (July 30, 2020, 11:56 PM), <https://www.hrw.org/news/2020/07/30/first-us-hospital-pledges-end-intersex-surgeries>; Nora Neus, *Major Children's Hospital Apologizes for Performing Cosmetic Genital Surgeries on Intersex Infants*, CNN: CNNHEALTH (July 29, 2020, 8:29 PM), <https://www.cnn.com/2020/07/29/health/intersex-surgeries-chicago-hospital/index.html>; *Intersex Justice Project's #EndIntersexSurgery Campaign Receives Unprecedented Promise of Action from a U.S. Hospital*, INTERACT (July 29, 2020), <https://interactadvocates.org/lurie-intersex-surgery/>.

surgeries on intersex children after the Intersex Justice Project's tireless protests and advocacy.² Intersex persons are individuals who have internal or external "sex traits or reproductive anatomy," or both, which are not solely associated with either female or male sexes.³ For decades, medical professionals in the United States have subjected intersex children to surgeries intended to "normaliz[e]" their sex traits to fit the expectations set by binary gender norms, including their "gonads, genitals, or internal sex organs."⁴ Prejudice and misconceptions surrounding so-called "atypical sex characteristics" lead parents and doctors to take drastic measures that often serve no medical purpose; these decisions can result in future complications for people who do not identify with the sex and gender that was chosen for them.⁵

Furthermore, these invasive surgeries violate the human rights of intersex persons, especially intersex

² Knight, *supra* note 1; Neus, *supra* note 1; *Intersex Justice Project's #EndIntersexSurgery Campaign Receives Unprecedented Promise of Action from a U.S. Hospital*, *supra* note 1.

³ *Frequently Asked Questions about Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>; *FAQ: What Is Intersex?*, INTERACT (last updated May 18, 2020), <https://interactadvocates.org/faq/>.

⁴ *A Changing Paradigm: US Medical Provider Discomfort with Intersex Care Practices*, HUM. RTS. WATCH (Oct. 16, 2017), <https://www.hrw.org/report/2017/10/26/changing-paradigm/us-medical-provider-discomfort-intersex-care-practices> (internal quotation marks omitted) [hereinafter *A Changing Paradigm*]; Neus, *supra* note 2 (noting that this Chicago hospital is the "first . . . in the nation" to make such an apology, and that the hospital maintains an exception for "medically necessary" cases); Arlene M. Baratz, *When It Comes to Intersex Children, Doctors Do Not Always Know Best*, THOMSON REUTERS FOUND. NEWS (Oct. 17, 2018, 1:54 PM), <https://news.trust.org/item/20181017135437-3klqp>; Graeme Reid, *Doctors Should Stop Defining Sexual 'Normality'*, HUM. RTS. WATCH (Feb. 5, 2018, 11:55 AM), <https://www.hrw.org/news/2018/02/05/doctors-should-stop-defining-sexual-normality>; *FAQ: What Is Intersex?*, *supra* note 3.

⁵ *A Changing Paradigm*, *supra* note 4; Knight, *supra* note 1.

children,⁶ contradict contemporary medical ethics,⁷ and nearly always result in physical and psychological trauma.⁸ To comply with international human rights standards that protect bodily autonomy on the basis of sex and gender, the United States must expand its domestic law.⁹ However, international prohibitions on sexual- and gender-based violence¹⁰ are not yet fully inclusive due to outdated gender norms that conflate sex identity and gender identity to the detriment of intersex individuals, and thus must also undergo critical changes by States Parties to the relevant international agreements to recognize the rights of intersex persons.

⁶ *Promoting Intersex Human Rights Internationally*, INTERACT, <https://interactadvocates.org/promoting-intersex-rights-internationally/> (last visited Sept. 19, 2020); *First, Do No Harm: Ensuring The Rights of Children Born Intersex*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/> (last visited Sept. 19, 2020).

⁷ See generally Rachel Hajar, *The Physician's Oath: Historical Perspectives*, 18 HEART VIEWS 154-159 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5755201/> (providing an overview on the ethical concepts of informed consent and the Hippocratic Oath in the medical field).

⁸ *A Changing Paradigm*, *supra* note 4; Neus, *supra* note 1; Baratz, *supra* note 1; Reid, *supra* note 4.

⁹ Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Juan E. Méndez (Special Rapporteur on Torture), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez, ¶ 77, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf; *First UN Resolution on the Rights of Intersex Persons: UN Calls to End Discrimination of Women and Girls in Sports, Including Women Born with Variations of Sex Characteristics*, INTL. LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N (Mar. 22, 2019, 5:58 AM) <https://ilga.org/first-un-resolution-rights-intersex-persons-women-sport>; *A Step Forward for Intersex Visibility and Human Rights*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Sept. 25, 2015), <https://www.ohchr.org/EN/NewsEvents/Pages/Astepforwardforintersexvisibility.aspx>; see also *Intersex Legislation & Regulation*, INTERACT, <https://interactadvocates.org/intersex-legislation-regulation/> (last visited Sept. 27, 2020).

¹⁰ In this article, the author will use the term "sexual- and gender-based violence" to address violence perpetrated on account of one's sex identity or gender identity or both, whereas other sources may use "gender-based violence" to refer to either type of violence or just violence based on gender identity.

I. INTERNATIONAL STANDARDS ON SEXUAL- AND GENDER-BASED VIOLENCE ARE UNNECESSARILY EXCLUSIVE

International human rights law should be expanded to improve protections for intersex persons. The Convention against Torture (CAT),¹¹ the Convention on the Rights of the Child (CRC),¹² and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹³ offer a foundation upon which states can build greater protections for intersex individuals because of these instruments' more gender-inclusive language than the leading instruments on sexual- and gender-based violence.¹⁴ It is important to note that although intersex is not synonymous with transgender or nonbinary gender identities, intersex persons may identify as any gender (e.g., transgender woman, transgender man, nonbinary person, woman, or man).¹⁵ And since the language used in these legal instruments often perpetuates the conflation of sex and gender identities, improving gender inclusivity in the law can push back against binary presumptions of gender and sex identities and subsequently increase intersex persons' access to legal protections.¹⁶ For example, the CAT refers to victims of torture as a "person," which is gender-inclusive term (despite the treaty's continued use of the outmoded and so-called "gender neutral" "he," which is misleading because its use prioritizes

¹¹ Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

¹² Convention on the Rights of the Child arts. 1-3, *opened for signature* Nov. 20, 1989, 1477 U.N.T.S. 3 [hereinafter CRC].

¹³ International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹⁴ *Promoting Intersex Human Rights Internationally*, *supra* note 7; *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement*, WORLD HEALTH ORG. (2014), https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf;jsessionid=7760F8ED9E1F2370F9C44E51133BC0D4?sequence=1.

¹⁵ *Frequently Asked Questions about Transgender People*, *supra* note 4; *FAQ: What Is Intersex?*, *supra* note 3.

¹⁶ *Frequently Asked Questions about Transgender People*, *supra* note 4; *FAQ: What Is Intersex?*, *supra* note 3.

men).¹⁷ Moreover, the CRC employs gender-inclusive language by defining “a child” as “every human being below the age of eighteen years.”¹⁸ Further, the ICESCR calls on states to ensure “the healthy development of the child” and to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁹

While not flawless, the aforementioned international treaties demonstrate that gender-inclusive language is already in common usage and can be reasonably extended to other international human rights treaties. However, intersex individuals are often excluded from the legal protections that directly address sexual- and gender-based discrimination and violence because they are shoehorned into outdated international human rights standards.²⁰ For example, the leading international human rights treaty on sexual- and gender-based violence, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), refers to women as “the female half of humanity” and uses the phrase “both sexes.”²¹ This language excludes protections for intersex persons due to its reliance on binary gender norms that presume certain sex traits presume a certain gender identity, and vice versa. Further, the Declaration on the Elimination of Violence against Women (DEVW) references “either of the sexes” and “men and women,” and it applies “gender-based violence” narrowly to women and “female children.”²²

¹⁷ CAT art. 1, *supra* note 11; see also *A Brief History of Gender Neutral Pronouns*, BBC NEWS (Sept. 22, 2019), <https://www.bbc.com/news/newsbeat-49754930>.

¹⁸ CRC arts. 1-3, *supra* note 12.

¹⁹ ICESCR art. 12, *supra* note 13.

²⁰ See, e.g., CEDAW, *supra* note 8; G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women, (Dec. 20, 1993) [hereinafter DEVW]; Juan E. Méndez, *supra* note 9, ¶ 77; see also Rikki Holtmaat & Paul Post, *Enhancing LGBT[Q]I[A+] Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 NORDIC J. HUM. RTS. 4 (2015).

²¹ CEDAW, *supra* note 8.

²² DEVW, *supra* note 20.

II. U.S. LAW IS INSUFFICIENT TO PROTECT INTERSEX PERSONS

Despite the inherent flaws in the international human rights law regime on sexual- and gender-based violence, these international standards still provide greater access to legal rights for intersex individuals than current U.S. law. Domestic law in the United States will require broad changes to protect the rights of intersex persons. U.S. law provides protections against sex or gender discrimination in the workplace, school, housing, or other public spaces.²³ And the Violence Against Women Reauthorization Act of 2013 offers expanded protections based on sex and gender identity, although focuses specifically

²³ *Know Your Rights: Sex Discrimination*, ACLU, <https://www.aclu.org/know-your-rights/sex-discrimination/#im-experiencing-sex-based-discrimination-in-housing>, (last visited Oct. 14, 2020); *Know Your Rights: Public Accommodations*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/public-accommodations> (last visited Mar. 28, 2021); *State Public Accommodation Laws*, NAT'L CONF. STATE LEGIS. (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

on domestic violence.²⁴ Moreover, the United States has signed but not ratified CEDAW.²⁵ Thus, U.S. law lacks comprehensive protections for the type of sex-

²⁴ Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13701, Sec. 3(a)(18) (defining “underserved populations” to include people who “face barriers in accessing . . . victim services” based on “gender identity”) [hereinafter Reauthorization Act of 2013]; Reauthorization Act of 2013, 42 U.S.C. § 13701, Sec. 3(b)(4) (amending Violence Against Women Act of 1994, 42 U.S.C. 13925(b) ¶ 11 by including a nondiscrimination clause that enumerates “sex” and “gender identity”) (referencing 18 U.S.C. § 249(c)(4) (defining gender identity as “actual or perceived gender-related characteristics”)); *H.R. 1581 - Violence Against Women Reauthorization Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1585/text> (last visited Feb. 28, 2021) (showing that the 2019 reauthorization passed in the House of Representatives but has not proceeded to the Senate). See also *Know Your Rights: Survivors of Violence*, NAT’L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/know-your-rights/survivors-violence> (last visited Oct. 14, 2020); *Frequently Asked Questions About VAWA and Gender*, NAT’L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN (2006), http://www.ncdsv.org/images/FAQ_VAWA%20and%20Gender.pdf; Kate Miller, *LGBT People Will Receive First-Ever Domestic Violence Protections Under VAWA*, THINKPROGRESS (Feb. 28, 2013), <https://archive.thinkprogress.org/lgbt-people-will-receive-first-ever-domestic-violence-protections-under-va-wa-f3ebfe1d946a/> (please note that the source uses the term “LGBT” as opposed to the more inclusive LGBTQIA+); Emily Cochrane, *Transgender and Gun Rights Are Sticking Points for Violence Against Women Act*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/politics/violence-against-women-act-transgender-guns.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>; Ashley Killough, *House Passes Reauthorization of Violence Against Women Act*, CNN: POLITICS (Apr. 4, 2019, 2:59 PM), <https://www.cnn.com/2019/04/04/politics/house-passes-violence-against-women-act-reauthorization/index.html>.

²⁵ *Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (status as at Mar. 1, 2021, 3:15 AM) (demonstrating that the United States has signed but not ratified CEDAW); *Status of Treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (status as at Mar. 1, 2021, 3:15 AM) (demonstrating that the United States has not signed the Optional Protocol). International law defines “ratification” as a state’s manifestation of its “consent to be bound by a treaty” after signing the treaty. Vienna Convention on the Law of Treaties arts. 2(1)(b), 11, 14(1), 16, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

ual- and gender-based violence inflicted by nonconsensual, sex-altering surgeries on children.

Unfortunately, the U.S. District Court for the Northern District of Texas ultimately quashed a recent attempt by the U.S. Department of Health & Human Services (HHS) to expand legal protections in medical and health care to all persons regardless of gender or sex.²⁶ Under a rule promulgated by HHS in 2016, it would have been possible for intersex individuals to file a civil rights complaint under Section 1557 of the Affordable Care Act and the Civil Rights Act of 1964.²⁷ In the 2016 rule, HHS expanded the definition of sex discrimination to include “one’s internal sense of gender, which may be male, female, neither, or a combination of male and female.”²⁸ However, the rule was “preliminarily enjoined, on a nationwide basis” that same year, and in 2019 after litigation, the court found that the HHS 2016 rule “exceeded the Department’s statutory authority.”²⁹ As a result, HHS removed these inclusive and so-called “overbroad

²⁶ *Section 1557 of the Patient Protection & Affordable Care Act*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited Oct. 14, 2020); *Civil Rights FAQs*, U.S. DEP’T OF HEALTH & HUM. SERVS.: OFF. FOR CIV. RTS., <https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html> (last visited Oct. 14, 2020); *Discrimination on the Basis of Sex*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html> (last visited Oct. 14, 2020); InterACT & Lambda Legal, *Providing Ethical & Compassionate Health Care to Intersex Patients: Intersex-Affirming Hospital Policies 5* (2018), <https://interactadvocates.org/wp-content/uploads/2018/09/interACT-Lambda-Legal-intersex-hospital-policies.pdf>.

²⁷ *Section 1557*, *supra* note 26; *Civil Rights FAQs*, *supra* note 26; *Discrimination on the Basis of Sex*, *supra* note 26; InterACT & Lambda Legal, *supra* note 26.

²⁸ *Section 1557*, *supra* note 26; *Fact Sheet: HHS Finalizes ACA Section 1557 Rule*, DEP’T OF HEALTH & HUM. SERVS.: OFF. FOR CIV. RTS. 1-2 (Jun. 12, 2020), <https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf> (internal quotation marks omitted). See also Part I n. 15 and accompanying text (explaining how pursuing gender-inclusivity can increase access to legal protections for intersex persons); *Frequently Asked Questions about Transgender People*, *supra* note 3.

²⁹ Nondiscrimination in Health & Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (Jun. 19, 2020) (codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92, 147, 155, 156); *Fact Sheet*, *supra* note 28, at 3.

provisions” related to gender, and it returned to what the 2020 final rule calls a “plain meaning” interpretation of Congress’ text.³⁰

III. RECOMMENDATIONS

International and U.S. law continue to offer deficient legal protections for intersex persons. The time has come to move beyond statements of disapproval³¹ and establish renewed human rights norms protections for those suffering violence on account of their sex or gender identity by amending CEDAW and DEVW.³² Amending international standards on sexual- and gender-based violence is a more pragmatic solution than campaigning for United Nations members to draft a new treaty because the amendment process is less complicated and will require fewer resources.³³ As discussed at a symposium at the University of Minnesota, CEDAW has a strong global reputation, and it would be counterproductive not to build upon that reputation.³⁴ Though these scholars were referring to the need to improve legal protections against violence for women,³⁵ given societal advancements since the enactment of CEDAW, these same strategies could improve protections against sexual- and gender-based violence for those who suffer such violence because their sex or gender identity do not conform to binary gender norms. Beyond that, building upon the preexisting framework would also serve to emphasize that the original exclusivity based on binary sex and gender norms was unacceptable. Ideally, updating international human rights standards on sexual- and gender-based violence will

³⁰ Nondiscrimination in Health & Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160; *Fact Sheet*, *supra* note 28.

³¹ Juan E. Méndez, *supra* note 9, ¶¶ 38, 76, 77, 88.

³² Cf. Lisa Baldez, *Why Not Amend CEDAW?*, U. OF MINN.: THE GENDER POL’Y REP. (Nov. 28, 2018), <https://genderpolicyreport.umn.edu/why-not-amend-cedaw/>.

³³ See Baldez, *supra* note 33; Marsha A. Freeman, *Addressing Gender-Based Violence: CEDAW and Political Will*, U. OF MINN.: THE GENDER POL’Y REP. (Nov. 28, 2018), <https://genderpolicyreport.umn.edu/addressing-gender-based-violence-cedaw-and-political-will/>.

³⁴ See Baldez, *supra* note 33; Freeman, *supra* note 34.

³⁵ See Baldez, *supra* note 33; Freeman, *supra* note 34.

also encourage broader recognition of nonbinary sexes or genders.

A good start is to update the language and definitions in the international treaties (*e.g.*, using gender-inclusive pronouns, like they/their/them in the English language,³⁶ or changing phrases like “the equal rights of men and women” to “all persons”) and to explicitly include intersex persons in the list of protected populations.³⁷ Additionally, the CEDAW Committee can write a new general recommendation either to encourage the need for an amendment, or to ensure the intention of any amendments is clear.³⁸ For example, the Committee should issue an updated version of its General Recommendation No. 19, which currently defines gender-based violence as a phenomenon experienced by “women” and as “discrimination . . . on a basis of equality with men” and generally in relation to men.³⁹ Applying gender-inclusive language in international law will recognize that freedom from sexual- and gender-based violence and discrimination is a right derived from each individual’s personhood (regardless of sex or gender identity)

³⁶ The author recognizes that further research is necessary to propose specific textual suggestions for these international legal instruments in languages other than English. See generally Miriam Berger, *A Guide to How Gender-Neutral Language Is Developing Around the World*, WASH. POST (Dec. 15, 2019, 6:00 AM), <https://www.washingtonpost.com/world/2019/12/15/guide-how-gender-neutral-language-is-developing-around-world/> (providing a brief introduction to “gender-neutral language” in languages other than English, as well as an explanation of the use of “they” as a “singular pronoun” in English). The Berger article addresses four out of the United Nations’ “six official languages.” *Official Languages*, U.N. (last visited Oct. 29, 2020), <https://www.un.org/en/sections/about-un/official-languages/index.html> (noting that “Arabic, Chinese, English, French, Russian and Spanish” are the United Nations’ official languages).

³⁷ CEDAW, *supra* note 8.

³⁸ See *Committee on the Elimination of Discrimination against Women: General Recommendations*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (last visited Oct. 29, 2020); Comm. on the Elimination of Discrimination against Women, *Gen. Recommendation No. 19: Violence against Women*, U.N. Doc. CEDAW/C/GR/19 (1992) [hereinafter *General Recommendation No. 19*]; CEDAW, *supra* note 8; Baldez, *supra* note 33.

³⁹ *General Recommendation No. 19*, *supra* note 37, ¶¶ 1, 11, 23, 24(t).

and shaped by hegemonic and toxic masculinity, rather than from a binary comparison of women's rights relative to men's rights. Only then can the international legal regime on sexual- and gender-based violence advance to protect intersex persons.

Furthermore, while these improvements to international human rights law are significant in the long-term, the immediate impact of such changes will be marginal without domestic reforms and implementation of these standards. The United States should expand its protections against sexual- and gender-based violence to explicitly prohibit discriminatory and violative medical procedures such as unnecessary sex-altering surgeries on children.⁴⁰ The United States should also prioritize reviving the HHS 2016 rule; ratifying CEDAW, CRC, and ICESCR and adopting these treaties into U.S. law; and heeding to its pre-existing legal obligations under the CAT.⁴¹ In the absence of nationwide efforts, local or state governments can take the lead — and many already have done so in regard to CEDAW.⁴² Finally, while these legal developments are necessary to improve

⁴⁰ *A Changing Paradigm*, *supra* note 4.

⁴¹ See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. 92); *Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 25; *Status of Treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 25; *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (status as at Mar. 1, 2021, 3:15 AM); *Status of Treaties: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en (status as at Mar. 1, 2021, 3:15 AM); *Status of Treaties: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (status as at Feb. 28, 2021, 11:15 AM); CAT art. 1, *supra* note 11; CRC arts. 1-3, *supra* note 12; ICESCR art. 12, *supra* note 13.

⁴² Heidi Nichols Haddad, *The U.S. Hasn't Signed the World's Foremost Women's Rights Treaty. Activists Have Gotten Local Versions Passed Instead.*, THE WASH. POST (Mar. 8, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/03/08/us-hasnt-signed-worlds-foremost-womens-rights-treaty-activists-have-gotten-local-versions-passed-instead/>.

and enforce protections for intersex persons subjected to traumatic and discriminatory medical procedures, hospitals and medical associations should not wait to comply. They can help end the violation of intersex bodies by prohibiting these nonconsensual surgeries on minors and updating medical practices and vocabulary related to intersex persons.⁴³ Doctors have a professional and moral obligation to take these actions.⁴⁴ Medical ethics have undergone many changes over the millennia, but core elements of these “ethical guidelines” prevail today: to “do no harm,” to treat patients “with compassion and respect for human dignity and rights,” and to ensure the patient has the capacity “to give informed consent.”⁴⁵ Advocacy already underway by organizations like the Intersex Justice Project,⁴⁶ and the steps taken by hospitals like the Chicago children's hospital to revise practices, has opened the door for lawmakers to finally take these critical steps. With reforms to international and U.S. law, as well as the medical community's willingness to respond to the demands of intersex people's rights advocates, we will move toward a more inclusive and just future for intersex persons.

⁴³ See generally *US: Doctors Need Intersex Care Standards*, HUM. RTS. WATCH (Oct. 26, 2017), <https://www.hrw.org/news/2017/10/26/us-doctors-need-intersex-care-standards>; Press Release, *Unnecessary Surgery on Intersex Children Must Stop*, PHYSICIANS FOR HUM. RTS. (Oct. 20, 2017), <https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/>; Martine Cools et al., *Caring for Individuals with a Difference of Sex Development (DSD): A Consensus Statement*, 14 NATURE REV. ENDOCRINOLOGY 7 (2018); Morgan Carpenter, *Intersex Variations, Human Rights, and the International Classification of Diseases*, 20 HEALTH & HUM. RTS. 2 (2018), <https://www.jstor.org/stable/26542072>.

⁴⁴ See generally Hajar, *supra* note 7.

⁴⁵ *Id.*

⁴⁶ See *Intersex Support and Advocacy Groups*, INTERACT (last updated Jul. 20, 2020), <https://interactadvocates.org/resources/intersex-organizations/> (listing intersex rights organizations in the United States and around the world).

TANZANIA BLOCKS DIRECT PETITIONS TO THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

by Ben Phillips*

On November 21, 2019, Tanzania withdrew its recognition of the right of individuals and Civil Society Organizations (CSOs) to bring claims before the African Court on Human and Peoples' Rights ("the Court").¹ Tanzania's withdrawal came just days before the Court ordered Tanzania to take steps to expunge a law requiring mandatory death sentences for capital crimes and at a time where most of the cases pending before the Court were against Tanzania.² This withdrawal is part of a larger crackdown by the Tanzanian government on opposition to the ruling Chama Cha Mapinduzi (CCM) party and President John Magufuli.³ The Court is an important mecha-

* Ben Phillips is an alumni of the Washington College of Law and former Human Rights Brief staff member. He works as an attorney advisor for a federal labor union, the American Foreign Service Association.

¹ *Tanzania: Withdrawal of Individual Rights to African Court Will Deepen Repression*, AMNESTY INT'L (Dec. 2, 2019), <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>.

² Alex Malanga, *Row Convicts Win Big at Africa Court*, THE CITIZEN (Nov. 30, 2019) <https://www.thecitizen.co.tz/news/Row-convicts-win-big-at-Africa-court/1840340-5368026-231fl-hz/index.html>; African Court on Human and Peoples' Rights, *Contentious Matters*, <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#pending-cases> (last visited Jul. 12, 2020).

³ Peter Beaumont, *Tanzania President Magufuli Condemned for Authoritarian Regime*, THE GUARDIAN (Oct. 29, 2019), <https://www.theguardian.com/global-development/2019/oct/29/tanzania-president-magufuli-condemned-for-authoritarian-stance>.

nism for accountability and part of a larger endeavor to create a strong regional human rights apparatus in Africa, and Tanzania's decision to withdraw the right of individuals and CSOs to directly file claims only serves to limit access to the Court.

The Court is a regional human rights body meant to enforce and protect the rights laid out in the African Charter on Human and Peoples' Rights (the Charter).⁴ It was officially formed in 2004 and has jurisdiction over all claims, whether contentious or advisory.⁵ It also has jurisdiction over cases referred to it by the African Commission of Human and Peoples' Rights (the Commission) and by individuals and recognized CSOs.⁶ Tanzania's withdrawal and its aftereffects has revealed the frailty of the current system and represents a significant challenge to the Court's authority and legitimacy.

Tanzania's withdrawal of the right of individuals and CSOs to bring claims before the Court is part of a larger trend of resisting the Court's jurisdiction and ability to enforce human rights protections. The Court does not have jurisdiction over claims from all African states, and in fact, only thirty of the fifty-four African states have signed onto the Protocol establishing the Court.⁷ At the time of withdrawal, Tanzania was one of nine nations that recognized the Court's ability to directly receive cases from individuals and CSOs.⁸ Tanzania was only the second country, after Rwanda in 2016, to withdraw the rights of individuals and CSOs to directly access the Court.⁹ Complicating matters further, the Court itself is based in Tanzania. Tanzania's move to withdraw recognition of the Court's jurisdiction, while being

⁴ Organization of African Unity, *African Charter on Human and Peoples' Rights* (Banjul Charter), June 27, 1981, 1520 U.N.T.S. 217.

⁵ See African Court on Human and Peoples' Rights, *Welcome to the African Court*, <https://en.african-court.org/index.php/12-homepage1/1208-welcome-to-the-african-court1> (last visited Jul. 12, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *Tanzania*, *supra* note 1.

the host nation of the Court itself, undermines its perceived authority and legitimacy.¹⁰ Consequently, shortly after Tanzania's withdrawal, Benin and Côte d'Ivoire both followed suit and withdrew the right of direct petition following decisions against them by the Court.¹¹ Tanzania's withdrawal, followed by Benin and Côte d'Ivoire, has created an existential crisis for the Court, as states have started restricting access to the Court in reaction to adverse decisions and increased accountability.

The withdrawal of the right to direct petition is also problematic in terms of general accessibility to the Court. The vast majority of cases heard by the Court come from direct petition, while referral by the Commission is very rare.¹² Referral requires that a case be brought to the Commission's attention through activist and CSO reports, and after review, the Commission must then decide to submit the case to the Court. Direct petition allows an individual or CSO to bypass the Commission's review and petition the Court themselves, and case numbers show that direct petition cases are more likely to be heard by the Court.¹³ Time and access to an impartial Court are important considerations when discussing human rights abuses, especially where there are severe abuses, and faster access to a court can prevent serious harm to endangered lives. Tanzania's decision to withdraw the right of direct petition slows the process and hinders access to the Court for its citizens and CSOs.

While Tanzania's withdrawal of direct petition has serious repercussions on the power of the Court, it also has grave implications on Tanzania's current political situation. Tanzania's decision to withdraw the right of individual complaints to the Court was preceded by

¹⁰ See *Tanzania*, *supra* note 1.

¹¹ *Benin and Côte D'ivoire to Withdraw Individual Access to African Court*, INT'L JUSTICE RES. CTR. (May 6, 2020), <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>.

¹² African Court on Human and Peoples' Rights, Contentious Matters, <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#statistical-summary> (last visited Nov. 1, 2020).

¹³ See Beaumont, *supra* note 3.

concerning actions committed by the ruling party of the Tanzanian government.¹⁴ President Magufuli and CCM have been condemned by human rights groups as an authoritarian regime for suppressing opposition and stifling freedom of the press in Tanzania.¹⁵ This has taken the form of banning and suspending news sources and prosecuting journalists and activists for criticizing the government or promoting opposition politics.¹⁶ The suppression of the press and opposition parties will be of the utmost concern moving forward, as victims will no longer be able to directly petition to the Court once they have exhausted domestic court processes.

The actions of Tanzania's ruling party to suppress opposition serves as an important context when considering the decision to withdraw from the Court and the consequences the withdrawal will have on holding the ruling party accountable. The main opposition party, Chadema, refused to take part in the 2019 election after the ruling party implemented tactics of intimidation and suppression of political opponents, including police disruption of opposition meetings and protests, using violence against party opponents, and alleged disappearances and extrajudicial killings.¹⁷ The suppression of opposition activities also included denying opposition party members the ability to register in local elections by closing registration offices and tampering with registration applications.¹⁸ According to media sources, the ruling regime has also engaged in severe intimidation tactics and had the police engage in beatings,

¹⁴ See Beaumont, *supra* note 3.

¹⁵ Mia Swart, *Rights Groups Accuse Tanzania's Magufuli Over Rising Repression*, AL JAZEERA (Oct. 28, 2019), <https://www.aljazeera.com/news/2019/10/rights-groups-accuse-tanzania-magufuli-rising-repression-191027101530996.html>.

¹⁶ Oryem Nyeko et al, "As Long as I am Quiet, I am Safe": Threats to Independent Media and Civil Society in Tanzania, HUM. RTS. WATCH (Oct. 28, 2019), <https://www.hrw.org/report/2019/10/28/long-i-am-quiet-i-am-safe/threats-independent-media-and-civil-society-tanzania>.

¹⁷ *Tanzania's Opposition to Boycott Elections Over 'Cheating'*, AL JAZEERA (Nov. 8, 2019), <https://www.aljazeera.com/news/2019/11/tanzania-opposition-boycott-elections-cheating-191108102925136.html>.

¹⁸ *Id.*

kidnappings, and armed attacks on opposition activists and political opponents.¹⁹ These tactics effectively suppressed the ruling party's opposition, and it resulted in a landslide victory in the November 2019 election where President Magufuli and CCM won ninety-nine percent of the seats in parliament.²⁰ Since Tanzania withdrew recognition of the right of direct petition, there have been reports that these tactics of suppressing the media and political opponents were ramped up and repeated in the most recent election in October 2020.²¹ Tanzania's withdrawal of the right to direct petition came at a time when there were many allegations of human rights abuses, and the withdrawal serves to hinder accountability for these actions while simultaneously eroding the legitimacy and strength of the Court as a human rights mechanism.

In fact, many activists and rights groups have decried the worsening political conditions domestically and argued that Tanzania's withdrawal would likely lead to less accountability for the actions of the current regime and further embolden President Magufuli and the CCM ruling party.²² To this point, reports on the last election in October 2020 have already shown that President Magufuli and CCM have continued to attack the press and political opponents.²³ Given this backdrop of repression of journalism and political activism, the Tanzanian government has already shown a predilection for avoiding criticism and accountability.²⁴ Additionally, at the time of the withdrawal, the majority of the cases before the Court

¹⁹ *US, UK Call Tanzania Elections 'Irregular, Lacking Credibility'*, AL JAZEERA (Nov. 27, 2019), <https://www.aljazeera.com/news/2019/11/uk-call-tanzania-elections-irregular-lacking-credibility-191127160231437.html>.

²⁰ *See id.*

²¹ *See Tanzania: Freedoms Threatened Ahead of Elections: Authorities Crack Down on Opposition Parties, Rights Groups, Media*, HUMAN RIGHTS WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/tanzania-freedoms-threatened-ahead-elections>.

²² *See Tanzania*, *supra* note 1.

²³ *See U.S. Cites 'Credible Allegations' of Fraud in Tanzania Election*, REUTERS (Oct. 29, 2020), <https://www.reuters.com/article/uk-tanzania-election-idUKKBN27E39Q>.

²⁴ *See Swart*, *supra* note 15.

against Tanzania involved violations of the right to a fair trial, which illustrates a systemic failure of their domestic courts to address human rights issues.²⁵ The withdrawal of the right of individuals and CSOs to bring claims to the Court effectively cripples the right of activists and CSOs to address human rights abuses as they can no longer petition to the Court after exhausting their domestic court options.

The African Court of Human and Peoples Rights was formed less than twenty years ago, and the aspiration was that its influence would be growing as it matures as a human rights mechanism. However, Tanzania's withdrawal of the right of individuals and CSOs to bring direct claims to the Court is a dangerous and concerning development for both the Court and Tanzania. As demonstrated by the subsequent withdrawal by both Benin and Côte d'Ivoire, the Court is facing a serious challenge to its jurisdiction and existence as regional human rights court. Regional human rights courts are important mechanisms for enforcing human rights protections as they have a legitimacy by being both international and local, which international human rights mechanisms often lack. The Court has the potential to be a strong and legitimizing regional human rights mechanism, but it must survive this unprecedented challenge to its authority and legitimacy. For that to happen, the African Commission on Human and People's Rights must endeavor to strengthen the Court and improve access to the Court by increasing the number of cases it refers. Additionally, the Commission and other international human rights institutions must intensely monitor the Tanzanian government and prevent further human rights abuses. The survival of the African Court of Human and Peoples Rights will rely on the strength of the African regional human rights system, and its ability to handle this current crisis.

²⁵ *See Tanzania*, *supra* note 1.

THE UNEXPECTED WAY COAL MINING IN ZIMBABWE'S HWANGE NATIONAL PARK IS A HUMAN RIGHTS VIOLATION

by Lily Baron*

President of Zimbabwe Emmerson Mnangagwa caused a public outcry amongst both locals and the international environmental activist community when reports emerged in September that he granted coal mining concessions to two Chinese companies for large swaths of land in the country's largest historic game reserve, Hwange National Park.¹ These Chinese-backed coal mining activities in Hwange National Park violate Article 21(5) of the African Charter on Human and Peoples' Rights² because they will threaten the park's ecosystem and ultimately its ability to attract tourists. As tourism is a prominent benefit derived from Zimbabwe's pristine natural resources, the damage posed to the tourist industry by mining in a National Park will detrimentally

* Lily Baron is a second-year law student at American University's Washington College of Law. Lily graduated from the George Washington University in 2018 with a bachelor's degree in International Affairs with Concentrations in International Development and Africa and Minors in History and Sociocultural Anthropology. She hopes to pursue a meaningful legal career with a focus on the intersection of the environment, economic development, and human rights.

¹ David Gilbert, *How China's Addiction to Coal Is Ravaging Zimbabwe's Environment*, VICE WORLD NEWS (Sep. 25, 2020, 9:50 AM), <https://www.vice.com/en/article/z3edby/how-chinas-addiction-to-coal-is-ravaging-zimbabwes-environment>; *Hwange National Park Tours*, VIATOR, <https://www.viator.com/Victoria-Falls-attractions/Hwange-National-Park/d5309-a11749> (last visited Oct. 24, 2020).

² Organization of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter) art. 21, June 27, 1981, 1520 U.N.T.S. 217 (hereinafter Banjul Charter).

impact the ability of Zimbabweans to fully benefit from the advantages derived from their natural resources.

China is the largest foreign investor and financier in Zimbabwe, and several Chinese firms are involved in coal mining operations in the country.³ In May of 2020, China announced its intention to fund a \$4.2 billion USD coal-power complex, which is anticipated to exceed Zimbabwe's energy needs.⁴ However, the concurrent mining plan set to take place in Hwange National Park has enraged residents, tourists, and wildlife activists alike, all of whom have vowed to block any mining in Zimbabwe's national parks in order to protect wildlife.⁵

Zimbabwe's economy relies upon three key sectors: agriculture, mining, and tourism, the last of which the government concedes is the only sector that can alleviate foreign currency shortages and high unemployment rates in the formal job market.⁶ In 2016, Zimbabwe's tourism sector contributed an estimated 6.1 percent to the country's GDP and employed over 90,000 people.⁷ In 2020, travel and tourism generated

³ Jevans Nyabiage, *China Lectures Zimbabwe on Environmental Duty and Transparency After Permits to Mine Park Cancelled*, SOUTH CHINA MORNING POST (Sep. 20, 2020, 8:00 PM), <https://www.scmp.com/news/china/diplomacy/article/3102208/china-lectures-zimbabwe-environmental-duty-and-transparency>.

⁴ Gilbert, *supra* note 1; see Antony Sguazzin et al., *China is Virtually Alone in Backing Africa's Coal Projects*, BLOOMBERG QUINT (May 7, 2020, 2:30 AM), <https://www.bloombergquint.com/global-economics/belt-and-road-china-stands-alone-in-backing-africa-coal-projects>.

⁵ *Chinese Invade Hwange National Park to Mine for Coal*, NEW ZIMBABWE (Sep. 3, 2020), <https://www.newzimbabwe.com/chinese-invade-hwange-national-park-to-mine-for-coal/>.

⁶ Zhou Zibanai, *The Tourism Sector: A Bright Line in Zimbabwe's Depressed Economic Environment*, 7 AFR. J. OF HOSP., TOURISM AND LEISURE 1, 1-2 (2018).

⁷ *Tourism Sector in Zimbabwe*, ZIMTRADE (Sep. 13, 2016), <https://www.tradezimbabwe.com/newsrelease/tourism-sector-zimbabwe/>.

an estimated \$1.3 billion USD in revenue.⁸ Tourism not only creates jobs in hotels, lodges, and restaurants, but also creates employment in other sectors like construction, food supplies, and repair services.⁹ Tourism also integrates a large number of local entrepreneurs, such as craftsmen and local guides, into the formal sector.¹⁰

Zimbabwe has undertaken international obligations which recognize the importance of protecting natural resources. Zimbabwe ratified the African Charter on Human and Peoples' Rights in 1986, thereby agreeing to recognize the rights, duties, and freedoms set forth within the Charter,¹¹ including various civil, political, economic, social, and cultural rights.¹² One of the Charter's distinctive features is that it recognizes the general rights of peoples, including the right of all peoples to self-determination, and the right of peoples to freely dispose of their wealth and natural resources.¹³ The latter of these rights is codified in Article 21, which elaborates that "State(s) [P]arties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their people to fully benefit from the advantages derived from their natural resources."¹⁴

⁸ *Zimbabwe – Contribution of Travel and Tourism to GDP in Current Prices*, KNOEMA, <https://knoema.com/atlas/Zimbabwe/topics/Tourism/Travel-and-Tourism-Total-Contribution-to-GDP/Contribution-of-travel-and-tourism-to-GDP> (last visited Feb. 27, 2021).

⁹ Llewellyn Leonard, *Mining and/or Tourism Development for Job Creation and Sustainability in Dullstroom, Mpulanga*, 31 *LOC. ECON.* 249, 258 (2015) (citing Gareth Butler, *An Assessment of the Social and Economic Impacts of Tourism Development in Dullstroom, Mpumalanga*, UNIV. OF JOHANNESBURG (2013), <https://www.fosaf.org.za/documents/2013-Woodford-et-al-2013-Immediate-impacts-of-rotenone.pdf>).

¹⁰ *Id.* at 254.

¹¹ Banjul Charter, *supra* note 2 art. 1.

¹² *A Guide to the African Charter on Human and Peoples' Rights*, AMNESTY INT'L (2006), <https://www.amnesty.org/download/Documents/76000/ior630052006en.pdf>.

¹³ *Id.*

¹⁴ Banjul Charter, *supra* note 2 art. 21.

Backed by two Chinese companies, the mining activities scheduled for Hwange National Park constitute a form of foreign exploitation. The mining concessions are not "exercised in the exclusive interest of the people," as required by Article 21.¹⁵ Rather, the project is an example of debt-trap diplomacy, in which developing countries like Zimbabwe are forced to hand over key assets to service loans from China that they cannot repay.¹⁶

This exploitation also happens on a smaller scale between individual Chinese mining companies and Zimbabwean workers. In Zimbabwe's Chinese-backed chrome mining sector, for example, the claim holder takes fifteen to thirty percent of the ore while the rest is sold at artificially low prices to the Chinese miners, who also own the equipment.¹⁷ Additionally, there is a history of forced labor and mistreatment of Zimbabwean mine workers.¹⁸ In one incident in July 2020, Zimbabwean coal miners were shot, allegedly by their Chinese boss, after they complained about not being paid.¹⁹

While Zimbabwe becomes trapped and its workers exploited, China's economy is stimulated as the country obtains strategic assets and asserts its political dominion.²⁰ In the present case, Chinese

¹⁵ *Id.*

¹⁶ *Diplomatic Crisis Deepens As African Workers Upset Over Exploitation by Chinese Mining Firms*, *BUS. WORLD* (March 1, 2021), <http://www.businessworld.in/article/Diplomatic-crisis-deepens-as-African-workers-upset-over-exploitation-by-Chinese-mining-firms/09-07-2020-295626/>.

¹⁷ *Vimbai Chinembiri, Tensions Flare Between Zimbabwe Miners and Chinese Investors*, *GLOB. PRESS J.* (Aug. 23, 2020), <https://globalpressjournal.com/africa/zimbabwe/tensions-flare-zimbabwe-chrome-miners-chinese-investors/>.

¹⁸ *See, e.g., Zimbabwe: Workers and Lawyers Association Accuse Chinese Mining Firms of Gross Human Rights Violations and Exploitation*, *BUS. & HUM. RTS. RES. CTR.* (July 10, 2020), <https://www.business-humanrights.org/en/latest-news/zimbabwe-workers-and-lawyers-association-accuse-chinese-mining-firms-of-gross-human-rights-violations-and-exploitation/>.

¹⁹ *Id.*

²⁰ Mark Green, *China's Debt Diplomacy*, *FOREIGN POL'Y* (April 25, 2019, 5:06 PM), <https://foreignpolicy.com/2019/04/25/china-debt-diplomacy/>.

corporations will be profiting at the expense of local communities' ability to preserve and benefit their natural resources.

Because the mining activities in Hwange National Park constitute a form of foreign exploitation under Article 21, Zimbabwe must undertake to eliminate the activities. Though the government announced it would prohibit all mining activities in national parks in light of the public call for their curtailment, it has yet to put into effect any legislation codifying this ban.²¹ Additionally, the High Court in Harare threw out a legal challenge against the two Chinese mining companies, signaling that the companies' mining rights remain valid under Zimbabwean law.²²

The adverse environmental effects on Hwange National Park's ecosystem and likely economic damage to the tourism industry will impinge upon Zimbabweans' abilities to fully benefit from their natural resources. Though the proposed mining activities would create some jobs, the mining activities will detrimentally impact the tourism industry due to environmental degradation and loss of aesthetic appeal.²³ The mining sites are within one of the most pristine areas of Hwange National Park,²⁴ which, as Zimbabwe's largest historic game reserve, is key to the health of the country's billion-dollar tourism industry.²⁵

The proposed coal mining project in Zimbabwe is not the first Chinese-backed coal scheme in Africa to

²¹ Gilbert, *supra* note 1.

²² *Id.*

²³ Leonard, *supra* note 10, at 250 (citing Héctor M. Conesa, *The Difficulties in the Development of Mining Tourism Projects: The Case of La Unión Mining District (SE Spain)*, 8 REV. DE TURISMO Y PATRIMONIO CULTURAL 653, 654-55 (2010)).

²⁴ Jonathan Watts, *Chinese Mining Firms in Zimbabwe Pose Threat to Endangered Species, Say Experts*, THE GUARDIAN (Sep. 3, 2020, 9:03 AM), <https://www.theguardian.com/world/2020/sep/03/chinese-mining-zimbabwe-pose-threat-endangered-species-hwange-national-park>.

²⁵ Linda Mujuru, *Coronavirus Dismantles Tourism, One of Zimbabwe's Biggest Economic Drivers*, GLOB. PRESS J. (Apr. 19, 2020), <https://globalpressjournal.com/africa/zimbabwe/coronavirus-dismantles-tourism-one-zimbabwes-biggest-economic-drivers/>.

raise concerns over its human rights and environmental implications. In 2019, Kenya's National Environmental Tribunal prevented a Chinese-backed scheme to build East Africa's first coal plant from moving forward because the owners failed to conduct a thorough environmental assessment of the plant's impact on Lamu, an idyllic archipelago in Northeast Kenya.²⁶ Lamu is major tourist attraction, UNESCO World Heritage Site, and the best-preserved Swahili settlement in East Africa.²⁷ Known especially for its heritage tourism,²⁸ Lamu attracts tens of thousands of tourists each year, generating over \$20 million USD in income.²⁹

The project was set to include both a port and coal plant in Lamu County, which was chosen for its remote location and accessibility for coal shipments.³⁰ However, the construction of the coal plant would have put Lamu's protected status at risk and could have ruined the livelihoods of the locals, who rely on Lamu's natural resources to sustain the local fishing and tourism industries.³¹ In addition to obfuscating some of Lamu's stunning vistas, the coal

²⁶ *Kenya Halts Lamu Coal Power Project at World Heritage Site*, BBC (June 26, 2019), <https://www.bbc.com/news/world-africa-48771519>; Tawanda Karombo, *Zimbabwe Has Okayed a Chinese Coal-Mining Pact at Its Top Game Reserve, Even as Elephants Die*, QUARTZ AFRICA (Sep. 3, 2020), <https://qz.com/africa/1899381/zimbabwe-okay-chinese-coal-mining-in-hwange-park-as-elephants-die/>.

²⁷ Abdi Latif Dahir, *China's Plan to Help Build Kenya's First Coal Plant Has Been Stopped — For Now*, QUARTZ AFRICA (June 27, 2019), <https://qz.com/africa/1653947/kenya-court-stops-china-backed-lamu-coal-plant-project/>.

²⁸ T. Luke Young, *Lamu, Kenya: Conservation of an East African Seaport*, MASS. INST. OF TECH., <http://web.mit.edu/akpia/www/AKPSite/4.239/lamu/lamu.html> (last visited Feb. 28, 2021).

²⁹ *The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels*, 31 UN ENV'T PERSPS. 8, https://wedocs.unep.org/bitstream/handle/20.500.11822/25363/Perspectives31_ImpactCoalPlantLamu_28032018_WEB.pdf?sequence=1&isAllowed=y (last visited Feb. 28, 2021) [hereinafter *The Impacts on the Community*].

³⁰ Dana Ullman, *When Coal Comes to Paradise*, FOREIGN POL'Y (June 9, 2019, 4:48 AM), <https://foreignpolicy.com/2019/06/09/when-coal-came-to-paradise-china-coal-kenya-lamu-pollution-africa-chinese-industry-bri/>.

³¹ *Kenya Halts Lamu Coal Power Project at World Heritage Site*, *supra* note 26.

plant would lead to elevated water toxicity levels, thereby deterring tourists from enjoying Lamu's beaches,³² and ultimately from visiting Lamu.

The National Environmental Tribunal cited Kenya's Impact Assessment & Audit Regulations in its decision to block the project from going forward.³³ This outcome was a win for environmentalists, who argued that the \$2 billion USD coal-fired power plant would devastate the island of Lamu.³⁴ Notably, the Tribunal recognized that to attract an increasing number of tourists, retain jobs, and remain viable, the tourism industry requires access to a well-maintained environment,³⁵ something that coal-related activities would destroy.³⁶

Similarly, scientists are imploring the Zimbabwean government to prioritize sustainable development environmental programs like tourism³⁷ and wildlife conservation as opposed to moving forward with the potentially destructive mining activities in Hwange National Park.³⁸ In Zimbabwe, tourism has a symbiotic relationship with wildlife conservation.³⁹ For example, in Hwange National Park, ecotourism companies pay for essential conservation services including anti-poaching operations and the

maintenance of boreholes necessary to provide water for the wild animals.⁴⁰ These conservation programs attract paying tourists who add to Zimbabwe's economic health and the ability of its citizens to effectively utilize their natural resources to sustain themselves.⁴¹

The planned mining activities in Hwange National Park pose a significant threat to the future of Zimbabwe's tourism industry and the capacity of Zimbabweans to use and benefit from their natural resources, in alignment with Article 21 of the African Charter on Human and Peoples' Rights. By banning mining activities in national parks and encouraging sustainable development instead, Zimbabwe will be able to ensure its citizens are able to benefit from their natural resources, while simultaneously conserving them, both now and for years to come.

³² *The Impacts on the Community*, *supra* note 29, at 8.

³³ *Save Lamu & 5 Others v. Nat'l Env't Mgmt. Authority (NEMA)* (2019) 196 K.L.R. 100 (Kenya).

³⁴ Dahir, *supra* note 27.

³⁵ Leonard, *supra* note 9, at 253 (citing United Nations Conference on Trade and Development, *Sustainable Tourism: Contribution to Economic Growth and Sustainable Development*, ¶ 26, U.N. Doc. TD/B/C.I.E.M.5/2 (Jan. 28, 2013)).

³⁶ Gilbert, *supra* note 1.

³⁷ In Zimbabwe, the tourism sector's capacity to fund wildlife conservation programs makes it sustainable. Tourism in other countries, and in general, is not necessarily a sustainable practice. For more information, see Gerardo Budowski, *Tourism and Environmental Conservation: Conflict, Coexistence, or Symbiosis?* 3 ENV'T CONSERVATION 27 (1976).

³⁸ Karombo, *supra* note 26.

³⁹ See Brendan Ryan, *Zimbabwe Govt Permits Chinese Companies to Drill for Coal in Hwange National Park*, MININGMX (Sep. 8, 2020), <https://www.miningmx.com/news/energy/43580-zimbabwe-govt-permits-chinese-companies-to-drill-for-coal-in-hwange-national-park/>.

⁴⁰ *Id.*; see, e.g., *Water for Hwange*, ADVENTURE TRAVEL CONSERVATION FUND, <https://adventuretravelconservationfund.org/water-for-wildlife-trust> (last visited Nov. 22, 2020).

⁴¹ Zibanai, *supra* note 6, at 11.

TRAPPED AT SEA: AS SEAFARERS' RIGHTS ERODE DURING COVID-19 PANDEMIC, ARBITRATION MECHANISM MAY OFFER A PATH FOR REDRESS

by Shannon Quinn*

Human rights abuses against laborers at sea are notoriously difficult to monitor and even more difficult to remedy. The global COVID-19 pandemic has presented additional challenges for seafarers: since March 2020, hundreds of thousands of cargo ship laborers have been unable to return home due to travel restrictions.¹ In many cases, these workers have been stranded at sea for months, working well beyond the expiration of their contracts in shocking conditions likened by seafarers and advocates to modern slavery.²

* Shannon Quinn is currently a second-year law student at American University Washington College of Law. She received a B.A. in International Affairs from the George Washington University in 2015. Shannon would like to acknowledge her editors at the Human Rights Brief for their invaluable input and guidance on this piece, and her partner Simone for her unconditional support.

¹ See, e.g., 'My Children Ask Me When Am I Coming Home': Stranded Seafarers Share Their Frustrations, U.N. NEWS (July 19, 2020), <https://news.un.org/en/story/2020/07/1068651>.

² See *Coronavirus Makes 'Modern Slaves' of Ship Crews*, UN Told, DW (Sept. 25, 2020), <https://www.dw.com/en/coronavirus-maritime-bubble/a-55047956>.

The economic importance of the shipping industry³ and power imbalance between transportation corporations and laborers create conditions ripe for violations of labor-based human rights. Under maritime law, states under which vessels are registered—known as “Flag States”—are responsible for regulating, policing, and enforcing international law on board.⁴ However, ships often register under “flags of convenience,” taking advantage of open registries established by countries that have few domestic regulations, cheap registration fees, and limited resources for enforcement.⁵ This compounds the difficulty of protecting seafarers' rights, allowing for limited oversight of the shipping industry. In the COVID-19 era, this limited oversight has led to a loosening of regulations on contract term limits and the disintegration of onboard conditions.⁶

One organization, Human Rights at Sea,⁷ advocates for the accountability of all actors in the maritime industry and is working to develop a human rights-based model of arbitration that could provide an alternative or additional forum for redress for seafarers.⁸ Under this model, the state responsible for

³ The shipping industry is the cornerstone of global trade, accounting for more than eighty percent of trade movement worldwide. See Press Release, U.N. Sec. Gen., Statement Attributable to the Spokesman for the Secretary-General on the Repatriation of Seafarers (June 12, 2020), <https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers>.

⁴ U.N. Convention on the Law of the Sea art. 217, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994)[hereinafter UNCLOS].

⁵ See *Flags of Convenience*, INT'L TRANSP. WORKERS' FED'N, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited Oct. 18, 2020).

⁶ See *Coronavirus Makes 'Modern Slaves' of Ship Crews*, UN Told, *supra* note 2.

⁷ HUMAN RIGHTS AT SEA, <https://www.humanrightsatsea.org/> (last visited Oct. 18, 2020).

⁸ See David Hammond et al., *Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea*, SHEARMAN & STERLING: HUM. RTS. AT SEA (2020) [hereinafter Arbitration White Paper], https://hrasarb.com/wp-content/uploads/2020/07/20200324-HRAS_Shearman-LLP_Arbitration_Human_Rights_White_Paper-UPDATED_20200505-ORIGINAL-SECURED.pdf

redressing these abuses would be a key player.⁹ The mechanism would be similar to that of investor-state arbitration, in which a state would articulate an offer to arbitrate with victims — whether through an international instrument or domestic legislation — and the individual would accept by initiating proceedings.¹⁰ Among the multitude of difficulties in redressing human rights abuses at sea is a lack of power to compel effective remedies like monetary damages; by leveraging the widespread adoption of the New York Convention on the Enforcement of Arbitral Awards, arbitration would enable victims to seek monetary compensation.¹¹ A key challenge, however, will be securing consent of states to arbitrate claims by individuals, as this mechanism would rely on states extending the offer. One potential avenue is to pressure Flag States to do so by singling out those with poor rights enforcement records.¹²

The COVID-19 pandemic offers a timely opportunity for non-governmental organizations and maritime stakeholders to pressure Flag States to opt into the development of this mechanism. According to the International Transport Workers' Federation (ITF), hundreds of thousands of seafarers are trapped at sea and there are increasing reports of crew members contemplating suicide.¹³ Crew member contracts typically run four to six months, and the Maritime Labour Convention imposes an eleven-month maximum.¹⁴ Restrictions on disembarking due to the pandemic have made it difficult to facilitate crew changes.

⁹ *Id.* at 8.

¹⁰ *Id.*

¹¹ *Id.* at 4-5.

¹² *Id.* at 9.

¹³ See ITF and JNG Joint Statement: On Seafarers' Rights and the Present Crew Change Crisis, INT'L TRANSP. WORKERS' FED'N (Oct. 5, 2020), <https://www.itfseafarers.org/en/news/itf-and-jng-joint-statement-seafarers-rights-and-present-crew-change-crisis> (demonstrating the ITF's sustained advocacy sounding the alarm on this crisis); Aurora Almendral, *Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>.

¹⁴ Maritime Labour Convention, Feb. 23, 2006, 2952 U.N.T.S. 3 [hereinafter MLC] (entered into force Aug. 20, 2013).

This crisis has enabled employers to coerce seafarers into extending their already-expired contracts, with some laborers reporting that they fear being black-listed if they refuse to continue work, which would cut off their means of survival.¹⁵ In August, Australian authorities investigated the cargo ship *Unison Jasper* based on accusations that the Burmese crew on board had been forced into extending expired contracts.¹⁶ Conditions on board are often bleak, requiring performance of complex, dangerous work in shifts up to twelve hours per day, seven days per week.¹⁷ As one Egyptian seafarer reported: "I think I will commit suicide because of the stress of the long contract. I feel that there is no meaning to life."¹⁸

This situation implicates an intersecting web of international agreements, including the Maritime Labour Convention (MLC) and the Forced Labour Convention (FLC). Under the UN Convention on the Law of the Sea (UNCLOS), Flag States are responsible for enforcing international laws on the vessels that are registered under the state, but states are failing to meet their obligations.¹⁹ When abuses are uncovered, developing an arbitral mechanism as an additional route for redress would create a path toward accountability for these Flag States.

¹⁵ See Almendral, *supra* note 13.

¹⁶ See Almendral, *supra* note 13.

¹⁷ See 'My Children Ask Me When Am I Coming Home,' *supra* note 1; see also FAQ on Crew Changes and Repatriation of Seafarers, INT'L MAR. ORG. (last visited Oct. 18, 2020), <http://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>.

¹⁸ See Mia Jankowicz, 'I Think I Will Commit Suicide': Cargo Ship Workers Have Been Trapped at Sea for Months Because of COVID-19, Banned from Ports, and Predict 'Anarchy' If Things Don't Change, BUS. INSIDER (Aug. 2, 2020), <https://www.businessinsider.com/cargo-ship-workers-trapped-sea-predict-anarchy-not-sent-home-2020-7> (documenting an increase in crew member suicides as a result of on-board conditions).

¹⁹ See UNCLOS, *supra* note 4, at article 217(1) ("States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards . . . [f]lag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.").

I. AN INTERLOCKING WEB OF HUMAN RIGHTS STANDARDS AT SEA

Flag States have a duty to “ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards.”²⁰ Several legal instruments directly implicate the responsibility of Flag States to protect seafarers’ rights.

The Maritime Labour Convention, for example, establishes a comprehensive set of requirements pertaining to the working conditions for seafarers, including maximum working hours, a minimum number of rest hours, and a maximum contract length of eleven months.²¹ Often referred to as the “Seafarers’ Bill of Rights,” the MLC has been ratified by ninety countries, accounting for “more than 91% of the world’s shipping fleet.”²² Significantly, the top three Flag States — Panama, Liberia, and the Marshall Islands — are all party to the MLC.²³

The current situation also implicates the Forced Labour Convention. Article 1(1) of the FLC expressly requires each signatory state to suppress the use of forced or compulsory labor.²⁴ The FLC defines forced or compulsory labor as “work or service which is exacted from any person under the menace of any penalty and for which that said person has not offered himself voluntarily.”²⁵ Many major Flag States, including Panama, are signatories to both the FLC and the MLC.²⁶ Given the relationship between

²⁰ UNCLOS, *supra* note 4, at art. 217(1).

²¹ *FAQ on Crew Changes and Repatriation of Seafarers*, *supra* note 17.

²² *Introduction to the Maritime Labour Convention*, SEAFARER’S RTS. INT’L, <https://seafarersrights.org/introduction-to-the-maritime-labour-convention/> (last visited Oct. 18, 2020).

²³ See *Top 10 Flag States 2019*, LLOYD’S LIST: MAR. INTEL. (Dec. 3, 2019), <https://lloydlist.maritimeintelligence.informa.com/LL1129840/Top-10-flag-states-2019>; MLC, *supra* note 14.

²⁴ Convention concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter FLC].

²⁵ *Id.* art. 2(1).

²⁶ See FLC, *supra* note 24; *Rule 94. Slavery and Slave Trade*, INT’L COMM. RED CROSS: CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94 (last visited Oct. 17, 2020).

labor, contracts, and compensation, the rights enshrined in these Conventions are particularly amendable to redress with monetary damages that could be awarded under an arbitral mechanism.

II. APPLYING HUMAN RIGHTS STANDARDS TO THE CURRENT CRISIS

As the situation at sea becomes increasingly dire, seafarers’ rights have steadily eroded. With their obligation to regulate and enforce international laws, Flag States have a responsibility to address these conditions.²⁷ Flag States, such as Panama, have permitted contracts to extend well beyond the MLC’s eleven month maximum.²⁸ Additionally, Flag States have not enforced MLC limitations on work hours or requirements imposed on employers to accurately log work hours, with some seafarers reporting being forced to work up to eighteen hours per day.²⁹ The failure to adapt to the challenges presented by the pandemic after nearly a year illustrates the severe under-enforcement of key labor protections enshrined in the MLC.³⁰

Contract extensions implicate protections against forced labor. Fred Kenney, Director of Legal and External Affairs at the International Maritime Organization, emphasized “that many overly fatigued seafarers have *no choice* but to continue working.”³¹ Similarly, the case of the *Union Jasper* shows that, most likely, some companies are physically forcing seafarers to sign extensions and subsequently subjecting them to prolonged abusive conditions.³²

²⁷ See UNCLOS, *supra* note 4, at art. 217(1).

²⁸ See Christiaan De Beukelaer, *The Hundreds of Thousands of Stranded Maritime Workers Are the Invisible Victims of the Pandemic*, JACOBIN MAG. (Oct. 11, 2020), <https://jacobinmag.com/2020/10/maritime-workers-seafarers-coronavirus-stranded>.

²⁹ See *Beyond the Limit: How Covid-19 Corner-Cutting Places Too Much Risk in the International Shipping System*, INT’L TRANSP. WORKERS’ FED’N (Sept. 20, 2020), <https://www.itfglobal.org/en/news/covid-corner-cutting-will-lead-deaths-environmental-catastrophe-new-shipping-report>.

³⁰ *Id.* at 5.

³¹ ‘*My Children Ask Me When Am I Coming Home*,’ *supra* note 1 (emphasis added).

³² See Almendral, *supra* note 13.

Stephen Cotton, secretary-general of the ITF, stated that “some crews had become ‘forced labor.’”³³ These laborers fear that they might lose their livelihoods if they fail to agree to the contract extensions, despite the danger presented by working on a vessel beyond the MLC’s maximum limits. By failing to act, Flag States are violating the FLC because the Convention requires under Article 1(1) that signatories take action to suppress forced labor.

Flag States that have signed on to these Conventions have an obligation to address these violations.³⁴ In the short term, Flag States must enforce regulations by disallowing continued contract extensions, closely scrutinizing requests that would lead to understaffed ships, and complying with MLC obligations to monitor hour logs. These first steps are necessary to establish safer conditions for seafarers during and beyond the current pandemic.³⁵

These violations of both the MLC and FLC also present an opportunity to persuade Flag States to offer arbitration as an alternative route to redress for the victims. Given the widespread nature of the violations coupled with the lack of an effective remedy under the usual system, state-backed arbitration of these claims can open the door for seafarers to receive monetary compensation.³⁶ Non-governmental organizations and other maritime stakeholders, such as the FTC, can shine a spotlight on this issue to convince these states to “buy in” to creating this new mechanism. This arbitral process would not entirely displace other avenues for seafarers to find justice in other fora, but the monetary compensation for the labor, contract and hours-related violations under the MLC and FLC could be readily tailored to the violations. The COVID-19-related abuses thus offer a particularly suitable opportunity to push for the establishment of

this alternative form of accountability for seafarers, which could be subsequently utilized beyond this immediate crisis.

While seafarers have worked to keep global supply chains running in the midst of the global pandemic, Flag States have not met their obligations to protect these laborers. Working conditions have deteriorated, and the long contracts that seafarers are being forced to carry out have serious mental and physical ramifications. Given the difficulty of redressing these abuses, it is well past time to think outside of the box on enforcement, and the arbitration initiative proposed by Human Rights at Sea does just that. The plight facing seafarers today offers a powerful example of why effective accountability mechanisms are needed in the maritime space and may create a path forward to pressure Flag States comply with their obligations under international law.

³³ *Coronavirus Makes ‘Modern Slaves’ of Ship Crews, UN Told*, *supra* note 2.

³⁴ UNCLOS, *supra* note 4, at art. 217(1).

³⁵ See Megan Scudellari, *How the Pandemic Might Play Out in 2021 and Beyond*, NATURE (Aug. 5, 2020), <https://www.nature.com/articles/d41586-020-02278-5>.

³⁶ See Arbitration White Paper, *supra* note 8, at 5.

HOW A UNIVERSAL DEFINITION MAY SHAPE THE LOOMING CLIMATE REFUGEE CRISIS

by Alexandra Haris*

Climate change is an undeniable phenomenon threatening the existence of humanity.¹ Natural disasters and other environmental changes lead to lost homes and jobs, causing more people to be displaced.² International organizations with special legal status, as well as individual countries, are obligated to develop potential solutions. One such entity with particular responsibility is the United Nations High Commissioner for Refugees (UNHCR).³ The UNHCR aims to protect refugees and administer the 1951 Refugee Convention (“the Convention”), which lays out refugees’ rights and creates global legal obligations for refugees’ protection.⁴ The Convention’s definition of refugee fails to include persons internal-

ly and externally displaced by climate change,⁵ and thereby prevents individuals displaced by climate change from receiving refugee status and qualifying for protections under the Convention.⁶ This Article explores the weaknesses of the UNHCR’s current definition, illustrates the current definition’s deficiencies through the case of Ioane Teitiota of Kiribati, and shows how the definition must expand to ensure equitable treatment.⁷

The Convention currently protects individuals displaced by a fear of persecution due to race, religion, nationality, or political opinion.⁸ No mention of environmentally displaced refugees means this class falls outside of the Convention’s scope. Moreover, it is unclear if the UNHCR views the climate crisis as severe enough to warrant a definition that would protect refugees who are displaced by environmental disasters. In fact, just a decade ago, the UNHCR stated the inclusion of climate refugee terminology could “potentially undermine the international legal regime for the protection of refugees whose rights and obligations are quite clearly defined and understood.”⁹ However, the issue the UNHCR appears fearful of could be resolved if it clearly defined “climate refugee.”

To clearly define “climate refugee,” the Convention should provide a singular, universal definition to replace the various definitions that currently exist.¹⁰ A singular definition for climate refugees has been difficult to create because of competing ideas of who

* Alexandra Haris is a first-year student at American University Washington College of Law where she is pursuing public interest law. She is a column writer for the Human Rights Brief and a member of the International Refugee Assistance Project.

¹ *Climate Change*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/climate-change/> (last visited Mar. 1, 2021).

² Sci. for Env’t Pol’y, *Migration in Response to Environmental Change* 3, 7 (Eur. Comm’n 2015), https://ec.europa.eu/environment/integration/research/newsalert/pdf/migration_in_response_to_environmental_change_51si_en.pdf

³ *About Us*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/en-us/about-us.html> (last visited Mar. 1, 2021).

⁴ Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

⁵ Joana Apap, *The Concept of “Climate Refugee” Towards a Possible Definition* 2 (Eur. Parliamentary Rsch. Serv. 2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf)

⁶ *Id.*

⁷ *Id.*

⁸ Apap, *supra* note 5, at 2.

⁹ Suong Vong, *Protecting Climate Refugees is Crucial for the Future*, HUMANITY IN ACTION (May 2017), https://www.humanityinaction.org/knowledge_detail/protecting-climate-refugees-is-crucial-for-the-future/.

¹⁰ *Id.*; Alex Randall, *Climate Refugees Definition: Can We Define a Climate Refugee?*, CLIMATE & MIGRATION COAL., <http://climatemigration.org.uk/climate-refugees-definition/> (last visited Mar. 1, 2021).

qualifies, ranging from narrow to broad definitions.¹¹ A narrow definition focuses on identifying those individuals who arguably need the most help because they have lost their home, for example, but it excludes individuals who suffer from lost livelihoods.¹² Conversely, a broad definition would guarantee coverage for every individual who has been displaced due to the consequences of climate change.¹³

I. IOANE TEITIOTA AND THE CASE FOR A BROAD DEFINITION

An example of the need for a broad definition of climate refugees is Ioane Teitiota. Teitiota is from the Republic of Kiribati, a Pacific island submerging under water due to rising sea levels caused by climate change.¹⁴ In 2015, two years after Teitiota applied for asylum based on forced displacement from climate change, the New Zealand High Court rejected his application, holding that he does not fall under the Refugee Convention's definition of "refugee."¹⁵ That same year, Teitiota's father filed a complaint with the UNHCR, which subsequently issued a statement that rising sea levels threaten life and necessitate a broadening of refugee law.¹⁶

To prevent the perils to Teitiota and others in similar positions, the universal definition of climate refugees should include a wider range of climate-related threats to livelihood. A potential broad definition of a climate refugee is a person who must leave their home, either temporarily or permanently, due to climate change disturbances that have either

destroyed their home or seriously impacted their quality of life.¹⁷

The first element may seem inconsequential, yet it would have a major impact on climate refugee classification. "A person who must leave their home," includes individuals who must migrate to stay alive or must migrate to retain their basic livelihood.¹⁸ This variance is essential and would be consistent with how other refugees are encapsulated within the Convention's definition.¹⁹ The Convention states that refugees can be protected if they have a "well-founded fear of being persecuted for reasons of . . . political opinion."²⁰ Including persecution for political opinion in the Convention's definition illustrates the breadth of issues that the Convention covers. While seeking refuge from political persecution could be a matter of life or death, it may include "well-founded" fears based on evidence of persecution.²¹ It is analogous to allow individuals displaced by climate change to qualify for basic protections under international law because they also have a well-founded fear of the ramifications the changing environment may have on their livelihood.

A second important element of a broad definition is "temporarily or permanently." Climate change increases the frequency of mega-storms and rising sea levels that deplete natural resources and result in submerged cities, scorched forests, and arid towns.²² More frequent and intense rates of disasters, "might

¹¹ OLI BROWN, *MIGRATION AND CLIMATE CHANGE* 18 (2008); Elizabeth Keyes, *Environmental Refugees? Rethinking What's in a Name*, 44 N.C. J. Int'l L. 461 (2019).

¹² Apap, *supra* note 5, at 5-6.

¹³ Keyes, *supra* note 11, at 464.

¹⁴ *Id.*

¹⁵ *Teitiota v. Chief Exec. of Ministry of Bus., Innovation, and Emp.* [2013] NZIPT 800413, at 65 (N.Z.).

¹⁶ Bill Frelick, *It Is Time to Change the Definition of a Refugee*, AL JAZEERA (Jan. 26, 2020), <https://www.aljazeera.com/opinions/2020/1/26/it-is-time-to-change-the-definition-of-refugee>.

¹⁷ Apap, *supra* note 5, at 3; Bonnie Docherty & Tyler Giannini, *Symposium: Confronting a Rising Tide: A Proposal for a Climate Refugee Treaty*, 33 HARV. ENV'T L. REV. 349, 361-69 (2009).

¹⁸ Docherty & Giannini, *supra* note 17, at 369.

¹⁹ *Id.* at 2.

²⁰ Refugee Convention, *supra* note 4.

²¹ Refugee Convention, *supra* note 4; *see also* 1951 Convention, AMERA INT'L, <https://www.refugeelegalaidinformation.org/1951-convention>.

²² *How Can Climate Change Affect Natural Disasters?*, U.S. DEP'T OF INTERIOR, https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters-1?qt-news_science_products=0#qt-news_science_products (last visited Mar. 28, 2021); *Climate Change and Unnatural Disasters*, FOOD & WATER WATCH (Sep. 14, 2017), <https://www.foodandwaterwatch.org/insight/climate-change-and-unnatural-disasters>.

lead to both temporary and permanent decisions to migrate.”²³ While one environmental catastrophe may lead to permanent inhabitation of an area, another may create damage that only requires temporary leave.²⁴ Additionally, this adoption would be consistent to the protection offered to other refugees, such as protections against forcible returns to home countries while there is a threat of persecution.²⁵ Political refugees may have a well-founded fear of persecution based on their political opinions that may only be a temporary fear.²⁶ Therefore, to accompany climate refugees fleeing distinct disasters and remain consistent with its protection of other refugees, the Convention must include “temporarily or permanently.”

Lastly, the definition must include, “destroyed their home or seriously impacted their quality of life.” This is essential to ensuring the Convention allows individuals whose lives have been seriously impacted by climate change to satisfy the definition. Specifically, it includes those who may still have their homes but no longer have a source of income due to changes in the land or surrounding topography.

II. LOOKING TO THE FUTURE

As climate change progresses, the UNHCR must provide protection to the increasing number of individuals who are affected. The international legal framework provides a starting point to create a universal, broad definition of “refugee” to include individuals displaced by climate change. This

²³ Keyes, *supra* note 11.

²⁴ Denise Chow, *Three Islands Disappeared in the Past Year. Is Climate Change to Blame?*, NBC NEWS (June 9, 2019), <https://www.nbcnews.com/mach/science/three-islands-disappeared-past-year-climate-change-blame-ncna1015316>; Sarah Ruiz-Grossman & Lydia O’Connor, *There Were More Than 100 “Billion Dollar” Climate Disasters in the Past Decade*, MOTHER JONES (Dec. 31, 2019), <https://www.motherjones.com/environment/2019/12/there-were-more-than-100-billion-dollar-climate-disasters-in-the-past-decade/>.

²⁵ 1951 Convention, *supra* note 21; *Fact Sheet: International Refugee Protection System*, NAT’L IMMIGR. F. (Apr. 1, 2019), <https://immigrationforum.org/article/fact-sheet-international-refugee-protection-system/>.

²⁶ *Id.*

proposed definition would also provide agreed-upon terms that could be implemented in the 1951 Refugee Convention, the main determiner of who can have refugee status and protection.²⁷ With this, climate refugees would have the basic rights and protections that other individuals with refugee status have under international law.

While there are many hurdles to overcome regarding climate refugees’ lack of protection, including the UNHCR’s explicit refusal ten years ago to list persons displaced by climate change as refugees, mindsets appear to be changing as the crisis becomes more urgent.²⁸ However, until the international legal framework incorporates a singular, universal climate refugee definition, climate refugees will continue to lack basic protections.

²⁷ Apap, *supra* note 5, at 2.

²⁸ *Why UNHCR Is Taking Action on Climate Change Displacement*, U.N. HIGH COMM’R ON REFUGEES, <https://www.unhcr.org/innovation/why-unhcr-is-taking-action-on-climate-change-displacement/>.



Regional bodies are some of the primary creators of international law and are on the front lines of human rights protections. The Regional Systems team seeks to provide up-to-date coverage of the world's regional bodies with a focus on the Organization of American States (OAS). The Regional Systems section follows the decisions and conclusions of both the Inter-American Commission for Human Rights (Commission) and the Inter-American Court of Human Rights. The Regional Systems team seeks to not only cover these issues but also analyze them within the context of the Inter-American system. This includes, but is not limited to, examining current matters before the Inter-American Commission or issues that should be before the Commission within the context of the American Declaration on Human Rights and Duties of Man and the American Convention on Human Rights.

The following articles examine some of the issues that the Inter-American Commission addressed at its most recent hearings and issues that potentially warrant closer examination by the Commission. The first article follows the case of René Schneider, a Chilean general that was assassinated by elements of the Chilean army under the direction of the CIA. His family has since then tried to hold the U.S. actors accountable and is currently trying to bring the case before the Commission. The second article is based on a recent hearing before the Commission on the subject of human trafficking in Central America and examines the recommendations given by the Commission and civil societies. Both these articles strike at what is critical about regional systems like the OAS. Regional systems often provide a forum for parties that have no other recourse and may lead to some level of accountability. Regional systems also provide an appropriate venue to tackle tough issues and examine them with a critical eye so that practicable solutions may be presented.



A LONG ROAD OR DEAD END?: JUSTICE FOR A CHILEAN GENERAL

by *Julio A. Sanchez and Anita
Sinha**

The proliferation of U.S. intervention in many Latin American countries during the twentieth century generated a penchant to uphold principles of non-intervention and sovereign equality of states.¹ This was one of the driving principles that created the Organization of American States (OAS). In its charter, the OAS emphasized that “the true significance of [regional] American solidarity and good neighborliness can only mean the consolidation on the continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.”² This foundational objective of the Inter-American Commission on Human Rights obligates the adjudication of Chilean General René Schneider’s petition.

Over fifty years ago, on the morning of October 22, 1970, armed men attempted to kidnap General René Schneider, commander-in-chief of the Chilean army. The kidnappers were dissident Chilean

* *Julio Sanchez is a third-year law student in American University Washington College of Law’s International Human Rights Law Clinic (AUWCL IHRLC). Anita Sinha is an Associate Professor of Law and the Director of AUWCL IHRLC. The authors currently represent General Schneider’s family before the Inter-American Commission on Human Rights. Michael E. Tigar, AUWCL Emeritus Professor of Law, and Ali Beydoun, former director of the AUWCL UNROW Human Rights Impaction Litigation Clinic, filed the initial petition for the Schneider family with the Commission, and continue to serve in an advisory role.*

¹ Robert K. Goldman “*History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights.*” 31 HUMAN RIGHTS Q. 856, 863 (2009).

² *Id.* at 859.

military officers, hired, paid, and armed by the U.S. Central Intelligence Agency (CIA) at the direction of then-National Security Advisor Henry Kissinger. Kissinger believed that “neutralizing” General Schneider would pave the path to a military coup that would prevent Salvador Allende from taking office as President of Chile.³ The would-be kidnappers shot General Schneider, and he died three days later from his injuries. Three years later, General Augusto Pinochet successfully led a military coup to oust the democratically elected president Allende.

Throughout the last century, the foreign policy of interventionism has motivated U.S. conduct in Latin America. The declaration of the Monroe doctrine⁴ and the following Roosevelt Corollary paved the path for the U.S. government to interfere in the internal affairs of Latin America for over a century.⁵ Early examples include engineering Panamanian independence from Colombia to facilitate U.S. control of the Panama Canal, and occupying the port of Veracruz to influence the Mexican revolution.⁶ During the 1980s, in the context of a “Second Cold War,” the United States supported right-wing authoritarian governments throughout the region. More recently, the United States repeatedly has attempted to orchestrate regime change in Venezuela and has pressured Mexico and Central American states to implement

³ Petition for Writ of Certiorari at 2, *Schneider v. Kissinger*, 547 U.S. 1069 (2005) (No. 05-753).

⁴ Monroe Doctrine, 1823, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1801-1829/Monroe> (last visited Feb. 10, 2021).

⁵ See also U.S. Dept. of State, *Roosevelt Corollary to the Monroe Doctrine, 1904*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1899-1913/roosevelt-and-monroe-doctrine> (last visited Mar. 1, 2021).

⁶ See *Before Venezuela, US Had Long Involvement in Latin America*, ASSOCIATED PRESS (Jan. 25, 2019), <https://apnews.com/article/2ded14659982426c9b2552827734be83>.

policies that effectively prevent migrants from entering the United States.⁷

It was the anxiety fueled by the Cold War after World War II that motivated the U.S. government's interest in targeting the left-leaning government in Chile, sparking the events that led to General Schneider's death.⁸ Under the direction of Kissinger, the U.S. government encouraged and initiated a two-pronged strategy to destabilize Chile.⁹ The first was to sabotage the Chilean economy with sanctions,¹⁰ and the second was to facilitate the removal of President Allende through a CIA-assisted military coup d'état. Kissinger believed that it was necessary to remove General Schneider, who was the commander-in-chief of Chile's armed services, to actualize a successful coup.¹¹ The CIA, under the direction of Kissinger, provided material support to several armed groups with the goal of removing General Schneider. It finally succeeding on its third kidnapping attempt.¹²

Domestic courts failed to hold the U.S. government accountable for its role in the assassination of General Schneider. In 2004, General Schneider's family sued Kissinger for his involvement, but the U.S. District Court declined to hear the case based on the political question doctrine.¹³ General Schneider's counsel appealed, but the Court of Appeals for the District of Columbia Circuit affirmed the decision to dismiss the case.¹⁴ The family appealed to the U.S.

⁷ Tony Wood, *A Year On, Juan Guaidó's Attempt at Regime Change in Venezuela Has Stalled*, THE GUARDIAN (Jan. 23, 2020), <https://www.theguardian.com/commentisfree/2020/jan/23/juan-guaido-regime-change-venezuela-chavismo-maduro>; James Fredrick, *How Mexico Beefs Up Immigration Enforcement to Meet Trump's Terms*, NPR (July 13, 2019), <https://www.npr.org/2019/07/13/740009105/how-mexico-beefs-up-immigration-enforcement-to-meet-trumps-terms>.

⁸ The U.S backed several authoritarian military regimes across the region. See, e.g., *Before Venezuela, US Had Long Involvement in Latin America*, *supra* note 6.

⁹ *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 255 (D.D.C. 2004).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 256.

¹³ *Id.* at 270 (holding that the case constituted a political matter best handled by the other branches of government).

¹⁴ *Schneider v. Kissinger*, 412 F.3d 190, 201 (D.C. Cir. 2005).

Supreme Court, but the court denied *certiorari*.¹⁵ The outcome of the domestic litigation on behalf of General Schneider highlights not only the unwillingness of the United States to take responsibility for human rights violations it orchestrated in Chile and elsewhere in Latin America, but it also exposes the structural and procedural barriers to achieving justice and receiving redress for such violations.

Undeterred by the U.S. domestic system, General Schneider's family turned to the Inter-American Commission on Human Rights ("the Commission"). The Schneider family petitioned the Commission in October 2006, asking that it hold the U.S. government accountable for its involvement in the extrajudicial killing of General Schneider. The petition alleges that the government's actions violated international human rights law, citing specific provisions of both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights ("the American Convention").¹⁶

The U.S. government took nearly eight years to respond and denied all allegations. Counsel for General Schneider's family swiftly filed a response to the government's submission, emphasizing that it is impossible to assess the violations against General Schneider without recognizing the United States' entrenched support of the perpetrators. Throughout the nearly fifteen years since the family filed the petition, counsel for the family have tried to create

¹⁵ *Schneider v. Kissinger*, 547 U.S. 1069 (2006).

¹⁶ See generally Organization of American States (OAS), American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.11.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V. II.82, doc. 6, rev. 1; American Convention on Human Rights "Pact of San Jose, Costa Rica," art. 25, November 22, 1969, 1144 U.N.T.S. 123. The Chilean Government, and through extension the United States, violated Articles I, IV, XVII, XVIII, XXII, and XXV of the Declaration. In addition to the Declaration, General Schneider, through his counsel, also alleged that the United States violated Articles 4 (Right to Life), 5 (Right to Humane treatment), 7 (Right to Personal Liberty), 13 (Freedom of Thought and Expression), and 16 (Freedom of Association) of the American Convention on Human Rights).

movement through the Commission's process, including by requesting admissibility hearings.¹⁷ They have requested six admissibility hearings, none of which the Commission granted.¹⁸

A challenge facing the Commission in cases involving the United States is that the United States is not a signatory to the American Convention. As a result, bringing a case against the United States in the Inter-American system may be more symbolic than practical in yielding concrete results. This means that, while the United States may show up to a hearing or a working meeting, the U.S. government more often than not fails to comply with the Commission's recommendations. This does not mean that the Commission should not act on General Schneider's petition. To the contrary, given the context of the U.S. government's interventionist policies in the region, the Commission should make the adjudication of the General's petition a priority. The United States infringed upon the OAS' founding principles of nonintervention, sovereign equality of states, and defense of human rights in the region. If the OAS and the Commission are going to uphold these principles, it is incumbent on them to hold the United States accountable for General Schneider's assassination.

¹⁷ See generally Rules of Procedure of the Inter-American Commission on Human Rights (Approved October 13, 2009). An admissibility hearing is the first step in according to the rules of procedure of the Inter-American Commission on Human Rights before a case is brought before the Commission. *Id.*

¹⁸ The family of René Schneider has a seventh hearing pending for the 178th session period.

REFORMING THE LEGAL PROCESS: AN END TO HUMAN TRAFFICKING IN LATIN AMERICA

*by Miranda Carnes**

Although slavery was legally abolished in Central America during the nineteenth century, modern-day slavery still exists today as human trafficking. Human trafficking is defined as

the recruitment, transportation, transfer, harboring or reception of persons, by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability, or the giving or receipt of payments or benefits to obtain the consent of a person having authority over another for the purpose of exploitation.¹

Article 6 of the American Convention on Human Rights explicitly outlaws this practice, stating that slavery, involuntary servitude, and the trafficking of women are prohibited in all forms, including during states of emergency.² In 2019, the Inter-American Court of Human Rights expanded the prohibition of trafficking with Resolution 4, holding states accountable for the prevention and elimination of

* Miranda Carnes is a first-year law student in American University Washington College of Law's *Human Rights Brief*.

¹ Inter-Am. Comm'n H.R., *Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking*, at 4, Dec. 7, 2019 [hereinafter Resolution 04/19].

² American Convention on Human Rights "Pact of San Jose, Costa Rica", act. 6, Nov. 22, 1969, 1144 U.N.T.S. 123.

human trafficking within the region.³ However, despite these resolutions, human trafficking remains pervasive in Central America.⁴ While many Central American States have incorporated anti-slavery language into their constitutions, enforcement remains a challenge. In December 2020, the Inter-American Court of Human Rights (the Court) addressed this problem with a hearing on the human rights of victims⁵ of human trafficking.⁶ The Court heard from civil society organizations in Honduras, Guatemala, and El Salvador, and provided recommendations based on the issues presented.⁷ The Court found that, to reduce human trafficking in Central America, the region needs to improve their criminal law procedures and provide a more holistic approach to sentencing.

Due to the complex nature of trafficking cases, the standard criminal processes are not sufficient to provide a complete solution to the problem. To improve their criminal procedures, Central American countries need to provide legal representation to victims, incorporate victimology into each case, and provide support for victims who choose not to participate in criminal legal proceedings. Currently in Central America, trafficked persons are predominately represented by lawyers from women's shelters or civil society organizations; the State does not provide representation.⁸ This means that, in order for victims to obtain adequate legal representation, they must seek out an organization for assistance. Human trafficking is

³ Resolution 04/19, Principle 20.

⁴ See LEONARD TERRITO, *INTERNATIONAL SEX TRAFFICKING OF WOMEN & CHILDREN: UNDERSTANDING THE GLOBAL EPIDEMIC 69* (Looseleaf Law 2010).

⁵ This article uses "victim" to describe survivors of human trafficking in keeping with the language used by civil society organizations in the Inter-American Court's hearing on human trafficking.

⁶ *Situación de los derechos humanos de las víctimas de trata de personas en la región*, Inter-Am. Ct. H.R. (Dec. 3, 2020), <https://www.youtube.com/watch?v=Kxm9urIc34M>. [hereinafter Inter Am. Ct. H.R. (Dec. 3, 2020)]

⁷ *Id.*

⁸ *Id.*

deeply intertwined with poverty and corruption; the need to proactively get help is a huge barrier to many victims. Additionally, adolescent women are the most vulnerable to human trafficking in Central America.⁹ Adolescents are less likely to have the ability to obtain legal representation, especially with the need for heightened security. Their age often means they have access to limited resources. Therefore, to enforce existing human trafficking laws, states need to provide legal representation for all victims who choose to participate in criminal proceedings and to provide aid to those that choose not to.

In addition to providing legal representation for trafficked persons, states need to incorporate victimology into their criminal legal procedures. Victimology is the study of victims, including what causes victimization, how the criminal justice system accommodates victims, and how other areas of society deal with victims of a crime.¹⁰ By analyzing the root causes of human trafficking and the elements that lead to victimization, States can work to eliminate human trafficking. Additionally, victimology can help defense attorneys, prosecutors, and court officials relate to victims during criminal proceedings.¹¹ Because trafficked persons have suffered severe trauma, their legal path to justice needs to include a more compassionate questioning process from both lawyers and judges. Therefore, by incorporating victimology into the criminal proceedings, states will provide a humanizing experience, which will encourage more victims to pursue legal avenues.

Furthermore, states need to take a more holistic approach to sentencing. Sentencing a criminal to prison for trafficking persons does not provide real relief to the victim. In addition to inflicting prison sentences on convicted traffickers, judges should

⁹ *Id.*

¹⁰ LEAH E. DAIGLE, *VICTIMOLOGY: THE ESSENTIALS* 1 (2nd Ed. 2018).

¹¹ *What is Victimology and Why is it Important in Forensic Psychology*, WALDEN UNIVERSITY, <https://www.waldenu.edu/online-masters-programs/ms-in-forensic-psychology/resource/what-is-victimology-and-why-is-it-important-in-forensic-psychology> (last visited Mar. 4, 2021).

require psychological and financial support for victims of trauma. In Honduras, for example, judges do not order reparations in human trafficking cases unless the Public Ministry specifically requests it.¹² Additionally, in 2019, zero of the human trafficking sentences in El Salvador included aspects of reparations.¹³ In order to provide trafficked persons with complete relief, and to help victims escape from the trafficking cycle, states need to train judges to include reparations in sentencing. With improved education and greater awareness of the specific needs of victims of human trafficking, Central American courts will be able to take greater strides towards the elimination of human trafficking.

Because the American Convention on Human Rights gives states an obligation to combat human trafficking and end slavery,¹⁴ States also need to support trafficked persons who choose not to participate in criminal proceedings. Currently, Guatemala and El Salvador offer limited support to these victims.¹⁵ Honduras, on the other hand, provides a fund for victims, regardless of their participation in the legal process.¹⁶ This fund is financed by government agencies, as well as by the United States through the Trafficking Victims Protection Act.¹⁷ With a victim's fund and existing constitutional protection for trafficked persons,¹⁸ Honduras has taken meaningful steps to eradicate human trafficking in the country by supporting victims regardless of their involvement in the legal system. Other countries in the region need to follow Honduras's lead to comply with their obligations under the American Convention on Human Rights. If victims of human trafficking receive funding from the State, they have a greater chance of escaping from the poverty that often traps them in the cycle.

¹² Inter-Am. Ct. H.R. (Dec. 3, 2020).

¹³ *Id.*

¹⁴ See also Resolution 04/19, Principle 20.

¹⁵ Inter-Am. Ct. H.R. (Dec. 3, 2020).

¹⁶ U.S. Dep't of State, *Trafficking in Persons Report* 224 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>

¹⁷ *Id.* at 224-25.

¹⁸ Inter-Am. Ct. H.R. (Dec. 3, 2020)

For example, in 2019, Honduras's Ministry of Development and Social Inclusion (SEDIS) provided 21 microloans to trafficked persons.¹⁹ The goal of the loans was to support small business development and help victims escape from poverty. If all Central American States adopt similar policies, trafficked persons have a greater opportunity to address the root causes of trafficking without utilizing legal avenues.

Once laws are in place and norms are established, the next task is enforcement, which begins with recommendations from the Inter-American Court of Human Rights. The Inter-American Commission on Human Rights first observes the general situation of human rights violations in the Americas and presents these issues to the Inter-American Court of Human Rights. The Court then enforces and interprets the American Convention on Human Rights to ensure that the Organization of American States' Member States comply with the Convention's provisions. According to the Inter-American Court of Human Rights' hearing on human trafficking, in order to enforce the American Convention on Human Rights, Central American states must improve criminal law proceedings, include reparations in sentencing, and provide financial support to victims of human trafficking who choose not to pursue legal justice. This holistic approach to human trafficking in the region will allow states to combat trafficking and reverse Latin America's trafficking statistics.

¹⁹ U.S. Dep't of State, *supra* note 15, at 225.

* * *