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TUBERCULOSIS IN INDIA: A HUMAN RIGHTS APPROACH TO HEALTHCARE

Dipika Jain & Brian Tronic***

ABSTRACT:

India has the highest burden of Tuberculosis (TB) in the world. By some estimates, over 600 Indians die each day from the disease. But it does not affect everyone equally—poor and marginalized communities are more likely to be exposed and become infected, progress from latent to active TB, and experience serious health consequences, including death. Despite these important human rights implications, India, like many countries, has based its Revised National Tuberculosis Program (RNTCP) on a bio-medical approach to the disease rather than a human rights approach. However, India has a strong tradition of health-rights litigation, which provides an opportunity for advocates to move beyond the bio-medical paradigm to claim specific rights. In the context of HIV/AIDS, for example, the Supreme Court and several High Courts have issued groundbreaking judgments protecting the rights of persons living with HIV, including their right to non-discrimination, their right to affordable (or free) medication, and their right to assistance in accessing treatment (e.g., through reduced fares on trains). Courts have also held the government accountable for inadequate health infrastructure and equipment and insufficient budgetary allocations for healthcare. These cases could allow advocates and activists to challenge the numerous shortcomings of India's

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TB control program as not mere policy failures, but rather as human rights violations. The importance of doing so cannot be overstated—the stigma associated with TB, the lack of testing equipment and drugs, and the government’s near total failure to address drug-resistant TB, contribute to unnecessary sickness, poverty, and death.

We argue that India should incorporate a human rights approach into the RNTCP because doing so would both protect stakeholders’ rights and make the program more effective. A human rights approach would provide adherence support so that poor patients can afford the frequent travel to clinics; effectively regulate medical providers to reduce misdiagnosis and improper treatment; combat TB-related stigma, which delays care-seeking; dedicate adequate funding so that drugs, testing equipment, and trained staff are widely available; provide enforceable rights so that patients can hold the government accountable; address potential concerns relating to privacy of medical data and coercive measures; and involve patients in the design and implementation of TB programs in order to better address their needs. A human rights approach would also have to address the socio-economic determinants of TB—a crucial issue in India—given that it has the highest number of malnourished persons in the world, a growing slum population that is projected to soon exceed 104 million, and over 720 million people living in poverty.

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I. INTRODUCTION

India has the highest burden of tuberculosis (TB) in the world.¹ Twenty-three percent of all persons with TB live in India, and every day, approximately 602 Indians die from the disease.² However, it does not affect all segments of the population equally. Rather, it thrives on the most vulnerable—the marginalized, the ostracized, and the poor.³ The UN Committee on the Elimination of Racial Discrimination, for example, has noted that India's scheduled castes and tribes (historically disadvantaged groups that are entitled to affirmative action) are “disproportionately affected” by TB and that healthcare facilities are either unavailable or substantially worse where such people live.⁴ The disproportionate effect that TB has on marginalized communities raises important human rights concerns, especially in light of the traumatic stigma associated with the medical condition, which can further isolate and marginalize groups that already face discrimination.⁵

Despite the clear connection between TB and human rights, many world governments have constructed their TB programs based on a bio-medical approach rather than a human rights approach. India, for example, has a strong health-rights jurisprudence dating back to the 1980s,⁶ but it has yet to be meaningfully applied in the context of TB. There have been individual court cases, but they do not fully

1. T. Jacob John, *Tuberculosis Control in India: Why Are We Failing?*, 51 INDIAN PEDIATRICS 523, 523 (2014) (citing WORLD HEALTH ORG., GLOBAL TUBERCULOSIS REPORT (2013), http://apps.who.int/iris/bitstream/handle/10665/91355/9789241564656_eng.pdf?sequence=1); see WORLD HEALTH ORG., GLOBAL TUBERCULOSIS REPORT 17-18, 170-71, 230 (2017), <http://apps.who.int/iris/bitstream/handle/10665/259366/9789241565516-eng.pdf;jsessionid=170471FA1C17B831DE012A9AB8105BB4?sequence=1>.

2. WORLD HEALTH ORG., GLOBAL TUBERCULOSIS REPORT 2, 132 (20th ed. 2015) [hereinafter WHO REPORT], http://apps.who.int/iris/bitstream/handle/10665/191102/9789241565059_eng.pdf?sequence=1 (noting that, in 2014, 220,000 people died from TB in India).

3. JILL HANNUM & HEIDI LARSON, WORLD HEALTH ORG., A HUMAN RIGHTS APPROACH TO TUBERCULOSIS: GUIDELINES FOR SOCIAL MOBILIZATION 1 (Karen Reynolds ed., 2001), www.who.int/hhr/information/A%20Human%20Rights%20Approach%20to%20Tuberculosis.pdf.

4. Comm. on the Elimination of Racial Discrimination [CERD], Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations of the CERD: India, ¶ 24, U.N. Doc. CERD/C/IND/CO/19 (May 5, 2007).

5. See Kounteya Sinha, *Fighting TB and Taboo*, TIMES INDIA (Jan. 30, 2010, 2:26 PM), <https://timesofindia.indiatimes.com/life-style/spotlight/Fighting-TB-and-taboo/articleshow/5517099.cms> (describing the social stigma associated with the diagnosis of TB in India).

6. Ravi Duggal, *Right to Health and Health Care- Theoretical Perspective*, in HEALTH CARE CASE LAW IN INDIA 1, 3, (Mihir Desai & Kamayani B. Mahabal eds., 2007) [hereinafter HEALTH CARE] (first citing Ravi Duggal et al., *Special Statistics-10: Health Expenditure across States: Part I*, 30 ECON. & POL. WKLY. 834 (1995); then citing Ravi Duggal et al., *Special Statistics-11: Health Expenditure across States: Part II: Regional Disparity in Expenditure*, 30 ECON. & POL. WKLY. 901 (1995); and then citing RAVI DUGGAL, THE PRIVATE HEALTH SECTOR IN INDIA

address the human rights issues surrounding TB in India. For example, in December 2016, the father of a minor girl with multi-drug resistant TB filed a writ petition in the Delhi High Court seeking treatment with the drug Bedaquiline, which had been denied.⁷ The case ended in a settlement, memorialized in a court order, in which the girl would be given access to the drug.⁸ In addition, in a different case, the Supreme Court ordered the government to change the dosing schedule of TB treatment.⁹

This is unfortunate, because a human rights approach to TB in India could both uphold patients' dignity and lead to better public health outcomes by increasing the accessibility of and demand for treatment and reducing loss to follow up.¹⁰ The potential of a human rights approach can be seen in the context of HIV—by framing access to HIV treatment in rights-based language, advocates in India have secured important court victories (discussed throughout this article), which have helped reduce annual AIDS-related deaths from 148,309 in 2007 to 67,612 in 2015.¹¹

This article seeks to demonstrate specific benefits of a human-rights approach to TB in India. Towards this end, it will first review the legal framework relating to the right to health, both in international and domestic law. It will then provide a brief overview of India's TB programs. Finally, it will make specific recommendations on how to implement a human rights approach to TB in India, locating support for each in domestic and international law.

– NATURE, TRENDS AND A CRITIQUE (2000)); Mihir Desai, *Trends in Judicial Outcomes and Consequences for Health Care*, in HEALTH CARE, *supra* note 6, at 163, 165.

7. See *Update on Litigation in Delhi High Court Regarding Treatment of XDR TB with Bedaquiline through the Conditional Access Programme*, LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/wp-content/uploads/2014/12/Bedaquiline-TB-Writ-Note.pdf> (last visited Apr. 30, 2018).

8. *Kaushal Tripathi v. Lal Ram Sarup TB Hospital*, the W.P.(C) 11879/2016 (order dated Jan. 20, 2017) (on file with author).

9. See *Indian Supreme Court Orders Daily TB Treatment for Millions*, EXPRESS TRIB. (Jan. 23, 2017), <https://tribune.com.pk/story/1304564/indian-supreme-court-orders-daily-tb-treatment-millions/>.

10. See generally *Factsheet: Human Rights and the Three Diseases*, STOP TB PARTNERSHIP, <http://www.stoptb.org/assets/documents/global/hrtf/Partnership%20Forum%20Fact%20Sheet%20-%20Human%20Rights%20June%202011%20FINAL%20COPY%20logos.pdf> (last visited Feb. 3, 2018); *Tuberculosis and Human Rights*, STOP TB PARTNERSHIP, www.stoptb.org/assets/documents/global/hrtf/Briefing%20note%20on%20TB%20and%20Human%20Rights.pdf (last visited Feb. 3, 2018).

11. NAT'L AIDS CONTROL ORG. (NACO) & NAT'L INST. OF MED. STATISTICS, INDIA HIV ESTIMATIONS 2015: TECHNICAL REPORT 17–19 (2015), <http://www.naco.gov.in/sites/default/files/India%20HIV%20Estimations%202015.pdf>.

This discussion is timely for several reasons. First, the RNTCP has completed twenty years, making it a suitable time to reflect upon both its successes and failures. Second, the Indian government's landmark proposal to implement universal health care is currently receiving unprecedented attention, making it a good time to discuss improvements to the public health system. In fact, some of the reforms needed to implement universal health care in India would directly address shortcomings in the RNTCP. Third, given the troubling increase of drug-resistant (and extremely drug-resistant) TB in India, it is essential that India strengthen the RNTCP immediately. This discussion also provides useful guidance amidst renewed concerns over other communicable diseases in India, including dengue fever and drug-resistant malaria.

II. LEGAL FRAMEWORK: THE RIGHT TO HEALTH

The right to health is enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹² The same provision requires states to take steps necessary for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” and “the creation of conditions which would assure to all medical service and medical attention in the event of sickness.”¹³ States are obligated to respect, protect, and fulfill the right to health—that is, they must refrain from taking actions that would interfere with the right to health, prevent third parties from impairing the right to health of others, and adopt appropriate measures towards the full realization of the right to health.¹⁴ International law also prohibits discrimination “in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement.”¹⁵

The right to health is not explicitly mentioned in India's Constitution.¹⁶ However, the Supreme Court has read the right to health into

12. G.A. Res. 2200A (XXI), art. 12(1), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter G.A. Res. 2200A (XXI)].

13. *Id.* art. 12(c)-(d).

14. See Comm. on Econ., Soc. & Cultural Rights, Econ., & Soc. Council, Substantive Issues Arising in the Implementation of the Int'l Covenant on Econ., Soc. & Cultural Rights: General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Int'l Covenant on Econ., Soc. & Cultural Rights), ¶¶ 33, 50-52, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter Highest Attainable Standard].

15. *Id.* ¶ 18.

16. See INDIA CONST.

the right to life contained in Article 21.¹⁷ In the landmark case *Francis Mullen v. Union Territory of Delhi*, the Court held that the right to life includes more than the right to be alive—it includes “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter”¹⁸ More specifically, in a series of cases dealing with the substantive content of the right to life, the Supreme Court has found that the right to live with human dignity includes the right to health.¹⁹ *State of Punjab and Others v. Mohinder Singh* reiterated the settled position wherein right to health is regarded as an integral aspect of right to life under Article 21, and the government has a constitutional obligation to provide health facilities.²⁰ The Supreme Court in *Consumer Education and Research Centre v. Union of India* explicitly held that the right to life meant a right to a meaningful life, which was not possible without having a right to healthcare.²¹ Furthermore, the Supreme Court has indicated that international human rights law should be “read into” the fundamental rights enumerated in the Indian Constitution in the absence of domestic statutory law on a given issue.²²

III. INDIA’S TB PROGRAM

India’s Revised National Tuberculosis Control Program (RNTCP) was inaugurated in 1997 based on the World Health Organization’s (WHO) recommended strategy of Directly Observed Treatment, Short Course (DOTS).²³ Patients are initially tested for TB using sputum smear microscopy and then given TB treatment by a trained DOTS provider who observes the patient consume the medication.²⁴ For the initial “intensive phase” of treatment (normally two months), patients must take observed treatment at a DOTS provider

17. *Id.* art. 21.

18. *Francis Mullen v. Union Territory of Delhi*, AIR 1981 SC 746, 747 (India); *see also* *Consumer Educ. and Research Ctr. v. Union of India*, AIR 1995 SC 922, 938-39 (India).

19. *See* Sheetal Shah, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT’L L. 435, 467 (1999).

20. *State of Punjab and Others v. Mohinder Singh*, AIR 1997 SC 1225 (India).

21. *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42 (India).

22. *See* *Vishaka v. Rajasthan*, AIR 1997 SC 3011, 3012 (India); *see also* *Writ Petition (Civil) Judgment of Apr. 17, 2014 at para. 54*, *Mohd. Ahmed v. Union of India*, No. 7279 of 2013 (Delhi HC) (India).

23. *Revised National Tuberculosis Control Programme (RNTCP): Guidelines for TB Control in India*, WORLD HEALTH ORG., www.searo.who.int/india/tuberculosis/topic/tb_rntcpguidelines/en/ (last visited Aug. 5, 2016).

24. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, TECHNICAL AND OPERATIONAL GUIDELINES FOR TUBERCULOSIS CONTROL 12, 28 (2005), <http://health.bih.nic.in/Docs/Guidelines/Guidelines-TB-Control.pdf> [hereinafter GUIDELINES].

three times a week, and in the “continuation phase” (four months), the patient takes observed treatment once per week and is given the two other weekly doses to take at home.²⁵ In more complicated cases, such as those involving drug-resistant TB, the treatment period can extend to over two years, including up to nine months in the intensive phase.²⁶

Since the RNTCP was initiated, India has made remarkable progress in TB diagnosis and treatment.²⁷ The RNTCP is now the world’s largest DOTS program, covering over 1.2 billion people, with a treatment success rate around 88% for registered cases.²⁸ However, there are also numerous well-documented problems with India’s TB programs, which will be discussed in more detail below.²⁹

IV. SPECIFIC RECOMMENDATIONS: HOW TO IMPLEMENT A HUMAN RIGHTS APPROACH TO TB IN INDIA

The meaning and importance of a human rights approach to TB has been thoroughly explained by public health advocates and scholars.³⁰ In this article, we will not repeat this discussion by attempting to cover all the aspects of human rights approach to TB in India, but rather will focus on key areas where India is currently falling short. For now, we will simply note that, in conceptualizing a human rights-based approach, UN agencies have used the acronym PANEL—Participation, Accountability, Non-discrimination, Empowerment, and Legality.³¹ These components will be discussed in the context of specific recommendations below.

25. *Id.* at 19; WORLD HEALTH ORG., STANDARDS FOR TB CARE IN INDIA 38 (2014) [hereinafter TB CARE IN INDIA], http://www.searo.who.int/india/mediacentre/events/2014/stci_book.pdf.

26. See Christoph Lange et al., *Management of Patients with Multidrug-Resistant/Extensively Drug-Resistant Tuberculosis in Europe: A TBNET Consensus Statement*, 44 EUR. RESPIRATORY J. 23, 39, 53 (2014).

27. FIFTH JOINT MONITORING MISSION, REVISED NAT’L TUBERCULOSIS CONTROL PROGRAMME, REPORT OF THE JOINT TB MONITORING MISSION, INDIA 12 (2015), www.tbonline.info/media/uploads/documents/jmmdraft2015.pdf; *Fighting Tuberculosis in India*, WORLD BANK, web.worldbank.org/archive/website01291/WEB/0_CO-85.HTM (last visited Feb. 6, 2018).

28. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, TB INDIA 2015: REVISED NATIONAL TB CONTROL PROGRAMME ANNUAL STATUS REPORT 28, 66 (2015), <http://www.tbcindia.nic.in/showfile.php?lid=3166> [hereinafter REVISED NATIONAL]; see WHO REPORT, *supra* note 2.

29. See generally FIFTH JOINT MONITORING MISSION, *supra* note 27, at 6.

30. See, e.g., FXB CTR. FOR HEALTH & HUMAN RIGHTS, HARVARD SCH. OF PUB. HEALTH, HEALTH AND HUMAN RIGHTS RESOURCE GUIDE 3.2 (5th ed. 2013), http://cdn2.sph.harvard.edu/wp-content/uploads/sites/25/2014/03/HHRRG_Chapter-3.pdf; HANNUM & LARSON, *supra* note 3.

31. See GABRIELLE BERMAN, U.N. EDUC., SCI., & CULTURAL ORG., UNDERTAKING A HUMAN RIGHTS-BASED APPROACH: A GUIDE FOR BASIC PROGRAMMING 13 (2008); WORLD

A. Address the Socio-Economic Determinants of TB

Malnutrition, crowding, poor air circulation, and poor sanitation—all of which are associated with poverty—increase one’s risk both of becoming infected with TB and of developing active TB.³² This is of particular concern in India because it has the highest number of malnourished persons in the world, a growing slum population that was projected to exceed 104 million by 2017, and, as of 2011, over 720 million people living in poverty.³³ The impact of these socio-economic determinants is likely immense—recent data suggests that half of the active TB cases among adolescents and adults in India could be attributable to the effects of undernutrition, and people living in housing made from low-quality materials are two and a half times more likely to have TB.³⁴ More generally, social protection spending is “strongly associated” with lower TB case notifications, incidence, and mortality rates, and research in India specifically has confirmed the

HEALTH ORG., ENSURING A HUMAN RIGHTS-BASED APPROACH FOR PEOPLE LIVING WITH DEMENTIA 1 (2015), <http://www.ohchr.org/Documents/Issues/OlderPersons> [hereinafter LIVING WITH DEMENTIA].

32. HANNUM & LARSON, *supra* note 3, at 9 (citing P. Kamolratanakul et al., *Economic Impact of Tuberculosis at the Household Level*, 3 INT’L J. TUBERCULOSIS & LUNG DISEASE 596, 599 (1999)).

33. MINISTRY OF HOUS. & URBAN POVERTY ALLEVIATION NAT’L BLDG. ORG., GOV’T OF INDIA, REPORT OF THE COMMITTEE ON SLUM STATISTICS/CENSUS 32 (2010); HIMANSHU, ASIAN DEV. BANK, POVERTY AND FOOD SECURITY IN INDIA 1 (2013); see *Population, Total*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN> (last visited Feb. 6, 2018) [hereinafter *Total Population*] (India’s population in 2011 was 1.247 billion); *Poverty Headcount Ratio at \$3.10 a Day (2011 PPP) (% of Population)*, DATAMARKET, <https://datamarket.com/data/set/15nh/poverty-headcount-ratio-at-2-a-day-ppp-of-population#lds=15nh!ho4=4t4p&display=line> (last visited Feb. 6, 2018) [hereinafter *Poverty Headcount*] (as of 2011, 58% of Indians lived in poverty).

34. Anurag Bhargava et al., *Undernutrition and the Incidence of Tuberculosis in India: National and Subnational Estimates of the Population-Attributable Fraction Related to Undernutrition*, 27 NAT’L MED. J. INDIA 128, 130 (2014); M. Muniyandi et al., *The Prevalence of Tuberculosis in Different Economic Strata: A Community Survey from South India*, 11 INT’L J. TUBERCULOSIS & LUNG DISEASE 1042, 1043 (2007) (first citing M. Muniyandi, *Tuberculosis Control Programme – is it Pro Poor?*, 1 SAARC J. TUBERCULOSIS, LUNG DISEASES & HIV/AIDS 14 (2004); and then citing CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, RNTCP STATUS REPORT (2007)) (“[W]e found that TB prevalence was 2.5 times higher among people living in katcha houses as compared to pucca houses”); see also Baskaran Dhanaraj et al., *Prevalence and Risk Factors for Adult Pulmonary Tuberculosis in a Metropolitan City of South India*, 10 PLOS ONE e0124260, at 13 (Apr. 23, 2015) (first citing N. Shetty et al., *An Epidemiological Evaluation of Risk Factors for Tuberculosis in South India: A Matched Case Control Study*, 10 INT’L J. TUBERCULOSIS & LUNG DISEASE 80 (2006); and then citing X. Kan et al., *Indoor Solid Fuel Use and Tuberculosis in China: A Matched Case-Control Study*, 11 BMC PUB. HEALTH 498 (2011)) (“The study observed that slum dwellers had a 1.6 times higher risk of both culture and bacteriologically positive PTB than non-slum dwellers.”), <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0124260&type=printable>.

“significant association” between standard of living and the prevalence of TB.³⁵

To combat malnutrition, India needs to strengthen the Public Distribution System (PDS), which provides subsidized food to hundreds of millions of people.³⁶ Corruption, low-quality grains, poor targeting (many poor families do not receive benefits), and a lack of accountability have greatly reduced its effectiveness.³⁷ India should fully implement the National Food Security Act, 2013, which mandates needed reforms—including an improved grievance redressal mechanism, creation of state level monitoring bodies, and increased transparency—and allows the number of beneficiaries to be significantly increased.³⁸ In February 2016, the Supreme Court reproached some states for failing to implement the Act.³⁹ India should also include persons with TB in the Antyodaya Anna Yojana (AAY) scheme, which provides additional foodgrains to the “poorest of the poor.”⁴⁰ In 2008, the Right to Food Commissioners appointed by the Supreme Court recommended that patients undergoing treatment for TB or HIV be included in the AAY scheme, which was accomplished for HIV patients in 2009.⁴¹ Given that TB can lead to malnutrition, the

35. Muniyandi, *supra* note 34; Katrina F. Ortblad et al., *Stopping Tuberculosis: A Biosocial Model for Sustainable Development*, 386 LANCET 2354, 2356 (2015).

36. See ANIKET BAKSY ET AL., CENT. FOR CIVIL SOC’Y, THE PDS, CASH TRANSFERS AND NUTRITION IN URBAN INDIA, 8–9 (2013), https://ccsinternship.files.wordpress.com/2013/05/291_pds-and-cash-transfer_aniket-aashna-aayushi.pdf; SAKSHI BALANI, PRS LEGISLATIVE RESEARCH, FUNCTIONING OF THE PUBLIC DISTRIBUTION SYSTEM: AN ANALYTICAL REPORT 1 (2013).

37. See BALANI, *supra* note 36, at 7; RAJITA VARMA, CENT. FOR CIVIL SOC’Y, THE ‘LAST MILE’ CRITIQUE: IMPLEMENTATION AND ACCESSIBILITY OF PDS IN DELHI 5 (2012), [ccs.in/internship_papers/2012/269_implementation-accessibility-of-pds-in-delhi_rajita-verma.pdf](https://ccsinternship_papers/2012/269_implementation-accessibility-of-pds-in-delhi_rajita-verma.pdf).

38. National Food Security Act, 2013, No. 20, §§ 3(2), 14-16, 27-29, Acts of Parliament, 2013 (India).

39. Utkarsh Ananda, *SC Raps Govt for Not Implementing Food Security Law: Is Gujarat Not a Part of India?*, INDIAN EXPRESS (Feb. 2, 2016, 4:08 AM), indianexpress.com/article/india/india-news-india/is-gujarat-not-part-of-india-sc-questions-failure-in-implementing-mnrega-food-act/.

40. National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India) (indicating that the Act’s purpose is to “provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity”); see also *Targeted Public Distribution System*, DEP’T FOOD & PUB. DISTRIBUTION, <http://dfpd.nic.in/public-distribution.htm> (last updated June 27, 2017).

41. COMM’RS OF THE SUPREME COURT, EIGHTH REPORT OF THE COMMISSIONERS OF THE SUPREME COURT: A SPECIAL REPORT ON MOST VULNERABLE SOCIAL GROUPS AND THEIR ACCESS TO FOOD 9 (2008), <http://www.hrln.org/hrln/pdf/rtf/reports/Eight%20report%20.harsh%20tanveer%20final%20aug%2020%2008.pdf>; M.V.S Prasad, *Antyodaya Anna Yojana*, PRESS INFO. BUREAU (Apr. 26, 2013, 5:38 PM), <http://www.pib.nic.in/newsite/mbErel.aspx?relid=95141>.

government should include TB patients as well.⁴² Regarding housing, India should upgrade slums through the new Housing for All by 2022 scheme, which is specifically directed at addressing the housing needs of the urban poor, including slum dwellers.⁴³ In doing so, the government should follow a participatory approach that ensures slum residents are actively engaged and their rights and needs are considered.⁴⁴

Tying domestic programs to international human rights standards is required under the Legality component of the PANEL approach,⁴⁵ and under international law, India must address the socio-economic determinants of TB.⁴⁶ The right to health in international law includes “a wide range of socio-economic factors that promote conditions in which people can lead a healthy life,” and the right to housing requires dwellings must have access to heating, lighting, sanitation, and adequate space and be able to protect the inhabitants from health hazards and disease vectors.⁴⁷

Within India, the Supreme Court has recognized that the right to life, enshrined in Article 21 of the Constitution, includes both the right to food and the right to a shelter with adequate living space, clean and decent surroundings, sufficient light, pure air and water, and sanitation.⁴⁸ Even persons living in illegal settlements have the right to these minimum standards—for example, in 2014, the Bombay High Court held that, since the right to life includes the right to water, the government cannot deny the water supply to a person on the ground that he is residing in a structure which was illegally erected.⁴⁹ The Court has also issued numerous interim orders in the ongoing “right

42. WORLD HEALTH ORG., GUIDELINE: NUTRITIONAL CARE AND SUPPORT FOR PATIENTS WITH TUBERCULOSIS 10, 19 (2013).

43. MINISTRY OF HOUS. & URBAN POVERTY ALLEVIATION, GOV'T OF INDIA, PRADHAN MANTRI AWAS YOJANA: HOUSING FOR ALL (URBAN): SCHEME GUIDELINES i (2015).

44. *See generally* REINHARD SKINNER ET AL., U.N. HABITAT, A PRACTICAL GUIDE TO DESIGNING, PLANNING, AND EXECUTING CITYWIDE SLUM UPGRADING PROGRAMMES (Jane Reid et al. eds., 2014).

45. *See, e.g.*, LIVING WITH DEMENTIA, *supra* note 31, at 4.

46. *See* Highest Attainable Standard, *supra* note 14, ¶ 2.

47. *Id.* ¶ 4; Comm. on Econ., Soc. & Cultural Rights, Rep. on the Sixth Session, annex III, ¶ 8(b), U.N. Doc. E/1992/23 E/C.12/1991/4 (Nov. 25, 1991–Dec. 13, 1991).

48. *See* Shantistar Builders v. Narayan Khimalal Totame, AIR 1990 SC 630, 633 (India); Chameli Singh v. State of U. P., AIR 1996 SC 1051, 1052-1053 (India).

49. Public Interest Litigation Oral Order of Dec. 15, 2014, Pani Haq Samiti v. Mumbai Muni. Corp., No. 10 of 2014, paras. 11, 19 (Bombay HC) (India).

to food” case, *PUCL v. Union of India*, indicating that the government must provide subsidized food to the infirm and destitute.⁵⁰

B. Provide Adherence Support

There are a variety of physical, financial, social, and cultural obstacles that can prevent a person who has started TB treatment from completing the entire course.⁵¹ In several studies, TB patients in India cited the distance to DOTS providers as a reason for discontinuing treatment.⁵² For example, one study in rural Maharashtra found that 34% of respondents lived more than five kilometers from a DOTS health facility and 17% lived more than ten kilometers away, and another study in a tribal area in Nagaland reported that the average time for rural residents to reach a Designated Microscopy Centre to obtain free treatment was three hours.⁵³ A related issue is the cost of transportation—in some areas, more than half of TB patients have to spend money to reach a DOTS centre.⁵⁴ While the amounts involved may be relatively small (between ten to thirty rupees), the repeated visits required for proper treatment (three times per week) and the widespread poverty in India (over 720 million people live on less than \$3.10 [Rs. 212] per day) can make this a serious barrier to obtaining treatment.⁵⁵ Inconvenient clinic hours, especially in conflict with working hours, make it difficult for some patients to adhere to the treatment schedule, and for those who continue treatment at the ex-

50. Interim Order of May 2, 2003, *People’s Union for Civil Liberties v. Union of India*, (2003) 2 SCR 1136 (India).

51. See Rony Zachariah et al., *Language in Tuberculosis Services: Can We Change to Patient-Centred Terminology and Stop the Paradigm of Blaming the Patients?*, 16 INT’L J. TUBERCULOSIS & LUNG DISEASE 714, 715 (2012).

52. Sudipta Basa & Srinivas Venkatesh, *Study on Default and Its Factors Associated among Tuberculosis Patients Treated under DOTS in Mayurbhanj District, Odisha*, 2 J. HEALTH RES. & REVIEWS 25, 26 (2015); P.G. Gopi et al., *Risk Factors for Non-Adherence to Directly Observed Treatment (DOT) in a Rural Tuberculosis Unit, South India*, 54 INDIAN J. TUBERCULOSIS 66, 69 (2007); Nirmalya Roy et al., *Risk Factors Associated with Default among Tuberculosis Patients in Darjeeling District of West Bengal, India*, 4 J. FAM. MED. & PRIMARY CARE 388, 390 (2015).

53. Shilpa Bawankule et al., *Delay in DOTS for New Pulmonary Tuberculosis Patient from Rural Area of Wardha District, India*, 9 ONLINE J. HEALTH & ALLIED SCI., no. 1, 2010, at 5, <http://cogprints.org/6991/1/2010-1-5.pdf>; Mrinalini Das et al., *Self-Administered Tuberculosis Treatment Outcomes in a Tribal Population on the Indo-Myanmar Border, Nagaland, India*, PLOS ONE e108186, Sept. 2014, at 3.

54. Srivastav Shalini et al., *Indirect Cost as Hindrance in Availing DOTS for Tuberculosis: Is the Treatment Truly Free of Cost?*, 2 NAT’L J. MED. RES. 35, 35 (2012).

55. *Id.* at 37; Suparna Bagchi et al., *Determinants of Poor Adherence to Anti-Tuberculosis Treatment in Mumbai, India*, 1 INT’L J. PREVENTIVE MED. 223, 230 (2010); *Poverty Headcount*, *supra* note 33; *Total Population*, *supra* note 33.

pense of work, lost wages can result in significant financial burden.⁵⁶ This is most acutely an issue for the poor since manual labourers are hired on a daily basis, and attending a clinic visit, however brief, will cost them the entire day's wages.⁵⁷

The behaviour of health providers is also problematic. Rude treatment has been reported, leading patients to switch to the more expensive private sector.⁵⁸ Some providers "weed out" patients who might not be able to complete the treatment (e.g., alcoholics) to avoid diminishing the centre's results.⁵⁹ Others require patients who have previously discontinued treatment to produce a "guarantor" who can vouch for them before they are allowed to resume treatment.⁶⁰ Furthermore, government health staff do not routinely follow up with patients that have stopped coming for treatment—data from 2008 in Ahmedabad found that, out of 123 TB patients who missed a dose of medication, only one third received a home visit.⁶¹ Poor support by health staff is a significant predictor of interrupted treatment.⁶²

India should provide free (or, at least, reduced fare) transport to patients accessing TB treatment in government health centres. This is currently provided to HIV patients in several states, either through free transport upon the showing of proper documentation (e.g., a certificate from an HIV treatment centre) or through reimbursement af-

56. Ramya Ananthkrishnan et al., *Socioeconomic Impact of TB on Patients Registered within RNTCP and Their Families in the Year 2007 in Chennai, India*, 29 LUNG INDIA 221, 222–23 (2012); Basa & Venkatesh, *supra* note 52, at 27; Rajesh D. Deshmukh et al., *Patient and Provider Reported Reasons for Lost to Follow Up in MDRTB Treatment: A Qualitative Study from a Drug Resistant TB Centre in India*, 10 PLOS ONE e0135802, at 5–6 (Aug. 24, 2015); Bhuwan Sharma et al., *Indirect Costs in the Treatment of Tuberculosis under DOTS*, 2 INT'L ARCHIVES INTEGRATED MED. 90, 92 (2015); Sonia Tiwari & R. R. Wavare, *Reasons for Non-Compliance and Profile of Tuberculosis Patients in Urban Area of Indore*, 6 NAT'L J. COMMUNITY MED. 55, 56 (2015).

57. K. R. John et al., *Costs Incurred by Patients with Pulmonary Tuberculosis in Rural India*, 13 INT'L J. TUBERCULOSIS & LUNG DISEASE 1281, 1285 (2009).

58. Deshmukh et al., *supra* note 56, at 5.

59. Peter D.O. Davies, *Multi-Drug-Resistant Tuberculosis*, in TUBERCULOSIS 809, 813 (M. Monir Madkour ed., 2004).

60. A. Jaiswal et al., *Adherence to Tuberculosis Treatment: Lessons from the Urban Setting of Delhi, India*, 8 TROPICAL MED. & INT'L HEALTH 625, 629 (2003); Nerges Mistry et al., *Drug-Resistant Tuberculosis in Mumbai, India: An Agenda for Operations Research*, 1 OPERATIONS RES. FOR HEALTH CARE 45, 49 (2012).

61. Bhavna Puwar et al., *A Record Based Study on Paediatric Tuberculosis in Ahmedabad City, India*, 3 NAT'L J. COMMUNITY MED. 153, 154 (2012); *see also* S. Gupta et al., *Patient Satisfaction Towards RNTCP: A Study of Patient Satisfaction Towards RNTCP in Meerut District, Uttar Pradesh*, 42 NAT'L TUBERCULOSIS INST. BULL. 9, 10 (2006) (indicating that when patients missed a dose, only 28% were contacted by the DOTS provider).

62. Sophia Vijay et al., *Risk Factors Associated with Default Among New Smear Positive TB Patients Treated under DOTS in India*, PLOS ONE e10043, Apr. 2010, at 3.

ter the fact.⁶³ The government should also help reduce the impact of lost wages by creating TB specific pensions and including persons living with TB in existing social protection schemes meant for, e.g., widows and the elderly, both of which have already been done for HIV patients in some states.⁶⁴ More generally, TB patients should be able to access government welfare programs and services through a single forum and a liaison should be provided to facilitate access.⁶⁵ Some states are experimenting with routing social protection schemes through HIV treatment centres; this should be explored as a possibility for TB as well.⁶⁶ The government should expand access to DOTS through community volunteers as an alternative to going to government health centres—there appears to be great variation in availability of community providers, with 89% of public sector TB patients doing this in Andhra Pradesh, but only 29% in Mizoram.⁶⁷ The government should also train health providers to be sensitive to the needs and challenges of TB patients, expand clinic timings, and ensure appropriate follow-up (such as SMS reminders and home visits) with patients who have missed a dose of medication or other treatment.

International law requires states to take “positive measures that enable and assist individuals and communities to enjoy the right to health.”⁶⁸ The Indian Constitution similarly states that the government must provide public assistance in cases of unemployment and other cases of undeserved want.⁶⁹ The Delhi High Court recognized the importance of this in *Love Life Society v. Union of India*, in which it ordered a meeting between the Ministry of Health and the Railway Ministry to discuss giving persons living with HIV a reduced train fare to travel to distant treatment centres.⁷⁰ Indian Railways subsequently

63. VIMLA NADKAMI ET AL., U.N. DEV. PROGRAMME, HIV SENSITIVE SOCIAL PROTECTION: A FOUR STATE UTILIZATION STUDY 31 (2011), http://www.undp.org/content/dam/india/docs/hiv_sensitive_social_protection_a_four_state_utilisation_study.pdf; see NAT'L AIDS CONTROL ORG. (NACO), GOVERNMENT ORDERS / CIRCULARS ON HIV SENSITIVE SOCIAL PROTECTION ISSUED BY STATE GOVERNMENTS 16, 62, 93, 96, 139, 159, 198, 211, 215, 222, 228, 240, 261, 263, 279, 313, 315 (n.d.), indiahivinfo.naco.gov.in/sites/default/files/media-gallery/718%20_%20Social%20Protection%20Compendium.pdf.

64. NADKAMI ET AL., *supra* note 63, at 4; see NACO, *supra* note 63, at 10, 94, 271.

65. FIFTH JOINT MONITORING MISSION, *supra* note 27, at 36–37.

66. NADKAMI ET AL., *supra* note 63, at viii.

67. MINISTRY OF HEALTH & FAMILY WELFARE, GOV'T OF INDIA, TB INDIA 2016: REVISED NATIONAL TB CONTROL PROGRAM ANNUAL STATUS REPORT 103 (2016), <http://tbcindia.nic.in/index1.php?lang=1&level=2&sublinkid=4569&lid=3174>.

68. Highest Attainable Standard, *supra* note 14, ¶ 37.

69. INDIA CONST. art. 41.

70. Writ Petition (Civil) Decision at 1, *Love Life Society v. Union of India*, No. 8700 of 2006 (Dehli HC) (India); *Love Life Society vs. Union of India & Ors*, HUM. RTS. L. NETWORK,

announced that it would offer a 50% concession.⁷¹ In addition, India's current TB policies recommend reimbursement of travel expenses; home visits or use of information technology to follow up with patients who have missed treatment; and making treatment available at locations and times so as to minimize workday disruptions.⁷²

C. *Ensure Quality Treatment*

The majority of Indians seek TB treatment in the private sector (at least initially), which is largely unregulated.⁷³ Unqualified practitioners with limited medical knowledge are able to “prescribe” TB medications because they are widely available over the counter (despite the law's requirement of a prescription).⁷⁴ Although India banned the use of serological tests for diagnosis of TB in 2012, private providers continue to use them for diagnosis.⁷⁵ Private providers also commonly prescribe inappropriate medication regimens, which contributes to drug resistance.⁷⁶ A 2010 study in Mumbai, for example, found that only six out of 106 private medical practitioners prescribed an appropriate drug regimen for TB with correct drugs, dosage, and

hrln.org/hrln/hiv-aids/pils-a-cases/207-love-life-society-vs-union-of-india-a-ors.html (last updated Mar. 3, 2008).

71. *Indian Railways To Offer 50% Concession To HIV-Positive People Traveling to NACO Treatment Centers*, KAISER HEALTH NEWS (June 11, 2009), khn.org/morning-breakout/dr00051191/.

72. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV'T OF INDIA, GUIDELINES ON PROGRAMMATIC MANAGEMENT OF DRUG RESISTANT TB (PMDT) IN INDIA 61, 63 (May 2012), <https://tbcindia.gov.in/WriteReadData/1892s/8320929355Guidelines%20for%20PMDT%20in%20India%20-%20May%202012.pdf> [hereinafter PROGRAMMATIC]; TB CARE IN INDIA, *supra* note 25, at 54–55, 69, 71.

73. *See* HEALTH CARE, *supra* note 6, at 3.

74. Ramesh Kumar, *Empirical Use of Antituberculosis Drugs Should Not Be Equated to Their Inappropriate and Indiscriminate Use*, 43 INDIAN J. PHARMACOLOGY 363, 363–64 (2011); Ekatha Ann John, *Over-Counter Drugs Fuel TB Threat*, TIMES INDIA (July 10, 2014, 5:51 AM), timesofindia.indiatimes.com/city/chennai/Over-counter-drugs-fuel-TB-threat/articleshow/38109005.cms.

75. Virander S. Chauhan, *Can India Defeat Tuberculosis and Save Three Lakh Lives?*, DNA (Mar. 24, 2015, 8:00 AM), www.dnaindia.com/analysis/standpoint-can-india-defeat-tuberculosis-and-save-three-lakh-lives-2071438; *Diagnosis of Tuberculosis*, GOV'T INDIA PRESS INFO. BUREAU (Nov. 30, 2012, 4:57 PM), pib.nic.in/newsite/PrintRelease.aspx?relid=89739; Sarman Singh, *Serology Testing Ban Needs To Be Enforced*, HINDU (Mar. 23, 2014, 12:41 AM), www.thehindu.com/opinion/open-page/serology-testing-ban-needs-to-be-enforced/article5820021.ece.

76. Alpa Dalal et al., *Resistance Patterns Among Multidrug Resistant Tuberculosis Patients in Greater Metropolitan Mumbai: Trends Over Time*, 10 PLOS ONE e0116798, Jan. 21, 2015, at 6–7.

duration.⁷⁷ Wrong and delayed diagnoses and improper treatment contribute to the spread of both TB and drug-resistant TB.⁷⁸

Another problem is that poor quality TB drugs are sold in the private sector.⁷⁹ This may be due to inadequate storage of properly formulated drugs or drugs that were not manufactured with the proper amount of active ingredients in the first place.⁸⁰ Regardless of the cause, this is a serious concern—in two studies, over 10% of certain TB medications failed quality testing.⁸¹ Substandard drugs can lead to patient death and development of drug resistance.⁸²

India needs to more thoroughly regulate the private health sector by enforcing the Clinical Establishments Act, 2010. The Act applies to both public and private health facilities and requires them to meet the Standard Treatment Guidelines issued by the government, which include the Standards for TB Care in India.⁸³ Under the Act, designated authorities can inspect any clinical establishment and give binding directions for improvement.⁸⁴ There are financial penalties for any violation of the Act, and if a clinical establishment is not complying with the conditions for registration, including the Standard Treatment Guidelines, the authorities can cancel its registration.⁸⁵ One key problem with the Clinical Establishments Act is that it does not provide for a separate body or budget to implement it, but rather assigns responsibilities for all inspections to a “district registering authority” led by existing government employees—the District Collector and the

77. Zarir F. Udhwadia et al., *Tuberculosis Management by Private Practitioners in Mumbai, India: Has Anything Changed in Two Decades?*, PLOS ONE e12023, Aug. 9, 2010, at 2; see also Gyanshankar Mishra & Jasmin Mulani, *Tuberculosis Prescription Practices in Private and Public Sector in India*, 4 NAT'L J. INTEGRATED RES. MED. 71 (2013) (finding that only 9.52% of TB treatment prescriptions from private practitioners and 4.76% from government facilities were correct).

78. See Anurag Bhargava et al., *Mismanagement of Tuberculosis in India: Causes, Consequences, and the Way Forward*, 9 HYPOTHESIS 1, 3–6 (2011); Mistry et al., *supra* note 60, at 49; *Patients in India Suffer the Consequences of Poor Regulation of TB Drugs*, MEDECINS SANS FRONTIERS (Mar. 21, 2014), www.msfindia.in/patients-india-suffer-consequences-poor-regulation-tb-drugs.

79. R. Bate et al., *Substandard and Falsified Anti-Tuberculosis Drugs: A Preliminary Field Analysis*, 17 INT'L J. TUBERCULOSIS & LUNG DISEASE 308, 309–10 (2013).

80. See *id.* at 310.

81. *Id.* at 309 (noting a 10.1% failure rate in India); Roger Bate et al., *Pilot Study of Essential Drug Quality in Two Major Cities in India*, PLOS ONE e6003, June 23, 2009, at 2.

82. Bate et al., *supra* note 79; Bate et al., *supra* note 81, at 1.

83. Clinical Establishments (Registration and Regulation) Act, 2010, No. 23, § 2(c)(ii), Acts of Parliament, 2010 (India); *Standard Treatment Guidelines*, MINISTRY HEALTH & FAM. WELFARE, <http://clinicalestablishments.gov.in/En/1068-standard-treatment-guidelines.aspx> (last visited Feb. 6, 2018).

84. Clinical Establishments (Registration and Regulation) Act, 2010, § 33.

85. *Id.* §§ 32, 40–46.

District Health Officer—who are already overburdened.⁸⁶ Thus, oversight is lost. The Act also fails to provide a grievance mechanism for patients in the private sector (the public sector already has one, at least on paper, as will be discussed below).⁸⁷ The Clinical Establishments Act should be amended to provide a separately financed body to inspect and oversee all health facilities, including private ones, and to create a grievance redressal mechanism.

The government should also enforce The Drugs and Cosmetics Act, 1940,⁸⁸ to ensure that only accurate and reliable diagnostics are used. Such tests already fall under the Act, and the government is empowered to prohibit manufacture and sale of devices that make false or misleading claims, with criminal penalties for violations.⁸⁹ The Act also gives the government the authority to prohibit import, manufacture, and sale of non-standard, misbranded, adulterated, and spurious drugs, including drugs that contain ingredients in quantities for which there is no therapeutic justification.⁹⁰ In addition, the government should enact the Drugs and Cosmetics (Amendment) Bill, 2013, which would give the government additional regulatory authority over medical devices, including the power to prohibit medical devices for which there is no functional justification.⁹¹

The Committee on Economic, Social and Cultural Rights (CESCR) has stated that health facilities, goods, and services must be “scientifically and medically appropriate and of good quality.”⁹² Under international law, States must also ensure that the privatization of the health sector does not threaten the quality of health services, and that health professionals meet appropriate standards of education and skill.⁹³ The failure to sufficiently regulate the activities of individuals, groups, or corporations so as to prevent them from violating the right to health of others is a violation of international law.⁹⁴ Similarly, Indian courts have made clear that allowing private hospitals to “run a mock [sic]” would “defeat the very purpose and the meaning and ex-

86. *Id.* at §§ 2(a), 10(1), 33; Anant Phadke, *Regulation of Doctors and Private Hospitals in India*, 51 *ECON. & POL. WKLY.* 46, 51 (2016).

87. Phadke, *supra* note 86, at 52.

88. Drugs and Cosmetics Act, 1940, No. 23, Acts of Parliament, 1940 (India).

89. *Id.* §§ 3(b)(iv), 17(c), 18(a)(i), 27(d).

90. *Id.* §§ 10, 10A, 18, 26A.

91. *See* Drugs and Cosmetics (Amendment) Bill, 2013, No. LVIII, §§ 12–13(7I), Acts of Parliament, 2013 (India).

92. Highest Attainable Standard, *supra* note 14, ¶ 12(d).

93. *See id.* ¶ 35.

94. *See id.* ¶ 51.

tent of the right to health care which is embodied in Article 21.”⁹⁵ The Supreme Court has explicitly stated that, in an appropriate case, it will give directions to even private employers to protect the right to life,⁹⁶ and it has ordered states to stop unqualified and unregistered persons from practicing medicine and making false claims.⁹⁷ Regarding poor quality drugs, the Supreme Court noted as far back as 1987 that “strict regulations” are needed to ensure that drugs maintain their quality, that “the process of regulation has to be strengthened,” and that “constant and regular attention has to be bestowed in order that the flow into the market may be only of acceptable drugs.”⁹⁸

D. Combat Stigma

In India, stigma related to TB is rampant.⁹⁹ Many people refrain from telling anyone, even family members, that they have or suspect that they have TB.¹⁰⁰ In some cases, persons with TB have lost their jobs after disclosing this at the work place.¹⁰¹ Some patients travel to distant clinics to avoid being seen taking treatment by their neighbours, or go to private clinics, which are perceived to offer more privacy,¹⁰² both of which increase the likelihood that treatment will be discontinued for financial reasons.¹⁰³ Even health care workers and

95. *Smt. Vandana Dixit v. Visitor S.G.P.G.I.*, (2010) ILR 3 All 1058, para. 25 (Allahabad HC) (India); *see also* *Pt. Parmanand Katara v. Union of India*, 1989 AIR 2039, para. 8 (India).

96. *Consumer Educ. & Research Cent. v. Union of India*, 1995 AIR 922, para. 30 (India).

97. *D.K. Joshi v. State of U.P.*, (2000) 3 SCR 525 (India); *Writ Petition of Mar. 27, 2007, Karnataka Network for People living with HIV/AIDS v. Balachandra K. Pagali*, No. 8852 of 2006 (Karnataka HC) (India).

98. *Vincent Parikurlangara v. Union of India*, 1987 2 SCR 468 (India).

99. *See* Tanu Anand et al., *Perception of Stigma Towards TB Patients on DOTS and Patients Attending General OPD in Delhi*, 61 INDIAN J. TUBERCULOSIS 35, 35 (2014); D. Somma et al., *Gender and Socio-Cultural Determinants of TB-Related Stigma in Bangladesh, India, Malawi and Colombia*, 12 INT'L J. TUBERCULOSIS & LUNG DISEASE 856, 858-60 (2008) (“India had the highest item-adjusted stigma index (1.17) . . .”).

100. *See* V. K. Dhingra & Shadab Khan, *A Sociological Study on Stigma among TB Patients in Delhi*, 57 INDIAN J. TUBERCULOSIS 12, 17 (2010) (“here was an immense stigma observed at society level with 60% of the patients hiding their disease (P<0.5) from the friends or neighbours . . .”); Priya Y. Kulkarni et al., *Treatment Seeking Behavior and Related Delays by Pulmonary Tuberculosis Patients in E-Ward of Mumbai Municipal Corporation, India*, 3 INT'L J. MED. & PUB. HEALTH 286, 289 (2013); C.M. Munegowda, *TB Stigma in India—A Harsh Reality Even After Five Decades of A TB Control Programme*, BMJ OPINION (Sept. 8, 2015), blogs.bmj.com/bmj/2015/09/08/tb-stigma-in-india-a-harsh-reality.

101. K. Jaggarajamma et al., *Psycho-Social Dysfunction: Perceived and Enacted Stigma among Tuberculosis Patients Registered under Revised National Tuberculosis Control Programme*, 55 INDIAN J. TUBERCULOSIS 179, 185 (2008).

102. Athar Parvaiz, *Running Away from TB Treatment*, INTER PRESS SERV. (July 22, 2013), <http://www.ipsnews.net/2013/07/kashmiris-run-away-from-tb-treatment/>; Sinha, *supra* note 5.

103. Parvaiz, *supra* note 102.

medical students are reluctant to work with TB patients.¹⁰⁴ This stigma is due, in part, to the widespread misunderstanding of the symptoms, cause, method of transmission, contagiousness, and even the curability of TB, at least in some parts of the country.¹⁰⁵

TB-related stigma is a well-recognized barrier to timely screening, diagnosis, care seeking, and adherence to treatment.¹⁰⁶ However, advocacy, communication, and social mobilization, which could be used to educate and fight stigma, is currently a low priority in the RNTCP.¹⁰⁷ India should fully implement the Operational Handbook on Advocacy, Communication, and Social Mobilization developed in 2014 by the Central TB Division,¹⁰⁸ which provides guidance on how to create effective education and information campaigns at the local, state, and national levels, and also follow the recommendations relating to education and awareness raising made by the 2015 Joint TB Monitoring Mission.¹⁰⁹

Under international law, states must address widespread stigmatization of persons on the basis of their health status (including disease), and must take “concrete, deliberate and targeted measures” to eliminate discrimination.¹¹⁰ States must also ensure access to health facilities, goods, and services on a non-discriminatory basis, and this must be done immediately (i.e., is not subject to progressive realiza-

104. Sonal Mobar & A.K. Sharma, *Stigma and Social Exclusion among Tuberculosis Patients: A Study of Ladakh, India*, 1 INT'L J. HEALTH, WELLNESS & SOC'Y 119, 136 (2011); Manjulika Vaz et al., *Perceptions of Stigma among Medical and Nursing Students and Tuberculosis and Diabetes Patients at a Teaching Hospital in Southern India*, 13 INDIAN J. MED. ETHICS 8, 8 (2016).

105. See Palash Das et al., *Perception of Tuberculosis among General Patients of Tertiary Care Hospitals of Bengal*, 29 LUNG INDIA 319, 320–21 (2012); S.N. Mani Devi Karampudi et al., *Awareness of Tuberculosis among Patients Attending RNTCP at Siddhartha Medical College, Vijayawada*, 1 ASIAN PAC. J. HEALTH SCI. 50, 50–53 (2014); P. Kulkarni et al., *Tuberculosis Knowledge and Awareness in Tribal-Dominant Districts of Jharkhand, India: Implications for ACSM*, 4 PUB. HEALTH ACTION 189, 189 (2014); Talha Saad & Abhay S. Tirkey, *Tuberculosis Associated Stigma among Patients Attending Outpatient in Medical College Hospital in Sagar (Madhya Pradesh) in Central India*, 3 J. MED. & HEALTH SCI. 126, 129 (2014).

106. FIFTH JOINT MONITORING MISSION, *supra* note 27, at 86; Kulkarni et al., *supra* note 105, at 189, 192; Saad & Tirkey, *supra* note 105, at 128–130 (“Patients who considered TB as a socially stigmatizing disease had a longer patient delay in seeking care for TB symptoms than those that did not.”).

107. GUIDELINES, *supra* note 24, at 39–41.

108. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV'T OF INDIA, OPERATIONAL HANDBOOK ON ADVOCACY, COMMUNICATION, AND SOCIAL MOBILIZATION (Mar. 2014), http://www.nrhmhp.gov.in/sites/default/files/files/1%20Handbook%20on%20ACSM%20%202014_04_02.pdf.

109. GUIDELINES, *supra* note 24, at 40–41.

110. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶¶ 33, 36, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

tion).¹¹¹ The Committee on Economic, Social and Cultural Rights has also noted that access to information is an integral component of the right to health¹¹² and that states have a positive obligation to conduct information campaigns and disseminate information relating to health.¹¹³ This would address the Non-discrimination component of the PANEL principles.¹¹⁴ Indian courts have acknowledged the importance of providing health-related information to the public—the Gujarat High Court noted in 2013 that “normalizing the presence of HIV/AIDS in society through public education is the only way to reduce discriminatory attitudes and practices,” and that the government should undertake awareness programs directed towards both the public at large and HIV patients specifically.¹¹⁵ Indian courts have also held that a public sector employee cannot be denied a position merely because they are living with HIV¹¹⁶ and that doctors cannot refuse to treat patients simply because they are living with HIV.¹¹⁷

E. Dedicate Adequate Funding for TB

India’s National Strategic Plan for Tuberculosis Control 2017–2025 states that Rs. 16,649 crore (Rs. 166 billion) is needed “over the next three years to transform TB control and achieve the national goal of ending TB as a major public health problem by 2025.”¹¹⁸ This is significantly lower than the WHO’s estimate of \$788 million (approximately Rs. 52 billion) needed for 2015 alone.¹¹⁹ Regardless, the government is not fully funding even the lower amount.

111. See Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13: The Right to Education (Art. 13), ¶¶ 43-44, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

112. Highest Attainable Standard, *supra* note 14, ¶ 3.

113. *Id.* ¶¶ 36–37.

114. See generally BERMAN, *supra* note 31.

115. Harshad J. Pabari v. Gujarat, 2013 GLR 3 (Gujarat) 258, paras. 30, 34(2), 34(5) (Gujarat HC) (India).

116. See, e.g., MX v. ZY, 1997 AIR 406 (Bom.) para. 62 (“[D]enial of work to the petitioner as a casual labourer merely because of his HIV status is thoroughly unjustified and-illegal . . .”); see also Atiya Bose & Kajal Bhardwaj, *Legal Issues that Arise in the HIV Context*, INFOCHANGE INDIA (Feb. 2008), <http://infochangeindia.org/component/content/article/361-hiv-aids/hiv-a-human-rights/6899-legal-issues-that-arise-in-the-hiv-context> (listing several “[d]iscrimination in the workplace” cases involving “[p]ersons living with HIV/AIDS”).

117. See, e.g., Oral Order of May 28, 2015 at 1, Sohila Kuwar v. Bihar, No. 8301 of 2015 (Patna HC) (India) (“[M]erely because a person is HIV positive no doctor can refuse to take care under Hypocretics [sic] oath . . .”).

118. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, REVISED NATIONAL TUBERCULOSIS CONTROL PROGRAMME: NATIONAL STRATEGIC PLAN FOR TUBERCULOSIS CONTROL 2017–2025 97 (n.d.) [hereinafter STRATEGIC PLAN], <https://tbcindia.gov.in/WriteReadData/NSP%20Draft%202020.02.2017%201.pdf>.

119. WHO REPORT, *supra* note 2, at 91.

Of the Rs. 45 billion proposed in the National Strategic Plan, it is estimated that Rs. 1,998.87 crore (Rs. 19 billion) will come from external sources.¹²⁰ This leaves Rs. 2,501.28 crore (Rs. 25 billion) to be funded by the government. However, in the first three years of the National Strategic Plan, the government approved only Rs. 1,607 crore (Rs. 16 billion) and, of this, only Rs. 887.27 crore (Rs. 8.8 billion) was actually released to the states.¹²¹ This has caused shortages of drugs and equipment and left some states unable to cover RNTCP staff salaries.¹²² For example, the 2015 Joint TB Monitoring Mission noted that, in Andhra Pradesh, contractual staff suffered delayed remuneration of at least four months.¹²³

A related problem is a lack of medication and equipment for drug-resistant TB. In 2013, for example, 248,000 cases of TB were tested for drug resistance and 35,400 were found to have multiple drug resistant or rifampicin-resistant TB.¹²⁴ However, only 20,700 received treatment that year.¹²⁵ Government doctors have reported such drug shortages for several years.¹²⁶ Also, while the WHO recommends one laboratory with drug-susceptibility testing for every five million people, the ratio in India, as of 2014, was 0.2 per five million.¹²⁷ The 2015 draft JMM report concluded that procurement of new testing equipment was “unaccountably delayed.”¹²⁸ There are also shortages of other key supplies.¹²⁹ The Sewri TB Hospital in Mumbai—the largest TB hospital in Asia—has refused to perform lung surgeries on TB patients because they do not have adequate ventilation equipment in

120. See Savita Thakur, *Govt. Cuts Back Planned Funding for National Health Mission by 20 Percent*, MED. DIALOGUES (Nov. 25, 2017), <https://medicaldialogues.in/govt-cuts-back-planned-funding-for-national-health-mission-by-20-percent/>.

121. See *Need to Enhance Budget for TB Programme*, INDIA SAGA (Apr. 8, 2017), <http://www.theindiasaga.com/saga-corner/need-to-enhance-budget-for-tb-programme>.

122. C. Maya, *TB Control Scheme Gasping for Life*, HINDU, <http://www.thehindu.com/news/cities/Thiruvananthapuram/tb-control-scheme-gasping-for-life/article8084492.ece> (last updated Sept. 22, 2016); Kanchan Srivastava, *TB Epidemic Looms Large with Rs 2,000 Crore Fund Cut, Erred Policy*, DNA, www.dnaindia.com/mumbai/report-tb-epidemic-looms-large-with-rs-2000-crore-fund-cut-erred-policy-2051254 (last updated Jan. 10, 2015); Ranjana Diggikar, *Funds Crunch Hits Fight Against TB*, TIMES INDIA, <http://timesofindia.indiatimes.com/city/aurangabad/Funds-crunch-hits-fight-against-TB/articleshow/45359806.cms/> (last updated Dec. 3, 2014).

123. GUIDELINES, *supra* note 24, at 32, 38–41.

124. FIFTH JOINT MONITORING MISSION, *supra* note 27.

125. Nishant Gupta et al., *Tuberculosis: A Man with Fever, Cough, and Mycobacterium*, SCI. INDIA, May–June 2016, at 25, 26.

126. See, e.g., Swati Jha, *MDR-TB Drug Shortage Continues*, ASIAN AGE (Jan. 12, 2015, 2:33 AM), <http://www.asianage.com/mumbai/mdr-tb-drug-shortage-continues-013>.

127. WHO REPORT, *supra* note 2, at 72.

128. GUIDELINES, *supra* note 24, at 47.

129. FIFTH JOINT MONITORING MISSION, *supra* note 27, at 59, 79, 103, 116.

the operating rooms and even suffer critical shortages of breathing masks for the staff, leaving surgeons at risk of contracting TB.¹³⁰

India should increase funding for the RNTCP in order to meet the targets set in the 2012-2017 National Strategic Plan.¹³¹ International law requires states to ensure that there is a sufficient quantity of public healthcare facilities, goods, services, and programs.¹³² Although this obligation is subject to progressive realization, states must take steps to the maximum of their available resources.¹³³ Providing essential drugs, as defined by the WHO, is a core obligation of the right to health, and states must make “every effort . . . to use all resources that are at its disposition” to provide essential drugs “as a matter of priority.”¹³⁴ This includes both standard TB medications and those for drug-resistant TB.¹³⁵ Insufficient expenditure on health and misallocation of public resources, which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized, constitute breaches of India’s obligations under international law.¹³⁶

Moreover, Indian courts have largely rejected financial limitations as an excuse in the context of the right to health. In *Paschim Banga Khet Majdoor Samity v. State of West Bengal*, the Supreme Court ordered the government to provide additional beds and facilities for patients needing emergency care.¹³⁷ The Court acknowledged that financial resources would be needed to provide these facilities, but noted “it is the constitutional obligation of the State to provide adequate medical services to the people” and “[w]hatever is necessary

130. *Lack of Equipment Hits TB Patients in Mumbai Civic Hospital*, DNA, <http://www.dnaindia.com/mumbai/report-lack-of-equipment-hits-tb-patients-in-mumbai-civic-hospitals-1973109> (last updated Mar. 29, 2014, 7:17 AM); Maitri Porecha, *Fear Stalks Sewri TB Hospital as Mask Stocks Dwindle*, DNA, <http://www.dnaindia.com/india/report-fear-stalks-sewri-tb-hospital-as-mask-stocks-dwindle-2103800> (last updated Jul. 12, 2015, 10:23 PM).

131. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, REVISED NATIONAL TUBERCULOSIS CONTROL PROGRAMME: NATIONAL STRATEGIC PLAN FOR TUBERCULOSIS CONTROL 2012–2017 22–23 (n.d.), <https://www.tbfacts.org/wp-content/uploads/2017/12/NSP-2012-2017.pdf>.

132. Highest Attainable Standard, *supra* note 14, ¶ 12(a).

133. G.A. Res. 2200A (XXI), *supra* note 12, art. 2(1).

134. Highest Attainable Standard, *supra* note 14, ¶ 43(d); Comm. on Econ., Soc. and Cultural Rights, Annex III, General Comment No. 3, The Nature of States Parties’ Obligations, ¶ 10, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990).

135. WORLD HEALTH ORG., WHO MODEL LIST OF ESSENTIAL MEDICINES 10–12 (19th ed. Nov. 2015).

136. Highest Attainable Standard, *supra* note 14, ¶ 52.

137. *Paschim Banga Khet Mazdoor Samity of Ors. v. State of West Bengal*, AIR 1996 SC 2426, paras. 10–11 (India).

for this purpose has to be done.”¹³⁸ Similarly, the Delhi High Court, for example, held that the government “cannot cite financial crunch as a reason not to fulfill its obligation to ensure access of medicines,” even if the medicines are extremely expensive (in that case, Rs. 600,000 [approximately \$8,700] per month per person).¹³⁹ More recently, in holding that the government must provide second-line HIV treatment to all those who need it, the Supreme Court rejected the government’s argument that it lacked funds to do so, stating, “It is a question of right to life guaranteed under Article 21 of the Constitution and the government cannot say finances are a constraint.”¹⁴⁰ The Delhi High Court has been active in ensuring access to other medical products, including HIV testing equipment and Anti-Haemophilic Factor.¹⁴¹

F. Provide Enforceable Rights

India’s TB guidelines and policies do not confer enforceable rights upon patients, but rather only set forth standardized protocols for healthcare providers.¹⁴² For example, one of the core components of the RNTCP is an uninterrupted supply of quality assured drugs.¹⁴³ However, the RNTCP does not provide a legal or other mechanism for enforcing this. More generally, there are numerous problems with the existing grievance redressal procedures under the National Rural Health Mission (NRHM)¹⁴⁴—a 2010 study described the complaint

138. *Id.* para. 16.

139. Writ Petition (Civil) Decision at paras. 1, 4, 69, Mohd Ahmed v. Union of India, No. 7229 of 2013 (Dehli HC) (India); *see also* Paschim Banga Khet Mazdoor Samity of Ors., AIR 1996 SC 2426.

140. *SC Forces Govt to Agree to Second-Line ART to All AIDS Patients*, TIMES INDIA (Dec. 11, 2010, 4:50 AM), <https://timesofindia.indiatimes.com/india/SC-forces-govt-to-agree-to-second-line-ART-to-all-AIDS-patients/articleshow/7078375.cms>.

141. *See, e.g.*, Writ Petition (Civil) at 1–2, Haemophiliacs Fed. v. Union of India, No. 16326 of 2006 (Delhi HC) (India); Writ Petition (Civil) Decision at 1, Love Life Society v. Union of India, No. 8700 of 2006 (Dehli HC) (India); DIPIKA JAIN & RACHEL STEVENS, *THE STRUGGLE FOR ACCESS TO TREATMENT FOR HIV/AIDS IN INDIA* 68–70 (Laya Medhini ed., 2008), <http://www.hrln.org/hrln/publications/books/913-the-struggle-for-access-to-treatment-for-hiv-aids-in-india.html> (discussing the *Love Life Society* case); *Haemophilia Federation India vs. Union of India*, HUM. RTS. L. NETWORK, www.hrln.org/hrln/disability-rights/pils-a-cases/129-haemophilia-federation-india-vs-union-of-india.html (last visited Jan. 28, 2018) (discussing the *Haemophiliacs Fed.* case); *Love Life Society vs. Union of India & Ors*, *supra* note 70.

142. MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, NATIONAL HEALTH POLICY 2015 DRAFT 56 (2014), https://www.nhp.gov.in/sites/default/files/pdf/draft_national_health_policy_2015.pdf [hereinafter HEALTH POLICY]; *see* PROGRAMMATIC, *supra* note 72; STRATEGIC PLAN, *supra* note 118; TB CARE IN INDIA, *supra* note 25.

143. REVISED NATIONAL, *supra* note 28, at 46; PROGRAMMATIC, *supra* note 72, at 5.

144. ARUNA KASHYAP, HUMAN RIGHTS WATCH, NO TALLY OF THE ANGUISH: ACCOUNTABILITY IN MATERNAL HEALTH CARE IN INDIA 103–07 (Oct. 2009).

handling mechanism as “abysmal” and, that same year, the Delhi High Court noted that, “despite the fact that under the NRHM there are service guarantees,” there “does not also appear to be any inbuilt mechanism for corrective action, restitution and compensation in the event of the failure of any beneficiary to avail of the services.”¹⁴⁵

India should ensure that the RNTCP is held accountable for the health of its patients. Given the country’s strong health rights jurisprudence (discussed throughout this article), an effective way to do this would be to provide free legal aid to TB patients. Some states are already doing this for HIV patients through state legal service authorities, bar associations, and partnerships with NGOs.¹⁴⁶ Tamil Nadu has created legal aid clinics inside of sixteen HIV Counseling and Testing Centres,¹⁴⁷ which could be replicated in select DOTS providers as well. More generally, the National Health Mission (NHM) needs to strengthen grievance redressal mechanisms at all levels—ASHA Grievance Redressal Committees; Village Health, Sanitation and Nutrition Committees; District and City Level Vigilance and Monitoring Committees; and Rogi Kalyan Samitis (Patient Welfare Committees).¹⁴⁸ India should also pass legislation making health a justiciable right, as suggested in the Ministry of Health and Family Welfare’s 2015 Draft National Health Policy.¹⁴⁹

Under international law, states must implement “accessible, transparent, and effective mechanisms of accountability” for rights violations.¹⁵⁰ Article 2(1) of the ICESCR requires states parties to take steps to achieve the right to health “by all appropriate means,” and there is a strong presumption that these means include legal remedies

145. OM PRAKASH ARYA ET AL., CUTS CTR. FOR CONSUMER ACTION, RESEARCH & TRAINING, CASE STUDY: IMPROVING THE SERVICE DELIVERY BY MEASURING RATE OF ABSENTEEISM AND INITIATING COMMUNITY MONITORING IN 30 HEALTH CENTRES IN TONK DISTRICT OF RAJASTHAN, INDIA 4 (2010), http://www.cuts-international.org/Cart/pdf/CASE-Study-Improving_the_Service_Delivery_by_Measuring_Rate_of_Absenteeism.pdf; Writ Petition (Civil) Judgment of June 4, 2010 at 32, *Laxmi Mandal v. Deen Dayal Harinagar Hospital*, No. 8853 of 2008 (Delhi HC) (India).

146. NAT’L AIDS CONTROL ORG., *supra* note 63, at 72, 119, 173, 296; NADKAMI ET AL., *supra* note 63, at 33.

147. NADKAMI ET AL., *supra* note 63, at 77–78.

148. MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, 8TH COMMON REVIEW MISSION: REPORT 2014, at 15, 18, 20, 25, 57, 93, 96–97, 99–105, 151, 189 (2014), http://nhm.gov.in/images/pdf/monitoring/crm/8th-crm/Report/8th_CRM_Main_Report.pdf; NAT’L RURAL HEALTH MISSION, GUIDELINES FOR COMMUNITY PROCESSES 14, 45 (2013), <http://nhsrindia.org/sites/default/files/Community%20Processes%20Guidelines26.06.2013.pdf>.

149. HEALTH POLICY, *supra* note 142.

150. U.N. Gen. Assembly, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 8, U.N. Doc. A/63/263 (Aug. 11, 2008) [hereinafter Right of Everyone].

for violations.¹⁵¹ Any person whose right to health has been violated should have access to effective judicial or other appropriate remedies at both the national and international levels, including both financial and equitable relief.¹⁵² This requirement of accountability extends to both the public and private health sectors.¹⁵³ Under the PANEL approach, legal aid would promote accountability and empower patients to claim their rights rather than simply wait for policies, legislation, or the provision of services.¹⁵⁴ In India, the Supreme Court itself has created accountability mechanisms when needed. In the “right to food” case, the Supreme Court issued several orders relating to accountability—it empowered local government to conduct social audits, assigned responsibility for implementing schemes to specific public officials, created a grievance procedure, and gave extensive monitoring powers to independently appointed commissioners.¹⁵⁵

G. *Respect Patients’ Privacy*

In 2012, the Ministry of Health and Family Welfare made TB a notifiable disease, which requires healthcare providers to notify local government health authorities if a patient is diagnosed with it.¹⁵⁶ The reporting doctor has to submit the patient’s name, age, sex, government ID number, address, phone number, the basis of the diagnosis, and certain medical information relating the disease (e.g., whether the patient’s TB is drug resistant).¹⁵⁷ Given the strong stigma associated with TB in India, and reports that at least some TB patients in India have refused treatment from DOTS providers due to the “apprehension of disclosure,” the government should explain and justify its use of patients’ names in the notification system, given the possible alternatives of coded or unnamed notification.¹⁵⁸

151. Econ., and Soc. Council, Comm. on Econ., Soc. and Cultural Rights, Substantive Issues Arising in the Implementation of the Int’l Covenant on Econ., Soc. and Cultural Rights: General Comment No. 9, ¶ 3, U.N. Doc E/C.12/1998/24 (Dec. 3, 1998); G.A. Res. 2200A (XXI), *supra* note 12, art. 2(1).

152. Highest Attainable Standard, *supra* note 14, ¶ 59.

153. Right of Everyone, *supra* note 150, ¶ 13.

154. LIVING WITH DEMENTIA, *supra* note 31, at 3.

155. RIGHT TO FOOD CAMPAIGN, SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION 9–10 (2008), <http://www.righttofoodindia.org/data/scordersprimeratoolforaction.pdf>.

156. MANOJ SINHA, MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, NOTIFICATION OF TB CASES (2012), <https://tbcindia.gov.in/showfile.php?lid=3136>.

157. CENT. TB DIV., MINISTRY OF HEALTH & FAMILY WELFARE, GOV’T OF INDIA, GUIDANCE FOR TB NOTIFICATION IN INDIA 3 (2012), <https://tbcindia.gov.in/showfile.php?lid=3139>.

158. RONALD BAYER & AMY FAIRCHILD, U.N. PROGRAMME ON HIV/AIDS (UNAIDS), THE ROLE OF NAME-BASED NOTIFICATION IN PUBLIC HEALTH AND HIV SURVEILLANCE 21–24,

This is supported by international law. The Committee on Economic, Social and Cultural Rights has recognized that the right to health is “closely related to and dependent on” the right to privacy.¹⁵⁹ Any limitations on the right to privacy based on public health concerns must be in accordance with international human rights standards and must be “strictly necessary.”¹⁶⁰ According to the Siracusa Principles, this means that restrictions must respond to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim.¹⁶¹ The burden of justifying a limitation upon the right to privacy lies with the state, and “[p]ublic health authorities must substantiate the need for a named identifier when collecting information.”¹⁶²

India should also develop clear policies and standards governing the non-consensual disclosure of a patient’s TB status, as recommended by the WHO.¹⁶³ This is essential because, not only is TB-related stigma strong and widespread, but the Supreme Court has troubling precedent on this issue. In *X v. Hospital Z*, the Court found no violation of privacy where a hospital revealed X’s HIV status to his uncle and, after X’s fiancée and the fiancée’s relatives found out (it is not clear how from the case), the wedding was called off.¹⁶⁴ The Court reasoned that disclosure was warranted to protect the fiancée’s right to life,¹⁶⁵ and that since the Indian Penal Code criminalizes acts likely to spread “infection of any disease dangerous to life,” the hospital would have participated in a crime if it did *not* disclose his HIV status.¹⁶⁶ While the WHO supports disclosure of a patient’s HIV sta-

32 (July 2000), http://www.unaids.org/sites/default/files/media_asset/jc338-name-based_en_1.pdf; Mohd. Afzalul Haque et al., *A Study on Socio-Demographic Profile and Feasibility of DOTS Provider Registered Under RNTCP in Varanasi District Uttar Pradesh*, 26 INDIAN J. COMMUNITY HEALTH 107, 109 (2014).

159. Highest Attainable Standard, *supra* note 14, ¶ 3.

160. *Id.* ¶ 28.

161. U.N. Econ. and Soc. Council, Comm’n on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, ¶ 10, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

162. *Id.* ¶ 12; AMY L. FAIRCHILD ET AL., WORKING GRP. ON GLOB. HIV/AIDS & STI SURVEILLANCE, U.N. PROGRAMME ON HIV/AIDS/WORLD HEALTH ORG., GUIDING PRINCIPLES ON ETHICAL ISSUES IN HIV SURVEILLANCE 17 (2013), http://apps.who.int/iris/bitstream/10665/90448/1/9789241505598_eng.pdf?ua=1.

163. CARL COLEMAN ET AL., WORLD HEALTH ORG., GUIDANCE ON ETHICS OF TUBERCULOSIS PREVENTION, CARE AND CONTROL 14 (2010), http://apps.who.int/iris/bitstream/10665/44452/1/9789241500531_eng.pdf.

164. *X v. Hospital Z*, AIR 1999 SC 495 (India); *see also X v. Hospital Z*, AIR 2003 SC 664 (India).

165. *Hospital Z*, AIR 1999 SC 495, para. 44.

166. Indian Penal Code, Act No. 45 of 1860, PEN. CODE §§ 269–270; *Hospital Z*, AIR 1999 SC 495, para. 43.

tus over their objection in certain circumstances, it is only to the sexual partners of the patient.¹⁶⁷ In *X v. Hospital Z*, the Supreme Court went far beyond this by authorizing disclosure to X's relatives (his uncle) and the relatives of X's fiancée as well.¹⁶⁸

H. Incorporate Explicit Limitations on Coercive Measures

India's TB policies do not discuss forced treatment or isolation for non-compliant patients, but merely state that when a patient has missed a dose of medication, the healthcare provider should "ensure that treatment is resumed promptly and effectively . . . in a sympathetic, friendly, and non-judgmental manner."¹⁶⁹ However, the government appears willing to consider more coercive measures. During the 2012 panic over "Totally Drug-Resistant" TB in Mumbai, the state and central governments announced that these patients would be isolated in a sanatorium (although it appears this did not actually end up happening).¹⁷⁰

Indian law on this point is troubling. In 1989, the Bombay High Court upheld a provision of the Goa, Daman and Diu Public Health Act that allowed the government to isolate a person with HIV for "such period and on such conditions as may be considered necessary and in such Institution or ward thereof as may be prescribed."¹⁷¹ The court noted that if there is a conflict between the right of an individual and the public interest, the former must yield to the latter.¹⁷² Although this provision was removed from the statute in 1995,¹⁷³ this holding was never overruled, and other provisions are also problematic. The same Health Act still allows a health officer to forcibly take someone to a hospital or other place of treatment if it appears that

167. WORLD HEALTH ORG., GUIDANCE ON COUPLES HIV TESTING AND COUNSELLING INCLUDING ANTIRETROVIRAL THERAPY FOR TREATMENT AND PREVENTION IN SERODISCORDANT COUPLES: RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH 11 (2012), http://apps.who.int/iris/bitstream/10665/44646/1/9789241501972_eng.pdf?ua=1.

168. See *Hospital Z*, AIR 2003 SC 664, para. 44.

169. PROGRAMMATIC, *supra* note 72, at 63.

170. See Malathy Iyer, *New, Deadlier Form of TB Hits India*, TIMES INDIA, <http://timesofindia.indiatimes.com/india/New-deadlier-form-of-TB-hits-India/articleshow/11396410.cms> (last updated Jan. 7, 2012, 1:37 PM); Somita Pal, *TDR-TB Patients to Be Isolated, Say Centre and State Govt*, DNA, www.dnaindia.com/mumbai/report-tdr-tb-patients-to-be-isolated-say-centre-and-state-govt-1637699 (last updated Jan. 15, 2012); Theo Smart, *What Is Being Done About TDR-TB in Mumbai?*, AIDSMAP (May 8, 2012), <http://www.aidsmap.com/What-is-being-done-about-TDR-TB-in-Mumbai/page/2271801>.

171. *Lucy R. D'Souza v. State of Goa*, 1990 AIR 355 (Bom.), paras. 1, 4(vii) (India).

172. *Id.* paras. 8, 20.

173. Goa, Daman, and Diu Public Health Act, 1985 and Rules, 1987, at 977 (India), <http://goaprintingpress.gov.in/uploads/Public%20Health%20Act%20and%20Rules.pdf>.

they have an infectious disease (including TB) and the person is: (i) without proper lodging or accommodation, (ii) without medical supervision directed to the prevention of the spread of the disease, (iii) lodging in a place occupied by more than one family, or (iv) in a place where his presence is a danger to the people in the neighbourhood.¹⁷⁴ Moreover, a person taken to the hospital under this provision can leave only with the permission of the Medical Officer in-charge or the Health Officer, and leaving without permission is punishable by up to three months in prison.¹⁷⁵ Several other states have similar laws.¹⁷⁶

India should incorporate explicit limitations on coercive measures into its TB policies. These should follow international law, as reflected in the Siracusa Principles and WHO guidance.¹⁷⁷ Restrictions in the name of public health must be strictly necessary, there must be no less intrusive means available, the restrictions must be based on scientific evidence, and they cannot be imposed in an unreasonable or discriminatory manner.¹⁷⁸ Forced isolation, in particular, must be the last resort and used “only after all voluntary measures to isolate [the] patient have failed.”¹⁷⁹ This is a high burden—community-based treatment models for even MDR- and XDR-TB have been successful in numerous countries, including India, and treating TB patients at home with appropriate infection measures in place generally poses no substantial risk to other family members.¹⁸⁰ In addition, coercive treatment may actually undermine the government’s public health goals by scaring people away from testing and treatment.¹⁸¹ Finally,

174. *Id.* at 956, 973, 977.

175. *Id.* at 978.

176. See Tamil Nadu Public Health Act, No. 3 of 1939, at 667, 670 (India), http://www.lawsofindia.org/pdf/tamil_nadu/1939/1939TN3.pdf; Madhya Pradesh Public Health Act, No. 36 of 1949, at 273, 276, 279 (India), http://www.lawsofindia.org/pdf/madhya_pradesh/1949/1949MP36.pdf; Puducherry (Public) Health Act, 1973, No. 5 of 1974, at 50 (India), <http://www.lawsofindia.org/pdf/puducherry/1974/1974Pondicherry5.pdf>; Travancore Cochin Public Health Act, 1955, No. 16 of 1955 (India), <http://www.sanchitha.ikm.in/node/2363>.

177. WHO Guidance On Human Rights And Involuntary Detention For XDR-TB Control, WORLD HEALTH ORG. (Jan. 24, 2007), http://www.who.int/tb/features_archive/involuntary_treatment/en/.

178. *Id.*

179. *Id.*

180. COLEMAN ET AL., *supra* note 163, at 22; *Drug Resistant TB: XDR-TB FAQ*, WORLD HEALTH ORG., <http://www.who.int/tb/areas-of-work/drug-resistant-tb/xdr-tb-faq/en/> (last visited Feb. 7, 2018).

181. See generally THELMA NARAYAN, A STUDY OF POLICY PROCESS AND IMPLEMENTATION OF THE NATIONAL TUBERCULOSIS CONTROL PROGRAMME IN INDIA (1998).

forced treatment (above and beyond forced isolation) should never be allowed.¹⁸²

I. Ensure Patient Participation

As reflected in the PANEL principles, a human rights approach to TB must ensure that TB patients are able to *participate* in all decisions that directly affect them.¹⁸³ Although not specifically listed in the major human rights treaties, the right to participate is implicit in a variety of other rights, including the right to self-determination, the right against medical experimentation, and the right to dignity.¹⁸⁴ The right to participate means that TB patients should be recognized as key actors in the health system, rather than passive recipients of commodities and services.¹⁸⁵ A key component of this is sharing information in an accessible format.¹⁸⁶ However, a significant number of patients using government TB services (at least in some areas) lack basic knowledge about the disease itself (as discussed above) and also the logistics of treatment, including the dosage schedule, the duration of treatment, potential side effects, and the fact that treatment must be continued even after the symptoms subside.¹⁸⁷ Such knowledge

182. WORLD HEALTH ORG., TUBERCULOSIS, ETHICS, AND HUMAN RIGHTS 14 (2013), http://www.euro.who.int/__data/assets/pdf_file/0004/242941/Tuberculosis,-ethics-and-human-rights.pdf.

183. WORLD HEALTH ORG., U.N. HUMAN RIGHTS, A HUMAN RIGHTS-BASED APPROACH TO HEALTH 2 (n.d.), http://www.ohchr.org/Documents/Issues/ESCR/Health/HRBA_HealthInformationSheet.pdf [hereinafter APPROACH TO HEALTH].

184. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948); G.A. Res. 2200A (XXI), *supra* note 12, art. 1; Highest Attainable Standard, *supra* note 14, ¶ 3.

185. *Factsheet*, *supra* note 10.

186. APPROACH TO HEALTH, *supra* note 183, at 3.

187. See Radha Aras et al., *Knowledge About Treatment Aspects Of Pulmonary Tuberculosis Patients Registered Under Revised National Tuberculosis Control Programme (RNTCP)*, 5 INDIAN J. APPLIED RES. 609, 609 (2015), https://www.worldwidejournals.com/indian-journal-of-applied-research-%28IJAR%29/file.php?val=April_2015_1427897254__188.pdf; R. Bansal et al., *Knowledge And Misconceptions Of Pulmonary Tuberculosis Patients At DOTS Centre, Urban Meerut*, 25 INT'L J. COMMUNITY HEALTH 119, 120 (2013), <http://www.iapsmupuk.org/journal/index.php/IJCH/article/view/357/194>; Rahul Ramesh Bogam, *Knowledge Of Tuberculosis: A Survey Among Tuberculosis Patients At Tertiary Health Care Center In Pune City*, 2 GLOBAL RES. ANALYSIS 128, 129 (2013), https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/recent_issues_pdf/2013/March/March_2013_1363599514_05d91_50.pdf; Rituparna Das & S. Baidya, *A Study on Knowledge of Pulmonary Tuberculosis and DOTS among Pulmonary Tuberculosis Patients in West Tripura District, India*, 12 SAARC J. TUBERCULOSIS, LUNG DISEASES & HIV/AIDS 3, 3 (2015); Malini Kar & M. Logaraj, *Awareness, Attitude and Treatment Seeking Behavior Regarding Tuberculosis in a Rural Area of Tamil Nadu*, 57 INDIAN J. TUBERCULOSIS 226, 227 (2010), <http://medind.nic.in/ibr/t10/i4/ibr10i4p226.pdf>; Kulkarni et al., *supra* note 105; Hetvi D. Mahida et al., *Are Urban Slum Dwellers Aware About Tuberculosis—A Cross Sectional Study in Surat City*, 5 NAT'L J. COMMUNITY MED. 346, 348 (2014), http://njcmindia.org/uploads/5-3_346-348.pdf; Lancelot M. Pinto & Zarir F. Udwadia, *Private Patient*

gaps have serious implications for informed consent, contribute to interrupted treatment,¹⁸⁸ and relegate patients to a passive role in their healthcare. Moreover, a participatory approach would build patient trust and strengthen cooperation, both of which are essential for health programs to succeed.¹⁸⁹

A participatory approach should also involve the patients in the design, implementation, and monitoring of TB programs.¹⁹⁰ The National Rural Health Mission's Village Health, Sanitation and Nutrition Committees (VHSNCs) are well placed to facilitate this. These Committees are explicitly intended to "provide an institutional mechanism for the community to voice health needs, experiences and issues with access to health services"¹⁹¹ and to "ensure community participation at all levels."¹⁹² They are formed at the village level and should include local politicians, health workers, and community members, including women, health system beneficiaries, and those from disadvantaged groups.¹⁹³ The VHSNCs are supposed to provide health system beneficiaries a role in monitoring and accountability by maintaining a public services register noting gaps in services and corrective actions to be taken (and by whom), visiting public health facilities to assess the availability and quality of services, and serving as a grievance redressal mechanism.¹⁹⁴ Where the Committee itself cannot resolve a complaint, it must forward the complaint to the district grievance redressal committee.¹⁹⁵ The VHSNCs are specifically involved with the RNTCP because their oversight includes confirming

Perceptions About A Public Programme; What Do Private Indian Tuberculosis Patients Really Feel About Directly Observed Treatment, 10 BMC PUB. HEALTH 357, 357 (2010), <https://bmcpublihealth.biomedcentral.com/track/pdf/10.1186/1471-2458-10-357?site=bmcpublihealth.biomedcentral.com>.

188. Vijay et al., *supra* note 62, at 7.

189. See Right of Everyone, *supra* note 150, ¶ 14; COLEMAN ET AL., *supra* note 163, at 13.

190. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, PRINCIPLES AND GUIDELINES FOR A HUMAN RIGHTS APPROACH TO POVERTY REDUCTION STRATEGIES 14-15 (n.d.), <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; see APPROACH TO HEALTH, *supra* note 183, at 2-3.

191. NAT'L RURAL HEALTH MISSION, *supra* note 148, at 37.

192. NAT'L RURAL HEALTH MISSION, HANDBOOK FOR MEMBERS OF VILLAGE HEALTH SANITATION AND NUTRITION COMMITTEE 1 (n.d.), http://www.nhm.gov.in/images/pdf/communitisation/vhsnc/Resources/Handbook_for_Members_of_VHSNC-English.pdf.

193. NAT'L HEALTH MISSION, VILLAGE HEALTH SANITATION & NUTRITION COMMITTEE, INTRODUCTION 1 (n.d.), <http://www.nhm.gov.in/communitisation/village-health-sanitation-nutrition-committee.html>.

194. See NAT'L RURAL HEALTH MISSION, *supra* note 148, at 41, 45.

195. *Id.* at 45.

that TB drugs and diagnostics are available in local public health centres.¹⁹⁶

However, in practice, many of the VHSNCs are not effective. Recent studies have found that the VHSNCs studies performed few of their specified functions, failed to monitor health centres, had little (or no) training, did not hold regular meetings, failed to follow up on action items from prior meetings, and even failed to understand their roles in the community.¹⁹⁷ The government's own Common Review Mission concluded in 2014 that NHM grievance redressal mechanisms are "weak across states"—many states do not have complaint/suggestion boxes for patient feedback, and even where they exist, there is no mechanism to analyse and address the issues highlighted.¹⁹⁸

India should strengthen the VHSNCs. VHSNC members need to be properly trained on their roles and responsibilities and a strong oversight mechanism (perhaps at the district level) needs to be implemented. The government should consider replicating successful state-level practices, such as identifying specific authorities for grievance redressal at various levels (such as the Principal Secretary and Health Commissioner at the state level and the Chief Medical and Health Officer at district level), forming committees in district hospitals and community health centres for reviewing complaints, and creating a state-level centralized call centre with a toll-free number.¹⁹⁹ The RNTCP should also support formation of TB patient groups in every district so that cured patients can serve as adherence advocates for TB patients undergoing treatment.²⁰⁰

196. *Id.* at 58-59.

197. Pramod Kumar Sah et al., *Performance of Village Health, Nutrition and Sanitation Committee: A Qualitative Study from Rural Wardha, Maharashtra*, 1 HEALTH AGENDA 112, 115 (2013), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.707.1401&rep=rep1&type=pdf>; V. Semwal et al., *Assessment of Village Health Sanitation and Nutrition Committee under NRHM in Nainital District of Uttarakhand*, 25 INDIAN J. COMMUNITY HEALTH 472, 475, 476 (2013), <http://www.iapsmupuk.org/journal/index.php/IJCH/article/view/558/275>; Aradhana Srivastava et al., *Are Village Health Sanitation and Nutrition Committees Fulfilling Their Roles for Decentralised Health Planning and Action? A Mixed Methods Study from Rural Eastern India*, 16 BMC PUB. HEALTH 1, 5 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4722712/pdf/12889_2016_Article_2699.pdf.

198. NAT'L HEALTH MISSION, TUBERCULOSIS, 8TH COMMON REVIEW REPORT 15, 126, 157 (2013), http://nhm.gov.in/images/pdf/monitoring/crm/8th-crm/Report/8th_CRM_Main_Report.pdf.

199. *Id.* at 126.

200. FIFTH JOINT MONITORING MISSION, *supra* note 27, at 41.

V. CONCLUSION

A human rights approach to TB in India would both uphold patients' dignity and improve the RNTCP's success. India has a strong right-to-health jurisprudence, which could be applied in the context of TB to address, e.g., the socio-economic determinants of TB, inadequate funding, and lack of access to drugs for drug-resistant TB.

The limitations of court involvement must be acknowledged. In the "right to food" case, for example, the Supreme Court's interim orders are "far from being fully implemented," and some state governments have not even bothered to reply to letters from the right-to-food commissioners appointed by Supreme Court despite the Court's direct order to "respond promptly" to them.²⁰¹ Other orders in that case have been implemented, but only after a "long and arduous process."²⁰² Similarly, in *Sankalp Rehabilitation Trust v. Union of India*, the government pledged to provide free ARV medication to HIV patients, but due to inadequate implementation, the petitioners had to request the intervention of the court.²⁰³

There are also limitations in the case law itself. Indian courts have not followed a human rights approach in cases involving forced isolation, and the case law relating to regulation of the private health sector provides mostly general principles but little direct guidance.

It is our hope that India will implement a human rights approach to TB. Healthcare providers need to engage with patients, not as data points or potential disease transmitters, but rather both as individuals worthy of respect and as partners in creating a healthier society. This will do more than just promote respect for human rights and health justice—it will lead to more effective public health interventions as well.

201. See RIGHT TO FOOD CAMPAIGN, *supra* note 155, at 13.

202. *Id.* at 29.

203. JAIN & STEVENS, *supra* note 141, at 44.

PEACE IN ISRAEL AND PALESTINE: MOVING FROM CONVERSATION TO IMPLEMENTATION OF A TWO-STATE SOLUTION

*Kenneth L. Lewis, Jr.**

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I. INTRODUCTION

The land known as Palestine has had a storied and tumultuous history. It has: birthed religions,¹ been the place of occupation and conquest,² spawned discord,³ and been the site of inter-faith cooperation.⁴ The small area of land has also been the subject of modern debates and the source of military and political conflicts that have crossed centuries.⁵ To be sure, the question of who should control or occupy Palestine/modern day Israel did not begin with Netanyahu's address to the United States Congress in 2015, nor did it begin with the meeting between Sadat and Begin at Camp David in 1978 or the meeting between Arafat and Barak at Camp David in 2000. Instead, that modern debate began after World War II—seventy years ago.⁶

1. See MORRIS JASTROW, *ZIONISM AND THE FUTURE OF PALESTINE: THE FALLACIES AND DANGERS OF POLITICAL ZIONISM* 98 (1919); see also Wayne Jackson, *The Origin of Christianity*, CHRISTIAN COURIER, <https://www.christiancourier.com/articles/83-origin-of-christianity-the> (last visited Jan. 23, 2018).

2. See GUDRUN KRÄMER, *HISTORY OF PALESTINE: FROM THE OTTOMAN CONQUEST TO THE FOUNDING OF THE STATE OF ISRAEL 1–17* (2011); see also Joseph E. Katz, *History of "Palestine" 1273 BCE to 1948*, ERETZ YISROEL, <http://www.eretzyisroel.org/~jkatz/palestine.html> (last visited Jan. 23, 2018).

3. See MICHAEL KRYZANEK, *DEBATES, DIFFERENCES, AND DIVISIONS: THE 25 ISSUES THAT SHAPE AMERICAN POLITICS* (2011) (discussing how the most intractable foreign policy problem facing the United States is the Israeli-Palestine dispute); see also Nathan Thrall, *The Past 50 Years of Israeli Occupation*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/opinion/sunday/the-past-50-years-of-israeli-occupation-and-the-next.html>.

4. See GUDRUN, *supra* note 2, at 202; see also Oren Liebermann, *Two Muslim Families Entrusted with Care of Holy Christian Site for Centuries*, CNN (Mar. 27, 2016), <http://www.cnn.com/2016/03/26/middleeast/easter-muslim-keyholder/index.html>; Lisa Palmieri-Billig, *Israeli Rabbi Speaks of Interfaith Cooperation in Vatican*, JERUSALEM POST (Oct. 17, 2010, 1:42 PM), <http://www.jpost.com/Jewish-World/Jewish-News/Israeli-rabbi-speaks-of-interfaith-cooperation-in-Vatican>.

5. See Rouba Al-Fattal, *The Foreign Policy of the EU in the Palestinian Territory*, CTR. FOR EUR. POL'Y STUD. (2010), http://aei.pitt.edu/14582/1/WD328_Al-Fattal_on_EU_FP_in_Palestine.pdf; see also *U.S. Role in the Israeli-Palestinian Conflict*, PBS NEWSHOUR (May 11, 2006, 10:18 AM), http://www.pbs.org/newshour/updates/middle_east-jan-june06-us_05-11/.

6. Some may say the Balfour Declarations reflect a modern approach, but that declaration was made before the World War II and mass relocation of European Jews into the Holy Land. Nonetheless, the Balfour Declaration is, in and of itself, the source of conflict as it seeks to give rights to and protect the rights of distinct peoples without ever stating how that feat was to be accomplished. See PALESTINE ROYAL COMMISSION REPORT, 1937, Cmd. 5479, at 22 (UK) (quoting the Balfour Declaration).

His Majesty's government view with favour [sic] the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours [sic] to facilitate the achievement of this object. It being clearly understood that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities in Palestine

Id. But see RASHID KHALIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* 27 (2010).

The Israeli government and the Palestinian Authority purportedly control or govern the land, but, although Israel is recognized as a state by the United Nations,⁷ a majority of countries,⁸ non-governmental organizations (“NGOs”),⁹ and international sport organizations,¹⁰ modern-day Palestine does not enjoy that wide-spread recognition.¹¹ Nonetheless, recently, several European nations, including the Vatican,¹² have moved to recognize modern-day Palestine as a state, and, in 2012, the UN General Assembly, via vote, upgraded Palestine’s status to a non-member observer state.¹³

Of course, the debate (whether at a water-cooler, over-a-beer, or organized by academics) over whether the country of Israel should be divided into two states has not been informed solely by an analysis of international law. The debate is informed and influenced by deeply rooted religious¹⁴ and geo-political¹⁵ viewpoints that often impede the

7. G.A. Res. 181 (II), at 133 (Nov. 29, 1947).

8. *Israel International Relations: International Recognition of Israel*, JEWISH VIRTUAL LIBR. PROJECT AICE, <http://www.jewishvirtuallibrary.org/international-recognition-of-israel> (last visited Jan. 19, 2018).

9. See Amichai Cohen & Stuart Cohen, *Israel’s Dichotomous Attitude Toward International Humanitarian Laws: Causes, Consequences, and Implications*, in *ISRAEL IN THE WORLD: LEGITIMACY AND EXCEPTIONALISM* 51, 62 (Emanuel Adler ed., 2013); see also 1 *ENCYCLOPEDIA OF THE JEWISH DIASPORA: ORIGINS, EXPERIENCES, AND CULTURE* 409 (M. Avrum Enlich ed. 2009).

10. See Yair Galily & Amir Ben-Porat, *Introduction: Sport, Politics and Society in the Land of Israel*, in *SPORT, POLITICS AND SOCIETY IN THE LAND OF ISRAEL: PAST AND PRESENT* 1, 5 (Yair Galily & Amir Ben-Porat eds., 2009).

11. Cf. John Quigley, *Palestine Statehood: A Rejoinder to Professor Robert Weston Ash*, 36 *RUTGERS L. REC.* 257 (2010). See generally Robert Weston Ash, *Is Palestine a “State”? A Response to Professor John Quigley’s Article, “The Palestine Declaration to the International Criminal Court: The Statehood Issue,”* 36 *RUTGERS L. REC.* 186 (2009).

12. As a sovereign monarchical-sacerdotal state, the Vatican City State is a unique, independent state, established in 1929, in which the state’s monarch is also the spiritual leader of the Roman Catholic Church throughout the world. See Stephen E. Young & Alison Shea, *Separating State from Church: A Research Guide to the Law of the Vatican City State*, 99 *L. LIBR. J.* 589, 589–592 (2007).

13. G.A. Res. 67/19, ¶ 2 (Nov. 29, 2012); see also *Palestinian Territories Profile*, BBC NEWS, (Dec. 7, 2017), <http://www.bbc.com/news/world-middle-east-14630174> (“UNESCO - the UN cultural and educational agency - did admit the ‘State of Palestine’ as a member.”).

14. See Joel Beinin & Lisa Hajjar, *Palestine, Israel and the Arab-Israeli Conflict: A Primer*, MIDDLE EAST RES. & INFO. PROJECT, Feb. 2014, at 1-4, 7, https://web.stanford.edu/group/sper/images/Palestine-Israel_Primer_MERIP.pdf; Anshel Pfeffer, *The Israel-Palestine conflict is not just about land. It’s a bitter religious war*, *GUARDIAN* (Nov. 20, 2014, 1:16 PM), <https://www.theguardian.com/commentisfree/2014/nov/20/israel-palestine-conflict-religious-war>; see also David Eidensohn, *Ultra Orthodox and Other Jews*, *YOUTUBE* (Jan. 31, 2013), https://www.youtube.com/watch?v=UVwp_OfBeNs; University of Nottingham, *Basic Beliefs of Islam*, *YOUTUBE* (Jan. 26, 2016), <https://www.youtube.com/watch?v=WxuHBTES2-s>; cf. Desiring God, *Israel, Palestine, and the Middle East*, *YOUTUBE* (Mar. 30, 2013), https://www.youtube.com/watch?v=ov0P_92wb n8.

dispassionate and objective analysis that fosters a solution.¹⁶ Consequently, this article will analyze whether international law or international agreements support the creation of two separate states—Israel and Palestine.

II. PALESTINE IS A STATE EVEN IF THE UNITED NATIONS FAILS TO OFFICIALLY RECOGNIZE PALESTINE AS A STATE

Indeed, no analysis of whether two states may exist in historical Palestine/modern-day Israel can be accomplished without first identifying and explaining what, under international law, is a state. A state is “an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.”¹⁷ Moreover, unlike corporations, which are created by following legally required processes, there is no clearly defined legal process for the creation of states. Thus, “the nearest international law analogues are (a) the process by which new members are admitted to the UN and (b) the phenomenon known as the recognition of the international system.”¹⁸

First, that the UN has not recognized¹⁹ or admitted a political entity as a member is not dispositive of whether that political entity

15. See generally Richard Falk, *Forty Years after 242: A “Canonical” Text in Disrepute?*, 37 J. PALESTINE STUD. 39 (2007). Even Bill Maher, who regards himself as an under-appreciated voice for societal introspection and equality, is not able to dispassionately debate the issue. See Presenting Israel, *Bill Maher: “Maybe now Europe Will Have More Sympathy for Israel”*, YOUTUBE (Mar. 26, 2016), <https://www.youtube.com/watch?v=-7nCRJHiDxA>.

16. See Herbert C. Kelman, *The Interdependence of Israeli and Palestinian National Identities: The Role of the Other in Existential Conflicts*, 55 J. SOC. ISSUES 581, 583, 588 (1999); see also Max Fisher, *The Two-State Solution: What it is and Why it Hasn’t Happened*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/world/middleeast/israel-palestinians-two-state-solution.html>.

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (AM. LAW INST. 1987), LexisNexis; see Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (describing a similar definition of “state”). “The [D]eclaratory [T]heory provides that the moment in which an entity satisfies all the conditions set out in the Montevideo [C]onvention the entity is a state.” Joseph William Davids, *What Makes a State?*, {NEW} INT’L L. (Oct. 3, 2015, 7:12 AM), <https://thenewinternationallaw.wordpress.com/2012/05/02/what-makes-a-state/>.

18. CHRISTOPHER L. BLAKESLEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 80 (5th ed. 2001); see also Montevideo Convention on the Rights and Duties of States, *supra* note 17.

19. The Constitutive Theory of Statehood provides that in addition to satisfying the four criteria described in the Montevideo Convention, the putative state must seek and obtain recognition as a state. See Brad R. Roth, *The Entity that Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 EAST ASIA L. REV. 91, 106-07 (2009).

qualifies for statehood because the criteria for membership in the UN requires a decision of the UN General Assembly upon recommendation of the UN Security Council.²⁰ The UN Charter (the “Charter”) provides in pertinent part:

Article 3

The original members in the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by the United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.²¹

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present charter and, in the judgment of the Organization [sic], are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be affected by a decision of the General Assembly upon the recommendation of the Security Council.²²

Because Article 4 of the Charter is conspicuously devoid of any criteria that the Security Council must consider or any limitations on that body’s power to refuse to recommend new members, the Security Council, as a body or its members (individually), have the unfettered discretion to recommend or refuse to recommend UN membership for new political entities including those entities claiming to be new states or nations. As a result, the Security Council, in making its decision, may be influenced by the afore-mentioned religious and geo-political biases without regard for whether the political entity that claims to be a state has established that it satisfies the criteria (territory, population, government, and foreign relations) for statehood.²³ Because of the purported bias, some experts have criticized the oft-quoted Reso-

20. U.N. Charter art. 4.

21. *Id.* art. 3.

22. *Id.* art. 4, ¶¶ 1, 2.

23. See Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1127-30, 1168 (1961); see also Ilona-Margarita Stettner, *Legal Fact Sheet – Palestinian Statehood According to International Law*, KONRAD-ADENAUER-STIFTUNG, http://www.kas.de/wf/doc/kas_7185-1442-2-30.pdf?120718151615 (last visited Jan. 28, 2018) (stating that “The declarative theory recognises [sic] the statehood of a territorial entity as long as the normative conditions of the Montevideo Convention are met. In contrast, the constitutive theory requires other countries to recognise [sic] the statehood of this territorial unit.”).

lution 242²⁴ as being so biased that it reduced the question of Palestine to a mere refugee problem.²⁵

III. THE SHELL GAME: MANY NATIONS RECOGNIZE PALESTINE AS STATE, BUT IT REMAINS UNCERTAIN WHETHER PALESTINE HAS A DEFINED TERRITORY AND WHETHER IT IS UNDER THE CONTROL OF ITS OWN GOVERNMENT

“The conflict between Israel and Palestine can only be solved with a two-state solution, negotiated in accordance with international law. . . . A two-state solution requires mutual recognition and a will to peaceful co-existence. . . .”²⁶ There can be no doubt that Palestine, albeit not universally, is recognized as a state.²⁷ In fact, since Palestine declared independence from Israel in 1988, more than 130 nations have recognized Palestine as a sovereign state.²⁸ The issue then is not

24. S.C. Res. 242 (Nov. 22, 1967).

25. See NORMAN G. FINKELSTEIN, *IMAGE AND REALITY OF THE ISRAEL-PALESTINE CONFLICT* 161 (2003); see generally *Legal Fact Sheet – Palestinian Statehood According to International Law*, *supra* note 23.

26. *Sweden Vows to Recognise State of Palestine*, AL JAZEERA (Oct. 4, 2014), <http://www.aljazeera.com/news/europe/2014/10/sweden-recognise-state-palestine-2014103144745449229.html>; see David C. Unger, *Maps of War, Maps of Peace*, 19 *WORLD POL’Y J.* 1 (2002); Nicole Gaouette & Elise Labott, *Trump Backs Off Two-State Framework for Israeli-Palestinian Deal*, CNN: POL., <http://www.cnn.com/2017/02/15/politics/trump-netanyahu-two-state-solution-israel-palestinians/index.html> (last updated Feb. 16, 2017, 12:54 AM).

UN Secretary-General Antonio Guterres, speaking in Cairo alongside the Egyptian Minister of Foreign Affairs, stressed that the Israelis and Palestinians must not abandon a commitment to a two-state solution.

“There is no Plan B to the situation between Palestinians and Israelis but a two-state solution and that everything must be done to preserve that possibility,” he said in remarks to the press.

Id.

27. See Francis A. Boyle, *The Creation of the State of Palestine*, 1 *EUR. J. INT’L L.* 301 (1990); see also James Crawford, *The Creation of the State of Palestine: Too Much Too Soon*, 1 *EUR. J. INT’L L.* 307, 309 (1990); Isabel Kershner, *Sweden Gives Recognition to Palestinians*, *N.Y. TIMES* (Oct. 30, 2014), <http://www.nytimes.com/2014/10/31/world/europe/sweden-recognizes-palestinian-state.html>.

The Swedish government on Thursday officially recognized a state of Palestine, as the new prime minister, Stefan Lofven, ignored Israeli protests and followed through on a pledge he made at his inauguration this month.

The Swedish Foreign Ministry posted a message on Twitter on Thursday announcing the move and saying the Swedish government “expressed hopes for peaceful coexistence between #Israel and #Palestine.”

Id.

28. See John V. Whitbeck, *The State of Palestine Exists*, 18 *MIDDLE EAST POL’Y* 62, 64 (2011); see also *Palestine (Or Palestinian Territories)*, *WORLD ATLAS*, <https://www.worldatlas.com/webimage/countrys/asia/lcolor/palestinianlinks.htm> (last updated Nov. 29, 2017).

recognition under the Constructive Theory of Statehood,²⁹ but rather satisfaction of all four of the afore-mentioned criteria under the Declarative Theory of Statehood.³⁰ Thus, the lingering questions are whether Palestine has a defined territory, and whether Palestine has control over those defined territories.³¹

Indeed, a fundamental roadblock to peace has been how and where to define the borders of Israel and Palestine.³² In recent years, the fragmented Palestinian Territories are generally located within the Gaza Strip, East Jerusalem, and the West Bank.³³ In addition, the “Palestinian State” believes that Israel must relinquish any right to, or control of, territories that Israel captured in the Six Day War of 1967.³⁴ Moreover, Palestine believes that Israel’s construction of settlements in the West Bank is unlawful.³⁵ Consequently, Palestine firmly believes that Israel must withdraw, pursuant to UN Security Council Resolution 242, to the pre-1967 borders,³⁶ and cede to Palestine all lands and settlements in the West Bank.³⁷ As a result, the boundaries of the Palestine State are still unsettled and/or disputed.

29. See Suzanne Kelly Panganiban, *Palestinian Statehood: A Study of Statehood through the Lens of the Montevideo Convention* 16 (Jan. 18, 2016) (unpublished Masters thesis, Virginia Tech University) (on file at <https://vtechworks.lib.vt.edu/handle/10919/64512>); see also *Legal Fact Sheet – Palestinian Statehood According to International Law*, *supra* note 23.

30. See Panganiban, *supra* note 29, at 15; see also *Legal Fact Sheet – Palestinian Statehood According to International Law*, *supra* note 23.

31. See Steven Erlanger, *Sweden to Recognize Palestinian State*, N.Y. TIMES (Oct. 3, 2014), http://www.nytimes.com/2014/10/04/world/europe/sweden-to-recognize-palestinian-state.html?_r=0 (“Though Mr. Reinfeldt’s [(the former Prime Minister of Sweden)] government had been critical of Israeli policies on settlements and the recent Gaza war, it refused to recognize Palestine as a sovereign state, arguing that the government there did not satisfy a basic criterion of sovereignty: to have control over its territory.”).

32. See ANTHONY H. CORDESMAN, *THE ISRAELI-PALESTINIAN WAR: ESCALATING TO NOWHERE*, 65-66 (2005).

33. *Land and Settlement Issues*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/land-and-settlement-issues.html> (last visited Mar. 13, 2018); *State of Palestine: Palestinian Territories*, NATIONS ONLINE PROJECT, http://www.nationsonline.org/oneworld/palestinian_territory.htm (last visited Mar. 13, 2018).

34. See ERIC BLACK, *PARALLEL REALITIES: A JEWISH/ARAB HISTORY OF ISRAEL/PALESTINE* (1992); Eric Black, *Resolution 242 and the Aftermath of 1967*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/oslo/parallel/8.html> (last visited Mar. 20, 2018); see also CORDESMAN, *supra* note 32.

35. See Zena Tahhan, *Israel’s Settlements: 50 Years of Land Theft Explained*, ALJAZEERA, (Nov. 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>.

36. See S.C. Res. 242, *supra* note 24; see also BLACK, *supra* note 34.

37. See S.C. Res. Jordan Draft 2014/916 (Dec. 30, 2014), <http://www.securitycouncilreport.org/un-documents/israelpalestine/>; see also BLACK, *supra* note 34.

Similarly, Palestine does not have its own air force.³⁸ It does not collect all of its taxes and revenues, and its borders are monitored and patrolled by Israeli forces.³⁹ Consequently, some experts opine that Palestine is not in control of its own government.⁴⁰

Below, this article demonstrates that Palestine, notwithstanding its disputed or ill-defined borders and “shared” governmental functions, is still an independent nation, and should be treated as such. This article further illustrates that the boundaries of the Palestinian State may be defined by resort to existing UN Resolutions, and prospective agreements between Israel and Palestine.

A. *The Boundaries of a Palestinian State, Without Force of Security Council Orders, are Merely Amorphous Talking Points*

1. Resolution 242 Should be a Basis for Defining the Boundaries of Israel/Palestine

As described above, the Palestinian State believes that its borders must include territories that Israel seized in the Middle East War of 1967. Palestine, as do other nations, asserts that Israel must adopt and respect Resolution 242, which was passed in November 1967.⁴¹ Resolution 242 called for the “withdrawal of Israeli armed forces from territories occupied in the recent conflict.”⁴² Resolution 242 also required that Israel demonstrate “respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.”⁴³ As

38. See *Comparisons of Military Strength of Israel and the Palestinians*, INST. FOR MIDDLE EAST UNDERSTANDING (Jan. 5, 2009), <https://imeu.org/article/comparison-of-military-strength-of-israel-and-the-palestinians> (fact sheet comparing Israel with Palestinian military forces).

39. See U.N. Conference on Trade and Development, *Report on UNCTAD Assistance to the Palestinian People: Developments in the Economy of the Occupied Palestinian Territory*, U.N. Doc. TD/B/60/3 (July 8, 2013); Meir Hovav & Menachem Amir, *Israel Police: History and Analysis*, 2 POLICE STUD.: INT’L REV. POLICE DEV. 5, 9 (1979) (discussing Israeli border police).

40. See Adam G. Yoffie, *Palestine Problem: The Search for Statehood and the Benefits of International Law*, 36 YALE J. INT’L L. 497, 503-04 (2011) (explaining ways in which Palestine does not meet international standards of legally recognized government); see also *Legal Fact Sheet – Palestinian Statehood According to International Law*, *supra* note 23; Steven Rosen, *The Palestinians’ Imaginary State*, FOREIGN POL’Y (Aug. 3, 2011, 9:50 PM), <http://foreignpolicy.com/2011/08/03/the-palestinians-imaginary-state-2/> (arguing that only either Hamas-controlled Gaza or Fatah-controlled West Bank could potentially gain legal recognition as Palestinian state because only these maintain self-controlled government).

41. S.C. Res. 242, *supra* note 24; see S.C. Res. Jordan Draft, *supra* note 37.

42. S.C. Res. 242, *supra* note 24.

43. S.C. Res. 242, *supra* note 24, ¶ 1(ii).

described below, Resolution 338⁴⁴ further reinforces that Resolution 242 should be the basis on which the parties define and describe the boundaries of the two states.

2. Resolution 338 is Instructive in its Application of Resolution 242

Notwithstanding the language of Resolution 242, the shell game regarding Palestinian borders may be played in perpetuity. For example, the Israelis have opined that the word “territories” as used in Resolution 242 does not mean *all* territories.⁴⁵ Likewise, the Israelis ask, if Palestine was not a state in 1967, how could or would Israel recognize Palestine’s right to live “within secure and recognized bounda-

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible. Adopted unanimously at the 1382nd meeting.

Id. at ¶¶ 1-4.

44. S.C. Res. 338 (Oct. 22, 1973).

45. See *History of Mid-East Peace Talks*, BBC NEWS (July 29, 2013), <http://www.bbc.com/news/world-middle-east-11103745>; see also *U.N. Security Council: The Meaning of Resolution 242*, JEWISH VIRTUAL LIBR. PROJECT AICE, <http://www.jewishvirtuallibrary.org/the-meaning-of-un-security-council-resolution-242> (last visited Feb. 4, 2018).

ries?”⁴⁶ Because, even if the Palestinians have the right to live within secure and recognized borders, Israel would argue that those borders were not recognized in 1967 and are still undefined in 2017.

Indeed, it is important that in moving toward a two-state solution, the parties embrace the spirit of Resolution 242, if not the inartful letter of Resolution 242. Certainly, subsequent resolutions and agreements have expanded on Resolution 242 and have illuminated the purpose and spirit of Resolution 242. For example, in 1973, the Security Council adopted Resolution 338, which provides:

The Security Council,

1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
2. Calls upon the parties concerned to start immediately after the ceasefire the *implementation of Security Council resolution 242 (1967) in all of its parts*;

Decides that, immediately and concurrently with the ceasefire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.⁴⁷

Resolution 338 required that the parties involved implement Resolution 242 in all of its parts.⁴⁸ Consequently, Resolution 338 essentially required that Israel withdraw its “armed forces⁴⁹ from territories occupied in the [June 1967] conflict.”⁵⁰ Therefore, the assertion that the word “territories” is ill-defined is specious at best. Indeed, Israel does not, and would not argue, that the phrase “recent conflict” is ill-defined, because Israel, like the drafters of Resolution 242, understood that phrase to mean and refer to that conflict known as the Six-Day War, the June 1967 War, or the Third Arab-Israeli War.⁵¹ If the parties know the conflict to which Resolution 242 refers, then the par-

46. The argument is that Palestine had no recognized boundaries in 1967 and, hence, Israel did not agree to recognize something that did not exist and which Israel could not identify. See President Barak Obama, Remarks by the President on the Middle East and North Africa (May 19, 2011), for the President Obama’s remarks on Israel/Palestine’s borders returning to the 1967 lines.

47. S.C. Res. 338, *supra* note 44, ¶¶ 1-3 (emphasis added).

48. *Id.* ¶ 2.

49. A literal and narrow interpretation would lead, albeit disingenuously, to the conclusion that Resolution 242 requires that Israel withdraw only soldiers and police (armed forces) but not Israeli civilians.

50. S.C. Res. 242, *supra* note 24, ¶ 1(i).

51. See *U.N. Security Council: The Meaning of Resolution 242*, *supra* note 45.

ties are fully cognizant of the territories (areas of land) that the parties to the conflict also lost or acquired during, or as a result of, the conflict.

Moreover, if Resolution 338 is not instructive in its application of the letter of Resolution 242, Resolution 338 is instructive in its application of the spirit of Resolution 242. The spirit of Resolution 242 is “the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security”⁵² and that “all Member States . . . have undertaken a commitment to act in accordance with Article 2 of the Charter.”⁵³ Thus, because the parties know and understand that Resolution 242 refers to the June 1967 War, the parties also know and understand the spirit of 242 (the inadmissibility of the acquisition of territory by war) must and does refer to inadmissibility of the acquisition of territory acquired during the June 1967 War.

3. At a Minimum, the Palestinian State Should Include the West Bank and Gaza

In 1978, President Jimmy Carter invited President Sadat of Egypt and Prime Minister Begin of Israel to Camp David for talks.⁵⁴ Those talks resulted in two agreements.⁵⁵ The first agreement was called “A Framework for Peace in the Middle East.”⁵⁶ The Framework for Peace in the Middle East in pertinent parts states:

To achieve a relationship of peace, in the spirit of Article 2 of the United Nations Charter, future negotiations between Israel and *any neighbor prepared to negotiate peace and security with it are necessary for the purpose of carrying out all the provisions and principles of Resolutions 242 and 338.*⁵⁷

52. S.C. Res. 242, *supra* note 24.

53. *Id.*; see U.N. Charter, *supra* note 20, art. 2, ¶ 4 (stating, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

54. *Camp David Accords and the Arab-Israeli Peace Process*, OFF. HISTORIAN, <https://history.state.gov/milestones/1977-1980/camp-david> (last visited Mar. 20, 2018).

55. *Id.*

56. *Camp David Accords: The Framework for Peace in the Middle East*, JIMMY CARTER PRESIDENTIAL LIBR. & MUSEUM, https://www.jimmycarterlibrary.gov/research/framework_for_peace_in_the_middle_east (last visited Mar. 20, 2018) [hereinafter *Framework for Peace in the Middle East*].

57. *Id.* (emphasis added).

Notwithstanding the fact that the Palestinians were not a party to the agreement,⁵⁸ the agreement stated:

(b) . . . The parties will negotiate an agreement which *will define the powers and responsibilities of the self-governing authority to be exercised in the West Bank and Gaza*. A withdrawal of Israeli armed forces will take place and there will be a redeployment of the remaining Israeli forces into specified security locations

(c) *When the self-governing authority (administrative council) in the West Bank and Gaza is established and inaugurated, the transitional period of five years will begin The negotiations will resolve, among other matters, the location of the boundaries and the nature of the security arrangements. The solution from the negotiations must also recognize the legitimate right of the Palestinian peoples and their just requirements.* In this way, the Palestinians will participate in the determination of their own future⁵⁹

Moreover, notwithstanding the fact that states have interpreted the Framework For Peace differently,⁶⁰ the document unequivocally resolves that self-government is to be exercised in the West Bank and Gaza.⁶¹ Consequently, what, if at all, should be at issue, is the scope and nature of the security and mutual assistance agreements⁶² that ought to be implemented between Israel and a Palestinian State—not whether a self-governing Palestinian State should exist.⁶³

Indeed, to argue that Palestine is not a state because its borders or territories are disputed or challenged by another state is tantamount to stating that Israel is not a state because its borders or territo-

58. *See id.* (explaining the Palestinian people were intended third-party beneficiaries of the contract).

59. *Id.* (emphasis added).

60. *See Camp David Accords*, ISR. MINISTRY FOREIGN AFF., <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/camp%20david%20accords.aspx> (last visited Jan. 28, 2018) (stating “The framework agreement regarding the future of Judea, Samaria and Gaza was less clear and was later interpreted differently by Israel, Egypt and the US.”).

61. *Framework for Peace in the Middle East*, *supra* note 56.

62. *See generally* Kenneth L. Lewis Jr., *The Extradition Treaty Between Jamaica and the United States: Its History and the Saga of Christopher “Dudus” Coke*, 45 U. MIAMI INTER-AM. L. REV. 63, 64-65, 76 (2013) (demonstrating that nations often enter into mutual legal assistance treaties and extradition treaties).

63. *Framework for Peace in the Middle East*, *supra* note 56.

Security is enhanced by a relationship of peace and by cooperation between nations which enjoy normal relations. In addition, under the terms of peace treaties, the parties can, on the basis of reciprocity, agree to special security arrangements such as demilitarized zones, limited armaments areas, early warning stations, the presence of international forces, liaison, agreed measures for monitoring and other arrangements that they agree are useful.

Id.

ries are disputed or challenged by other states.⁶⁴ To fully illustrate the invalidity of the argument, I offer that it is unlikely, under international law, that Argentina or Great Britain would have lost the cloak of statehood due to their dispute over the right to control the Falkland Islands.⁶⁵ Similarly, China does not lose its statehood or its place on the UN Security Council merely because China describes Taiwan as within its territorial borders⁶⁶—that is, some parcel of its land is subject to competing territorial claims.

B. *The Palestinian State Is Under the Control of Its Own Government*

The Palestinian State is under the control of its own government, although to a limited degree. “Palestine is governed by a Parliamentary Democracy referred to as the Legislative Council (“PLC”).”⁶⁷ The Palestinian Authority comprises, like the government of the United States, a legislative branch, an executive branch, and a judicial branch.⁶⁸ The Palestinians also have their own police force.⁶⁹

In September 2005, after Israel withdrew troops from the Gaza Strip, the Palestinian Authority assumed control of the territory, but Israel “control[led] . . . the airspace, seafront and access - including deliveries of food and other goods - apart from the crossing with Egypt.”⁷⁰ Moreover, although pursuant to the Protocol on Economic

64. See *Legal Fact Sheet – Palestinian Statehood According to International Law*, *supra* note 23, at 1-2 (“Exclaves and fragmented territories such as Gaza, East Jerusalem and the West Bank also exist in other regions and states such as Alaska, Gibraltar and Kaliningrad. At the same time, it is difficult to use the lack of defined borders between the Palestinian territories and Israel as an argument against the criterion of a defined territory when the same undefined border also applies to Israel, where it is not considered a problem.”).

65. See generally Peter Wilby, *The Islands of Black Gold*, *NEW STATESMAN*, Mar. 15, 2010, at 22, 25 (discussing British and Argentinian control over the Falkland Islands).

66. See generally John Shijian Mo, *Settlement of Trade Disputes Between Mainland China and the Separate Customs Territory of Taiwan Within the WTO*, 2 *CHINESE J. INT’L L.* 145 (2003) (explaining both the Constitution of People’s Republic of China and the laws of the Republic of China expressly consider both Mainland China and Taiwan as belonging to the same China).

67. *Palestinian Government*, MISSION PALESTINE, <http://palestine.dk/palestine/government/> (last visited Jan. 28, 2018); *For the Council*, PALESTINIAN LEGIS. COUNCIL, <https://goo.gl/n219uQ> (last visited Jan. 28, 2018).

68. See *The Basic Law*, PALESTINIAN LEGIS. COUNCIL, <https://goo.gl/n219uQ> (last visited Jan. 28, 2018).

69. See *Palestinian Authority*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Palestinian-Authority> (last visited Jan. 28, 2018).

70. *Palestinian Territories Profile*, *BBC NEWS* (Dec. 7, 2017), <http://www.bbc.com/news/world-middle-east-14630174>.

Relations,⁷¹ Israel collects taxes for the Palestinian Authority, Israel is required to remit those taxes to the Palestinian Authority, and the Palestinian Authority also collects money on behalf of Israel.⁷² Therefore, one should note that the Palestinian people are not required to pay taxes to a foreign nation (namely, Israel). Instead, Israel collects taxes on behalf of the Palestinian State.

In light of the foregoing, the question is not, for purposes of international law, whether the Palestinian people have their own government. Instead, the question is whether the Palestinian Authority has yet achieved the level of sovereignty that it desires and is typically attributable to an independent state. “Although understandings of sovereignty have evolved over time, the earliest and most traditional definition asserts that states have the freedom to govern themselves as they choose, with full control over their internal and external affairs and free from interference or intervention”⁷³ Today, we may regard Palestine as a nation that, like others, does not have territorial or economic sovereignty.⁷⁴

C. *History is Replete with Examples of the “Two-State Solution”*

History is replete with examples of countries that have been divided into separate states. In fact, several states were divided to settle political, religious, economic, and ethnic-based conflicts or wars. Lest we forget, India and Pakistan previously comprised one state.⁷⁵ Likewise, South Korea and North Korea were, before separation, one nation.⁷⁶ The international community also recognized Serbia and

71. Protocol on Economic Relations Between the Government of the State of Israel and the P.L.O., Representing the Palestinian People, Isr.-P.L.O., May 4, 1994, 33 I.L.M. 622.

72. See Daniel Engber, *Israel Sends \$50 Million a Month to the Palestinians?*, SLATE (Feb. 17, 2006), http://www.slate.com/articles/news_and_politics/explainer/2006/02/israel_sends_50_million_a_month_to_the_palestinians.html; see also U.N. Conference on Trade and Development, *supra* note 39, at 8.

73. Ted Piccone & Ashley Miller, *Cuba, the U.S., and the Concept of Sovereignty: Toward a Common Vocabulary?*, BROOKINGS INST. (Dec. 19, 2016), <https://www.brookings.edu/research/cuba-the-u-s-and-the-concept-of-sovereignty-toward-a-common-vocabulary/>.

74. See *id.* (explaining Cuba does not enjoy territorial and economic sovereignty).

75. See Rathnam Indurthy & Muhammad Haque, *The Kashmir Conflict: Why it Defies Solution*, 27 INT’L J. WORLD PEACE 9, 10 (2010); see also Kallie Szczepanski, *What Was the Partition of India?*, THOUGHT CO. (Mar. 8, 2017), <https://www.thoughtco.com/what-was-the-partition-of-india-195478>.

76. See Mark P. Barry, *The U.S. and the 1945 Division of Korea: Mismanaging the ‘Big Decisions’*, 29 INT’L J. ON WORLD PEACE 37, 37, 39-40; see also Kallie Szczepanski, *Why Is the Peninsula Split into North Korea and South Korea?*, THOUGHT CO. (Mar. 10, 2017), <https://www.thoughtco.com/why-north-korea-and-south-korea-195632>.

Montenegro as two separate states,⁷⁷ and, more recently, Sudan, the African nation, became two states—Sudan and the Republic of South Sudan.⁷⁸

There is no doubt that, as a result of deeply-rooted cultural and religious reasons, India was divided into two states—India and Pakistan.⁷⁹ In 1947, the United Kingdom decided to make India an independent country that would enjoy self-rule.⁸⁰ Unfortunately, at that time, the political parties—one comprising predominantly Hindus and the other comprising predominantly Muslims—determined that their constituents did not desire to be governed by another religious/ethnic group.⁸¹ Consequently, in an effort to reduce or eliminate the existing conflicts and skirmishes based on religious differences or identity, the UK determined that it would divide India into two separate countries—India and Pakistan.⁸²

Similarly, after almost a half-century of articulating their discontent with the then government of a united⁸³ Sudan,⁸⁴ the people of

77. See John M. Fraser, *Serbia and Montenegro: How Much Sovereignty? What kind of Association?*, 58 INT'L J. 373, 373-74 (2003); see also Matt Rosenberg, *History of the Former Country of Yugoslavia*, THOUGHT CO. (Jan. 22, 2018), <https://www.thoughtco.com/the-former-yugoslavia-1435415> (“Following a referendum, in June 2006, Montenegro and Serbia split into two separate independent countries. The creation of Montenegro as an independent country resulted in Serbia losing their access to the Adriatic Sea.”).

78. See North, *South Sudan Now Separate Nations*, CBC NEWS (July 8, 2011), <http://www.cbc.ca/news/world/north-south-sudan-now-separate-nations-1.992942> (“June 20, 2011[.] The governments of Sudan and Southern Sudan sign an agreement that calls for the withdrawal of Sudan troops from the disputed border region of Abyei. A UN-backed peacekeeping force from Ethiopia will be in Abyei until a referendum to decide which part of Sudan its residents will join . . . July 9, 2011[.] The Republic of South Sudan declares independence, becoming the [fifty-fourth] state in Africa.”). See generally Alan Boswell, *Sudan's Split: As South Cheers, the North Protests*, TIME MAG. (Jan. 31, 2011), <http://content.time.com/time/world/article/0,8599,2045274,00.html> (“It is a bloody equation southerners remember all too well. Oppression and war at the hands of Khartoum have left the soon-to-be nation one of the least developed areas in the world, and racial and religious tensions still bring the blood here to a boil. Most southern Sudanese, who are mainly non-Muslim Africans, see their years of war as resistance to northern attempts to Islamicize the South and pin it under Arab rule. ‘The mistreatment that they [northerners] have subjected southerners to, [treating them as] sub-humans—this is what brought people to this day,’ declared the South’s leader, Salva Kiir, in a speech after the referendum results were announced on Sunday.”).

79. See STEPHEN P. COHEN, *SHOOTING FOR A CENTURY: THE INDIA-PAKISTAN CONUNDRUM* 2, 5, 12 (2013).

80. *Id.* at 5.

81. See generally *id.* at 5, 31-32 (discussing the history of the communal and political rivalry between India and Pakistan).

82. See *id.* at 2, 5, 12.

83. Here, “united” means only that the country was recognized by the UN and other international bodies as one country, not that its people share common interests or equal protections under the law.

South Sudan, primarily non-Muslim Sudanese, resisted what they believed was Muslim and Islamic oppression and created a new and separate state—The Republic of South Sudan.⁸⁵ The international community supported the separation of Sudan into two countries because the international community desired to end war, suffering, genocide, and the shameful episode in human history, often referred to simply as “Darfur.”⁸⁶

Indeed, if the international community reasoned that India and Sudan should have been, and eventually were, separated into two independent nations so that those persons who share religious, ethnic, and cultural identities may live together and enjoy self-government, then the international community should also recognize that Israel and Palestine should be separated, so that those persons who share religious, ethnic, and cultural identities may live together and enjoy self-government. Similarly, if the international community reasoned that India and Sudan should have been, and eventually were, separated into independent nations to avoid armed conflict between disparate groups, then the international community must also recognize

84. See Hagar Taha, *Darfur and South Sudan: United in Struggle, Divided by Future?*, E-INT’L REL. (Sept. 9, 2011), <http://www.e-ir.info/2011/09/09/darfur-and-south-sudan-united-in-struggle-divided-by-future/> (“The South question started even before the independence of Sudan in 1956 with one civil war that extended from 1955 to 1972, and another that started in 1983 and ended with the signing of the Comparative Peace Agreement (CPA) between the Government of Sudan (GoS) and the Sudan Liberation Movement (SPLM/A) in Nairobi in 2005.”).

85. See Boswell, *supra* note 78 and accompanying text.

86. See Ahmed Hussain Adam, *The Secession of South Sudan and Its Impact on Darfur: Time for a New Direction*, SUDAN TRIB. (May 30, 2011), <http://www.sudantribune.com/spip.php?article39066> (“Darfur Conflict is more than [eight] years old today. The UN described it as the world worst humanitarian crisis; the International Criminal Court (ICC) as well as the US State Department classified it as genocide. The ICC indicted the Head of the regime, AL-Bashir for masterminding with absolute control a criminal plan to destroy the people of Darfur. Yet, the international community failed to impose the norm of the Responsibility to Protect (R2P) in [favor] of the civilian populations in Darfur. The human and economic costs of this conflict are horrific beyond . . . belief. The international and regional political responses to the Darfur conflict started in 2004[.] [N]onetheless, they failed to put an end to the conflict. Therefore, it is incumbent upon the international community and all concerned actors to reassess their approaches and strategies to formulate a holistic and bold approach to end the human suffering and restore peace and security in Darfur. It is time for a new beginning in Sudan. This is the only way forward, to guarantee a united, democratic and stable Sudan or rather Sudan minus the South. Darfur is a key factor for the stability of Sudan and the region as a whole. O[nce] it is less than a million square miles, Darfur becomes a majority in terms of number of the population (more than [forty-five] percent of Sudan’s population) and land-size in the Sudan; with major implications. Thus, Darfur crisis has to be resolved within the context of the broader agenda of structural and democratic change in Sudan. The experience of more than [eight] years of the negotiations manifested that, a peaceful and negotiated solution can[no]t be reali[z]ed under the current regime. Nevertheless, Darfur can[no]t be resolved militarily.”). See generally David Lanz, *Save Darfur: A Movement and Its Discontents*, 108 OXFORD UNIV. PRESS 669.

that Israel and Palestine should be separated to avoid wars, air strikes, intifadas, civilian casualties, and a persistent state of unrest.⁸⁷ The international community has recognized that truth for almost four decades, because, as early as 1979, the former European Community has recognized that lasting peace would result only from a two-state solution.⁸⁸

IV. AFTER ISRAEL AND PALESTINE ARE DIVIDED INTO TWO NATIONS, THEY MUST ENTER INTO AGREEMENTS THAT GUARANTEE EACH OTHER'S SAFETY AND RIGHT TO EXIST, AND THEY MUST CONCEDE TO THE PRESENCE OF A PEACEKEEPING CONTINGENT THAT HAS THE RIGHT TO USE FORCE

After dividing Israel and Palestine into two nations, the two nations must enter into agreements that guarantee each other's safety and right to exist. The parties must agree that each has the right to exist and that the citizens of each country have the right to life, liberty, and the pursuit of happiness.⁸⁹ The two sovereign nations must agree that neither will interfere with nor cause anyone or any nation to interfere with or abridge the afore-mentioned rights. As such, and in furtherance and support of the agreements, the parties must agree to the presence of UN peacekeeping forces—in Jerusalem and the proposed demilitarized zones—that have the right to use force.

A. *Palestine and Israel Should Seek to Emulate the Relationship and Agreements Between Egypt and Israel*

Like Israel and Egypt, Israel and Palestine could enter an agreement that normalizes diplomatic relations and terminates hostilities.⁹⁰ The state of peace that has lasted between Israel and Egypt for over

87. See Jeffrey Heller, *Netanyahu Wants to Define Israel as Jewish State in Law*, REUTERS (May 1, 2014), <http://www.reuters.com/article/us-israel-jewish-netanyahu-idUSBREA400EP20140501>.

88. See 1979: *Israel and Egypt Shake Hands on Peace Deal*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/26/newsid_2806000/2806245.stm (last visited Jan. 28, 2018). “A statement from the nine European Community nations praised the efforts of President Sadat and Prime Minister Begin to make peace. But, in a comment bound to anger the Israelis, it added that a settlement could only happen if the Palestinian people were given a homeland.” *Id.*

89. For instance, the United States Declaration of Independence states that *all people* should enjoy the inalienable rights of life, liberty, and the pursuit of happiness. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

90. See Mitchell Bard, *Israel-Egypt Relations: Background & Overview of Peace Treaty*, JEWISH VIRTUAL LIBR. PROJECT AICE (Mar. 26, 1979), <http://www.jewishvirtuallibrary.org/israel-and-egypt-make-peace>; see also *Framework for Peace in the Middle East*, *supra* note 56.

three decades, and which has survived the Arab Spring, regime change, and wars in the Middle East, may be the model to which Palestine and Israel should aspire. For example, as a result of its peace agreement with Egypt, Israel conceded certain territories that it had obtained through war and that Israel considered to be of vital military strategic importance.⁹¹ Moreover, in furtherance of peace, Israel ceded to Egypt certain settlements that were constructed in the Sinai.⁹² So too, in furtherance of peace between Israel and Palestine, Israel may return territories that Israel obtained through military conflict, and Israel may also return Palestinian lands that are occupied by Israeli settlers.

Certainly, Israel should expect and demand that the Palestinians also make some overtures in furtherance of peace. Like Egypt, the Palestinian military and intelligence services should share information⁹³ to thwart the efforts of zealots (various and sundry) and radical hate groups like ISIS. Notwithstanding the fact that such cooperation seems unlikely or unachievable, one must note that before 1979, no one would have expected that senior Egyptian and Israeli government and military officials would meet regularly to share data and assess common threats.⁹⁴

Pursuant to its 1979 peace agreement with Israel, Egypt agreed to turn the Sinai into a demilitarized zone and acquiesced to the free passage of Israeli ships through the Suez Canal.⁹⁵ Similarly, Palestine should agree to a demilitarized zone⁹⁶ between it and Israel, and Pal-

91. See ARIE MARCELLO KACOWICZ, *PEACEFUL TERRITORIAL CHANGE* 134 (1994); see also Bard, *supra* note 90.

92. See KACOWICZ, *supra* note 91, at 135; see also Bard, *supra* note 90.

93. See Ben Caspit, *The Israeli-Egyptian Love Affair*, AL-MONITOR (Mar. 3, 2016), http://www.washingtonpac.com/Articles%20of%20Interest/israeli_egyptian_love_affair.htm; see also Neri Zilber, *Israel's Secret Arab Allies*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/israels-secret-arab-allies.html>.

94. See Caspit, *supra* note 93 (“Nonetheless, it is clear that the closeness between Sisi and Israel’s highest echelons is not a superficial one. . . . For the first time in many generations, intelligence information is almost totally shared between the sides, mainly with regard to the struggle against the Islamic State (IS) branch in the Sinai Peninsula.”).

95. Egypt-Israel Peace Treaty, Egypt-Isr., Mar. 26, 1979, U.N.T.S. 17813; see Andrew Glass, *Egypt, Israel Finish Peace Treaty, March 26, 1979*, POLITICO (Mar. 26, 2014, 12:01 AM), <http://www.politico.com/story/2014/03/this-day-in-politics-egypt-israel-march-26-1979-105014>.

96. A Demilitarized Zone between North and South Korea has existed since 1953. See Paul Szoldra, *The Border Area Between North and South Korea may be the Tensest Place on Earth*, BUS. INSIDER (Mar. 17, 2017, 10:03 AM), <http://www.businessinsider.com/north-and-south-korea-dmz-border-is-a-warzone-2017-3>.

estine should agree not to use its land or territories to block Israeli commercial vehicles and vessels.⁹⁷

B. A Peacekeeping Force That Has the Right to Use Force Should be Stationed in the Demilitarized Zones and Jerusalem

To secure the peace that is to be achieved by the two-state solution and the concessions that the parties would make in furtherance of that solution, the UN should deploy a peacekeeping force to monitor the demilitarized zones and Jerusalem. The characteristics of that peacekeeping force, however, should be a hybrid of some of the characteristics of the traditional peacekeeping force and some of the characteristics of the so-called modern peacekeeping force.

The traditional UN peace-keeping force is characterized by consent and cooperation of parties to the conflict, international support, as well as support of the UN Security Council, UN command and control, multinational composition of operations, no use of force, neutrality of UN military between rival armies, and political impartiality of the UN in relationships with rival states.⁹⁸

The modern UN peacekeeping force is characterized by, among other things, “(1) military disengagement, demobilization, and cantonment, (2) policing, (3) human rights monitoring and enforcement, (4) information dissemination, (5) observation, organization, and conducting of elections, (6) rehabilitation, (7) repatriation, (8) administration, [and] working with or overseeing regional or non-UN peacekeeping operations”⁹⁹

1. The UN Peacekeeping Force Should Adopt Many of the Characteristics of Traditional UN Peacekeeping Efforts, But The UN Peacekeeping Contingent That Operates in Jerusalem and the Proposed Demilitarized Zones Must Have the Right to Use Force

The UN Peacekeeping Contingent in Jerusalem and the proposed demilitarized zones must be neutral and impartial, and it should have the right to use force. Unless the UN and the Security Council pro-

97. There can be no doubt that Israel also should agree that it would not use its lands or territories to block Palestinian commercial vehicles and vessels.

98. See PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 10, (Ramesh Thakur & Albercht Schnabel eds., 2001); see also Amira A. Ghoniem, *United Nations Peacekeeping Operations: Improvements for Mission Success* (2003) (unpublished thesis, Stanford University) (on file with Stanford University).

99. See PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT, *supra* note 98, at 12.

vide explicit support and unequivocal direction and policies regarding the use of force, the UN peacekeeping mission will fail¹⁰⁰ and the parties will think that the peacekeepers are toothless tigers that are unable to enforce their mandate.¹⁰¹

For example, Amira A. Ghoniem is careful to demonstrate that that “one of the main reasons the UN was initially unable to make notable progress in Bosnia was the lack of international support early in the peace effort.”¹⁰² Ghoniem, in her thesis supervised by Professor Lusignan, also highlights that the UN peacekeeping efforts were unsuccessful in Bosnia because the “U.S . . . strongly opposed the use of force.”¹⁰³ Therefore, if a UN peacekeeping force is not permitted to use force in more than ill-defined instances of self-defense,¹⁰⁴ Israeli and Palestinian terrorists could destabilize the peace between the nations, recognizing that the terrorists would escape recourse unless they were apprehended or killed by Israeli and Palestinian forces, who, in light of geopolitical and religious biases, may be reluctant to apprehend and prosecute terrorists.

2. The UN Peacekeeping Force Should Comprise Members of the UN (not merely Members of The UN Security Council), and That Force Should Be Directed and Controlled By General Assembly Resolution to Ensure That the Objectives and Directives of the Force Are Democratically and Universally Determined and Enforced
 - a. The UN Peacekeeping Force Should Comprise Members of the UN, not Merely Members of the UN Security Council

Because the members of the UN desire¹⁰⁵ that Israel and Palestine become two separate, independent, and sovereign states, those member nations must support and comprise the peacekeeping force that it is to operate in Jerusalem and the demilitarized zones. Moreover, a peacekeeping force that comprises all members of the UN (not

100. See Ghoniem, *supra* note 98, at 5.

101. See *id.*

102. *Id.* at 9.

103. *Id.*

104. See *id.* at 5 (“This problem characterizes United Nations peacekeeping missions in Somalia, Bosnia, and Rwanda. This attempt proved disastrous in that UN protection forces did not have the power to offer either protection or force.”).

105. See Fisher, *supra* note 16 (stating that “Most governments and world bodies have set achievement of the two-state solution as official policy, including the United States, the United Nations, the Palestinian Authority and Israel. This goal has been the basis of peace talks for decades.”).

merely members of the Security Council) would embody the political impartiality and neutrality that must exist in and typify any peacekeeping force that operates in Jerusalem and the demilitarized zones. Of course, by using a peacekeeping force that is universal in its membership, the UN can effectively counter any arguments offered by Israel or Palestine that the peacekeeping force is or would be ineffective because the peacekeeping force comprises only allies of either Israel or Palestine, and that the peacekeeping force comprises only a small percentage of countries, who have significant clout and leverage such that they would dominate the operations of the peacekeeping force.

- b. The Peacekeeping Force Should be Directed and Controlled by General Assembly Resolution to Ensure That the Objectives and Directives of the Force Are Democratically and Universally Determined and Enforced

Because Security Council resolutions do not always reflect the desire, conclusions, or agreements of the general assembly,¹⁰⁶ the peacekeeping force should be directed and controlled by General Assembly Resolution¹⁰⁷ to ensure that the objectives and directives of the force are democratically and universally determined, enforced, and accepted. For example, the US-led force that occupied Iraq did not receive universal support¹⁰⁸ and was considered illegitimate because the invasion did comply or comport with international law. To that end, Kofi Annan, the former Secretary-General of the UN, stated that the US-led invasion of Iraq was illegal because “it was not sanctioned by the UN Security Council or in accordance with the UN’s founding charter.”¹⁰⁹ Mr. Annan stated that “the war in Iraq and its aftermath . . . brought home *painful lessons about the importance of resolving use-of-force issues jointly through the UN*” and noted “that

106. See BLAKESLEY ET AL., *supra* note 18, (stating that there have been several General Assembly Resolutions passed against Israel but few Security Council Resolutions passed against Israel); see also Nigel D. White, *The Relationship Between the UN Security Council and General Assembly in Matters of International Peace and Security*, in *THE USE OF FORCES IN INTERNATIONAL LAW* 292, 307 (Marc Weller ed., 2015).

107. This represents a departure from the status quo because issues of peace and security are to be within the province of the UN Security Council and General Council Resolutions are non-binding.

108. See Elaine Sciolino, *Chirac Says Time Proves France Was Right to Resist War*, N.Y. TIMES, Jan. 6, 2007, at A7.

109. Ewen MacAskill & Julian Borger, *Iraq War was Illegal and Breached UN Charter, says Annan*, GUARDIAN (Sept. 15, 2004), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

such action needed UN approval *and a much broader support of the international community.*"¹¹⁰

Democratic principles are furthered should the peacekeeping force be controlled by General Assembly Resolution, because, absent input by the entire UN Membership, only the permanent members of the UN Security Council (United States, United Kingdom, France, Russia, and China) would determine (subject to the veto power of the each permanent member) the mission, scope, and composition of the peacekeeping force.¹¹¹ As stated above, however, the two-state solution for Israel and Palestine must be universal in appearance and in fact.¹¹² That two-state solution should represent the universal, concrete and collective will of the members of the UN.¹¹³ That resolution, defining and describing the purpose, scope, and function of a peacekeeping force, cannot be universal in fact where it does not include the vote of almost two hundred member nations.¹¹⁴

V. CONCLUSION

Israel declared itself an independent nation state seventy years ago.¹¹⁵ In those seven decades, it has become patently apparent that the Palestinian people also desire their own independent state.¹¹⁶ As demonstrated above, an increasing number of countries have recognized Palestine as an independent country, and there is an existing basis for determining the borders of the two countries.¹¹⁷ Consequently, the international community must, to promote peace and security, implement Resolutions 242 and 338, and create a universal peacekeeping force to operate in Jerusalem and the demilitarized zones. Likewise, independent Israel and Palestine should enter into

110. *Excerpts: Annan Interview*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/3661640.stm (last updated Sept. 16, 2004, 2:39 PM) (emphasis added); see *Lessons of Iraq War Under-score Importance of UN Charter*, UN NEWS CTR. (Sept. 16, 2004), <http://www.un.org/apps/news/story.asp?NewsID=11953#.WZ4iK3d949c> (emphasis added).

111. See White, *supra* note 106.

112. See Fisher, *supra* note 16.

113. See *What We Do: The General Assembly*, U.N. FOUND., <http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html?referrer=https://www.google.com/> (last visited Feb. 6, 2018).

114. *Id.*

115. See The Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3 (Isr.), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>.

116. See generally Joel Greenberg, *Abbas Formally Declares U.N. Statehood Bid*, WASH. POST (Sept. 16, 2011), https://www.washingtonpost.com/world/middle-east/abbas-formally-announces-un-membership-bid/2011/09/16/gIQAUJpfXK_story.html?utm_term=.d9b4d56771ec.

117. See *supra* note 13; see also *supra* Part III(A).

security agreements, mutual assistance agreements, and extradition agreements to ensure that each nation cooperates with the other to preserve peace and security and to punish Israeli and Palestinian citizens who violate the terms of peace.¹¹⁸

The discussion above serves as a catalyst for peace between Israel and Palestine, and a notice to the international community that it need not, nor should it wait another seventy years before separating Israel and Palestine into two *independent and sovereign* nations. Israelis have the right to live in peace and security. Palestinians desire the same. The international community must take affirmative steps to bring peace to the Middle East.

118. *See supra* Part IV(B).

SEX, LIES, AND VIDEOTAPE: CONSIDERING THE ABC CASE AND ADOPTING THE DSSH METHOD FOR THE PROTECTION OF THE RIGHTS OF LGBTI ASYLUM SEEKERS

*M. Yanick Saila-Ngita**

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I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) estimated in 2017 that there were 65.6 million displaced people worldwide.¹ By mid-2014, there were 1.2 million asylum seekers worldwide.² Among the millions who seek refuge are individuals who face perse-

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1. ISSAC KASAMANI, UNHCR, GLOBAL TRENDS 2016: FORCED DISPLACEMENT IN 2016 1, 2 (2017), <http://www.unhcr.org/5943e8a34.pdf>.

cution in their nation of origin due to their sexual orientation and/or gender identity. LGBTI (lesbian, gay, bisexual, transgender, and intersex) people who apply for asylum are often met with the challenge of proving that they face persecution in their home country if they remain there. As a result, nations that assess refugees have struggled in constructing a process to determine whether a person's claim of being LGBTI is credible.

In 2014, the European Court of Justice (ECJ) decided the *A, B, C v. Staatssecretaris van Veiligheid* case (ABC case).³ The Court ruled that certain practices were a violation of the right to human dignity under Article 1 and the right to privacy under Article 7 of the Charter of Fundamental Rights of the European Union.⁴ The ABC case should be given consideration and reviewed by any jurisdiction in determining the limits for assessing an application of asylum for an LGBTI person. However, the ABC case does not go as far as to provide affirmative measures for nations to take. In this instance, the DSSH method, developed by S. Chelvan, should be adopted by nations that adjudicate applications for asylum on the basis of sexual orientation.

I will begin with a summary of the challenges LGBTI asylum seekers face. I will then discuss instances where the rights of LGBTI asylum seekers have been called into question and will then detail why the ABC case should be considered by other jurisdictions outside of the European Union. Finally, I will argue that the DSSH method is a solution for protecting the rights of LGBTI asylum seekers while ensuring that nations engage in practices that are in accordance with international law; I will also analyze any possible opposition to the method.

II. BACKGROUND

The modern view of asylum was developed at a time before the international community recognized the problem of discrimination against LGBTI people.⁵ Understanding the refugee problem that fol-

2. See Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLICY INSTITUTE (Oct. 28, 2015), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-4>.

3. Joined Case C-148/13, C-149/13, & C-150/13, *A, B, C v. Staatssecretaris Van Veiligheid en Justitie*, 2014 EUR-Lex CELEX LEXIS 2406 (Dec. 2, 2014).

4. *Id.* ¶ 64-65.

5. See ELSPETH GUILD & JEAN MONNET, CURRENT CHALLENGES FOR INTERNATIONAL REFUGEE LAW WITH A FOCUS ON EU POLICIES AND EU CO-OPERATION WITH THE UNHCR 1, 6 (Dec. 2013), <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO->

lowed World War II,⁶ the crafting of the Convention on the Status of Refugees,⁷ and the attempts to include LGBTI people in the framework⁸ are important to having a proper context to understand the challenges that LGBTI people currently face in the world as well as the challenges that governments face in trying to assess credible claims of asylum. This historical backdrop illuminates the evolving nature of refugee status.

A. *History of the 1951 Refugee Convention*

World War II lasted from 1939 to 1945.⁹ The many years of armed conflict displaced an estimated 60 million people.¹⁰ On continental Europe alone, the anti-Semitic regime of Adolf Hitler had slaughtered an estimated six-million Jews.¹¹ The Nazis stripped Jews of their citizenship in the years after they rose to power, which meant that many Jews were left stateless after the war.¹² In 1945, representatives from 50 countries gathered in San Francisco for the United Nations Conference on International Organization.¹³ The nations represented at the conference drafted the UN Charter and signed it on June 6, 1945.¹⁴ The Charter came into effect in October 1945 when members of the

DROI_NT%282013%29433711_EN.pdf (stating that the modern view of asylum was developed at the end of World War II); Hannah Harris Green, *The Ongoing Legal Plight of LGBTQ Refugees*, JSTOR DAILY (June 22, 2016), <https://daily.jstor.org/very-real-plight-lgbtq-refugees/> (describing how even after the passage of the Refugee Convention protecting individuals with a “well-founded fear of being persecuted” based on membership of a “particular social group,” homosexuals faced discrimination because homosexuality was illegal nearly in all countries).

6. See *Understanding the Global Refugee Crisis*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/understanding-global-refugee-crisis> (last visited Feb. 17, 2018).

7. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, <http://www.refworld.org/docid/3be01b964.html> [hereinafter Convention Relating to the Status of Refugees].

8. See UNHCR, THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM-SEEKERS AND REFUGEES 1, 5 (2010), <https://data2.unhcr.org/en/documents/download/45897>.

9. Giada Zampano et al., *Migrant Crisis: A History of Displacement*, WALL STREET J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-a-history-of-displacement/>.

10. *Id.*

11. *The Holocaust*, HISTORY (2009), <http://www.history.com/topics/world-war-ii/the-holocaust>.

12. See *The Nazis in Power: Discrimination, Obedience, and Opportunities*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/decision-making-times-injustice/nazis-in-power-discrimination-obedience-opportunism> (last visited Feb. 17, 2018).

13. *1945: The San Francisco Conference*, UNITED NATIONS, <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> (last visited Feb. 17, 2018).

14. See U.N. Charter; *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Feb. 17, 2018).

Security Council ratified it.¹⁵ In 1946, the UN General Assembly passed a resolution to create the International Refugee Organization (IRO).¹⁶ The principal activity of the IRO was the resettlement of refugees from across much of Europe.¹⁷ The UN intended for the IRO to only be in operation until 1950, but it became evident that its work would have to continue as the number of refugees grew over time.¹⁸ The UN's Economic and Social Council called for a study that would investigate the status of refugees and make recommendation of the possibility of conventions.¹⁹

This became a key document known as the *Study of Statelessness*.²⁰ The study provided great detail into aspects of the condition of stateless persons/refugees including: international travel, right of entry and sojourn, personal status, family rights, rights of property, exercise of trades or professions, education, relief, social security, right to appear before the courts as plaintiff or defendant, exemption from reciprocity, expulsion and reconduction, taxation and military service.²¹ After reviewing the study, the Economic and Social Council appointed a committee to draft a convention that would be submitted to the UN General Assembly.²² The Convention relating to the Status of Refugees was adopted on July 28, 1951.²³

In 1951, the UN also established the Office of the UNHCR.²⁴ In 1967, the UN adopted a protocol to the Convention that expanded the coverage of the Convention to all refugees and not just those who were uprooted because of World War II.²⁵ Since its creation, 142 countries have signed on to the Convention and Protocol.²⁶ As signa-

15. See U.N. Charter; *History of the United Nations*, *supra* note 14.

16. See G.A. Res. 62 (I), Refugees and Displaced Persons (Dec. 15, 1946); Gilbert Jaeger, *On the History of the Int'l Prot. of Refugees*, 83 IRRC 727, 732 (2001).

17. *International Refugee Organization (IRO)*, U.N.: ARCHIVES & RECORDS MGMT. SEC., https://archives.un.org/sites/archives.un.org/files/files/Finding%20Aids/2015_Finding_Aids/AG-018-007.pdf (last visited Feb. 17 2018).

18. See Erika Feller, *International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present, and Future*, 83 IRRC 581, 584 (2001).

19. Jaeger, *supra* note 16, at 733.

20. *Id.* at 733.

21. See *id.*

22. See *id.* at 735.

23. See Convention Relating to the Status of Refugees, *supra* note 7; Jaeger, *supra* note 16, at 736.

24. See G.A. Res. 319 (IV), Refugees and Stateless Persons (Dec. 3, 1949); Jaeger, *supra* note 16, at 736 (quoting G.A. Res. 319 (IV), *supra* note 24).

25. Natalie Muller, *Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights*, DEUTSCHE WELLE (July 28, 2016), <http://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093>.

26. *Id.*

tories, nations are obligated to provide assistance, shelter, and access to education and work for refugees.²⁷

The 1951 Convention and 1967 Protocol provide the definition of refugee in the international context.²⁸ An asylum seeker is a person who has applied for recognition as a refugee.²⁹ If authorities determine that the applicant meets the definition of a refugee they are granted asylum.³⁰ The 1951 Convention does not define how states are to determine refugee status.³¹ Instead, the establishment of asylum proceedings and refugee status determinations are left to each state party to develop.³² Over the years, states arrived at interpretations for some of the key language of the convention.³³ There is no universal consensus as to what constitutes “membership in a particular social group.”³⁴

B. LGBTI Asylum History

The world has seen great advancement in the area of civil and human rights for LGBTI people. The latter half of the twentieth century and beginning of the twenty-first century saw the decriminalization of homosexuality in much of the developed world.³⁵ In addition, same sex couples in many nations may enter into relationships, recognized by the state, as well as enjoy the right to adopt children.³⁶ However, in much of the world, LGBTI people continue to face harm. In many nations, homosexuality is an offense that can be met with im-

27. *Id.*

28. Convention Relating to the Status of Refugees, *supra* note 7, art. 1 (Article 1(A)(2) of the Convention defines refugees as owing to 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it).

29. International Justice Resource Center, *Asylum and the Right of Refugees*, <http://www.ijrcenter.org/refugee-law/> (last visited Feb. 17, 2018).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *Id.*

35. TERENCE BALL ET AL., *POLITICAL IDEOLOGIES AND THE DEMOCRATIC IDEAL* 248 (9th ed. 2014).

36. *See Same-Sex Marriage Around the World; A Global Snapshot*, TQ (May 18, 2017, 7:30 AM), <https://thequeerness.com/2017/05/18/same-sex-marriage-around-the-world-a-global-snapshot/> (last updated Aug. 7, 2017).

prisonment or even capital punishment.³⁷ In Nigeria, it is illegal for gay people to organize meetings or form clubs.³⁸ On January 7, 2014, President Goodluck Jonathan signed the Same-Sex Marriage Prohibition Act, which criminalizes all same sex unions and marriages.³⁹ In Iran, sex between two men is punishable by death.⁴⁰ Men can even be flogged for a lesser offense such as kissing.⁴¹ Additionally, the practice of “corrective rape” against lesbians is prevalent even in the first nation to include LGBTI protections in its Constitution, South Africa.⁴² Corrective rape is also a phenomenon that occurs in Jamaica.⁴³ Angelina Jackson, a LGBT rights activist in Jamaica, was raped at gunpoint by a group of anti-gay rapists who posed as lesbians to lure her to a remote trail.⁴⁴ When she went to the police, Jackson says that they did not take her claim seriously and were more concerned with the fact that she identified as a lesbian.⁴⁵ A lack of response from law enforcement to anti-LGBTI attacks is a frequent concern expressed by LGBTI people living in Jamaica.⁴⁶

As recently as May 2017, reports claimed that the Russian authorities actively persecute gays in Chechnya.⁴⁷ A local Russian news-

37. See Pamela Duncan, *Gay Relationships are Still Criminalized in 72 Countries, Report Finds*, *GUARDIAN* (July 27, 2017, 1:00 AM), <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report>.

38. See Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality May be Punished by Death*, *WASH. POST* (June 16, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.78b8544e92fa.

39. Same Sex Marriage (Prohibition) Act, 2013, [http://www.placng.org/new/laws/Same%20Sex%20Marriage%20\(Prohibition\)%20Act,%202013.pdf](http://www.placng.org/new/laws/Same%20Sex%20Marriage%20(Prohibition)%20Act,%202013.pdf); see also Katherine Purvis, *Bisi Alimi on LGBT Rights in Nigeria: 'It May Take 60 Years but We Have to Start Now'*, *GUARDIAN* (Feb 9, 2016, 5:38 AM), <https://www.theguardian.com/global-development-professionals-network/2016/feb/09/bisi-alimi-on-lgbt-rights-in-nigeria-it-may-take-60-years-but-we-have-to-start-now>.

40. ISLAMIC PENAL CODE, art. 108-10 (May 22, 1996) (Iran), http://mehr.org/islamic_penal_code_of_iran.pdf; Bearak, *supra* note 38.

41. See *Gay Men in Iran Struggle to Survive*, ISLAMIC ST. IRAN CRIME RES. CTR., <http://isicrc.org/gay-men-in-iran-struggle-to-survive/> (last visited Feb. 22, 2018).

42. See Pumza Filani, *South Africa's Lesbians Fear 'Corrective Rape'*, *BBC NEWS* (June 30, 2011), <http://www.bbc.com/news/world-africa-13908662> (stating that “corrective rape” is when men attempt to “correct” the sexual orientation of lesbian women by raping them).

43. See David McFadden, *Gay Rights Activists in Jamaica Confronting Sexual Violence Against Lesbians*, *CTV NEWS*, <http://www.ctvnews.ca/world/gay-rights-activists-in-jamaica-confronting-sexual-violence-against-lesbians-1.2347877> (last updated Apr. 28, 2015).

44. *Id.*

45. *Id.*

46. *Id.*

47. See Anna Arutunyan, *Rights Groups: Gays Being Rounded up in Chechnya Detention Centers*, *USA TODAY* (Apr. 21, 2017 2:44 PM), <https://www.usatoday.com/story/news/world/2017/04/20/russia-chechnya-lgbt-gay-men/100689962/>.

paper reported that police in Chechnya had rounded up 100 gay men and held them in special detention centers.⁴⁸ Chechen leader Ramzan Kadyrov went as far as to deny the existence of gays in Chechnya, saying, “You cannot arrest or repress people who just don’t exist in the republic.”⁴⁹ It is within these sorts of hostile and often life threatening environments that LGBTI people pursue asylum claims outside of their home nations.

The core principle of the 1951 Convention on the Status of Refugees is that no one who is determined to be a refugee shall be returned to a nation where they face threats to their life or freedom.⁵⁰ While the original convention did not provide language for the protection of sexual minorities,⁵¹ since the 1990s, many countries have interpreted it to include LGBTI people.⁵² Article 1A(2) of the Convention states that a person who “owing to well-founded fear of being persecuted for ‘membership of a particular social group’ may be deemed a refugee and granted refugee status.”⁵³ In recent years, that clause has been interpreted by many states to include the LGBTI community as a particular social group.⁵⁴ Interpretation of the term “membership of a particular social group” has varied across jurisdictions for many years.⁵⁵ In 2002, the UNHCR presented guidelines that helped to reconcile the varying interpretations around the phrase.”⁵⁶

48. *Id.*

49. *Id.*

50. Convention Relating to the Status of Refugees, *supra* note 7, art. 33.

51. *See id.* (providing protections for many individuals but staying silent in regards to protecting sexual minorities).

52. *See* Janna Wessels, *Sexual Orientation in Refugee Status Determination*, REFUGEES STUD. CTR. U. OXFORD, WORKING PAPER SERIES NO. 73, Apr. 2011, at 9, <http://www.refworld.org/pdfid/4ebb93182.pdf> (citing Jenni Millbank, *A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003*, 14 SOC. & L. STUD. 115, 116 (2005)).

53. Convention Relating to the Status of Refugees, *supra* note 7, art. 1(A)(2).

54. *See* Millbank, *supra* note 52, at 115.

55. Wessels, *supra* note 52, at 10-11, 14 (the 1993 Canadian case of *Canada v. Ward* suggested three categories of social groups: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence).

56. UNHCR, Guideline on Int’l Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (defining membership of a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”).

Recognizing a need to affirm the rights of LGBTI people within existing international human rights laws, a group of academics, jurists, and UN independent experts met in Yogyakarta, Indonesia in 2006, resulting in the Yogyakarta Principles.⁵⁷ The Yogyakarta Principles apply many of those found in the Universal Declaration of Human Rights⁵⁸ and expand the language to include protections for people on the basis of sexual orientation and gender identity.⁵⁹ The Yogyakarta Principles are a universal guide for applying international human rights laws for the purpose of protecting LGBTI people.⁶⁰ Principle 23 addresses the rights of LGBTI individuals seeking asylum.⁶¹ It broadly declares that individuals should not face harm on the basis of their sexual orientation and that states have a responsibility to protect the individual from harm.⁶² In addition to an affirmative guarantee of the right to asylum for LGBTI persons, the Yogyakarta Principles also enumerate obligations of state parties.⁶³

While the Principles are not binding within any given jurisdiction, they provide guidance for the interpretation of international human rights treaties and their applicability to LGBTI people. Beyond the Yogyakarta Principles, the UNHCR released a guide for Claims to

57. 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, HUM. RTS. WATCH (Mar. 26, 2007, 8:00 PM), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>. See generally THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (Mar. 2007) [hereinafter YOGYAKARTA PRINCIPLES].

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

59. See YOGYAKARTA PRINCIPLES, *supra* note 57, at 10 (stating in Principle 1 that "all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.") (emphasis added).

60. See YOGYAKARTA PRINCIPLES, *supra* note 57; 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, *supra* note 57.

61. YOGYAKARTA PRINCIPLES, *supra* note 57, at 27 (stating that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.").

62. *Id.*

63. *Id.* (stating that "states shall: a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum; b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.").

Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and the 1967 Protocol related to the Status of Refugees.⁶⁴ The UNHCR published these guidelines, which define such terms as “persecution,” under the context of LGBTI asylum seekers.⁶⁵ Throughout the guidelines, the UNHCR emphasizes on recognizing that LGBTI asylum seekers’ experiences may differ from case to case and that factors, such as culture and religion, should be considered when adjudicating an asylum application.⁶⁶ Not all LGBTI applicants will have experienced persecution in the same way or even at all. The possibility, immediacy, and degree of persecution may be assessed to determine the potential consequences faced by the applicant if they were denied asylum and returned back to their home country.⁶⁷

While the process of applying for asylum varies across nations, each nation has established its own asylum processes. In the case of the European Union, the framework for granting asylum status is given in Directive 2004/83.⁶⁸ Article 4 of the Directive outlines the assessment of facts and circumstances necessary to complete the asylum process.⁶⁹ It allows members states to: “consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.”⁷⁰

Directives in the European Union are not self-executing; therefore member states are permitted leeway in applying the directive within their borders.⁷¹

64. UNHCR, Guidelines on Int’l Protection No. 9, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

65. *See id.* ¶ 6 (citing UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (Jan. 1992) [hereinafter UNHCR Handbook]) (defining persecution as “involve[ing] serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological makeup of the applicant.”).

66. *Id.* ¶ 3.

67. *Id.* ¶ 18.

68. Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC).

69. *Id.*

70. *Id.*

71. *See* Alicia Hinarejos, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?*, 14 EUR. L.J. 620, 630 (2008).

C. Failures of LGBTI Asylum Adjudication

Along with the duty to assess asylum applications for their credibility, nations must also consider the sensitive nature of LGBTI asylum cases. The question that is often centered in this debate is “How do you prove someone is gay?”⁷² Believing that such an inquiry is the goal of the asylum adjudication process has had dire consequences.⁷³ For example, in recent years, information about the United Kingdom’s assessment of LGBTI asylum seekers has come under scrutiny. In 2014, a confidential document from the UK Home Office was leaked to the press.⁷⁴ The documents revealed the questions that an official from the Border Agency asked a bisexual asylum seeker.⁷⁵ The questions were of an explicit nature concerning the applicant’s sexual preferences and behaviors: “‘Did you put your penis into x’s backside?’ . . . ‘When X was penetrating you did you have an erection? . . . Why did you use a condom?’ . . . ‘What is it about the way that men walk that turns you on?’”⁷⁶ The official from the Home Office asked the asylum seeker these questions over the course of five hours.⁷⁷ Following the release of this damning information about the UK Border Agency, the LGBTI rights group Stonewall released a report.⁷⁸

The report found that in the UK, LGBTI asylum seekers often find themselves in scenarios that would not be conducive to a successful disclosure of their experiences to a border agent.⁷⁹ Upon arrival to a port of entry, UK border agents attempt to assess the identity of the asylum seeker and determine their credibility.⁸⁰ Given the sensitive nature of discussing sexual orientation and/or gender identity, especially as the grounds for seeking asylum, the interview process for an applicant is often times quite tense.

72. NATHANAEL MILES, *NO GOING BACK: LESBIAN AND GAY PEOPLE AND THE ASYLUM* 14 (Stonewall ed., 2010).

73. *See id.* at 14-16.

74. Diane Taylor & Mark Townshend, *Gay Asylum Seekers Face ‘Humiliation’*, *GUARDIAN*, (Feb. 8, 2014, 4:00 PM), <https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>.

75. *See id.*

76. *Id.*

77. *See id.*

78. *See Stonewall’s History*, STONEWALL, <http://www.stonewall.org.uk/about-us/stonewalls-history> (last visited Apr. 19, 2018) (Stonewall is a British organization founded in 1989 whose key priority is the empowerment of and advocacy for LGBTI people in the United Kingdom and abroad. Stonewall conducts research, publishes resources for LGBTI individuals on their rights in areas such as health, education and employment. Stonewall also actively campaign parliament in furtherance of LGBTI civil and human rights).

79. *See MILES, supra* note 72, at 10.

80. *See id.*

The UK Border Agency's *modus operandi* of trying to establish credibility emphasizes detecting inconsistencies and falsehoods during an applicant's interview.⁸¹ This approach is damaging because it fails to consider the cultural experiences of asylum seekers who may be accustomed to keeping their sexual orientation a secret due to the stigma attached to it.⁸² Unsurprisingly, Stonewall found that, for many LGBTI applicants, proving one's sexual orientation as the basis for asylum is a challenge.⁸³ Making things even more difficult, the asylum applicant bears the burden to raise this issue and failure to do so could be held against them.⁸⁴

As part of the process to determine the validity of an asylum claim, UK Border Agents would pose confrontational questions that were highly sensitive and personal in nature to the applicants.⁸⁵ Many applicants are survivors of rape, torture, and other forms of sexual violence.⁸⁶ An applicant with this type of personal history may be highly uncomfortable discussing the details of their experience as doing so could trigger such traumatic memories.⁸⁷ An applicant's apprehension to discuss their experiences is often interpreted by the border agent as evidence of dishonesty and that their claim for asylum is therefore not credible.⁸⁸ The Stonewall report found that this type of questioning did not help border agents assess an asylum claim but, in reality, created a barrier to communication between the asylum applicant and the border agent.⁸⁹

As part of the asylum application process, some applicants have taken extraordinary steps to prove that they in fact identify as LGBTI, including the submission of explicit videos and photographs of them-

81. *Id.*

82. Adeboya, a Nigerian asylum seeker to the UK, when discussing his asylum interview experience said that "[w]here I come from, it's something you don't tell anybody. I found it very hard because I feel like you wouldn't understand and you always take it the wrong way." *Id.* at 10.

83. *Id.* at 14.

84. *Id.*

85. Example of questions posed include: "Can you prove you are a homosexual?", "Why do you choose to be homosexual when it is illegal in your country?", "Why do you think you are a homosexual, you have been married and had children?", and "Can't you be discreet about your homosexuality and thereby avoid being noticed as a gay person?" *Id.* at 15.

86. *Id.* at 16.

87. *See, e.g., id.* at 16 (Chantal, an asylum seeker from Jamaica said that, "You want to forget about your past but then you have to try and think of everything again to explain what you've been through. They ask you, what are your reasons? Tell them the date, the time, everything – but it's buried. If you don't quite remember they say you're telling lies but that's not what you're doing.").

88. *See id.* at 16.

89. *See id.*

selves in sexual situations.⁹⁰ Some nations have even gone as far as administering tests in order to assess the credibility of a claim for asylum stemming from LGBTI identity.⁹¹

In the Czech Republic, authorities used phallometry to determine whether a male⁹² applicant had homosexual attractions.⁹³ Phallometry, which is used to measure sexual arousal, is a mechanical technique that is utilized in both the medical and criminal justice contexts in the Czech Republic.⁹⁴ Electrodes are attached to a man's penis and a device measures the response to sexually explicit visual and audio stimuli.⁹⁵ The Czech Ministry of the Interior, which evaluates asylum applications, has the authority to call for phallometric testing⁹⁶ to assess whether an applicant has a credible claim of homosexuality.⁹⁷ In response to the practice in the Czech Republic, the UNHCR asserted that, while assessing the credibility of an application for refugee status is required, determining the validity of every piece of evidence that an applicant presents is "hardly possible."⁹⁸ The UNHCR referenced the

90. See, e.g., Claire Bennett, *What Does an Asylum Seeker Have to do to Prove Their Sexuality?*, THE CONVERSATION (Mar. 5, 2015, 9:00 AM), <http://theconversation.com/what-does-an-asylum-seeker-have-to-do-to-prove-their-sexuality-38407> (Aderonke Apata, a prominent Nigerian LGBT rights activist was initially denied asylum in the UK. The Home Office determined that he claim that she was a lesbian and could face the death penalty in Nigeria if deported was dubious due to the fact that she had previously been in a heterosexual relationship and had children. As Barrister Andrew Bird for the Home Office said, "You can't be heterosexual one day and a lesbian the next day, just as you can't change your race." In an appeal, Apata submitted explicit video footage of her with her girlfriend).

91. *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims Based on Persecution due to Sexual Orientation*, UN REFUGEE AGENCY (Apr. 2011) [hereinafter *UNHCR's Comments*], <http://www.unhcr.org/4daed0389.pdf>.

92. The corresponding process for women is called "vaginal photoplethysmography" or "VPG." *Id.*

93. *The Practice of Phallometry Testing for Gay Asylum Seekers*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (Sept. 12, 2010), <http://fra.europa.eu/en/news/2011/practice-phallometric-testing-gay-asylum-seekers>.

94. *UNHCR's Comments*, *supra* note 91.

95. *Id.*

96. The Czech national asylum authorities could, upon written consent of the applicant, request a diagnostic from an authorized expert of psychology and sexology about the asylum applicant's sexuality. *Id.*

97. *The Practice of Phallometry Testing for Gay Asylum Seekers*, *supra* note 93.

98. UNHCR comments that,

A person's sexual orientation is not a matter of fact that can be easily identified through evidence. Sexual orientation and gender identity are broad concepts which create space for self-identification. Sexual orientation is far more than sexual conduct or a sexual act and rather is fundamental to a person's identity; who they are, how they live in society and how they express who they are. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

UNHCR's Comments, *supra* note 91 (first citing HJ (Iran) (FC) and HT (Cameroon) (FC) v. Secretary of the State for the Home Department [2010] UKSC 31 (appeal taken from 2009

Yogyakarta Principles, which prohibits practices such as phallometry.⁹⁹ The UNHCR noted that applicants often file for asylum because they face a particularly vulnerable situation in their home country.¹⁰⁰ Intrusive testing, such as phallometry, must be avoided as it may elicit feelings of shame and embarrassment from an applicant, making them less likely to respond to questioning.¹⁰¹ Ultimately, the UNHCR concluded that using phallometry to assess a person's claim for refugee status violates personal dignity and international human rights laws.¹⁰²

Revelations of the outrageous practices by state authorities regarding the assessment of LGBTI asylum applications demand urgent action and a reckoning by the judiciary. A 2014 case out of the ECJ acts as an affirmation for states that already assess LGBTI asylum claims by establishing acceptable limits for the adjudication process for asylum.¹⁰³

III. THE ABC CASE

A. *About the ABC Case*

The *ABC* case was a consolidation of three different cases involving gay men who challenged the Dutch government's decision to deny their respective applications for asylum.¹⁰⁴ All three men applied for temporary residence permits (asylum).¹⁰⁵ "A" was a gay man from Gambia who applied for asylum in the Netherlands.¹⁰⁶ The Dutch authorities denied his application, but A reapplied for asylum and reflected on his application his willingness to undergo a "test" or

EWCA Civ 172); then citing *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); then citing *Lawrence v. Texas*, 539 U.S. 558 (2003); then citing *Pretty v. United Kingdom*, 35 Eur. Ct. H.R. 1, App. No. 2346/02, (2002); and then citing *YOGYAKARTA PRINCIPLES*, *supra* note 57, at 11-12).

99. See *UNHCR's Comments*, *supra* note 91 (quoting *YOGYAKARTA PRINCIPLES*, *supra* note 57) ("any form of medical or psychological treatment, procedure, testing, or [confinement] to a medical facility, based on sexual orientation or gender identity [shall be prohibited].").

100. *UNHCR's Comments*, *supra* note 91 (citing *UNHCR Handbook*, *supra* note 65, ¶ 190).

101. *UNHCR's Comments*, *supra* note 91.

102. *Id.* ("Phallometry cannot be considered a sufficiently reliable resource to prove or disprove an applicant's sexuality in the context of asylum claims. Moreover, phallometry is at variance with the applicant's dignity and privacy and may amount to degrading treatment as prohibited by international legal standards.").

103. *Joined Case C-148/13, C-149/13, & C-150/13, A, B, C v. Staatssecretaris Van Veiligheid en Justitie*, 2014 EUR-Lex CELEX LEXIS 2406 (Dec. 2, 2014).

104. *Id.* ¶ 2.

105. *Id.* ¶ 30.

106. See *id.* ¶¶ 22-25; S. Chelvan, *C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris Van Veiligheid En Justitie: Stop Filming and Start Listening – A Judicial Black List for Gay Asylum Claims*, EUR. L. BLOG (Dec. 12, 2014), <http://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/>.

perform a homosexual act in order to prove his homosexuality.¹⁰⁷ The Dutch authorities denied A's second application in July 2011.¹⁰⁸

In June 2012, the Dutch government denied the asylum claim of B, an Afghan national, on the ground that his statements concerning his homosexuality were "vague, perfunctory and implausible."¹⁰⁹ The state authorities believed that he should have been able to provide "more details about his emotions and his internal awareness of his sexual orientation."¹¹⁰

C was a national of Uganda.¹¹¹ When C first applied for asylum in the Netherlands, he did so for reasons other than persecution on the basis of his sexual orientation.¹¹² When the state authorities first denied his application, he did not challenge the finding, but instead reapplied based on the fear that he would be harmed in his home country because of his homosexuality.¹¹³ C provided a video recording of himself performing "intimate acts with a person of the same sex" to the authorities who carried out the assessment of his application.¹¹⁴ The authorities denied his application in October 2012 for a lack of credibility.¹¹⁵ The Staatssecretaris claimed that: (1) C should have declared his fear of persecution for his sexual orientation on his first application; (2) he did not clearly explain "how he became aware of his homosexuality[:]" and (3) that he could not answer questions about any Dutch LGBTI rights organizations.¹¹⁶

The three men appealed their respective decisions to the Rechtbank-Gravenhage, the Dutch court of first instance. The court dismissed A and C's appeals as "unfounded" and dismissed B's appeal by concluding that "the Staatssecretaris could have reasonably found the B's statements concerning his homosexuality were not credible."¹¹⁷ The men subsequently appealed to the Raad van State, an advisory board to the Dutch government and legislature. The men asserted that the questions asked by the Dutch authorities constituted a breach of human dignity and a breach of the right to private life under the Char-

107. A, B, C, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 24.

108. *Id.* ¶ 25.

109. *Id.* ¶ 26.

110. *Id.*

111. S. Chelvan, *supra* note 106.

112. A, B, C, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 27.

113. *Id.* ¶ 28.

114. *Id.*

115. *Id.* ¶ 29.

116. *Id.*

117. *Id.* ¶ 31-32.

ter of Fundamental Rights of the European Union.¹¹⁸ The Raad van State referred the cases collectively to the ECJ for a preliminary ruling.¹¹⁹ The ECJ sought to determine the limits that Directive 2004/83¹²⁰ and the Charter of Fundamental Rights impose on member states when assessing the credibility of an asylum applicant's declared sexual orientation and how these methods may differ from other grounds of persecution.¹²¹

On December 2, 2014, the ECJ delivered its opinion on the ABC case.¹²² It held that Directive 2004/83, read in light of the Charter, establishes limits on authorities evaluating an asylum application for fear of persecution due to sexual orientation.¹²³ However, member states are not obliged to accept declared sexual orientation as fact.¹²⁴ The declaration by the applicant is merely a starting point in assessing an application's credibility.¹²⁵

According to the ECJ, member states may consider it an applicant's duty to provide information to substantiate their asylum re-

118. *Id.* ¶ 35. The Charter of Fundamental Rights of the European Union, promulgated in December 2000, contains political, social, and economic rights for EU citizens under EU law. Article 3 & Article 7 of the Charter, respectively, state that “[e]veryone has the right to respect for his or her physical and mental integrity” and “[e]veryone has the right to respect for his or her private and family life, home and communications.” Charter of Fundamental Rights of the European Union, art. 3 & 7, Dec. 18, 2000, 2000 O.J. (C 364) 1.

119. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 43.

120. *See* Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC) (“(1) Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application . . . (3) The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied; (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm; (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm; (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country; (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.”).

121. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 48.

122. *See id.*

123. *Id.* ¶ 49-52.

124. *Id.* ¶ 58.

125. *Id.* ¶ 49.

quest.¹²⁶ This may include requiring confirmation of statements made by applicants regarding their declared sexual orientation.¹²⁷ However, any assessments meant to determine an applicant's credibility must be in accordance with the Charter.¹²⁸ The Court looked specifically at four practices: (1) the use of stereotypes; (2) the questioning of an applicant's sexual practice; (3) the administering of "tests" or allowing applicants to submit photographs and videos; and (4) denying asylum due to an applicant's failure to raise persecution for sexual orientation in their initial claim.¹²⁹ The Court found that all of these practices violated the Charter.¹³⁰

First, the Court held that the use of stereotypes is a violation of Article 4(3)(c) of Directive 2004/83.¹³¹ Stereotypical notions about the behavior and experiences of LGBTI people are limiting and do not take into account the varied proclivities, experiences, and knowledge that LGBTI asylum seekers might have before they file an application.

Second, the Court held that questions relating to applicants' sexual practices violate the right to privacy under Article 7 of the Charter.¹³² The Court recognized that the Charter permits authorities to interview an applicant regarding their declared sexual orientation.¹³³ However, questions about sexual practices, especially when such information is divulged to an official, invade upon the privacy rights of asylum applicants.¹³⁴

Third, the Court held that administering tests to prove an applicant's sexual orientation violates the right to human dignity under Article 1 of the Charter.¹³⁵ In addition, the Court prohibited the production of evidence to substantiate an applicant's claimed sexual orientation.¹³⁶ The Court noted that tests, which sometimes require the submittal of evidence, not only infringe upon human dignity, but, from an evidentiary stance, lack probative value.¹³⁷

126. *Id.* ¶ 50.

127. *Id.* ¶ 51.

128. *Id.* ¶ 53.

129. *Id.* ¶ 59.

130. *Id.*

131. *Id.* ¶ 9, 60-63.

132. *Id.* ¶ 64; *see* Charter of Fundamental Rights of the European Union, *supra* note 118, art.

7.

133. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 64.

134. *Id.*

135. *Id.* ¶ 65.

136. *Id.* ¶ 72.

137. *Id.* ¶ 65.

Finally, the Court held that under Directive 2004/83, an applicant's failure to raise their declared sexual orientation as grounds for seeking asylum, prompted by a well-founded fear of persecution, should not be held against them.¹³⁸ The Court noted that, while the Directive may permit member states to oblige asylum seekers to submit all material necessary to assess the application "as soon as possible," the sensitive nature of sexual orientation claims makes a difference.¹³⁹ An applicant fleeing from a nation where their sexual orientation is stigmatized may not feel comfortable divulging their declared identity at first instance.¹⁴⁰

B. *Justification for Considering the ABC Case*

The ruling by the ECJ in the ABC case is highly persuasive. Jurisdictions assessing the application of LGBTI persons who possess a well-founded fear of persecution in their nation of origin should consider and give weight to the ABC case ruling. While certain progressive nations have reached a consensus that LGBTI people deserve recognition under the phrase "membership in a social group,"¹⁴¹ an inconsistency remains as to the limits placed on assessing an LGBTI asylum application.

Prohibiting the use of stereotypes as a factor in the evaluation of an LGBTI asylum seeker's application is consistent with international human rights and human dignity principles. The Yogyakarta Principles bestow upon LGBTI people a sense of dignity.¹⁴² Competent authorities in nations that assess potential LGBTI asylum seekers' applications prevent the violation of international human rights laws by precluding asylum adjudicators from using stereotypes in evaluations. In addition, many nations already recognize that LGBTI people deserve equal treatment in areas including housing, employment, education, and immigration.¹⁴³ In such nations, precluding the use of stereotypes in asylum adjudication ensures that nations follow their own domestic laws.

138. *Id.* ¶ 70.

139. *Id.* ¶ 68-69.

140. *Id.* ¶ 70-71.

141. Convention Relating to the Status of Refugees, *supra* note 7, art. 1(A)(2).

142. YOGYAKARTA PRINCIPLES, *supra* note 57, at 11 (Principle 3 states that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.").

143. See *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUM. RTS. WATCH (June 23, 2017, 3:00 PM), <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity>.

Prohibiting adjudicators from asking applicants about their sexual practices furthers the recognition of the dignity of LGBTI people. Researchers emphasize that focusing on the sexual activities of the applicant rather than the persecution they face because of self-identification as a member of a social group misses the mark.¹⁴⁴ Asylum applicants rarely face persecution because they are not caught performing a sexual act; rather, persecution typically arises from asylum seekers' claimed sexual orientations and identities.¹⁴⁵

Further, nations should either prohibit or tightly limit tests as a means of assessing asylum applications of LGBTI persons. As the ECJ noted, tests to "prove" the sexual orientation of an applicant violate their dignity.¹⁴⁶ In addition, tests for sexual orientation and the submission of video and photographic evidence of sexual orientation do not carry great probative value. Moreover, securing such evidence is overly invasive. The ECJ correctly recognizes that subjecting LGBTI persons to tests on the basis of their sexual orientation or gender identity undermines their human rights.¹⁴⁷ States should intervene when they become aware that this sort of conduct is taking place within their jurisdiction.¹⁴⁸

Jurisdictions should also consider the negative impact of denying an LGBTI asylum applicant the ability to raise a claim of asylum based on their sexual orientation if they do not raise such a claim at first instance. LGBTI asylum seekers find themselves outside of their home nation, seeking refuge because their original environment threatens their safety and liberty. Adjudicating bodies should consider the various cultural and particularized experiences of an LGBTI asy-

144. Erin Gomez, *The Post-ABC Situation for LGB Refugees in Europe*, 30 EMORY INT'L L. REV. 475, 487 (2016) (citing Volker Türk, *Ensuring Protection to LGBTI Persons of Concern*, 25 INT'L J. REFUGEE L. 120, 124 (2013)).

145. Cf. Gomez, *supra* note 144 (citing Türk, *supra* note 144).

146. Joined Case C-148/13, C-149/13, & C-150/13, A, B, C v. Staatssecretaris Van Veiligheid en Justitie, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 65 (Dec. 2, 2014).

147. Yogyakarta Principle 18 states that,

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

YOGYAKARTA PRINCIPLES, *supra* note 57, at 23.

148. States shall: a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms.

Id.

lum applicant.¹⁴⁹ The development of individual sexual orientation does not follow any singular, traditional path with which an asylum official may be familiar.¹⁵⁰ Therefore, authorities must be flexible to this reality.¹⁵¹

The likely criticism to the above arguments is in regard to their extraterritorial nature because the ECJ decided the ABC case. The ECJ only has purview over the member states of the European Union and only interprets European Union law. One might imagine a judge in a U.S. federal district court hearing a challenge to the practices of the U.S. Citizenship and Immigration Service wherein an EU court decision is offered as authority. The judge might react by asking, “Why should we care what they say in Europe?” However, it is not a completely strange occurrence for a U.S. court to cite foreign law and cases.¹⁵² As Associate Justice Ginsburg once proclaimed, “I frankly don’t understand all the brouhaha latterly from Congress and even some of my colleagues about referring to foreign law.”¹⁵³ In addition, while the Yogyakarta Principles are not binding law in any jurisdiction, the progressive nations that grant asylum to LGBTI people have ratified treaties that call upon them to take action to protect the rights of *all* people.¹⁵⁴

149. See Gomez, *supra* note 144, at 476 (citing Nina Haase, *EU Court Examines If ‘gay’ is Grounds for Asylum*, DW (Feb. 24, 2014), <http://www.dw.com/en/eu-court-examines-if-gay-is-grounds-for-asylum/a-17454674>) (“Applicants who have struggled with their sexual identities in their countries of origin will not necessarily fully accept their LGB sexuality immediately upon entering the receiving country and often will still be developing their sexual identities during an asylum application.”).

150. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Louis Middelkoop, *Dutch Court Asks Court of Justice to Rule on the Limits of Verification of the Sexual Orientation of Asylum Seekers*, EUR. L. BLOG (Apr. 23, 2013), <http://europeanlawblog.eu/2013/04/23/dutch-court-asks-court-of-justice-to-rule-on-the-limits-of-verification-of-the-sexual-orientation-of-asylum-seekers/>).

151. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Middelkoop, *supra* note 150).

152. See generally Stephen Yeazell, *When and How U.S. Court Should Cite Foreign Law*, 26 CONST. COMMENT 59, 61, 73 (2009) (quoting and citing video of Justice Ruth Bader Ginsburg).

153. *Id.* at 73 (quoting and citing video of Justice Ruth Bader Ginsburg).

154. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 20378; International Convention on the Elimination of All Forms of Racial Discrimination, art 1, Mar. 7, 1966, 660 U.N.T.S. 9464.

IV. THE DSSH METHOD

A. *Background on DSSH and Chelvan*

While the ECJ's ruling in the ABC case is highly instructive to other jurisdictions on how they should consider interpreting their own asylum laws, it does not provide affirmative alternatives to prevent the type of unlawful practices that have often occurred in asylum proceedings. Thus, the DSSH method provides a "gap filler" to the ABC case.¹⁵⁵ The DSSH method stands as a tool to ensure that competent adjudicators do not breach the limits of the ABC case while assessing applications for asylum from LGBTI persons based on their sexual orientation or gender identity.

S. Chelvan, a barrister from the UK, first developed the DSSH method while pursuing his Law PhD at the Kings College London.¹⁵⁶ Chelvan debuted the method at a conference in April 2011.¹⁵⁷ Chelvan noted that, since a landmark case in 2010 in the UK, advancements occurred in how authorities in the UK viewed LGBTI asylum laws.¹⁵⁸ That year, the UK Supreme Court ruled in favor of the Home Department in the joint case of HJ & HT v. Secretary of State.¹⁵⁹ In that case, an Iranian man and a Cameroonian man brought cases after applying for asylum in the UK.¹⁶⁰ The Court held that the Home Office's unofficial policy of reasonable tolerable discretion was unlawful.¹⁶¹

155. S. Chelvan, *At the End of the Rainbow: Where Next for the LGBTI Refugee?*, REFUGEE STUD. CTR. (Jan. 24, 2014), <https://www.rsc.ox.ac.uk/news/at-the-end-of-the-rainbow-where-next-for-the-lgbti-refugee-s-chelvan>; see also *LGBTI Asylum Claims – the Difference, Stigma, Shame, Harm Model*, RIGHT REMAIN (Aug. 7, 2014), <http://www.righttoremain.org.uk/legal/lgbti-asylum-claims-the-difference-shame-stigma-harm-model/>.

156. See S. Chelvan, *From ABC to DSSH: How to Prove That You are a Gay Refugee*, FREE MOVEMENT (July 23, 2014), <https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/>.

157. See *id.*

158. See Mary O'Hara, *Legal Aid Barrister of the Year: 'It's A Very Dangerous to be Gay in'*, GUARDIAN (July 16, 2014, 3:00 PM), <https://www.theguardian.com/society/2014/jul/16/legal-aid-barrister-dangerous-world-gay-asylum-seekers-s-chelvan>.

159. HJ (Iran) (FC) and HT (Cameroon) (FC) v. Secretary of the State for the Home Department [2010] UKSC 31 (appeal taken from 2009 EWCA Civ 172).

160. *Id.*

161. Catherine Baksi, *Legal Hackette Lunches with S. Chelvan*, LEGAL HACKETTE'S BRIEF (Jan. 25, 2016), <https://legalhackette.com/2016/01/25/legal-hackette-lunches-with-s-chelvan/> (explaining the Home Office policy of reasonable tolerable discretion, "[w]here it accepted claimants were gay and would face persecution or death if returned to their home countries, it suggested they could avoid such threats by voluntarily exercising discretion and concealing their sexuality").

After the UNHCR convened a meeting in 2011 in Geneva to discuss LGBTI asylum claims,¹⁶² national governments called for the UNHCR to devise a questionnaire that authorities could use to assess LGBTI asylum application in accordance with international human rights laws and principles.¹⁶³ Chelvan rejected this call for a questionnaire because of the arbitrary nature of a numeric-based system.¹⁶⁴ For Chelvan, the key to assessing the application of an LGBTI asylum seeker is difference.¹⁶⁵ For it is difference that makes the asylee the initial target of their persecutor and therefore a member of the particular social group under the language of the 1951 Convention related to the Status of Refugees.¹⁶⁶ Moreover, it is not necessarily a sexual act that brings the LGBTI applicant to the attention of their persecutor, but, rather, a recognition by the persecutor that the asylum applicant does not conform to that society's dominant idea of acceptable sex and gender roles.¹⁶⁷

B. *Implementing the DSSH Method*

DSSH stands for “Difference, Stigma, Shame, Harm.”¹⁶⁸ Using this model, the adjudicator poses open ended, narrative-based questions to elicit responses from the asylum applicant. The first stage focuses on difference.¹⁶⁹ The interviewer asks the applicant questions about when they knew they were different than “other boys and girls” and when they knew they fell outside the norms of their gender's behavior.¹⁷⁰ Because an applicant is likely to recognize that they were different from their peers and what the culture in their home country expected of them, this leads to an awareness and discussion of stigma.

162. See Jesse Bernstein, *Human Rights First Welcomes Attention on LGBTI Refugees – Urges Continued Reforms to Ensure Protections*, HUFFPOST (Oct. 13, 2010, 8:08 PM), https://www.huffingtonpost.com/human-rights-first/hrf-welcomes-attention-on_b_762012.html.

163. See Baksi, *supra* note 161.

164. Chelvan, *supra* note 106 (Chelvan noting that “[i]t is not practical, since a questionnaire of 40 questions would result in an applicant who was only able to answer 15 questions ‘correctly’ as ‘not gay’, and an individual who answered 39 questions correctly as having learnt the answers from the internet.”).

165. See *id.*

166. See *id.*

167. William Lee Adams, *Gay Asylum Seekers Forced to ‘Prove’ Their Sexuality*, NEWSWEEK (Sept. 24, 2014, 11:09 AM), <http://www.newsweek.com/2014/10/03/gay-asylum-seekers-forced-prove-their-sexuality-272666.html> (quoting Chelvan as saying, “The majority of individuals are not caught in a sexual act by religious police It’s the fact that they don’t conform to a heterosexual narrative that makes them identifiable.”).

168. S. CHELVAN, *DSSH MODEL AND LGBTI ASYLUM CLAIMS* 28 (Apr. 2014), <https://www.no5.com/cms/documents/DSSH%20Model%20and%20LGBTI%20Asylum%20Claims.pdf>.

169. *Id.* at 29.

170. *Id.* at 35.

The topic of stigma prompts the applicant to discuss issues like when and how they recognized that others disapproved of their identity or conduct. Stigma is tightly connected with regional social/cultural/religious norms.¹⁷¹ The issue of stigma can also lead to a discussion of when and how asylum applicants learned that the majority of their originating society disapproved of their identity and/or conduct and that society implemented laws and cultural practices to respond to LGBTI people in an oppressive manner.¹⁷²

The stigma attached to the applicant's identity will often lead to feelings of shame around their identity.¹⁷³ The shame attached to the stigma may impact the asylum seeker in such a way that leaves them isolated and alienated by the society at large.¹⁷⁴ However, the last phase of the DSSH model is perhaps the most important. The applicant will discuss what events occurred that gave them the well-founded fear of persecution in their home country.¹⁷⁵ The harm might be in the form of violence from a state actor. The state actor might threaten the applicant with torture, detention, or even capital punishment.¹⁷⁶ The persecutor might be a non-state party. In some instances, the threat may come from within the family, such as in the case of honor killings.¹⁷⁷

In October 2012, the UNHCR formerly endorsed the DSSH method.¹⁷⁸ S. Chelvan presented his findings to the UNHCR in Geneva, which found the arguments compelling.¹⁷⁹ In December 2013, the Migrationvert (the Swedish Migration Board) invited Chelvan to Stockholm to give a presentation to the board.¹⁸⁰ Court lawyers and judges attended Chelvan's presentation.¹⁸¹ As of 2014, the government of New Zealand chose to adopt the DSSH method as part of its

171. Chelvan, *supra* note 156.

172. Chelvan, *supra* note 168, at 31.

173. *Id.* at 32.

174. *Id.*

175. *Id.* at 37.

176. *Id.* at 34.

177. See generally Gregg Zoroya, 'Honor killings': 5 Things to Know, USA TODAY (June 9, 2016, 12:35 PM), <https://www.usatoday.com/story/news/world/2016/06/09/honor-killings-united-nations-pakistan/85642786/> (Honor killings are a form of extreme punishment exacted to regain family honor in the wake of what is considered a sexual crime, such as adultery or other sexual impropriety and homosexuality).

178. Sweden – "Changing the Chapter" in *Understanding LGBTI asylum claims*, NO.5 BARRISTERS CHAMBERS (Dec. 4, 2013), <http://www.no5.com/news-and-publications/news/668-sweden-changing-the-chapter-in-understanding-lgbti-asylum-claims/>.

179. *Id.*

180. *Id.*

181. *Id.*

asylum review process.¹⁸² In addition, the governments of Germany, Finland, and Cyprus reviewed the DSSH method for potential adoption by their government agencies.¹⁸³

UN member states that assess the application of LGBTI asylum seekers should adopt the DSSH method. After only just a few short years, the DSSH method enjoys support from a growing list of progressive nations who are committed to providing a refuge for asylum seekers fleeing persecution, while maintaining the integrity of their asylum adjudication process.¹⁸⁴ Given that the UNHCR, which designates a framework for the global community on refugee and asylum policies, adopted the DSSH method,¹⁸⁵ there is great potential for it to be recognized beyond just a handful of nations.

States that have ratified the 1951 Refugees Convention should apply the DSSH method. In order for the DSSH to expand its reach in the future, this paper recommends that ratifying nations draft the DSSH method as an optional protocol. Optional protocols attach to previously established treaties.¹⁸⁶ Optional protocols allow signatories of the treaty that wish to enter into a separate agreement from the treaty to do so.¹⁸⁷ Optional protocols deal with a substantive and/or procedural area of the treaty.¹⁸⁸ An optional protocol would likely be the best option to implement the DSSH method because only a certain number of signatories to the 1951 Convention on the Status of Refugees assess LGBTI asylum seekers for refugee status.¹⁸⁹ For example, nations such as Iran and Russia, both ratifying members to the Convention, have widely reported cases of abuse towards its LGBTI community.¹⁹⁰ The adoption of the DSSH method via an optional pro-

182. Jasmine Dawson & Paula Gerber, *Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?*, 29 INT'L J. REFUGEE L. 292, 294 (2017); S. Chelvan, *supra* note 106.

183. Adams, *supra* note 167.

184. *Id.*; Dawson & Gerber, *supra* note 182, at 294.

185. Sweden – “Changing the Chapter” in *Understanding LGBTI asylum claims*, *supra* note 178.

186. See *What is an Optional Protocol*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (last visited Apr. 25, 2018).

187. See *id.*

188. See *id.*

189. See *UNHCR's Views on Asylum Claims based on Sexual Orientation and/or Gender Identity Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, U.N. HIGH COMMISSION FOR REFUGEES (Nov. 4), <http://www.unhcr.org/uk/5829e36f4.pdf>.

190. Emine Saner, *Gay rights around the world: the best and worst countries for equality*, GUARDIAN (July 30, 2013), <https://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

protocol would be the diplomatic mechanism that could ensure that the method has the widest reach possible among progressive nations.

While the DSSH method is innovative in its approach to assessing applications for asylum while respecting the rights of applicants, it is nevertheless flawed in some ways that would require addressing prior to an adoption by the UN in an optional protocol. For example, the DSSH method does not provide safeguards to ensure that false narratives cannot pass as credible. While government agencies desire sensitivity towards the experiences of asylum seekers, there is a continued need to protect the integrity of the asylum process. Over time, a system could develop where applicants who do not possess legitimate claims for refugee status are able to slip through the system because they know just the right statements to make in order to seem credible.

Furthermore, opposition to DSSH may rest upon the method's emphasis on a showing of self-identification as LGBTI. If harm is the most crucial step in determining whether states should grant asylum, how significant is it that the applicant actually self-identify as LGBTI or have same sex attractions? For example, a heterosexual man in a nation that has hostile views towards gays could be perceived as gay by his neighbor who then threatens him with violence. Under the DSSH method, this heterosexual man would not likely possess a narrative indicating feelings and experiences of difference, stigma, or shame. However, his perceived homosexuality by his neighbor could pose a grave threat to him. Would this man be granted asylum under the DSSH method? Since refugees by definition must be members of a targeted social group, will social group be expanded to include perceived LGBTI people as a social group? This paper would argue that in that instance, the responsibility falls on the UNHCR and national governments to interpret whether that man's experiences position him as a member of a particular social group, namely, the LGBTI community.

V. CONCLUSION

Every day across the world, LGBTI people awaken to lives in nations that are, at times, openly hostile towards their very existence and in which their lives may be at risk. The 1951 Refugee Convention and the 1967 Protocol rightly expanded to protect this vulnerable population, allowing them access to the possibility of life and liberty be-

yond the spaces where they confront hate.¹⁹¹ By giving consideration to the ECJ's ABC case, governments will ensure that they are upholding the values found within their own domestic laws that would give LGBTI refugees freedom whilst also defending international human rights. In addition, the adoption of the DSSH method via an optional protocol is an exciting opportunity for nations that already have a commitment to protecting LGBTI people. By taking the necessary steps, nations can guarantee that they provide LGBTI people the dignity they deserve through a process that acknowledges this social group's vulnerabilities and power.

191. See Convention Relating to the Status of Refugees, *supra* note 7; UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (Sept. 2011), <http://www.unhcr.org/en-us/4ec262df9.pdf#zoom=95>.

THE NECESSITY FOR A PERMANENT DISINCENTIVE: EXAMINING THE USE OF CHEMICAL WEAPONS WITH A FOCUS ON SYRIA'S CIVIL WAR

*Michelle Almary**

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I. INTRODUCTION

Chemical weapons are, by nature, horrific and fundamentally indiscriminate, and society has historically viewed their use as a viola-

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tion of international law.¹ Exposure to chemical weapons causes unique emotional and psychological consequences and often yields greater harm than the mere physical effects of conventional weapons.² In spite of the various treaties and tribunals that reflect universal agreement on the importance of prohibition, the continued use of chemical weapons without consequence poses an immediate threat to the peace and stability of the international community.³ A permanent solution is crucial to ensure that the use of chemical weapons does not go unpunished.

A permanent solution is crucial to ensure that the use of chemical weapons by anyone, under any circumstance, does not go unpunished. The International Criminal Court (“ICC”),⁴ established and governed by the Rome Statute,⁵ was created to address the lack of a permanent forum for prosecuting atrocities of this magnitude. The court cannot exercise jurisdiction over a state that is not a party to the Rome Statute, but the United Nations Security Council (“Security Council”) may grant jurisdiction through a referral.⁶ The Security Council should adopt a resolution that creates automatic grounds for referral to the ICC for any use of chemical weapons, and the ICC’s jurisdiction should be based on the Kampala Amendment.⁷ If the current lan-

1. See U.N. SCOR, 72d Sess., 7893d mtg. at 2, 13, 15-16, U.N. Doc. S/PV.7893 (Feb. 28, 2017); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter *Chemical Weapons Convention*]; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter *Geneva Protocol*]; Jillian Blake & Aqsa Mahmud, *A Legal ‘Red Line’?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244, 246, 249, 251, 255 (2013); Kirsten Patrick et al., *Lest We Forget: Why the Use of Chemical Weapons Must Not Go Unchallenged*, 185 CAN. MED. ASS’N J. 1299, 1299 (2013).

2. See O.C. Eneh & F.I. Ogbuefi-Chima, *Chemical Weapons: Man-Made Destroyers of Life*, 5 J. APPLIED SCI. & DEV. 5, 6 (2014); David Martin, *The Chemical Weapons Convention: Hollow Idealism or Capable Mechanism? The Syrian Intervention as a Test Case*, 37 LOY. L.A. INT’L & COMP. L. REV. 31, 34 (2015) (citing Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, 15 INT’L SECURITY 5, 22 (1990)).

3. See, e.g., Michele Kelemen, *Civilians Pay the Price As Syrian Conflict Grows More Violent*, NPR (Sept. 6, 2016, 4:30 PM), <http://www.npr.org/2016/09/06/492857910/civilians-pay-the-price-as-syrian-conflict-grows-more-violent>; Nick Robins-Early, *How Will Syria’s Assad Be Held Accountable For Crimes Against Humanity?*, HUFFPOST (Mar. 28, 2015, 11:38 AM), http://www.huffingtonpost.com/2015/03/28/syria-war-crimes_n_6950660.html.

4. See discussion *infra* Section IV.A.

5. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

6. *Id.* art. 11, 13.

7. Amendment to Article 8 of the Rome Statute of the International Criminal Court, June 10, 2010, 2868 U.N.T.S. 195, Resolution RC/Res.5 [hereinafter *Kampala Amendment*]; see discussion *infra* Section IV.B.

guage under Article 8 of the Rome Statute⁸ is not interpreted to implicitly ban chemical weapons, Article 8 should be revised to explicitly refer to chemical weapon use as a war crime.

Last year, North Korean ruler Kim Jong Un's half-brother, Kim Jong Nam, was poisoned with the nerve agent VX⁹ at the Kuala Lumpur International Airport and died from suffocation.¹⁰ More recently, in March, a Russian former double agent, Sergei Skripal, and his daughter were poisoned with a nerve agent known as Novichok¹¹ while they were in England.¹² The Syrian civil war presents the most recent case involving chemical warfare, during which all parties to the war engaged in countless war crimes and crimes against humanity.¹³ Although the United States-Russia Framework for Elimination of Syrian Chemical Weapons ("Framework")¹⁴ and the Organization for the Prohibition of Chemical Weapons ("OPCW")¹⁵ ordered the Syrian government to surrender all chemical weapons, Bashar Al

8. Rome Statute, *supra* note 5, art. 8 (defining "war crimes" within the jurisdiction of the court).

9. See generally *Facts About VX*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://emergency.cdc.gov/agent/vx/basics/facts.asp> (last visited Apr. 16, 2018).

10. See Joshua Berlinger, *Kim Jong Nam: The Plot to Murder North Korea's Exiled Son*, CNN, <https://www.cnn.com/2017/07/26/asia/kim-jong-nam-killing/index.html> (last updated Sept. 26, 2017, 6:10 AM). Two female suspects are currently on trial in Malaysia. See *Jong-nam Murder Trial Roundup: What We Know So Far*, MALAYMAIL (Feb. 9, 2018), <https://www.malaymail.com/s/1573835/jong-nam-murder-trial-roundup-what-we-know-so-far#bG14YFOv4sKd7LQy>.

11. Novichok is "reportedly five to eight times more toxic than VX nerve agent." *Russian Spy: What are Novichok Agents and What Do They Do?*, BBC NEWS (Mar. 19, 2018), <http://www.bbc.com/news/world-europe-43377698>.

12. *Id.*

13. See John B. Bellinger, *Make ISIS' Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015), <https://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html>; Kelemen, *supra* note 3; Jared Malsin, *Assad's Regime is Still Using Chemical Weapons in Syria*, TIME (Sept. 14, 2016), <http://time.com/4492670/syria-chemical-weapon-aleppo-assad-regime>; Robins-Early, *supra* note 3 ("[W]ar crimes and crimes against humanity are being committed across the board by all parties."); Lucy Rodgers et al, *Syria: The Story of the Conflict*, BBC NEWS (March 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> ("A UN commission of inquiry has evidence that all parties to the conflict have committed war crimes - including murder, torture, rape and enforced disappearances."); *Syria and Isis Committing War Crimes*, GUARDIAN (Aug. 27, 2014), <https://www.theguardian.com/world/2014/aug/27/syria-isis-war-crimes-united-nations-un> (discussing the various war crimes and crimes against humanity committed by the Syrian government and Islamic State); *Syria Conflict: All Parties Committed War Crimes in Aleppo - UN*, BBC NEWS (Mar. 1, 2017), <http://www.bbc.com/news/world-middle-east-39126653>.

14. Letter from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, Framework for elimination of Syrian chemical weapons (Sept. 19, 2013) [hereinafter Framework], <http://undocs.org/A/68/398>.

15. *About OPCW*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-opcw> (last visited Mar. 16, 2017); see Chemical Weapons Convention, *supra* note 1, art. VIII(1).

Asaad's¹⁶ military has allegedly deployed chemical weapons on numerous occasions.¹⁷ Opposition groups have also engaged in chemical warfare.¹⁸ The international community has failed to intervene, even though the war continues to escalate and violate all notions of basic human rights. The parties to the Syrian war have a "license to kill;" they are under the impression that they can act with impunity because of the lack of "consequences or accountability for their actions"¹⁹ The war in Syria is a prime example of the dire need for a permanent solution for prosecuting the use of chemical weapons.

A permanent solution such as automatic referral to the ICC will be successful because international criminal justice has a deterrent effect, substantiates or disproves allegations, and reduces the likelihood that groups will retaliate and seek retribution.²⁰ At present, politics between nations continue to be an obstacle to any significant intervention from the UN acting on its own. Thus, automatic referral can bypass that threat of politicization and simultaneously achieve justice, peace, and stability. One obstacle, however, is that the Rome Statute

16. See *Bashar al-Assad Fast Facts*, CNN, <http://www.cnn.com/2012/12/06/world/meast/bashar-al-assad—fast-facts/> (last updated Mar. 4, 2018), for a brief discussion about Syrian President Bashar al-Assad.

17. Org. for the Prohibition of Chemical Weapons [OPCW] Executive Council, *Destruction of Syrian Chemical Weapons*, EC-M-33/DEC.1 (Sept. 27, 2013); see Anne Barnard & Somini Sengupta, *Syria Is Using Chemical Weapons Again, Rescue Workers Say*, N.Y. TIMES (May 6, 2015), <http://www.nytimes.com/2015/05/07/world/middleeast/syria-chemical-weapons.html>; Martin Chulov & Kareem Shaheen, *International Concern Over Claims of Chemical Weapon Attack in Syria*, GUARDIAN (Dec. 13, 2016, 2:06 PM), <https://www.theguardian.com/world/2016/dec/13/international-concern-over-claims-of-chemical-weapon-attack-in-syria>; Russell Goldman, *Syria's Chemical Weapons Have Been Destroyed. So, Why Do Chlorine Gas Attacks Persist?*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/world/middleeast/syria-chlorine-gas-attack.html>; Malsin, *supra* note 13; *Syria Blamed for Chemical Weapons Attack in 2015*, BBC NEWS (Oct. 22, 2016), <http://www.bbc.com/news/world-middle-east-37736184>; *Syria: Fresh Chemical Attack on Aleppo a War Crime*, AMNESTY INT'L (Aug. 11, 2016, 5:37 PM), <https://www.amnesty.org/en/latest/news/2016/08/syria-fresh-chemical-attack-on-aleppo-a-war-crime>.

18. Anthony Deutsch, *Exclusive: Chemical Weapons Used by Rebels in Syria - sources*, REUTERS (Nov. 5, 2015, 10:24 AM), <http://www.reuters.com/article/us-mideast-crisis-syria-chemicalweapons-idUSKCN0SU2PZ20151105>; Goldman, *supra* note 17; Eric Schmitt, *ISIS Used Chemical Arms at Least 52 Times in Syria and Iraq, Report Says*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html>; *Syria: New Deadly Chemical Attacks*, HUM. RIGHTS WATCH (Sept. 28, 2016, 1:00 AM), <https://www.hrw.org/news/2016/09/28/syria-new-deadly-chemical-attacks>.

19. Malaka Gharib, *Can Attacks On Aid Workers Be Stopped?*, NPR (Sept. 29, 2016, 11:49 AM) <http://www.npr.org/sections/goatsandsoda/2016/09/29/495829011/why-is-no-one-punished-for-attacks-on-aid-workers>.

20. See Annika Jones, *Seeking International Criminal Justice in Syria*, 89 INT'L L. STUD. 802, 803 (2013).

does not explicitly list chemical weapon use as a war crime; rather, it ambiguously refers to the use of toxic weapons.²¹

There are other alternatives to a Security Council referral to the ICC, such as prosecution in Syrian domestic courts or an *ad hoc* international criminal tribunal.²² Another option is an internationalized criminal tribunal,²³ similar to the International Military Tribunal for Germany that was created for the Nuremberg trials in 1945. Although the Security Council used these alternatives in the past, their effects were only temporary; past tribunals merely addressed the specific problem for which they were created.²⁴ In light of the inconceivable duration of the hostilities in Syria, coupled with the international community's obvious intent to prohibit chemical weapon use,²⁵ prosecutions by the ICC is the most promising cause of action, since it would create a system that ensures accountability in Syria and for future use of chemical weapons.

Following this introduction, in Part II, I present the background of chemical weapon regulation and the classification of the major categories of chemical weapons. After presenting the four major categories of chemical weapons and their effects, I discuss the 1925 Geneva Protocol and chemical weapon use post-Geneva. I then discuss the Chemical Weapons Convention and the Organization for the Prohibition of Chemical Weapons, which enforces the CWC. In Part III, I present the most notable and relevant events during the timeline of the Syrian civil war that focuses on the use of chemical weapons. In Part IV, I argue that, in order to address the atrocities in Syria and prevent future recurrences, the international community needs to implement a permanent disincentive, a responsibility that the Security Council should carry. I then present the mechanics of the ICC and, in arguing for automatic referral, I discuss the possible alternatives and why they are not sufficient.

21. See Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (listing the use of "poison or poisoned weapons" and "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" as a violation of the Rome Statute).

22. See ADVISORY SERV. ON INT'L HUMANITARIAN LAW, INT'L COMM. RED CROSS, INTERNATIONAL CRIMINAL JUSTICE: THE INSTITUTIONS (Oct. 2013), <https://www.icrc.org/en/download/file/1103/international-criminal-justice-institutions-icrc-eng.pdf>.

23. See *id.*

24. See *id.*

25. See discussion *infra* Part II.

II. CHEMICAL WEAPON CLASSIFICATION AND THE HISTORY OF REGULATION

A chemical weapon is traditionally defined as a “toxic chemical contained in a delivery system, such as a bomb or shell.”²⁶ The CWC has defined chemical weapons more broadly than the traditional designation; the “term chemical weapon is applied to any toxic chemical or its precursor that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action.”²⁷ The physical effects of chemical weapons obviate the world’s insistence on prohibiting their use. Depending on the chemical, those effects include: “blindness, blistering, burning, lung damage, skin discoloration, involuntary urination and defecation, vomiting, twitching, convulsions, paralysis, and unconsciousness.”²⁸

Multiple international treaties demonstrate a worldwide consensus that the prohibition of chemical weapons is imperative to international peace and stability. Chemical weapons are an indiscriminate weapon in violation of the 1925 Geneva Protocol,²⁹ a protocol to the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War,³⁰ which followed the Hague Conventions of 1899 and 1907.³¹ These treaties set the foundation for the laws of war and war crimes over one hundred years ago, and subsequent treaties have built upon that foundation to fill gaps in the law that the international community realized with the advancement of society.

26. *Brief Description of Chemical Weapons*, OPCW, <https://www.opcw.org/about-chemical-weapons/what-is-a-chemical-weapon> (last visited Mar. 16, 2017); see ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, FACT SHEET 4: WHAT IS A CHEMICAL WEAPON? 1 (Nov. 2017), https://www.opcw.org/fileadmin/OPCW/Fact_Sheets/English/Fact_Sheet_4_-_CW_types.pdf.

27. *Brief Description of Chemical Weapons*, *supra* note 26. The OPCW explains the Convention defines chemical weapons more generally as “Munitions or other delivery devices designed to deliver chemical weapons, whether filled or unfilled, are also considered weapons themselves.” *Id.*

28. Martin, *supra* note 2, at 35 (citing Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365, 371-72 (2004)).

29. Geneva Protocol, *supra* note 1, at 164-66.

30. *Supervision of the International Trade in Arms and Ammunition and in Implements of War*, League of Nations Conf. D. 58 (Feb. 6, 1932), <http://digital.library.northwestern.edu/league/le000102.pdf>.

31. International Convention with Respect to the Laws and Customs of War by Land (Hague II), July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter 1899 Hague Convention]; Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention].

A. *Background on Chemical Weapon Regulation*

The large-scale use of chemical weapons in World War I in spite of the 1899 and 1907 Hague Conventions alarmed the international community. Although the Hague Conventions did not explicitly refer to chemical weapons, both prohibited “poison or poisoned arms” and, in the 1899 Convention, “arms, projectiles, or material of a nature to cause superfluous injury,” which was changed to “arms, projectiles, or material calculated to cause unnecessary suffering” in 1907.³²

Combatants in WWI used “at least twenty-eight types of gases and sixteen different mixtures of gases,”³³ including chlorine and phosgene, choking agents, and mustard gas, a blistering agent.³⁴ As a response, the 1925 Geneva Conference led to the creation of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (“1925 Geneva Protocol” or “Protocol”), which prohibits the use of chemical and biological weapons in international armed conflict.³⁵ The United States and Japan did not ratify the protocol before World War II³⁶ and many state parties reserved the right to use chemical weapons against non-party states or in response to any states that used chemical weapons against them.³⁷ A fundamental problem with the 1925 Geneva

32. 1899 Hague Convention, *supra* note 31, art. 23(a), (e); 1907 Hague Convention, *supra* note 31, art. 23(a), (e).

33. Martin, *supra* note 2, at 32 (citing BROOKS E. KLEBER & DALE BIRDSSELL, *THE CHEMICAL WARFARE SERVICE CHEMICALS IN COMBAT 3* (Stetson Conn ed., Ctr. Of Military History, 2003)).

34. Martin, *supra* note 2, at 32 (citing *Chemical Weapons*, U.N. OFF. FOR DISARMAMENT AFF. (UNODA), <https://www.un.org/disarmament/wmd/chemical/> (last visited Mar. 19, 2018) [hereinafter *UNODA Chemical Weapons*]); see also Sarah Everts, *When Chemicals Became Weapons of War*, 93 *CHEMICAL & ENGINEERING NEWS*, no. 8, Feb. 23, 2015, at 8, <http://chemicalweapons.cenmag.org/when-chemicals-became-weapons-of-war/>; Marek Pruszewicz, *How Deadly Was the Poison Gas of WWI?*, *BBC NEWS* (Jan. 30, 2015), <http://www.bbc.com/news/magazine-31042472>. “A well-known vesicant substance is mustard gas or dichlorodimethyl sulphide, (ClCH₂CH₂)₂S, made from ethene and disulphur dichloride (S₂Cl₂), which attacks the whole body and is carcinogenic (induces cancer). It may take up to 24 hours to start becoming apparent, and about 2-3 days to kill at low rate, from the time it is exposed.” Eneh & Ogbuefi-Chima, *supra* note 2, at 13.

35. Geneva Protocol, *supra* note 1; see Bureau of Int’l Sec. & Nonproliferation, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, U.S. DEP’T ST., <https://www.state.gov/t/isn/4784.htm> (last updated Sept. 25, 2002).

36. Bureau of Int’l Sec. & Nonproliferation, *supra* note 35.

37. Geneva Protocol, *supra* note 1; Bureau of Int’l Sec. & Nonproliferation, *supra* note 35.

Protocol was that it did not address the research, development, or stockpiling of chemical weapons.³⁸

Many countries deployed or produced chemical weapons notwithstanding the provisions of the 1925 Geneva Protocol.³⁹ Japan used them against China in 1930 and Italy used mustard gas against Ethiopia in 1935.⁴⁰ The US, England, and Germany also prepared and stockpiled tons of chemical weapons during the war, but did not deploy them only because they feared retaliation.⁴¹ During the Cold War, England and the US developed chemical weapons together, and the Soviet Union also had development facilities.⁴² Once again, the international community faced a rude awakening, especially because modern developments during that time period fostered the potential for use of chemical weapons simultaneously with nuclear bombs.⁴³ By the late 1980s, Iran, Iraq, Israel, Syria, and Egypt had the means to combine chemical weapons and ballistic missiles.⁴⁴ Further, the government of Saddam Hussein in Iraq also used chemical weapons such as mustard gas, sarin, and nerve agents during the war against Iran in the 1980s and against its own Kurdish population in 1991.⁴⁵

Chemical weapons have unique characteristics that make them exceptionally effective when they are deployed in an urban setting,⁴⁶ thus the likelihood of their use during war was high. Moreover, lead-

38. Geneva Protocol, *supra* note 1; Martin, *supra* note 2, at 33 (quoting *UNODA Chemical Weapons*, *supra* note 34) (first citing *UNODA Chemical Weapons*, *supra* note 34; and then citing Geneva Protocol, *supra* note 1).

39. See *UNODA Chemical Weapons*, *supra* note 34.

40. See Martin, *supra* note 2, at 33 (first citing McNaugher, *supra* note 2, at 7; and then citing *UNODA Chemical Weapons*, *supra* note 34); Everts, *supra* note 34; Pruszewicz, *supra* note 34.

41. See *Arms Control and Proliferation Profile: The United Kingdom*, ARMS CONTROL ASS'N (Mar. 29, 2017), <https://www.armscontrol.org/factsheets/ukprofile> ("During World War I, the United Kingdom produced an arsenal of chlorine and mustard gases. In 1957 the UK abandoned its chemical weapons program and has since eradicated its stockpiles."); *Chemical Weapons*, FAS, <https://fas.org/nuke/guide/usa/cbw/cw.htm> (last updated June 15, 2000, 7:26 AM) ("During World War II, President Roosevelt announced a no-first-use policy but had promised instant retaliation for any Axis use of chemical agents At the end of the war stockpiles of newer agents, called "nerve gases," were discovered. These were found to be effective in much lower concentrations than those agents known up to that time. The end of World War II did not stop the development or stockpiling of chemical weapons."); Everts, *supra* note 34; Pruszewicz, *supra* note 34.

42. See Martin, *supra* note 2, at 35 (quoting *UNODA Chemical Weapons*, *supra* note 34) (citing Sewell, *supra* note 28, at 367).

43. See Martin, *supra* note 2, at 35.

44. Martin, *supra* note 2, at 37 (citing McNaugher, *supra* note 2, at 25).

45. Martin, *supra* note 2, at 34 (first citing McNaugher, *supra* note 2, at 8, 17; and then citing Sewell, *supra* note 28, at 372).

46. Martin, *supra* note 2, at 36 (citing McNaugher, *supra* note 2, at 21, 22, 30).

ers were particularly interested because of the power and political leverage they could attain with such weapons. International concern stemmed from the notion that a state fearing attack would most likely launch a preemptive strike or, if already under attack, a state, with its regional alliances, would be legally authorized to launch a proportional counter attack, based on Article 52 of the UN (“UN”) Charter.⁴⁷ The history of chemical weapon use clearly shows that implementing more stringent measures is indispensable to ensuring the peace and stability of the entire international community. Although it appears that many people, including some party states, ignored the 1925 Geneva Protocol and that the Protocol had a few shortcomings, it is now widely accepted as customary international law.⁴⁸

The CWC is the “first multilateral arms control and nonproliferation treaty” containing a time period for the destruction of a whole category of weapons of mass destruction and integrating a comprehensive verification system⁴⁹—a far more expansive treaty than the 1925 Geneva Protocol. The CWC entered into force in 1997 and “prohibits the development, production, stockpiling, and use of chemical weapons.”⁵⁰ According to Article 1 of the CWC:

1. Each State Party to th[e] Convention undertakes never under any circumstances:
 - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
 - (b) To use chemical weapons;
 - (c) To engage in any military preparations to use chemical weapons;

47. U.N. Charter art. 52, Oct. 24, 1945, 1 U.N.T.S. XVI; Martin, *supra* note 2, at 37 (citing Jordan J. Paust, *Use of Military Force in Syria by Turkey, NATO, and the United States*, 34 U. PA. J. INT’L L. 431, 435-36 (2012)).

48. U.N. General Assembly Resolution 2162B called for all states to strictly adhere to the 1925 Geneva protocol. U.N. General Assembly Resolution 2603 asserted that the prohibition on the use of chemical weapons in international armed conflicts were widely accepted rules of international law. G.A. Res. 2162B (XXI), at 11 (Dec. 5, 1966); G.A. Res. 2603 (XXIV), at 16 (Dec. 16, 1969); *see* Rep. of the U.N. Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, ¶ 1, A/67/997-S/2013/553 (Sept. 16, 2013).

49. *About the CWC*, U.S. CHEMICAL WEAPONS CONVENTION WEB SITE, http://www.cwc.gov/cwc_about.html (last visited Feb. 10, 2018).

50. *Id.*

- (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under th[e] Convention.⁵¹

The OPCW is responsible for overseeing the CWC's implementation, including the worldwide destruction of chemical weapons.⁵² At present, the OPCW has 192 member states.⁵³ The OPCW and the UN formed a legally binding relationship in 2001 and "agree[d] to cooperate closely within their respective mandates and to consult on matters of mutual interest and concern."⁵⁴ The OPCW is authorized to investigate party states, but in order to investigate non-party states, the OPCW must cooperate with the UN Secretary General.⁵⁵ If it receives information from a state party alleging violations, the OPCW will inspect and monitor activities and facilities of a state party to ensure compliance.⁵⁶

B. Major Categories of Chemical Weapons

The distinct and terrifying facet of chemical weapons supports the urgency of more stringent regulation and enforcement. The capacity of this "pervasive and invisible agent to inflict particularly gruesome injury with little or no warning, and often with no means of escape, is viewed by many military personnel as 'dirty' warfare, infused with an intrinsic evil not accorded to other weapons systems."⁵⁷

Toxic chemicals more commonly used in warfare are generally separated into four categories: nerve, blister, blood, and choking agents.⁵⁸ Nerve agents, such as tabun, sarin, and soman, thwart the enzymes that are vital to the proper functioning of the nervous system

51. Chemical Weapons Convention, *supra* note 1, art. I(1)(a)-(d).

52. *About OPCW*, *supra* note 15.

53. *Id.*

54. G.A. Res. 55/283, art. II, ¶ 1, (Sept. 24, 2001); *see* Org. for the Prohibition of Chemical Weapons [OPCW], Decision on the Relationship Agreement Between the United Nations and the OPCW, ¶ 1, C-VI/DEC.5 (May 17, 2001).

55. G.A. Res. 55/283, *supra* note 54, ¶ 2(c).

56. *Id.* art. IV, ¶ 2-3; *Part XI. Investigations in Cases of Alleged Use of Chemical Weapons*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/chemical-weapons-convention/annexes/verification-annex/part-xi/#c12112> (last visited Feb. 23, 2018).

57. David D. Haines & S. C. Fox, *Acute and Long-Term Impact of Chemical Weapons: Lessons from the Iran-Iraq War*, 26 FORENSIC SCI. REV. 97, 98 (2014) (citing JEREMY PAXMAN & ROBERT HARRIS, *A HIGHER FORM OF KILLING: THE SECRET HISTORY OF CHEMICAL AND BIOLOGICAL WARFARE* (2007)).

58. Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13; Haines & Fox, *supra* note 57, at 101 (citing COLIN S. GRAY, *ANOTHER BLOODY CENTURY: FUTURE WARFARE* 269 (2007)).

by interfering with neurotransmission.⁵⁹ This leads to the impairment of muscle function and a high likelihood of death.⁶⁰ Nerve agents are highly toxic and enter the body by inhalation, skin absorption, or consumption.⁶¹ Symptoms of this agent tend to manifest exceptionally quickly and commonly include suffocation, nausea, vision impairment, difficulty breathing, vomiting, and seizures.⁶²

Blistering agents cause severe blisters, burns, blindness, permanent respiratory damage, and cancer.⁶³ This type of agent acts initially as an irritant, but later becomes a cell poison.⁶⁴ Common examples of blistering agents are: sulfur mustard, nitrogen mustard, lewisite, and phosgene oxime.⁶⁵ Blood agents, such as hydrogen cyanide, cyanogen chloride, and arsine, are poisons that pass into the bloodstream and hinder regular cell functions, causing suffocation.⁶⁶ Choking agents are typically in the form of gas and rapidly disperse in the atmos-

59. Eneh & Ogbuefi-Chima, *supra* note 2, at 13 (“Nerve chemical weapons agents are neurotoxins (like sarin, tabun, soman or VX), which block an enzyme that is necessary for the central nervous system to function, leading to a disruption of muscle function followed by a seizure and, eventually, death.”); Haines & Fox, *supra* note 57, at 102 (“[N]erve agent . . . refers to small molecules that complex with and inhibit the enzymes that are necessary for nerve transmission, resulting in failure of neuromuscular control over critical physiologic functions.”); *Nerve Agents*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/nerve-agents> (last visited Mar. 16, 2017).

60. Eneh & Ogbuefi-Chima, *supra* note 2, at 13; Haines & Fox, *supra* note 57, at 102 (citing Frederick R. Sidell, *Nerve Agents*, in *TEXTBOOK OF MILITARY MEDICINE: MEDICAL ASPECTS OF CHEMICAL AND BIOLOGICAL WARFARE* 129, 131-39 (Frederick R. Sidell et al. eds, 1997); *Nerve Agents*, *supra* note 59).

61. Eneh & Ogbuefi-Chima, *supra* note 2, at 13; *Nerve Agents*, *supra* note 59; see Haines & Fox, *supra* note 57, at 102 (citing Sidell, *supra* note 60).

62. *Nerve Agents*, *supra* note 59; see Eneh & Ogbuefi-Chima, *supra* note 2, at 13; Haines & Fox, *supra* note 57, at 102.

63. Eneh & Ogbuefi-Chima, *supra* note 2, at 12; Haines & Fox, *supra* note 57, at 102-04; *Blister Agents*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/blister-agents> (last visited Mar. 16, 2017).

64. See Eneh & Ogbuefi-Chima, *supra* note 2, at 12; *Blister Agents*, *supra* note 63; see also Haines & Fox, *supra* note 57, at 102-04.

65. Eneh & Ogbuefi-Chima, *supra* note 2, at 12 (citing RANDOLPH NORRIS SHREVE & JOSEPH BRINK, *CHEMICAL PROCESS INDUSTRIES* (2006)); Haines & Fox, *supra* note 57, at 102-04; *Blister Agents*, *supra* note 63.

66. Eneh & Ogbuefi-Chima, *supra* note 2, at 13 (“Early symptoms of cyanide poisoning include restlessness, headache, palpitations and breathing difficulties, followed by vomiting, convulsions, respiratory failure and unconsciousness. In a confined space, the volatile HCN quickly reaches lethal concentration levels, hardly leaving the time to display early symptoms, but victims simply fall dead. There is no antidote for cyanide poisoning.”); *Blood Agents*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/blood-agents> (last visited Mar. 16, 2017); see Haines & Fox, *supra* note 57, at 101-02.

phere.⁶⁷ These agents “[target] the nose, lungs and throat, and [produce] an immediate smothering effect followed by oedema (excess fluid) of the lung possibly resulting in death by asphyxiation.”⁶⁸

The effects of chemical weapons, however, stretch further than physical impairment and mutilation. Exposure to some agents can also result in psychological damage.⁶⁹ These physically and psychologically horrific consequences of chemical warfare highlight the difference between weapons of this type and more traditional weapons of war. The foregoing discussion on chemical weapon regulation throughout history indicates that these effects have traditionally been utterly terrifying to the international community. Prohibition of the use of chemical weapons continues to be the ultimate theme.

III. THE SYRIAN CIVIL WAR

The Syrian civil war erupted in March 2011, when Syrian President Bashar Al-Assad reacted to peaceful opposition to his regime.⁷⁰ The government used disproportionate force, which led to the surge of armed opposition by rebel groups.⁷¹ Shortly after, other extremist groups, such as the Islamic State of Iraq and Syria (“ISIS”), formed to seize territory in Syria.⁷² In 2011, the UN Human Rights Council (“UNHRC”) mandated the Independent International Commission of Inquiry on the Syrian Arab Republic (“Independent Inquiry”) to investigate any allegations of violations of international human rights law,⁷³ which found that “widespread and systematic violations of

67. See Eneh & Ogbuefi-Chima, *supra* note 2, at 12. Common choking agents include “chlorine, Cl₂, . . . phosgene or carbonyl chloride, COCl₂, [and] nitrogen oxide, NO” *Id.*

68. Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13.

69. See *Psychotomimetic Chemical Weapons*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/protection/types-of-chemical-agent/psychotomimetic-agents/> (last visited Mar 19, 2018). Psychotomimetic agents include “substances which, when administered in low doses (<10 mg) cause conditions similar to psychotic disorders or other symptoms emanating from the central nervous system (loss of feeling, paralysis, rigidity, etc.). The effects are transitory and cause inability to make decisions and incapacitation A serious effect of poisoning with BZ [3-quinuclidinyl benzilate], as also with other atropine-like substances, is an increased body temperature. Deterioration in the level of consciousness, hallucinations and coma occur subsequently. Incapacitating after-effects may remain 1-3 weeks after the poisoning.” *Id.*

70. Rodgers et al., *supra* note 13; *Syria’s Civil War Explained From The Beginning*, AL-JAZEERA (Apr. 14, 2018), <http://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

71. *Syria’s Civil War Explained*, *supra* note 70.

72. Rodgers et al., *supra* note 13; *Syria’s Civil War Explained*, *supra* note 70.

73. Gulnara Iskakova (Vice-President and Rapporteur), Rep. of the Human Rights Council on its Seventeenth Special Session, at 3-5, U.N. Doc. A/HRC/S-17/2 (Oct. 18, 2011); *Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommis->

human rights [were] committed by the Syrian military, security forces and pro-government militias.”⁷⁴ The war, thus far, has resulted in about 470,000 deaths and has caused approximately half the population to be displaced, including over 4 million people that fled the country and 6.36 million people displaced within the country.⁷⁵ Since 2011, 11.5% of Syrians have died or suffered injuries and 13.8 million people cannot earn a living.⁷⁶ Caught in the midst of the chaos, more than 4.5 million civilians have fled Syria as refugees and had to endure the resistance of some countries refusing to accept refugees.⁷⁷ Civilians are deprived of access to adequate drinking water and food, mainly due to the active blocking of humanitarian aid by the parties involved in the war.⁷⁸

In 2012, President Obama referred to Syria’s use of chemical weapons as crossing a legal “red line,” which would warrant a response from the US military.⁷⁹ The Independent Inquiry again reported reasonable grounds to believe that “Government forces . . . had committed crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law.”⁸⁰ About a year later, the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (“U.N. Mission”) pursued investigations into seven of sixteen allegations of chemical weapon use

sion.aspx (last visited Feb. 16, 2018) (“[T]he Human Rights Council through resolution S-17/1 adopted at its 17th special session with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.”).

74. *Human Rights Council Opens Special Session on Human Rights in Syrian Arab Republic*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER (Dec. 2, 2011), <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11679&LangID=E>.

75. Simon Lewis, *The Death Toll from Syria’s War is Actually 470,000*, TIME (Feb. 11, 2016), <http://time.com/4216896/death-toll-syria-war-470000/>.

76. *Id.*

77. DIANE BOLME ET AL., A COMPREHENSIVE RESPONSE TO THE SYRIAN REFUGEE CRISIS: HIGHLIGHTING THE UNITED STATES’ ROLE IN THE INTERNATIONAL EFFORT 16 (Nathan Bradshaw & Taylor Twadelle eds., 2016), https://jsis.washington.edu/wordpress/wp-content/uploads/2016/06/Task-Force-D-Report-2016-Friedman_.pdf.

78. “*Deprivation of food, water, shelter and medical care – a method of war in Syria, and a crime against humanity*”, U.N. HUM. RTS. OFF. HIGH COMMISSIONER (Feb. 6, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14224&LangID=E>.

79. Glenn Kessler, *President Obama and the ‘Red Line’ on Syria’s Chemical Weapons*, WASH. POST (Sept. 6, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/?utm_term=.0ef064c6dfe; see also Framework, *supra* note 14.

80. U.N. Gen. Assembly, Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, at Summary, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012).

received by the Secretary General.⁸¹ The U.N. Mission concluded that the parties in the Syrian war used chemical weapons on five different occasions.⁸² The Syrian government crossed the legal “red line.”

The CIA and the US government immediately threatened a limited military strike against Assad, but Russia stepped in to broker a deal and proposed that the Syrian government join the CWC.⁸³ The Syrian government ultimately agreed, and the US and Russia created the Framework to establish the timeline for elimination and destruction of Syria’s materials and on-site inspections.⁸⁴ The Framework called upon the Security Council to adopt a resolution to reinforce the decision of the OPCW.⁸⁵ Subsequently, the Security Council adopted Resolution 2118 and “determined that the use of chemical weapons anywhere constituted a threat to international peace and security, and called for the full implementation of the [OPCW]”⁸⁶ Furthermore:

The [Security] Council specifically “prohibited Syria from using, developing, producing, otherwise acquiring, stockpiling, or retaining chemical weapons, or transferring them to other States or non-State actors,” and emphasized that “no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer such weapons.”⁸⁷

81. U.N. Secretary-General, *Identical Letters Dated 13 December 2013 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council*, U.N. Doc. A/68/663-S/2013/735, annex (Dec. 13, 2013).

82. *Id.* ¶¶ 109, 111, 113, 115, 117.

83. *Timeline of Syrian Chemical Weapons Activity, 2012-2018*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> (last updated Apr. 13, 2018).

84. Framework, *supra* note 14, at 2, 3, 5.

85. *Id.* at 2 (“The United States and the Russian Federation commit to work together towards prompt adoption of a Security Council resolution that reinforces the decision of the OPCW Executive Council. This resolution will also contain steps to ensure its verification and effective implementation and will request that the Secretary-General, in consultation with OPCW, submit recommendations to the Security Council on an expedited basis regarding the role of the United Nations in eliminating the Syrian chemical weapons programme. The United States and the Russian Federation concur that the Security Council resolution should provide for review, on a regular basis, of the implementation in Syria of the decision of the Executive Council of OPCW, and in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the Security Council should impose measures under Chapter VII of the Charter of the United Nations.”).

86. Press Release, Security Council, Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118 (2013), U.N. Press Release SC/11135 (Sept. 27, 2013) [hereinafter Meetings Coverage], <https://www.un.org/press/en/2013/sc11135.doc.htm>.

87. Martin, *supra* note 2, at 55 (quoting Meetings Coverage, *supra* note 86).

Notwithstanding the strong international response, the Independent Inquiry once again found evidence that the parties in Syria used chemical weapons on multiple occasions.⁸⁸

In 2015, the Security Council mandated the OPCW-U.N. Joint Investigative Mechanism (“Joint Mechanism”) “to identify to the greatest extent feasible those involved in the use of [toxic] chemicals as weapons in [Syria]”⁸⁹ The Joint Mechanism found substantial evidence that the Syrian Air Force was responsible for two chlorine attacks and were responsible for another instance where ISIS used sulfur-mustard gas.⁹⁰ The Joint Mechanism submitted its findings to the Security Council, which was then tasked to determine what measures to take based on the findings. At present, all of the Security Council’s actions were blocked and no individual has been held accountable for his or her crimes.⁹¹

Pursuant to the Framework, the OPCW removed all and destroyed most of Syria’s declared chemical weapons by 2015.⁹² None-

88. *Syria: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/Syria> (last visited Feb. 22, 2018) (“Despite its accession to the Chemical Weapons Convention in 2014, the Syrian government used toxic chemicals in several barrel bomb attacks in Idlib governorate in March, April, and May. While Human Rights Watch was unable to conclusively determine the toxic chemicals used, the distinct smell of chlorine reported by rescue workers and doctors indicate that it was probably used.”).

89. Press Release, United Nations, Security Council Considers Fourth Report by Joint Investigative Mechanism, U.N. Press Release DC/3668 (Oct. 27, 2016), <https://www.un.org/press/en/2016/dc3668.doc.htm>; Press Release, United Nations, Joint Investigative Mechanism Presents Its Third Report to Security Council, U.N. Press Release DC/3651 (Aug. 30, 2016), <https://www.un.org/press/en/2016/dc3651.doc.htm>; see S.C. Res. 2235, ¶ 5 (Aug. 7, 2015).

90. See U.N. Press Release, DC/3668, *supra* note 89; U.N. Press Release, DC/3651, *supra* note 89.

91. See U.N. Press Release, DC/3651, *supra* note 89.

92. See *Ellesmere Port Facility Completes Destruction of Its Consignment of Syrian Chemicals; Almost Three Quarters of Syria’s Entire Stockpile Now Destroyed*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 7, 2014), <https://www.opcw.org/news/article/ellesmere-port-facility-completes-destruction-of-its-consignment-of-syrian-chemicals-almost-three-q/>; *OPCW: All Category 1 Chemicals Declared by Syria Now Destroyed*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 28, 2014), <https://www.opcw.org/news/article/opcw-all-category-1-chemicals-declared-by-syria-now-destroyed/>; *OPCW Confirms Progress in Eliminating Syria’s Chemical Weapons*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 20, 2014), <https://www.opcw.org/news/article/opcw-confirms-progress-in-eliminating-syrias-chemical-weapons/>; *OPCW Maritime Operation Completes Deliveries of Syrian Chemicals to Commercial Destruction Facilities*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (July 24, 2014), <https://www.opcw.org/news/article/opcw-maritime-operation-completes-deliveries-of-syrian-chemicals-to-commercial-destruction-facilities/>; *OPCW-UN Joint Mission: Total chemical material removed and destroyed raised to 92.5%*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 24, 2014), <https://www.opcw.org/news/article/opcw-un-joint-mission-total-chemical-material-removed-and-destroyed-raised-to-925/>; *Removal of Syrian Chemicals Passes 86% of Total*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 22, 2014), <https://www.opcw.org/news/article/removal-of-syrian-chemicals-passes-86-of-total/>; *Update on Syrian Chemical Weapons Destruction and the Fact-Finding Mission into Alleged*

theless, the Joint Mechanism alleged that forces conducted chlorine attacks on multiple occasions even after the destruction⁹³ (chlorine was not part of the Framework because it is an industrial chemical, but its use as a poison gas would violate the CWC⁹⁴). In August of 2016, the Joint Mechanism, once again, found more substantial evidence of chemical weapon use by the Syrian government and ISIS.⁹⁵ The U.N. General Assembly also established the “International, Impartial and Independent Mechanism” in December 2016.⁹⁶ In a recent report, the Commission once again indicated that, in July 2017, Syrian government forces used chemical weapons, primarily chlorine, in Ayn Tarma, Zamalka, and Damascus.⁹⁷ In November 2017, Harastra experienced a chemical attack, where the evidence and symptoms pointed to the use of an organo-phosphorous pesticide by government forces.⁹⁸

Despite the numerous Security Council mechanisms created to collect evidence, the OPCW destruction of Syria’s declared weapons, and continuous allegations that chemical weapons are being deployed in Syria by all parties involved in the war, the international community has not made an effort to intervene and has not held a single person accountable.⁹⁹ The war is entering its seventh year with no

Chlorine Gas Attacks, ORG. FOR PROHIBITION CHEMICAL WEAPONS (May 22, 2014), <https://www.opcw.org/news/article/update-on-syrian-chemical-weapons-destruction-and-the-fact-finding-mission-into-alleged-chlorine-gas/>; *U.S. Completes Destruction of Sarin Precursors from Syria on the Cape Ray*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 13, 2014), <https://www.opcw.org/news/article/us-completes-destruction-of-sarin-precursors-from-syria-on-the-cape-ray/>.

93. See U.N. Press Release, DC/3651, *supra* note 89; U.N. Secretary-General, *Letter dated 24 August 2016 from the Secretary-General addressed to the President of the Security Council*, ¶ 26, U.N. Doc. S/2016/738 (Aug. 24, 2016) [hereinafter U.N. Secretary-General, Letter dated Aug. 24, 2016].

94. See Dorian Geiger, *How Chlorine Gas Became a Weapon in Syria’s Civil War*, AL-JAZEERA (Mar. 23, 2017), <http://www.aljazeera.com/indepth/features/2017/03/chlorine-gas-weapon-syria-civil-war-170314110043637.html>; Oliver Holmes, *Syria’s Deadly Chlorine Gas Wasn’t Included On Chemical Weapons Ban*, BUS. INSIDER (Apr. 22, 2014, 11:32 AM), <http://www.businessinsider.com/syrias-deadly-chlorine-gas-wasnt-included-on-chemical-weapons-ban-2014-4>.

95. See U.N. Press Release, DC/3651, *supra* note 89; U.N. Secretary-General, Letter dated Aug. 24, 2016, *supra* note 93 (“The Mechanism investigated nine cases, of which eight were related to the use of chlorine or chlorine derivative as a weapon and one was related to the use of sulfur mustard.”).

96. G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Jan. 11, 2017).

97. Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic of the Human Rights Council on Its Thirty-Seventh Session, U.N. Doc. A/HRC/37/72, annex II, ¶ 13 (Feb. 1, 2018).

98. See *id.* ¶¶ 13-15.

99. See PETER VAN HARN ET AL., CLINGENDAEL, CHEMICAL WEAPONS CHALLENGES AHEAD: THE PAST AND FUTURE OF THE OPCW WITH A CASE STUDY ON SYRIA 4, 49, 78 (Oct.

prosecutions of the individuals committing the crimes and with no justice for the Syrian civilians who were killed, injured, or driven out of their country.

Frustrated with the lack of justice, France initiated the International Partnership against Impunity for the Use of Chemical Weapons with the support of about thirty countries and international organizations.¹⁰⁰ It has already started identifying perpetrators of chemical warfare and publishing their names online, using public shame as a method for deterrence and ensuring the perpetrators will be held accountable when the time comes.¹⁰¹

Many states have turned to imposing sanctions on Syria,¹⁰² but doing so does not necessarily have a deterrent effect. For those in-

2017); *OPCW Fact-Finding Mission in Syria Continues Investigations into Allegations of Chemical Weapons Use*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Feb. 7, 2018), <https://www.opcw.org/news/article/opcw-fact-finding-mission-in-syria-continues-investigations-into-allegations-of-chemical-weapons-use/> (indicating an investigation and reporting by the OPCW, but no further action by any states).

100. *International Partnership against Impunity for the use of Chemical Weapons*, NO IMPUNITY CHEMICAL WEAPONS, <https://www.noimpunitychemicalweapons.org/en.html> (last visited Apr. 16, 2018); *Fighting Impunity: International Partnership against Impunity for the Use of Chemical Weapons, Declaration of Principles*, FR. DIPLOMATIE (Jan. 23, 2018), https://www.diplomatie.gouv.fr/IMG/pdf/international_partnership_against_impunity_for_the_use_of_chemical_weapons_declaration_of_principles2_en_cle818838-1.pdf.

[The] International Partnership against Impunity for the Use of Chemical Weapons . . . commit[s] to the following:

- Collect . . . and preserve relevant information to support efforts to hold accountable those responsible for the proliferation or use of chemical weapons;
- Facilitate the sharing of such information, with participating States, and international, or regional organisation as appropriate, so that those responsible may be brought to justice;
- Use relevant mechanisms to designate individuals, entities, groups and governments involved in the proliferation or use of chemical weapons for sanctions, as appropriate;
- Publicize the names of individuals, entities, groups or governments placed under sanctions for their involvement in the proliferation or use of chemical weapons through a dedicated website;
- Strengthen the capacity of Participating States, through national and supranational measures, to hold accountable those involved in the use of chemical weapons . . . ;
- Support, where appropriate, common positions in existing fora regarding the use of chemical weapons, for example the OPCW . . . and the UN Security Council and General Assembly.

Id.

101. Gregory D. Koblentz, *#NOIMPUNITY: Will the Newest International Effort to Stop Chemical Attacks in Syria Succeed?*, WAR ON ROCKS (Mar. 2, 2018), <https://warontherocks.com/2018/03/noimpunity-will-newest-international-effort-stop-chemical-attacks-syria-succeed/>.

102. See, e.g., *Media Release: Sanctions Targeting Syria's Chemical Weapons Program*, MINISTER FOR FOREIGN AFF. (AUSTL.) (Aug. 24, 2017), https://foreignminister.gov.au/releases/Pages/2017/jb_mr_20170824.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D (Australia has sanctioned “40 individuals and 14 entities linked to the Syrian regime’s chemical weapons program. These individuals and entities are now subject to targeted financial sanctions, with individuals also subject to travel bans.”).

volved in the Syrian chemical attacks, “the costs imposed by sanctions and the uncertain risk of future prosecution for war crimes are a faint echo of the fear that if the regime falls, their very survival will be threatened.”¹⁰³

IV. A PERMANENT DISINCENTIVE IS NEEDED, FREE FROM THE POLITICS OF THE UNITED NATIONS

“While chemical weapons have so far accounted for only a fraction of the deaths and casualties inflicted by the Syrian civil war, they have the potential to cause far greater destruction if the Assad regime uses them on a larger scale.”¹⁰⁴ Much of the world initially interpreted the 1925 Geneva Protocol to apply only to international armed conflicts.¹⁰⁵ However, in 1966, the UN General Assembly (“UNGA”) called for *all* states to firmly abide by the Protocol.¹⁰⁶ Three years later, the UNGA declared that the ban of the use of chemical and biological weapons in international armed conflicts, as represented in the Protocol, was a standard rule of international law.¹⁰⁷ The International Committee of the Red Cross, a highly respected source on International Humanitarian Law, similarly declares that “state practice establishes th[e] rule as a norm of customary international law applicable in both international and non-international armed conflicts.”¹⁰⁸

Syria is a party to the 1925 Geneva Protocol and is therefore legally bound by its provisions.¹⁰⁹ Based on the development of the Protocol’s interpretation, Syria has violated the provisions several times by engaging in chemical warfare in a non-international armed conflict.¹¹⁰ Syria’s actions also constitute a violation of customary international law. As a recurring theme, however, there are absolutely no interventions or attempts to prosecute the persons responsible for these violations, even though the international community explicitly

103. Koblentz, *supra* note 101.

104. *Id.*

105. See, e.g., Katharine York, *The Chemical Weapons Convention: Preventative Measures Against Horror (Part 2 of 3)*, VIEW FROM ABOVE (May 5, 2014) (quoting Geneva Protocol, *supra* note 1), <http://djilp.org/5159/the-chemical-weapons-convention-preventative-measures-against-horror-part-2-of-3/> (“The Geneva Protocol only applies to international war because the parties only ‘agree to be bound as between themselves’; thus, the prohibition only applies to war between two or more signatory states.”). See generally Geneva Protocol, *supra* note 1.

106. G.A. Res. 2162B (XXI), *supra* note 48.

107. G.A. Res. 2603 (XXIV), *supra* note 48, at 16.

108. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 259 (2005).

109. See Geneva Protocol, *supra* note 1 (indicating that Syria acceded the Protocol on Dec. 17, 1968).

110. See discussion *infra* Section IV.B.

condemns such actions. Rather than continuing the passive approach taken thus far, a more stable and effective solution is critical to ensure the current safety of the international community and the safety for the future.

A. *The International Criminal Court*

The Rome Statute is the foundational and governing document for the ICC, which is located in The Hague, Netherlands.¹¹¹ The Rome Statute was adopted at a UN diplomatic conference in 1998 and the treaty was entered into force in 2002.¹¹² 124 countries have acceded to or ratified the Rome Statute, but Syria is not a state party.¹¹³ Syria signed the Rome Statute on November 29, 2000, but has not ratified it.¹¹⁴ The ICC is designed as a court of last resort;¹¹⁵ under the principle of complementarity, it must defer to national proceedings whether or not they lead to prosecution, unless there is no functioning judicial system, or if the national proceedings are intended to shield a suspect from prosecution.¹¹⁶

The Rome Statute requires territorial or personal jurisdiction, subject-matter jurisdiction, and temporal jurisdiction before the ICC can prosecute an individual.¹¹⁷ The court has subject-matter jurisdiction to prosecute for international crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.¹¹⁸ Territorial jurisdiction exists if the crime was committed on the territory of a state party and personal jurisdiction is satisfied if the individual is a national of a state party.¹¹⁹ The court can satisfy jurisdictional requirements in three ways: (1) referral from a party state, (2) referral from the UN Security Council, or (3) if a Pre-Trial Chamber of ICC judges grants

111. *About: How The Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (last visited Feb. 13, 2016) [hereinafter *How the Court Works*].

112. Rome Statute, *supra* note 5; see also *Rome Statute of the International Criminal Court*, INT'L CRIM. CT. (July, 17, 1998), <https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument>.

113. See Rome Statute, *supra* note 5; see also *Rome Statute of the International Criminal Court*, *supra* note 112.

114. *10. Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited Apr. 11, 2018). See generally Rome Statute, *supra* note 5.

115. *How The Court Works*, *supra* note 111; see also Richard Dicker, *ICC: The Court of Last Resort*, HUM. RTS. WATCH (June 29, 2012), <https://www.hrw.org/news/2012/06/29/icc-court-last-resort>.

116. See Rome Statute, *supra* note 5, art. 16, 18.

117. Rome Statute, *supra* note 5, art. 11; see also *How the Court Works*, *supra* note 111.

118. Rome Statute, *supra* note 5, art. 5; see also *How the Court Works*, *supra* note 111.

119. Rome Statute, *supra* note 5, art. 12.

an application of the Prosecutor to open an investigation on her own initiative.¹²⁰ The crimes defined in the Rome Statute do not have a statute of limitations, but the court's jurisdiction is not absolutely retroactive; the crimes must have occurred after the Rome Statute went into effect.¹²¹ Nevertheless, if a state became a party subsequent to the court's establishment, jurisdiction can only retroactively extend to the date of ratification.¹²²

While not a UN organization, the ICC has a cooperation agreement with the UN.¹²³ When a matter is not within the court's jurisdiction, the Security Council can refer the situation to the ICC, granting it jurisdiction.¹²⁴ The ICC Prosecutor then has the discretion to decide whether to pursue an investigation.¹²⁵ The Security Council has used this power to refer situations in non-Party States to the ICC on only two prior occasions: the first time for Darfur, Sudan in 2005 and then for Libya in 2011.¹²⁶

There are two overarching obstacles regarding the UN Security Council and the ICC: the lack of resources and enforcement mechanisms, and partisan interests of the five permanent members.

B. *Automatic Referral*

The devastating gravity of the effects of chemical warfare and the widespread dissatisfaction with such weapons in the international community warrants stringent consequences. “[R]estoring the norm requires that all those who use toxic chemicals be held accountable.”¹²⁷ Automatic referral will finally eliminate loopholes for avoiding punishment, thereby creating a deterrent effect. It will simultaneously motivate the international community to prosecute individuals for chemical weapon use because it is a concrete and easily enforceable system. The lack of resources and mechanisms to prosecute these criminals has resulted in a seemingly helpless situation,

120. *Id.* art. 13.

121. *See id.* art. 29.

122. Rome Statute, *supra* note 5, art. 15 *bis*, 15 *ter*.

123. *Id.*, art. 2; *see also* Int'l Criminal Court [ICC], *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, ICC-ASP/3/Res.1 (July 22, 2004), http://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf.

124. Rome Statute, *supra* note 5, art. 13(b).

125. *Id.* art. 53(1).

126. Tiina Intelman, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, HUFFPOST (May 28, 2013, 11:53 AM), https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html.

127. Koblentz, *supra* note 101.

where a civil war continues with the same stamina for years, while the rest of the world watches.

It may seem outrageous that so many instances of chemical weapon use in Syria have gone completely unpunished even though there is an entire arms control treaty dedicated to the prohibition of precisely those types of weapons.¹²⁸ However, the CWC sets out a rather meager approach to dealing with violations of the treaty and the Syrian war has made that apparent numerous times. The CWC assigns to the Conference the responsibility to take the necessary measures to “ensure compliance with th[e] Convention and to redress and remedy any situation which contravenes the provisions”¹²⁹ It also provides that the “Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the UN General Assembly and the UN Security Council.”¹³⁰ Over the course of the Syrian war, this system has proved fruitless and there is no reason to believe that it will be any different in the future.

Since the events of the war most likely amount to cases of “particular gravity,” the issue has been, or would be, brought to the attention of the Security Council or General Assembly. This results in the same scenario as each time the Security Council has presented a resolution to refer the use of chemical weapons in Syria to the ICC, because once again any course of action would have to be approved by the five permanent members. Thus, just as each proposal to refer the situation to the ICC has been rejected by Russia and China based on partisan interests, the same would occur with any issue the Conference brings to the attention of the UN.

All possible avenues to pursue justice and accountability for such a grave offense are continuously hindered, creating a vicious cycle of impunity. Two preliminary obstacles must be addressed before the ICC Prosecutor may accept a Security Council referral and open an investigation into Syria. First, can the language in Article 8(2)(e)(xiv)¹³¹ of the Rome Statute be applied to the situation in Syria? Second, can the language of the Rome Statute be interpreted to include a prohibition on the use of chemical weapons? Both questions would have to be answered in the affirmative for the Prosecutor

128. *See generally* Chemical Weapons Convention, *supra* note 1.

129. *Id.* art. XII(1).

130. *Id.* art. XII(4).

131. *See* Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (“Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices . . .”).

to determine that such actions in Syria potentially amount to war crimes and therefore warrant investigation.

1. Characterizing the Syrian War

Article 8(2) of the Rome Statute originally only prohibited the use of “poison or poisoned weapons” and “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the context of international armed conflicts.¹³² The situation in Syria is not a conflict where a state is fighting against another state, and as such, is not of international character. Rather, it can be characterized as a non-international armed conflict (“NIAC”),¹³³ which warrants application of the law of armed conflict.¹³⁴ Prior to the adoption of the Second Additional Protocol to the Geneva Conventions (“Additional Protocol II”),¹³⁵ NIACs were “under-regulated and under-ex-

132. *Id.* art. 8(2)(b)(xvii)-(xviii). The Statute defines “war crimes” as “(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention” and “(b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts” *Id.* art. 8(2)(a)-(b).

133. The Statute defines a non-international armed conflict as one “that take[s] place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” Rome Statute, *supra* note 5, art. 8(2)(f). It is necessary to first inquire whether the situation amounts to an armed conflict. The International Criminal Tribunal for the former Yugoslavia held in *Tadić* “that an armed conflict exists whenever there is [1] a resort to armed force between States, or [2] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

134. Also referred to as international humanitarian law, or IHL. Tom Ruys, *The Syrian Civil War and The Achilles’ Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT’L L. 247, 248-49 (2014).

135. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. The purpose of Additional Protocol II was to improve and supplement Common Article 3 to the 1949 Geneva Conventions without altering its existing conditions of application. *See id.* pmbl. It applies to all armed conflicts that are not already mentioned in the “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),” which occur on a State Party’s territory, where the State Party’s “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* art. 1.

amined,”¹³⁶ and were mainly governed by Article 3, common to all four Geneva Conventions of 1949 (“Common Article 3”).¹³⁷

In the June 2010 Review Conference of the Rome Statute, Belgium proposed an amendment to add the language of Article 8(2)(b) to Article 8(2)(e).¹³⁸ This amendment came to be known as the Kampala Amendment.¹³⁹ It has currently been ratified by thirty-two state parties and is only binding on those state parties that have ratified the amendment,¹⁴⁰ but has also become incorporated into the Statute itself.¹⁴¹ The Kampala Amendment to the Rome Statute would grant the ICC subject-matter jurisdiction over the situation in Syria because the amendment expanded the list of war crimes in a NIAC.¹⁴² Security Council referral of Syria can be predicated upon the use of “poison or poisoned weapons” or “asphyxiating, poisonous or other gases.”

Opponents may argue that the Kampala Amendment does not apply to Syria because it has not specifically ratified the Amendment. However, as mentioned above, the language of the Amendment has been incorporated into the Statute. The possible non-binding nature of the Amendment therefore should not make a difference. The earmark of the Security Council referral is the power to “expand the jurisdiction of the ICC to cover acts by nationals of non-parties or on

136. Ruys, *supra* note 134, at 248 (first citing ERIK CASTRÉN, CIVIL WAR 244 (1966); and then citing JEAN SIOTIS, LE DROIT DE LA GUERRE ET LES CONFLICTS ARMÉS D’UN CARACTÈRE NON-INTERNATIONAL 248 (1958)).

137. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135. “In the case of armed conflict not of an international character . . . Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever . . . : (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* art. 3(1)(a)-(d).

138. See Kampala Amendment, *supra* note 7.

139. *Id.*

140. *Id.* “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.” Rome Statute, *supra* note 5, art. 121(5).

141. See Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EUR. J. INT’L L. (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

142. See *id.*

the territory of non-parties.”¹⁴³ If the Security Council can expand ICC jurisdiction to bind non-parties to the Statute, then it also follows that the court should have the power to bind non-parties to the Amendment.

2. Does the Rome Statute Prohibit the Use of Chemical Weapons?

Assuming referral can be based on the Kampala Amendment, it becomes necessary to ascertain whether the ambiguous language of Article 8(2)(e)(xiii) and (xiv) can be construed to encompass the use of chemical weapons.¹⁴⁴ To safeguard the best interests of the international community, the Article 8 provisions should be read as prohibiting the use of chemical weapons. In the event that the provisions are interpreted more narrowly, the text of the Rome Statute under Article 8 ought to be revised to explicitly forbid chemical weapons.

One justification in favor of construing Article 8 to include chemical weapons is that the language “asphyxiating, poisonous or other gases” mirrors the language of the 1925 Geneva Protocol, which specifically prohibits the use of chemical weapons.¹⁴⁵ The Czech Republic made a declaration upon its ratification of the Kampala Amendment:

The Czech Republic interprets the Amendment to Article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010) as having the following meaning:

- (i) The prohibition to employ gases, and all analogous liquids, materials or devices, set out in article 8, paragraph 2 (e) (xiv), is interpreted in line with the obligations arising from the Convention on the Prohibition of the Development, Production, stock-piling and Use of Chemical Weapons and on Their Destruction of 1993.¹⁴⁶

A state party’s pronouncement of this interpretation lends support to this view. Opponents argue that the omission of a specific reference to chemical weapons is significant; i.e., a proposal to explicitly prohibit chemical and biological weapons that was removed from the

143. *Id.*

144. This controversial topic has been constantly debated. See Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction Over War Crimes Under Article 8 of the ICC Statute*, 8 J. INT’L CRIM. JUST. 1219, 1227 (2010) (comparing the different views of commentators).

145. Compare Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (prohibiting the use of “poisoned weapons” and “asphyxiating, poisonous or other gases, and all analogous liquids, materials or device . . .”), with Geneva Protocol, *supra* note 1 (prohibiting “the use of bacteriological methods of warfare . . . between [the parties of the agreement] . . .”).

146. Kampala Amendment, *supra* note 7, Declarations.

final draft is evidence of the parties' intentions.¹⁴⁷ A treaty, however, cannot be interpreted solely based on drafting history.¹⁴⁸

Under the Vienna Convention of the Law of Treaties, the text and terms of a treaty must be interpreted first,¹⁴⁹ whereas drafting history is considered as a supplemental means of interpretation.¹⁵⁰ Words such as "poison," "asphyxiation," "gases," and "liquids" are used in the Rome Statute, the CWC, and the 1925 Geneva Protocol.¹⁵¹ Blood agents under the CWC are poisons (or poisoned weapons), dispersed as gases, that cause the body to suffocate. Suffocation is equivalent to asphyxiation.¹⁵² Choking agents are also gases and result in death by asphyxiation.¹⁵³ Blistering agents are in the form of a gas or liquid and "can act as poison if they pass into the blood stream, and can cause death by asphyxiation if they reach the respiratory system."¹⁵⁴

Both terms have the same meaning in both contexts. In addition, the drafting history of the treaty shows that the main reason for removing chemical and biological weapons from the final draft was essentially because some wanted to include nuclear weapons but others argued against it, which led to an agreement to omit nuclear, chemical, and biological weapons altogether.¹⁵⁵ The parties did not exclude the explicit language because of a disfavor of chemical weapons prohibition.

147. Alamuddin & Webb, *supra* note 144, at 1227-28.

148. Vienna Convention on the Law of Treaties, art. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* Akande, *supra* note 141.

149. Vienna Convention, *supra* note 148, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

150. *Id.* art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.").

151. *See* Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii); Chemical Weapons Convention, *supra* note 1, art. XIII; Geneva Protocol, *supra* note 1.

152. *See Asphyxia*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/asphyxia> (last visited Feb. 24, 2018).

153. *See generally* Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13; Haines & Fox, *supra* note 57, at 102.

154. Eneh & Ogbuefi-Chima, *supra* note 2, at 12; *see also* Haines & Fox, *supra* note 57, at 101-02.

155. Some states at the Rome Conference "insisted that it was unfair or misleading to exclude nuclear weapons — 'the rich man's weapons of mass destruction' — but to include biological and chemical weapons — 'the poor man's' version of what is prohibited." Alamuddin & Webb, *supra* note 144, at 1228 n.41.

Article 8(2)(e) also includes “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”¹⁵⁶ This provision is evidence of an intention to conform to customary international law and so provides an additional justification because “[s]tate practice establishes . . . [the prohibition of the use of chemical weapons] as a norm of customary international law applicable in both international and non-international armed conflicts.”¹⁵⁷

The language of the Rome Statute mirrors the 1925 Geneva Protocol, the Czech Republic declared that it interprets the Rome Statute in accordance with the CWC, and the ordinary meaning of the terms are equivalent to the terms in the CWC.¹⁵⁸ The use of chemical weapons is also prohibited under customary international law.¹⁵⁹ Thus, the provisions of the Rome Statute should be understood to imply the prohibition of the use of chemical weapons. This construction of Article 8(2)(e)(xiii) and (xiv), and the fact that referral based on the Kampala Amendment is analogous to referral based on the Rome Statute, together demonstrate the likelihood of ICC jurisdiction and ultimately support automatic referral to the ICC for any use of chemical weapons as a war crime.

3. How Automatic Referral Addresses the Current Obstacles of the ICC

There appears to be enough regulation through the CWC and the Security Council, but politics will surely stand in the way of any meaningful intervention. The Security Council “can’t bring (peace-building) resolutions to a vote because they’re blocked by one of the five permanent members (China, France, Russia, the UK and the US) who themselves are committing these violations”¹⁶⁰ When the ICC has jurisdiction to prosecute the Syrian government and rebel forces for engaging in chemical warfare, the prohibition of chemical weapons will finally be enforced and the ICC will gain credibility and support in the international community.

156. Rome Statute, *supra* note 5, art. 8(2)(e).

157. HENCKAERTS & BECK, *supra* note 108, at 3.

158. See Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii); Geneva Protocol, *supra* note 1; Kampala Amendment, *supra* note 7, Declarations; Chemical Weapons Convention, *supra* note 1, art. XIII.

159. HENCKAERTS & DOSWALD-BECK, *supra* note 108, at 260.

160. Malaka Gharib, *Can Attacks On Aid Workers Be Stopped?*, NPR (Sept. 29, 2016, 11:49 AM), <http://www.npr.org/sections/goatsandsoda/2016/09/29/495829011/why-is-no-one-punished-for-attacks-on-aid-workers>.

The use of chemical weapons as a general matter, not restricted only to the Syrian conflict, should result in automatic referral to the ICC by means of a Security Council resolution. Instead of leaving it up to the discretion of the Security Council to refer a situation involving chemical weapons on a case-by-case basis, it should adopt a resolution that declares that *any* use of such weapons will trigger automatic referral to the ICC. The political obligations and issues of the Security Council would thus not hinder justice. This system of bypassing politics, however, is not proposed with the intention of defrauding the ordinary course of UN affairs. Rather, it is a necessary step which targets and counteracts Russia's and China's prior biased and self-interested vetoes.¹⁶¹ Both countries have failed to actively address their issues through a referral and have consequently blocked any intervention necessary for the safety of the international community in its entirety.¹⁶²

A possible argument against automatic referral to the ICC is that, over the years, many people have criticized the court as weak.¹⁶³ One particular concern affecting the credibility of the court is that, even though three of the five permanent members of the Security Council are not parties to the Rome Statute and the ICC, they nevertheless have the power to refer other non-parties to the ICC for prosecution.¹⁶⁴ If the Security Council referred the Syrian conflict to the ICC, there would be many parties and individuals to investigate and prosecute, including the Syrian government members, the governmental forces, and the different oppositional groups. Skeptics will also argue that the ICC is limited in resources and has never dealt with such a large-scale case.¹⁶⁵

The purpose of the ICC's existence is to have a permanent and established international tribunal¹⁶⁶—automatic referral will effect-

161. See, e.g., Joseph Logan & Patrick Worsnip, *Anger after Russia, China block U.N. action on Syria*, REUTERS (Feb. 4, 2012, 4:28 PM), <https://www.reuters.com/article/us-syria/anger-after-russia-china-block-u-n-action-on-syria-idUSTRE80S08620120205> (describing an instance where “Russia and China vetoed a U.N. resolution that would have backed an Arab plan urging Syrian President Bashar al-Assad to give up power . . .”).

162. See, e.g., Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, GUARDIAN (May 22, 2014, 11:07 AM), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>.

163. See, e.g., *Courting Disaster?*, ECONOMIST (May 27, 2010), <http://www.economist.com/node/16219717>.

164. See LAWRENCE MOSS, FRIEDRICH EBERT STIFTUNG, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: TOWARDS A MORE PRINCIPLED RELATIONSHIP* 4 (Mar. 2012), <http://library.fes.de/pdf-files/iez/08948.pdf>.

165. See *id.*

166. Rome Statute, *supra* note 5, pmbl.

ate those goals. With such a structure already in place, it is not necessary to create a new one. The parties to the Syrian conflict have breached a clear line, so the members of the Security Council and the international community should not hesitate to ensure that the situation is referred to the ICC. Since the ICC is a nongovernmental organization, it lacks a police force or enforcement body of its own, and thus relies on the cooperation and assistance of the international community.¹⁶⁷

Another possible obstacle standing in the way of automatic referral is Russia and China's potential use of their veto powers and whether it is possible for all five permanent Security Council members to agree on the resolution creating automatic grounds for referral. Member states should not be concerned about exposing themselves to the possibility of prosecution for involvement in the conflict because the ICC's jurisdiction would only be for prosecuting chemical weapon use. Neither China nor Russia have been accused of participation in chemical warfare—at least not yet.

Another limitation is the high probability that Russia will not want to break its long-standing alliance with Assad. To address this concern, the Security Council resolution may instead create automatic grounds for referral for any *future* use of chemical weapons. However, in the event that the resolution will only be adopted with that qualification, another system will have to be put into place to ensure that the parties to the Syrian conflict do not walk away free men. They must be held accountable for their actions, even if it is not for the use of chemical weapons.

This system of automatic referral will be beneficial for the ICC because parties to the Rome Statute have recently been withdrawing support for the court.¹⁶⁸ African countries primarily have denounced the court because they believe that only their countries are targeted by the court.¹⁶⁹ All of the ICC's successful prosecutions since its exist-

167. INT'L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 19 (May 2011), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>. See generally Rome Statute, *supra* note 5.

168. See, e.g., Elias Meseret, *African Leaders OK Strategy for Mass Withdrawal from ICC*, AP (Jan. 31, 2017), <https://apnews.com/0e19488f91bc4ccfad1e167c6c5742d5>.

169. See Iain Macleod & Shehzad Charania, *Three Challenges for the International Criminal Court*, OUP BLOG (Nov. 16, 2015), <http://blog.oup.com/2015/11/three-challenges-international-criminal-court/>; Nanjala Nyabola, *Does the ICC have an Africa Problem?*, GLOBAL POL'Y F. (Mar. 28, 2012), <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html>.

tence as a court have been against African countries.¹⁷⁰ In the event that the Security Council adopts a resolution unhindered by the usual vetoes, creating automatic referral to the ICC for the Syrian conflict will reassure the international community that the ICC is fulfilling its purpose, rather than merely targeting specific countries.

Automatic referral and the underlying purpose of the ICC complement each other. On the one hand, we have a problem of prior solutions being merely temporary and therefore a recurring problem, and on the other hand, we have a court that is not living up to its potential and is instead being accused of targeting African countries. With automatic referral, the ICC can ensure that the ban on chemical warfare is enforced regularly, and if the ICC is given the responsibility for dealing with such a large-scale problem, it will finally do what it was made for and will improve its reputation. The court will gain importance simply by having automatic jurisdiction over a specific crime—in most aspects it will still be a court of last resort. It is important to keep the court as a last resort to preserve the original ICC system. Automatic referral should take place when domestic courts are not an option, or not functioning, or will be futile—if the system does not change, in that the ICC must defer to national proceedings whether or not they lead to prosecution, then again no parties are going to be held accountable and all the technicalities will help war criminals escape prosecution.

C. *Ruling Out Alternatives*

Alternatives to automatic referral are available, but they will not result in a long-term solution to the overarching chemical weapon problem. An alternate route for pursuing justice could be grounded on Syria's obligations under other treaties and whether Syria violated any of those obligations. Syria is party to the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")¹⁷¹ and the International Covenant on Civil and Political Rights ("ICCPR"), which protects the right to life and would seem to prohibit the use of chemical weapons.¹⁷² Neither treaty explicitly prohibits the means used to perpetrate genocide, or purely unlawful and intentional killing.¹⁷³ Therefore, these treaties cannot be regarded as

170. See Nyabola, *supra* note 169.

171. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

172. International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 172.

173. Blake & Mahmud, *supra* note 1, at 254.

providing a “blanket prohibition” for Syria’s use of chemical weapons.¹⁷⁴ “If Syria used chemical weapons to unlawfully kill civilians or to perpetrate genocide, those actions would be a violation of Syria’s treaty obligations, but not any more so than if Syria used conventional weapons to perpetrate the same actions.”¹⁷⁵ Hence, the CWC—and possibly the 1925 Geneva Protocol—remains the basis for justifying automatic referral.

The notion that Syria’s actions, whether by chemical weapons or conventional weapons, would be treated the same provides additional support for the argument that there should be automatic referral. We have already witnessed the consequences of no punishment: A civil war has continued to escalate for seven years, the once beautiful and boasting cities of Syria have been ravaged and torn to the ground, and innocent civilians have had to endure gravely unimaginable horror.¹⁷⁶ Absent a system for automatic referral, which would target the problem head-on, all the parties to the war, and even parties to armed conflicts in the future, will continue to take advantage of the current system. It appears that, at every step of the way, there is a miniscule technicality that allows the parties to escape punishment and liability, which is exactly where the problem arises.

The system of automatic referral does not vest the five permanent members of the Security Council with unlimited discretion to accept or veto on a case-by-case basis every proposed referral to the ICC. Rather, it safeguards and prioritizes the peace and stability of the international community by frustrating selfish and biased attempts to hinder those objectives. International consensus on the horror of chemical weapons and the historical trend of prohibition is, as explained above, without a doubt customary international law.¹⁷⁷

Domestic courts in Syria are technically under an obligation to investigate and prosecute the responsible individuals and parties that might have committed crimes on their territory,¹⁷⁸ but that is not a possibility since the war is still enduring and the courts are not in operation.¹⁷⁹

174. *Id.*

175. *Id.*

176. Rodgers et al., *supra* note 13.

177. *See* discussion *supra* Part II.

178. Jones, *supra* note 20, at 804-05.

179. *See id.* at 805 (citing Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59, annex XIV (Feb. 5, 2013)).

Domestic courts in other countries may be able to prosecute individuals on the basis of universal jurisdiction.¹⁸⁰ Germany and Sweden have started to pursue this avenue of accountability, but have encountered various challenges.¹⁸¹ Since the conflict is still ongoing, authorities are unable to gather evidence from Syria.¹⁸² In addition, universal jurisdiction is typically exercised against individuals that are physically present in the prosecuting country, but the individuals of interest here are not in Germany or Sweden.¹⁸³

Another option is an *ad hoc* international criminal tribunal, which is created under the Chapter VII powers of the Security Council.¹⁸⁴ Russia will not agree to a special *ad hoc* international criminal tribunal set up specifically for Syria because doing so would expose Assad's regime to the risk of prosecution, and Russia is allied with Syria.¹⁸⁵ Nevertheless, Russia showed interest in chemical weapon regulation by establishing the Framework with the US and suggesting that Syria join the CWC to have its chemical weapons destroyed.¹⁸⁶ An *ad hoc* tribunal has been created by the Security Council on two different occasions, once for Yugoslavia and another time for Rwanda.¹⁸⁷ However, those tribunals were created to deal with atrocious crimes in specific regions for specific conflicts.¹⁸⁸

A more permanent approach to Syria's conflict is crucial because of the gravity of the issue, which will continue to present itself again and again in other conflicts if no permanent measures are taken. In

180. *Universal Jurisdiction*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (“[U]niversal jurisdiction” refers to the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist . . .”).

181. See “*These are the Crimes we are Fleeing*”, HUM. RIGHTS WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

182. See *id.*

183. See *id.*

184. See U.N. Charter, *supra* note 47, art. 39-41.

185. See Saloni Malhotra, *Achieving Justice for Syria is Not as Hopeless as it Seems*, FOREIGN POL'Y RISING (Nov. 29, 2017), <https://foreignpolicyrising.com/2017/11/29/achieving-justice-for-syria/> (indicating that Russia supports Syria and the regime of Bashar Al-Assad).

186. See Framework, *supra* note 14.

187. *UN Documentation: International Law*, DAG HAMMARSKJOLD LIBR., <http://research.un.org/en/docs/law/courts> (last visited Apr. 3, 2018).

188. See *Mandate and Crimes Under ICTY Jurisdiction*, U.N. INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction> (last visited Apr. 3, 2018); *The ICTR in Brief*, U.N. MECHANISM INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Apr. 3, 2018).

addition to the reasons laid out above, a prime advantage of referring these cases to the ICC is avoiding the lengthy and expensive process of establishing a new tribunal, since a permanent mechanism is already in place.¹⁸⁹

An internationalized criminal tribunal,¹⁹⁰ also referred to as a hybrid court, could provide another possible forum for justice. This type of tribunal combines domestic and international elements in relation to the officers and pertinent law.¹⁹¹ The involvement of domestic officers often yields a feel of regional dominion over the tribunal's work and increases the perceived legitimacy of the region.¹⁹² Participation of international officers could additionally contribute dexterity and "increase the perceived independence and impartiality of the criminal justice process."¹⁹³ However, this would be an extremely risky alternative because the domestic officials would certainly be biased and would stand in the way of a fair system.¹⁹⁴ On the contrary, the ICC would provide an independent and impartial forum to ensure equitable adjudication for all parties.

Another alternative that is advocated for very often on this topic is to question whether the international community is justified to intervene in Syria. "Parties to the Geneva Conventions and their Additional Protocols are explicitly obligated not only to respect their treaty obligations, but also to ensure respect for them."¹⁹⁵ This is not an explicit provision. Rather, the "Responsibility to Protect" is a result of universal accord.¹⁹⁶ The idea is that States "have a 'Responsibility to Protect' . . . their civilian populations and that other States must act

189. Jones, *supra* note 20, at 811 ("In the event that sufficient will is gathered for the pursuit of international criminal justice, it would be more likely, and more prudent, for the Security Council to refer the situation to the ICC under Article 13(b) of the Rome Statute than to establish a new institution for the same purpose.").

190. *See id.* *See generally* S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

191. *See* Jones, *supra* note 20, at 811-12; *Internationalized Criminal Tribunals*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/> (last visited Feb. 17, 2018). *See generally* Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 97 A.J.I.L. 295, 2178 U.N.T.S. 137.

192. *See* Jones, *supra* note 20, at 812 (first citing Lindsey Raub, *Positioning Hybrid Trials in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1017, 1041-44 (2009); and then citing Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306 (2003)).

193. Jones, *supra* note 20, at 812 (citing Dickinson, *supra* note 192, at 306).

194. Jones, *supra* note 20, at 813 ("[T]he involvement of victors in the prosecution of the defeated could result in biased and unfair trials.").

195. *5 Things You Should Know About Chemical Weapons and International Law*, HUM. RTS. FIRST (Aug. 2013), <https://www.humanrightsfirst.org/wp-content/uploads/HRF-Chemical-Weapons-Factsheet.pdf>.

196. *Id.*

affirmatively when a State is unwilling or unable to meet their responsibility.”¹⁹⁷ In regards to the use of force:

[Responsibility to Protect] may include the use of force, but may also involve measures short of that, including targeted sanctions, international condemnation, diplomatic efforts, referral to the ICC, etc. Resort to force by one State on the territory of another, even for the purpose of protecting a civilian population against war crimes, crimes against humanity and genocide, may be unlawful absent Security Council authorization, unless also justifiable as self-defense.¹⁹⁸

A military intervention is not likely to be more successful than an automatic referral to the ICC. A military intervention in Syria would stir up more anger and resistance and would probably lead to an increase of hostilities. The duration of the war in Syria shows that the parties are deeply invested and would oppose involvement from an outside military force for meddling in their internal affairs. However, the strength of the intervention could make a difference. A military that is extremely prepared to join a drawn-out war will have a greater effect than a military that is unprepared for such circumstances.

V. CONCLUSION

Chemical weapons are “quintessentially weapons of terror.”¹⁹⁹ The international community has an obligation to end the war crimes and crimes against humanity in Syria, but legally cannot do so without the UN and the International Criminal Court. The UN Security Council should adopt a resolution that creates automatic grounds for referral to the International Criminal Court for any use of chemical weapons and the ICC’s jurisdiction should be grounded on the Kampala Amendment.²⁰⁰ If the current language of the Rome Statute does not implicitly include chemical weapons, the Statute should be revised to explicitly refer to chemical weapon use as a war crime. I argue for a more permanent approach to Syria’s conflict because of the gravity of the issue, which is likely to present itself again and again in future conflicts if no permanent measures are taken. A seven-year civil war and hundreds of thousands of deaths is more than a reason to

197. *Id.*

198. *Id.*

199. Simon Wessely, *Psychological Implications of Chemical and Biological Weapons*, 323 *BRIT. MED. J.*, 878, 878 (2001).

200. Rep. of the Ind. Int’l Comm. of Inquiry on the Syrian Arab Republic on its Twenty-Fifth Session, U.N. Doc. A/HRC/25/65, at 2 (Feb. 12, 2014).

create such a resolution and to stop the problem before it gets worse or happens again somewhere else.

If the Security Council can avoid a veto from China and Russia, who have vetoed two referral proposals so far,²⁰¹ the provisions of the Rome Statute will present an obstacle. Once the ICC has jurisdiction to prosecute the Syrian government and rebel forces for chemical weapon use, the prohibition of chemical weapons will finally be enforced, and the ICC will earn credibility and support from the international community.

Implementing automatic referral will address the lack of prosecution and accountability for using chemical weapons since World War I. Numerous treaties and international criminal tribunals have been unable to put a stop to the use of these weapons. A conflict that is continuing into its seventh year goes to show that those treaties and tribunals had little, if any, effect outside of their immediate time frames.

An automatic referral system will eliminate the present bias and politicization of the Security Council, both of which undermine the independence of the ICC. The language of the Rome Statute mirrors the 1925 Geneva Protocol, and the ordinary meaning of the terms are equivalent to the terms in the CWC. The use of chemical weapons is prohibited under customary international law.²⁰² Thus, the provisions of the Rome Statute should be construed to prohibit the use of chemical weapons. This construction of Article 8(2)(e)(xiii) and (xiv), and the fact that referral based on the Kampala Amendment is analogous to referral based on the Rome Statute, together demonstrate the likelihood of ICC jurisdiction and ultimately supports automatic referral to the ICC for any use of chemical weapons as a war crime.

The purpose of the ICC's existence is to have a permanent and established international tribunal,²⁰³ and automatic referral will effectuate those goals. With such a structure already in place, it is not necessary to create a new one. Chemical weapons have stained the peace and stability of the international community for hundreds of years. It is necessary to put aside politics because, as members of the interna-

201. See U.N. SCOR, 7825th mtg. at 3, U.N. Doc. S/PV.7825 (Dec. 5, 2016); U.N. SCOR, 7893d mtg. at 4, U.N. Doc. S/PV.7893 (Feb. 28, 2017).

202. HENCKAERTS & DOSWALD-BECK, *supra* note 108, at 260; see also *5 Things You Should Know About Chemical Weapons and International Law*, *supra* note 195.

203. Rome Statute, *supra* note 5, pmbl.

tional community, everyone has a duty to protect the innocent individuals in Syria, those who fled Syria, and those who had their lives taken away.

SOUTH KOREA MATERNITY LEAVE: HOW U.S. LAW COULD BE LESS BURDENSOME TO EMPLOYERS AND PROVIDE MORE PROTECTION FOR WOMEN IN THE WORKPLACE

*Olivia Kim**

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I. INTRODUCTION

Doesn't receiving a higher education afford you more opportunities to advance your career? Not quite. Many South Korean women have received higher education, but cannot advance their careers because of the ineffective and chauvinistic provisions set out in the Labor Standards Act.¹ The Labor Standards Act, hereinafter LSA, is the main body of law regulating minimum standards for working conditions.² The Act on Equal Employment and Support for Work-Family Reconciliation governs mandatory hiring guidelines.³ Of the population in South Korea between the ages of twenty-five and thirty-four, a higher percentage of women have received postsecondary education than men.⁴ Despite the fact that a higher percentage of women have received a tertiary education, only 57% of women are employed, compared to the 78.6% of men that are employed.⁵ Further, there is a disproportionate percentage of males in high level positions compared to women.⁶ Women only make up 17% of seats in parliament, and a meager 2.4% of seats on the board of companies.⁷

A recent survey by the Korea Chamber of Commerce and Industry, hereinafter KCCI, and McKinsey & Company, has found that Korean Corporate Culture desperately needs a change to address the

1. See *South Korea's Working Women: Of Careers and Carers*, ECONOMIST (June 11, 2016) [hereinafter *South Korea's Working Women*], <https://www.economist.com/news/asia/21700461-conservative-workplaces-are-holding-south-korean-women-back-careers-and-carers> (stating that three-quarters of women go to Universities but employers overlook that when faced with hiring a female or male).

2. Jeong Han Lee & Anthony Chang, *Korea*, in EMPLOYMENT & LABOUR LAW 133, 133 (Charles Wynn-Evans & Jennifer McGrandle eds., 4th ed. 2015).

3. *Id.*

4. See *South Korea's Working Women*, *supra* note 1. In South Korea, 71.8% of women have received a tertiary education, compared to 63.9% of men. *Id.*

5. *Id.*

6. See, e.g., CREDIT SUISSE, THE CS GENDER 3000: WOMEN IN SENIOR MANAGEMENT 8 (2014) (indicating that, as of 2013, women made up only 2.4 % of boards of companies situated in South Korea); OECD, OECD ECONOMIC SURVEYS: KOREA 12 (2016) (indicating that, as of 2014, "Women [in Korea] account for a disproportionate share of non-regular workers, thus discouraging female employment.").

7. CREDIT SUISSE, *supra* note 6 (indicating that women only made up 2.4% of board members in South Korean companies); *Women in national parliaments*, INTER-PARLIAMENTARY UNION ARCHIVE, <http://archive.ipu.org/wmn-e/classif.htm> (last updated Dec. 1, 2017) (indicating that, as of April 14, 2016, women made up 17% of the Republic of Korea's parliament).

inefficiencies in the workplace.⁸ McKinsey & Company, a global management consulting firm,⁹ pointed out that local companies need to “establish a new corporate culture, away from the authoritarian-style management [to increase global competitiveness].”¹⁰ Jun In-sik, KCCI’s Chief of corporate culture division, said “Even if companies expand facility investment and recruit talented workers, it’s hard to reap good accomplishments if the software of corporate management to combine capital and human resources is outdated”¹¹ In KCCI and McKinsey & Company report, they found that 35% of the disadvantage in evaluations and promotions of women were due to a career gap for childbirth and childcare.¹²

South Korea had other motives for implementing maternity leave provisions. As a result, the provisions do not adequately protect women. South Korea first implemented maternity leave as part of the Act on Equal Employment in 1987, one year before the 1988 Summer Olympics in Seoul, Korea.¹³ South Korea adopted the Act on Equal Employment in order to gain recognition internationally as a developed nation and to meet the International Labor Organization (ILO) standards for minimum levels of “legally acceptable” working conditions.¹⁴ South Korea’s Act on Equal Employment states that the purpose of the Act is “to realize gender equality in employment in accordance with the principle of equality proclaimed in the Constitution . . . by ensuring equal opportunities and treatment in employ-

8. KCCI & MCKINSEY & CO., REPORT ON THE DIAGNOSIS ON ORGANIZATIONAL HEALTH AND CORPORATE CULTURE OF KOREAN COMPANIES 1, 28-29 (2016) [hereinafter KCCI & MCKINSEY & Co.].

9. *About Us: Overview*, MCKINSEY & Co., <https://www.mckinsey.com/about-us/overview> (last visited Feb. 8, 2018).

10. *Corporate Korea Needs Culture Reform: Experts*, YONHAP NEWS AGENCY (June 1, 2016, 2:41 PM), <http://english.yonhapnews.co.kr/news/2016/06/01/0200000000AEN20160601006600320.html>.

11. *Id.* (quoting a statement made by Jun In-sik).

12. KCCI & MCKINSEY & Co., *supra* note 8, at 10; see also *Korean Women Angry at Being Promoted Less Than Men*, GRAND NARRATIVE (Jan. 18, 2010), <https://thegrandnarrative.com/2010/01/18/korea-sexual-discrimination-workplace/> (indicating that, in a 2010 survey of working Korean women, 35.9% of responders indicated that they receive low evaluation scores if they take time off of work before or after giving birth).

13. Myunghwa Lee, *Legislative Initiative for Work-Family Reconciliation in South Korea: A Comparative Analysis of the South Korean, American, French, and German Family Leave Policies*, 22 ASIAN AM. L.J. 45, 57 (2015) (first citing Jenny Ma, *Of “Females and Minors”: A Gendered Analysis of the Republic of Korea’s Labor Standards Act and Reforming Labor Market Dualism*, 49 COLUM. J. TRANSNAT’L L. 717, 725-26 (2011); and then citing Act on Equal Employment and Support for Work-Family Reconciliation, Act. No. 3989, Dec. 4, 1987, June 7, 2011 (S. Kor.), translated in Ministry of Government Legislation online database, <http://www.moleg.go.kr/FileDownload.mo?flSeq=38868>).

14. Lee, *supra* note 13 (citing Ma, *supra* note 13).

ment . . . and protecting maternity and promoting female employment”¹⁵ However, these laws are not fulfilling their intended purpose.¹⁶ The laws that South Korea adopted for female employees are too extensive and the fines for violations are so minimal that there is little incentive for businesses to comply with the extensive regulations.¹⁷

In 2001, the Act on Equal Employment was amended to require that “all Korean workplaces provide up to one year job-protected paid leave to employed parents (both mothers and fathers) who wish to care for a child under one year of age.”¹⁸ However, in 2005, approximately 48% of businesses were in violation of parental leave laws set out in the Act on Equal Employment,¹⁹ which “can be attributed to an attitude of disregard for laws and reliance on business custom and industry practices.”²⁰ Article 6 of the Labor Standards Act, which provides for equal treatment of males and females, states that “No employer shall discriminate against workers on the basis of gender”²¹ Businesses do not have a great incentive to abide by the laws set out in the Act on Equal Employment because Article 114 of the Labor Standards Act, which sets out penal provisions, states that any organization in violation of Article 6 “shall be punished by a fine not exceeding five million won[,]”²² which is only approximately 4,600 USD.

The South Korea labor laws that set out to provide special protections for female employees are overreaching and ineffective. South

15. Act on Equal Employment and Support for Work-Family Reconciliation, Act. No. 3989, Dec. 4, 1987, amended by Act No. 8781, Dec. 21, 2007, art. 1 (S. Kor.).

16. See Lee, *supra* note 13, at 81 (citing Act on Equal Employment and Support for Work-Family Reconciliation, Act. No. 3989, Dec. 4, 1987, amended by Act No. 10339, June 4, 2010 & Act No. 8781, Dec. 21, 2007, art. 7-8 (S. Kor.)) (stating that gender discrimination is illegal but gender inequality has contributed to gender discrimination in the workplace); Ma, *supra* note 13, at 737 (stating that “[Korean] employers have failed to live up to the Korean Constitution and the LSA’s promises.”).

17. See Ma, *supra* note 13, at 738.

18. Kyungmin Baek & Erin L. Kelly, *Noncompliance with Parental Leave Provisions in Korea: Extending Constitutional Research to a New Legal Context*, 39 L. & SOC. INQUIRY 176, 176 (2014); see Act on Equal Employment and Support for Work-Family Reconciliation, Act. No. 3989, Dec. 4, 1987, amended by Act No. 8781, Dec. 21, 2007, art. 19 (S. Kor.). Currently, the Act on Equal Employment requires that employers, “grant childcare leave, if a worker asks for leave to take care of his/her child (including an adopted child) aged 6 and under who is not enrolled into elementary school.” *Id.*

19. Baek & Kelly, *supra* note 18, at 176-77, 179.

20. Lee, *supra* note 13, at 59 (citing Baek & Kelly, *supra* note 18, at 177).

21. Geunlogijunbeob [Labor Standards Act], Act No. 5309, Mar. 13, 1997, art. 6 (S. Kor.), translated in Ministry of Government Legislation online database, <http://www.moleg.go.kr/FileDownload.mo?flSeq=26558>.

22. *Id.* art. 114, amended by Act No. 9038, Mar. 28, 2008.

Korea should look to the U.S. Family and Medical Leave Act of 1993²³ and the Pregnancy Discrimination Act of 1978,²⁴ which amended Title VII of the Civil Rights Act of 1964 to revise its maternity leave laws and increase fines to promote a higher rate of compliance in order to prevent gender-based discrimination in the workplace.²⁵

II. BACKGROUND

The deeply rooted values in South Korean culture have a large impact on various aspects of daily life. South Korea culture is largely based on Confucianism,²⁶ and it is believed that “each individual has [their] own roles and responsibilities according to [their] identity and social class.”²⁷ Each person has his or her own “duty and roles to play and each of the roles has its moral principle to be adhered to according to age, gender, job, and education.”²⁸ South Koreans place a great emphasis on social harmony, loyalty, and honor.²⁹ South Koreans are encouraged to act for the benefit of society as a whole, and to limit pursuit of self-interest.³⁰ In Korean culture, there is an emphasis on loyalty and respect for elders and people of seniority.³¹ South Koreans feel that they must be loyal to their company and “owe a supreme allegiance to the company’s interest and identify completely with the goals of the company” because of the Confucian values that are stressed upon them.³² These Confucian values influence all aspects of life, and are also prominent in the workplace.³³

23. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2016).

24. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. §§ 2000e (2016)).

25. See 42 U.S.C. §§ 2000e–2000e-17.

26. See Lee, *supra* note 13, at 75.

27. Tan Soo Kee, *Influences of Confucianism on Korean Corporate Culture*, 36 ASIAN PROFILE (2008).

28. *Id.*

29. See Andrew Eungi Kim & Gil-sung Park, *Nationalism, Confucianism, Work Ethic and Industrialization in South Korea*, 33 J. CONTEMP. ASIA 37, 44 (2003).

30. See MYUNG OAK KIM & SAM JAFFE, *THE NEW KOREA: AN INSIDE LOOK AT SOUTH KOREA’S ECONOMIC RISE* 177 (2010); Kee, *supra* note 27.

31. Kim & Park, *supra* note 29 (discussing Confucian values such as loyalty and respect for elders or authority figures).

32. *Id.*; see also Choong Y. Lee, *Korean Culture and Its Influence on Business Practice in South Korea*, 7 J. INT’L MGMT. STUD. 184, 185 (2012) [hereinafter *Korean Culture and Its Influence on Business*].

33. See Kee, *supra* note 27.

Confucianism is deeply rooted in South Korean corporate culture and is manifested in its management styles.³⁴ South Korea has a traditional labor market which is based on “long-term employment and seniority-based wages [making] it costly to take a leave of absence from work.”³⁵ Most South Korean companies use a top-down management structure,³⁶ which means that top management makes decisions, and that these decisions are handed down the hierarchy for execution.³⁷ The manager is seen as the “father” of their department, who, in return for loyalty, looks out for the well-being of his subordinates.³⁸ Employees are protected by their employers, but are not given any responsibility or freedom to express their opinions.³⁹ As a way of showing loyalty and respect to their managers, employees are strongly encouraged not to leave work until their supervisor leaves.⁴⁰ A recent study by McKinsey & Company found that “superiors who value working late consider it a sign of hard-working.”⁴¹ To show respect to their superiors, employees must point out the mistakes of their superiors indirectly in order to not offend them.⁴²

South Korea is a restrained society, as they “do not put much emphasis on leisure time . . . and feel that indulging themselves is somewhat wrong.”⁴³ Employees are discouraged from taking vacations, because it signifies a lack of dedication to the company and loyalty to their colleagues.⁴⁴ Because employees are discouraged from taking time off from work even for vacations, maternity leave is especially frowned upon because it requires colleagues to cover for the

34. See Kim & Park, *supra* note 29 (discussing Confucian values such as loyalty and respect for elders or authority figures).

35. ANGEL GURRIA, OECD, A FRAMEWORK FOR GROWTH AND SOCIAL COHESION IN KOREA 26 (June 2011).

36. See *Korean Culture and Its Influence on Business*, *supra* note 32, at 189 (discussing Korean management style, which consists of top-down decision making).

37. See Micah Harper, *Top-Down vs. Bottom-Up Management Styles*, TOURO U. WORLDWIDE (Jan. 3, 2015), <http://www.tuw.edu/content/business/top-down-bottom-up-management/>.

38. See *Korean Culture and Its Influence on Business*, *supra* note 32 (discussing the importance of subordinates being loyal to managers and of managers looking out for their subordinates).

39. See Kee, *supra* note 27.

40. See Michael Kocken, *Korean Overtime and Why Korea has the Second Longest Working Hours in the OECD*, ASIA OPTIONS (Apr. 23, 2015), <http://www.asiaoptions.org/korean-overtime/>.

41. KCCI & MCKINSEY & CO., *supra* note 8, at 11; see also KIM & JAFFE, *supra* note 30.

42. See *Korean Culture and Its Influence on Business*, *supra* note 32, at 184-85.

43. *What About South Korea?*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country/south-korea/> (last visited Feb. 22, 2018).

44. See Kim Bo-eun, *Korea: Republic of Workaholics*, KOREA TIMES (July 21, 2013, 11:36 AM), http://www.koreatimes.co.kr/www/news/biz/2015/02/328_139616.html.

ing self-discipline, seen as a woman entertainer, or identified as “easy.”⁵² “Easy” is a term used to describe “women who will easily engage in sexual activity.”⁵³ These double standards force women to juggle the balance between building relationships through dinner and drinks while not being perceived as a woman entertainer.⁵⁴ As a result, employers are more inclined to hire males because they can partake in the relationship building process without these limitations.

Because of the influence of Confucianism, South Koreans value collectivism and therefore, female employees are not encouraged to speak about discrimination.⁵⁵ Collectivism is “the practice or principle of giving a group priority over each individual in it.”⁵⁶ Since South Koreans value working for the greater good of society, and not for the individual, women are not encouraged to speak out about discrimination they face in the workplace, but rather to accept this type of treatment for the greater good of society.⁵⁷ These values are deeply engrained in the corporate culture, and remain as such because new members observe and adapt to the existing corporate culture they encounter.⁵⁸ These “inefficient” ways of working have been engrained in the mindsets of employees and have become a social norm.⁵⁹

III. SOUTH KOREA’S REGULATIONS FOR FEMALE EMPLOYEES ARE OVERREACHING AND INEFFECTIVE

When South Korea implemented maternity leave provisions to comply with the ILO’s standards, it implemented additional provisions in an effort to protect female employees. As a consequence, South Korea has many special protections set forth for female employees,⁶⁰ but the provisions are simply for appearances and, in practice, are over-extensive while offering very little protection for the female employees.⁶¹ In fact, the special protections set out for female

52. *Id.*

53. *Id.* at 1086.

54. *See id.* at 1079.

55. Kee, *supra* note 27.

56. *Collectivism*, OXFORD DICTIONARY OF ENGLISH 341 (3rd ed. 2010); *see also* Lee, *supra* note 13, at 76 (citing Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement*, 27 MICH. J. INT’L L. 1, 29-35 (2005)).

57. *See* Kee, *supra* note 27.

58. *Id.*

59. *See* KCCI & MCKINSEY & CO., *supra* note 8, at 1.

60. *See* Ma, *supra* note 13, at 731, 739 (citing Joonmo Cho & Kyu-Young Lee, *Deregulation of Dismissal Law and Unjust Dismissal in Korea*, 27 INT’L REV. L. & ECON. 409 (2007)).

61. *See id.* at 741 (describing the inefficiencies of the “special protections” afforded to working women).

employees are sexist and hinder female employees from advancing in their careers. The female employment rate was below the OECD average because mothers who wish to return to work usually end up in “low paid, part-time, and temporary employment.”⁶²

The special protections prohibit employers from having female employees perform certain types of jobs, and require employers to make special exceptions for women for extended periods of time. The “special protections” afforded to women include: a one-day menstruation leave each month, restrictions on performing work inside a pit, and restrictions on work for pregnant females.⁶³ Further, the LSA defines a pregnant woman as “a female in pregnancy [sic] or with less than one year after childbirth.”⁶⁴ Taking all the special protections into consideration, the employers must comply with the restrictions for “pregnant” females for almost two years⁶⁵—much longer than the duration of the actual pregnancy.

The LSA sets forth restrictions for both pregnant and non-pregnant women. The LSA states that females shall not be forced to work between the hours of 10 p.m. and 6 a.m.⁶⁶ In addition to these extensive regulations, the LSA requires that employers grant pregnant female workers ninety days of leave before and after childbirth, with at least forty-five days allocated to the period after childbirth, and sixty days of pay by the employer.⁶⁷ Moreover, Article 74 of the LSA prohibits employers from having pregnant female workers work overtime.⁶⁸ Because of these extensive regulations for female employees, approximately 5,000 women are fired each year while on maternity or parental leave.⁶⁹ Although some were fired due to their companies’ financial struggles, most of the women were dismissed for “other reasons” that the companies did not specify.⁷⁰ Many other women return

62. See Hye-Ryun Kang & Chris Rowley, *Women in Management in South Korea: Advancement or Retrenchment?*, 11 ASIA PAC. BUS. REV. 213, 223 (2005); Lee, *supra* note 13, at 46-47, 75.

63. Geunlogijunbeob [Labor Standards Act], Act No. 5309, Mar. 13, 1997, art. 65, 72, 73 (S. Kor.), translated in Ministry of Governmental Legislation online database, <http://www.moleg.go.kr/FileDownload.mo?flSeq=26558>; see also Ma, *supra* note 13, at 729.

64. *Id.* art. 65.

65. *See id.*

66. *Id.* art. 70(1).

67. *Id.* art. 74(1), (4), amended by Act No. 8781, Dec. 21, 2007, Act No. 11270, Feb. 1, 2012, Act No. 12325, Jan. 21, 2014.

68. *Id.* art. 74(5), amended by Act No. 11270, Feb. 1, 2012.

69. Kim Se-jeong, *5,000 Women on Maternity Leave Fired Every Year*, KOREA TIMES (Sept. 13, 2015, 5:38 PM), http://www.koreatimes.co.kr/www/news/nation/2015/09/116_186737.html; see also Roh Mihye, *Women Workers in a Changing Korean Society*, in *WOMEN OF JAPAN AND KOREA: CONTINUITY AND CHANGE* 240, 240-41 (Joyce Gelb & Marian Lief Palley eds., 1994).

70. Se-jeong, *supra* note 69.

to the workforce after giving birth only to take on part-time positions.⁷¹ One thing the “special provisions” have in common is the underlying notion that all females require these “protections” and dismisses the idea that some women may not want or need these protections, and that they may want to work at a level similar to their male counterparts.

In order to adequately protect female employees, South Korea must adopt laws that force employers to change the corporate culture to discourage discrimination. Deeply rooted Confucian values in the South Korean Culture inherently encourage discrimination between male and female employees, so South Korean labor laws should focus on changing these cultural values in order to promote equality between male and female employees. South Korea needs to promote gender equality in the workplace, not only to change the Confucian ideals in the corporate culture, but also to increase the total labor force by utilizing the qualified female workforce.

A. *South Korean Corporate Culture Encourages Discrimination*

South Korean corporate culture encourages discrimination against women, so laws should be designed to protect female employees from discrimination. As previously mentioned, late night dinners and drinks play an important role in the South Korean business culture.⁷² The provisions in the LSA prohibiting employers from requiring pregnant females to work late at night encourage employers to favor hiring males over females.⁷³ Further, employers are prohibited from having female employees work late up to one year after giving birth, making employing females costly for the employers.⁷⁴

There may be other factors that encourage gender discrimination in the workplace. The discrimination likely takes place because most fathers do not take paternity leave to care for their children, and as a result, do not understand the struggles that mothers experience in try-

71. Lee, *supra* note 13, at 80 (citing OH, *supra* note 47).

72. See KIM & JAFFE, *supra* note 30, at 189; *South Korean Culture*, S. KOR. DOING BUS. GUIDE, <http://www.southkorea.doingbusinessguide.co.uk/the-guide/south-korean-culture> (last visited Feb. 5, 2018).

73. *Poll Finds Employers Prefer Hiring Men*, YONHAP NEWS AGENCY (Mar. 15, 2016, 11:32 AM), <http://english.yonhapnews.co.kr/national/2016/03/15/0302000000AEN20160315005400320.html>.

74. See Geunlogijunbeob [Labor Standards Act], Act No. 5309, Mar. 13, 1997, *amended by* Act No. 10339, June 4, 2010, art. 65, 70 (S. Kor.), *translated in* International Labour Organization online database, <http://www.ilo.org/global/lang—en/index.htm>.

ing to balance a career and family life.⁷⁵ Only 2% of the requests for parental leave were from men, because of “concern that it would have negative effects on their career and relationships with colleagues.”⁷⁶ The small percentage of fathers that take paternity leave are labeled as “brave” because they chose to take paternity leave even if it would have consequences on their careers.⁷⁷ Fathers can request a reduced work schedule as an alternative to taking paternity leave, but often this is not a feasible alternative.⁷⁸ The reduced work schedule is not mandated, and employers are free to reject the request without being penalized.⁷⁹ Because most fathers do not take time off from work to care for their newborn children, the mothers must undertake this role, and the practice of women taking time off work to care for their newborns is seen as a burden to the employers and their colleagues.

B. Confucian Gender Roles Promote Discrimination

The gender roles rooted in the Confucian culture promote different treatment of men and women. In Confucianism, men are seen as superior, and their authority is not challenged by anyone of an inferior status.⁸⁰ The woman’s role is to obey men: “their fathers before they are married, [and] their husbands after they are married.”⁸¹ This gender inequality is not only practiced within the home, but also in the workplace.⁸² Employers are less likely to recruit women, especially married women because they frequently ask for leave, must balance work with their duties as a mother, and may not put work as their first priority.⁸³ However, it is hard for women to put work as their first priority because of social expectations, as Confucianism teaches that “women should place first priority on family responsibility.”⁸⁴

75. See Lee, *supra* note 13, at 90-91; see also Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 781 (2000).

76. Randall S. Jones & Satoshi Urasawa, *Labour Market Policies to Promote Growth and Social Cohesion in Korea*, 1068 OECD ECON. DEP’T WORKING PAPERS 1, 11 (2013).

77. See *Getting Paternity Leave Still Tough in S. Korea*, BUS. WORLD ONLINE (Jan. 15, 2016), <http://www.bworldonline.com/content.php?section=Labor&title=getting-paternity-leave-still-tough-in-s.-korea&id=121488>.

78. See Meejung Chin et al., *Family Policy in South Korea: Development, Current Status, and Challenges*, 21 J. CHILD & FAM. STUD. 53, 56 (2012) (stating that paternity leave in South Korea is not mandated).

79. See Lee & Chang, *supra* note 2, at 142; Chin et al., *supra* note 78.

80. Kee, *supra* note 27.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

C. Existing Legislation in South Korea is Ineffective

Although maternity leave provisions in South Korea have been in place for over thirty years, “less than one out of every five pregnant female employees takes advantage of family leave.”⁸⁵ Female employees’ reasons for not taking family leave include: “fear of disrupting the workload, . . . guilt for fellow workers, . . . policy inadequacy, and . . . fear of dismissal or penalties in promotions and salary.”⁸⁶ Even when the female employees do take family leave, they often return to the office to find that their job duties have been “[re]assigned to another team with inferior responsibilities . . . transferred out of town where commuting is not feasible . . . [or are bullied] into signing a resignation form.”⁸⁷ Women are not encouraged to bring law suits, but if they are successful in bringing a lawsuit, the damages awarded to the employees do not adequately compensate the employee for the loss of their employment.⁸⁸

IV. U.S. LAW CAN HELP SOUTH KOREA PREVENT GENDER DISCRIMINATION IN THE WORKPLACE

The United States has a maternity leave provision that is less burdensome to employers and has a high rate of compliance. The Family and Medical Leave Act of 1993, hereinafter FMLA, allows all eligible employees, men and women, to take twelve workweeks of leave for “the birth of a child and to care for the new born within one year of birth.”⁸⁹ Upon the employee’s return, the employer must restore employee to the original position or an equivalent position with equivalent benefits, pay, and other terms of employment.⁹⁰ If an employer violates provisions of the FMLA, the employer may have to pay damages, including wages or other compensation denied to the employee by the violation, actual monetary loss to the employee as a

85. Lee, *supra* note 13, at 86 (citing *Chulsan Mit Yuga Hyujik Hyunhwang [Status on Care Leave Participants]*, STAT. KOREA, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1504 (last updated Mar. 15, 2017)).

86. Lee, *supra* note 13, at 86 (citing Nam-Hee Do, *Kiuppei Janyeo Yangyuk Jiwon Shiltaewa Junkchekgwajae [Current State of Company Assistance on Care Leave and Remaining Legislative Tasks in Korea]*, KOREA INST. CHILD CARE & EDUC. (2012), <https://goo.gl/8Evrqy>).

87. *Id.* (citing OH, *supra* note 47).

88. *See, e.g., id.* at 87 (citing Seoul Central District Court [Dist. Ct.], *Hwang v. Lim*, Criminal Appeals Section 9, Feb. 13, 2014 (S. Kor.)) (stating that the Court of Appeals awarded the plaintiff \$2,000 USD when the firm fired the employee upon discovering she was pregnant).

89. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2016).

90. *Id.* § 2614.

direct result of the violation, interest on wages or actual monetary loss, and reasonable attorney's fees.⁹¹

The Equal Employment Opportunity Commission, hereinafter EEOC, amended Title VII of the Civil Rights Act of 1964 to include the Pregnancy Discrimination Act of 1978.⁹² The Pregnancy Discrimination Act requires an employer "to show that their policies do not have a disproportionate adverse effect on women, and that their policy is job related for the position in question and consistent with business necessity."⁹³ According to the EEOC, an "employer can prove a business necessity by showing that the requirement is 'necessary to safe and efficient job performance.'"⁹⁴ However, the policies can still be in violation of the EEOC if the employer refuses to adopt a less discriminatory alternative to satisfy their business needs.⁹⁵

A. FMLA Requirements and Compliance

The FMLA has a workable standard that employers can adhere to, which results in a high rate of compliance. Fifty-nine percent of employees are eligible for leave under the FMLA, and sixteen percent of the covered and eligible employees took a leave under FMLA in 2012.⁹⁶ In order to qualify for leave under the FMLA, employees must have worked for their employer for at least twelve months, logged 1,250 hours of work over the past twelve months, and been employed with a company that employs at least fifty individuals who live within a seventy-five mile radius of the company.⁹⁷ Companies that violate the regulations set forth under the FMLA may have to pay money damages including lost wages, interest on lost wages, and reasonable attorney's fees.⁹⁸

91. *Id.* § 2617(a)(1), (3).

92. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. §§ 2000e (2016)).

93. Camille Hébert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 J. GENDER, SOC. POL'Y & L. 107, 142 (2015). See generally 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2016).

94. JENNY R. YANG, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES 26 (2015), https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977)).

95. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2016); see also 42 U.S.C. § 2000e-2(k)(1)(C) (2016).

96. JACOB ALEX KLERMAN ET AL., ABT ASSOC. INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT i-ii (2014).

97. *FMLA (Family & Medical Leave)*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/benefits-leave/fmla> (last visited Jan. 16, 2018).

98. See 1 EMP. DISCRIM. COORD. *Analysis of Federal Law* § 32:77, Westlaw (database updated Apr. 2018); Deborah C. England, *What Money Damages are Available if You Win an*

The FMLA further protects employees by prohibiting employers from “discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise any FMLA right.”⁹⁹ According to the U.S. Department of Labor’s key findings for the Act’s twentieth anniversary, “the [FMLA] codified a simple and fundamental principle: Workers should not have to choose between the job they need and the family members they love and who need their care.”¹⁰⁰ The study showed that “employers generally find it easy to comply with the law, and misuse of the FMLA by workers is rare.”¹⁰¹

B. Legislative History of Title VII to Protect Women Against Discrimination

In *Muller v. Oregon*, decided in 1908, “the Supreme Court upheld a law restricting the number of hours women could work in laundries on the theory that the state was justified in acting to protect the ‘maternal functions’ of women.”¹⁰² On its face, these laws “accommodated the domestic and reproductive obligations of women to protect them from exploitation by employers.”¹⁰³ The United States Equal Employment Opportunity Commission issued its first guidelines on pregnancy discrimination in 1972, due to the pressure from women’s rights advocates.¹⁰⁴ The Court’s decision prior to the enactment of the Pregnancy Discrimination Act set a precedent that “women were not entitled to any ‘special’ benefits or treatments based on their pregnancy; but neither could employers penalize those women who were able to work while pregnant,” essentially stating that “a pregnant worker who could work like a man (or . . . a non-pregnant person), had the right to continue to do so.”¹⁰⁵

FMLA Case?, NOLO, <http://www.nolo.com/legal-encyclopedia/what-money-damages-are-available-if-you-win-fmla-case.html> (last visited Jan. 16, 2018).

99. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #77B: PROTECTION FOR INDIVIDUALS UNDER THE FMLA (2011), <https://www.dol.gov/whd/regs/compliance/whdfs77b.pdf>.

100. *Family Medical Leave Act Benefits Workers and Their Families, Employers*, U.S. DEP’T LAB. (Feb. 4, 2013), <https://www.dol.gov/opa/media/press/whd/WHD20130175.htm>.

101. *Id.* In fact, 91% of employers reported that complying with FMLA has either no noticeable effect or a positive effect on business operations. *See id.*

102. Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 72 (2013) (citing *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

103. Brake & Grossman, *supra* note 102.

104. *Id.* at 72-73.

105. *Id.* at 74.

The U.S. amended Title VII of the Civil Rights Act of 1964 to issue revised guidance addressing issues of pregnancy.¹⁰⁶ The EEOC enacted The Pregnancy Discrimination Act of 1978 to prevent discrimination on the basis of pregnancy, childbirth, or other related medical conditions.¹⁰⁷ Camille Hébert claims that “the disparate impact theory, rather than the disparate treatment theory” likely promoted Title VII’s requirement to accommodate pregnancy.¹⁰⁸ “Both disparate impact and disparate treatment refer to discriminatory practices [But] disparate impact occurs when policies, practices, rules or other systems that appear to be neutral result in a disproportionate impact on a protected group.”¹⁰⁹ Pregnancy-neutral policies cause a disparate impact to women because of the temporary physical limitations associated with pregnancy and childbirth.¹¹⁰ The Pregnancy Discrimination Act insisted that “employers abandon express rules and policies that classified on the basis of pregnancy, as well as stereotyped ways of thinking about the pregnant women as workers.”¹¹¹

Prior to the enactment of the Pregnancy Discrimination Act, the *Gilbert* Court held that exclusion based on pregnancy was not a distinction based on gender, even though pregnancy was confined only to women, because it is “different from the typically covered diseases” as pregnancy “is often a voluntarily undertaken and desired condition.”¹¹² Congress enacted the Pregnancy Discrimination Act after the ruling in *Gilbert*, showing that Congress intended to disapprove the *Gilbert* holding and the notion that discrimination based on pregnancy is not a form of sex discrimination.¹¹³ The Supreme Court held in *California Federal Savings & Loan Ass’n v. Guerra*, that the Pregnancy Discrimination Act was “intended to provide relief to working women

106. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2016); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. §§ 2000e (2016)); see also S. REP. NO. 95-331, at 2 (1977).

107. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. §§ 2000e (2016)).

108. Camille Hébert, *Disparate Impact and Pregnancy: Title VII’s Other Accommodation Requirement*, 24 J. GENDER, SOC. POL’Y & L. 107, 109 (2016).

109. *EEO: General: What are Disparate Impact and Disparate Treatment?*, SOC’Y FOR HUM. RES. MGMT. (Aug. 30, 2016), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx>.

110. See Hébert, *supra* note 108, at 109-11.

111. Brake & Grossman, *supra* note 102, at 67, 75 (first citing 42 US C § 2000e(k); and then citing H.R. REP. NO. 95-948, at 3 (1978), as reprinted in 1978 U.S.C.A.N. 4749, 4751).

112. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (citing *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 375, 377 (E.D. Va. 1974)).

113. Hébert, *supra* note 108, at 113 (citing CHAIRMAN HARRISON A. WILLIAMS, JR., COMM. ON LABOR & HUMAN RES., U.S. SENATE, LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 (U.S. Government Printing Office 1980)).

and to end discrimination against pregnant workers”¹¹⁴ and to “guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”¹¹⁵ The Court in *Nashville Gas Co. v. Satty* held that:

the employer’s policy of denying accumulated seniority to women returning from pregnancy leave violated Title VII, because, even though “neutral in its treatment of male and female employees,” the employer’s practice imposed a substantial burden on women and not men with respect to their employment opportunities that had not been justified by business necessity.¹¹⁶

C. *Success of Enactment of Law to End Discrimination Based on Pregnancy in the United States*

Since the enactment of the Pregnancy Discrimination Act, only a few cases involving pregnancy discrimination claims have reached the Supreme Court, meaning lower level courts have “taken a relatively strong reading of the Act.”¹¹⁷ However, this does not mean that pregnancy discrimination is no longer present in the U.S. But, the Pregnancy Discrimination Act has improved the workplace for women because there is an increased number of women working outside of the home since the passage of the Act.¹¹⁸ Although there are still many cases reported of women being discriminated against in the workplace and U.S. laws are not perfect in preventing discrimination in the workplace, there have been significant improvements since the enactment of the Pregnancy Discrimination Act.

V. CAN A LEGAL TRANSPLANT BE SUCCESSFUL IN SOUTH KOREA?

South Korea should consider a legal transplant of U.S. maternity leave laws to change their culture and attitude toward discrimination based on gender in the workplace. A legal transplant can be deemed successful when it solves the legal problem for which the transplant

114. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285-86 (1987) (citing 123 CONG. REC. 8,144 (1977)).

115. *Guerra*, 479 U.S. at 289 (quoting 123 CONG. REC. 29,658 (1977)).

116. Hébert, *supra* note 108, at 135 (quoting and citing *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140-43 (1977)).

117. Brake & Grossman, *supra* note 102, at 67, 77.

118. See Amal Bass, *Slow & Uneven Progress: The Pregnancy Discrimination Act at 35*, WOMEN’S L. PROJECT (Oct. 31, 2013), <https://womenslawproject.wordpress.com/2013/10/31/slow-uneven-progress-the-pregnancy-discrimination-act-at-35/>.

was made.¹¹⁹ Legal transplants may be an excellent option because of its “utility to the lawmaker: it is easier for the lawmaker to borrow a law than to create a law.”¹²⁰ Also, because law “gives expression to culture . . . [and] . . . provides symbols whereby cultural values and goals may be expressed[,]”¹²¹ legal transplants can also have a significant effect on and change the host culture.¹²² Therefore, if South Korea revises its laws, they will be able to change the mindsets and cultural values of people through the laws.¹²³ “A change in the behavior must be the first step . . . [and a] change in attitudes will follow.”¹²⁴ South Korea can change the behavior of companies and employees of companies by enacting laws that promote gender equality in the workplace, and then, eventually, causing a change in peoples’ mindset.

A. *A Country in Need of Transplant Should Be Looking for Solutions and Options*

In order for a transplant to be successful, it is important “that the country in need of the transplant is actually and actively looking for solutions and options, rather than waiting for the host . . . country . . . [to implement] laws that do not really fit their needs.”¹²⁵ To achieve viability, the “law must comport with the cultural context in which it is located”¹²⁶ At the very least, the law should not clash violently with the culture in which it is to be transplanted.¹²⁷ The law does not need to completely comport with culture, but should not be so invasive that it leads to rejection.¹²⁸ In fact, one study showed that a trans-

119. Salvatore Mancuso, *Legal Transplants and Economic Development Civil Law Vs. Common Law?, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS – PERSPECTIVES OF EVOLUTION* 75, 83 (Jorge Costa Oliveira & Paulo Cardinal eds., 2009).

120. Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT’L ECON. L. 1235, 1272 (1997) (citing Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996)).

121. *Id.* at 1276.

122. *See id.* at 1271.

123. In 1964, Martin Luther King stated: “Even though morality cannot be legislated, behavior can be regulated” as a response to whether he would wait until the culture was ready for civil rights legislation. James S. Cole, *Which Comes First: Changing the Culture or Changing the Law?*, MERCATORNET (July 29, 2013), https://www.mercatornet.com/articles/view/which_comes_first_changing_the_culture_or_changing_the_law/12528.

124. *Id.*

125. María Paula Reyes Gaitán, *The Challenges of Legal Transplants in a Globalized Context: A Case Study on “Working” Examples* (Oct. 2014) (unpublished Masters of Law dissertation, University of Warwick) (on file with the Social Science Research Network), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530811.

126. Nichols, *supra* note 120, at 1239.

127. *See id.* at 1273.

128. *See, e.g., id.* at 1273-74.

planted law survived even when it had little relationship to the host culture.¹²⁹

A transplant of U.S. Labor Laws would be successful in South Korea because it is not hostile to western concepts.¹³⁰ Many universities in South Korea teach a portion of their undergraduate and graduate courses in English, with some schools offering nearly a third of their courses in English.¹³¹ South Koreans see speaking English as a lucrative skill, and have the idea that “the ability to speak English is worth its weight in gold.”¹³²

There are signs that South Korea’s culture is already becoming more westernized. The older generation considers South Korea’s young adults to be more individualistic and westernized, because of the decline of “jeong.”¹³³ “Jeong” is a term used to describe “feelings of fondness, caring, bonding, and attachment that develop within interpersonal relationships.”¹³⁴ One critical aspect of “jeong” is deep interdependence, and a relationship of mutual give and take.¹³⁵ The fact that “jeong” is declining means that South Koreans are less focused on making sacrifices for their interdependent relationships, and are focusing more on their individual lives. Individuals now place more value on “personal happiness” and “work-life balance.”¹³⁶ People are no longer willing to sacrifice their current happiness for an uncertain future.¹³⁷ Since South Korea is showing their openness to western concepts by incorporating curriculum taught in English and

129. See *id.* at 1268-71 (illustrating the successful legal transplant in Kazakhstan despite the new law not having much of a relationship to Kazakhstani culture).

130. See Seong Hwan Cha, *Myth and Reality in the Discourse of Confucian Capitalism in Korea*, 43 *ASIAN SURV.* 485, 488 (2003) (indicating that western influence began on East Asian countries, including Korea, has been around since the nineteenth century); cf. Nichols, *supra* note 120, at 1274 (citing Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *AM. J. COMP. L.* 93, 97 n.14 (1995)) (indicating that a factor involved in Kazakhstani society accepting a transplanted law was that Kazakhstan “is not hostile to the West or Western concepts”).

131. *Studying in South Korea*, COMPLETE UNIV. GUIDE, <http://www.thecompleteuniversityguide.co.uk/international/asia/south-korea/> (last visited Feb. 6, 2018).

132. *The Future of English in Korea*, DIPLOMAT (June 29, 2014), <https://thediplomat.com/2014/06/the-future-of-english-in-korea/>.

133. See DANIEL TUDOR, *KOREA: THE IMPOSSIBLE COUNTRY* 100 (2012).

134. Christopher K. Chung & Samson J. Cho, *Conceptualization of Jeong and Dynamics of Hwabyung*, 3 *PSYCHIATRY INVESTIGATION* 46, 47 (2006).

135. TUDOR, *supra* note 133, at 92.

136. KCCI & MCKINSEY & CO., *supra* note 8, at 1; Annamarie Mann & Bailey Nelson, *Thinking Flexibly About Flexible Work Arrangements*, GALLUP (Dec. 12, 2017), <http://news.gallup.com/opinion/gallup/223304/thinking-flexibly-flexible-workarrangements.aspx>.

137. KCCI & MCKINSEY & CO., *supra* note 8, at 1.

being more individualistic, South Korea may be open to more western concepts, including U.S. maternity leave laws.

B. Korea is Showing Signs of Wanting to Change Their Corporate Culture

South Korea's corporate culture is changing, and companies are starting to adopt western corporate cultures.¹³⁸ Since South Korea is receptive to change, it is an opportune time for South Korea to reevaluate their current maternity leave provisions, and adopt U.S. maternity leave laws to better balance employer and employee interests. CJ Group, a South Korean conglomerate, is taking steps to “combat Korea's notoriously unsustainable work culture for women” by creating a “returnship” program that is specifically designed to help women returning to the workplace after being out of work for two or more years.¹³⁹ CJ Group's program includes “flexible hours, mentoring and special training from managers.”¹⁴⁰ While this is a great program, CJ Group is one of the only companies that offer this type of program for female workers to return to the workforce. As evidenced by the number of applicants, there is still a large number of female employees looking for flexible working hours to accommodate for their desire to advance their careers while taking care of their families.¹⁴¹

Samsung Electronics, ranked eighteenth on Forbes's “The World's Biggest Public Companies” list in 2016,¹⁴² has recently announced that they are going to change their corporate culture by moving “away from a top-down culture and towards a working

138. See Choong Y. Lee & Jennifer Lee, *South Korean Corporate Culture and its Lessons for Building Corporate Culture in China*, 9 J. INT'L MGMT. STUD., 33, 39 (2014).

139. Caroline Fairchild, *Korean Corporate Culture at a Crossroads*, FORTUNE (May 14, 2014), <http://fortune.com/2014/05/14/korean-corporate-culture-at-a-crossroads/>.

140. *Id.*

141. For instance, in 2013, 2,530 applicants applied for the 150 available positions. See Kim Rahn, *More Mothers Returning to Work*, KOREA TIMES (Aug. 19, 2013, 5:00 PM), http://www.koreatimes.co.kr/www/news/nation/2016/08/602_141345.html.

142. *The World's Biggest Public Companies: #18 Samsung Electronics*, FORBES, <http://www.forbes.com/companies/samsung-electronics/> (last updated May 2016) [<https://web.archive.org/web/20161012085820/https://www.forbes.com/companies/samsung-electronics/>]. In 2017, Forbes ranked Samsung Electronics as the fifteenth biggest public company in the world. *The World's Biggest Public Companies: #15 Samsung Electronics*, FORBES, <http://www.forbes.com/companies/samsung-electronics/> (last updated May 2017) [<https://web.archive.org/web/20170927160356/https://www.forbes.com/companies/samsung-electronics/>].

environment that fosters open dialogue.”¹⁴³ Samsung also said they “will . . . reduce unnecessary overtime and weekend work” to encourage “employees to spend time with their families”¹⁴⁴ Samsung’s announcement has sparked an interest in small and medium-sized companies to also change their corporate culture.¹⁴⁵ South Korea’s legislature should take this opportunity to revise maternity leave laws and encourage a change from old Confucian ideals while taking advantage of the momentum of the changing mindsets of their citizens as well as companies seeking a change in corporate culture.¹⁴⁶

In 2014, The Ministry of Gender Equality and Family (MOGEF) launched a taskforce to promote gender equality.¹⁴⁷ MOGEF’s objectives are to: expand women’s employment, create conditions for work-life balance, increase women’s representation, and spread the culture of gender equality.¹⁴⁸ Although the government has implemented many programs to promote gender inequality, the progress has been slow because of deep-rooted traditions and cultural norms that make it difficult for women to move up in their careers once they have families.¹⁴⁹ It may be more effective to enact laws, with penalties high enough to promote compliance, to encourage employers to encourage gender equality in the workplace.

C. Differences in U.S. Culture from South Korean Culture

The culture of the U.S. is largely based on individuality and equality,¹⁵⁰ as opposed to social harmony in South Korea.¹⁵¹ Ameri-

143. Se Young Lee, *World’s Biggest Startup? Samsung Electronics to Reform Corporate Culture*, REUTERS (Mar. 23, 2016, 10:27 PM), <https://in.reuters.com/article/samsung-elec-culture/worlds-biggest-startup-samsung-electronics-to-reform-corporate-culture-idINKCN0WQ0CT>.

144. *Id.*

145. Kim Jong-nam, *Changing Corporate Culture*, KOREA TIMES (June 3, 2016, 5:00 PM), http://www.koreatimes.co.kr/www/news/opinion/2016/06/162_206225.html.

146. As an example of South Korea’s willingness to change its corporate culture, South Korea’s legislature passed a bill on February 28, 2018 to be effective on July 1, 2018 to reduce Korea’s maximum working hours from sixty-eight hours per week to fifty-two, and making all public holidays mandatory paid days off. Anthony Chang et al., *New Legislation Reduces Maximum Weekly Working Hours in Korea*, LEXOLOGY (Apr. 10, 2018), <https://www.lexology.com/library/detail.aspx?g=eb4a6126-1eb4-4a78-a2c9-d20f382dcd1d>. The new law will initially be applied to large companies before being rolled out in stages to smaller companies. *Id.*

147. *See Gender Equality Policy*, MINISTRY GENDER EQUALITY & FAM., http://www.mogef.go.kr/eng/pc/eng_pc_f001.do (last visited Feb. 6, 2018).

148. *See id.*

149. Meg Kochuba, *The Republic of Korea*, PAUL HASTINGS, <https://www.paulhastings.com/genderparity/countries/korea.html> (last visited Jan. 27, 2018).

150. *Country Comparison*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country-comparison/the-usa/> (last visited Jan. 27, 2018).

151. Kim and Park, *supra* note 29, at 44.

cans value their independence and consider “themselves as separate individuals . . . [rather than] members of a close-knit, tightly interdependent family.”¹⁵² Essentially, “Americans are generally less concerned about history and traditions[,]” and more focused on what the future holds.¹⁵³ Americans also value equality, and uphold the idea that everyone is created equal, both men and women.¹⁵⁴ In the U.S., people typically refer to others by their first name, and generally use informal speech.¹⁵⁵ Americans are also direct and honest about their opinions, and encourage open communication to resolve any conflicts.¹⁵⁶ Gender roles are not as distinct in the U.S., and there are many instances where the woman is the primary breadwinner for the family.¹⁵⁷ Americans also value time, and discourage spending time on activities that have no visible or beneficial outcome.¹⁵⁸

D. *Why U.S. Laws Would Work in South Korea*

Like South Korea’s current situation of firing women due to pregnancy, the U.S. faced a similar situation prior to the enactment of the Pregnancy Discrimination Act. As noted by the National Partnership for Women & Families in its review of the Pregnancy Discrimination Act and its history, twenty five years after its passing, “Prior to the passage of the PDA, it was not uncommon for employers to fire female employees who became pregnant, require that they take unpaid leave, or deny them benefits such as insurance coverage for pregnancy-related conditions.”¹⁵⁹ Because of such discriminatory practices, the National Partnership for Women & Families led the

152. *Key American Values*, U. MO.–ST. LOUIS, <http://www.umsl.edu/~intelstu/Admitted%20Students/Visitor%20Handbook/keyvalues.html> (last visited Jan. 27, 2018).

153. *Id.*

154. *See id.*

155. *See American Culture*, INTERNATIONALSTUDENT, https://www.internationalstudent.com/study_usa/way-of-life/american-culture/ (last visited Jan. 27, 2018, 5:05 PM).

156. *See Key American Values*, *supra* note 152.

157. *See* Dennis Cauchon, *An American Role-Reversal: Women the New Breadwinners*, USA TODAY (Mar. 24, 2013, 5:24 PM), <https://www.usatoday.com/story/news/nation/2013/03/24/female-breadwinners/2015559/>.

158. *See Key American Values*, *supra* note 152.

159. *The Pregnancy Discrimination Act, 25 Years Later: Pregnancy Discrimination Persists*, NAT’L PARTNERSHIP WOMEN & FAMILIES, <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/the-pregnancy-discrimination.pdf> (last visited Jan. 30, 2018) (first citing *Gilbert*, 429 U.S. 125 (1976); then citing *Geduldig v. Aiello*, 417 U.S. 484 (1974); and then citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974)).

Campaign to End Discrimination Against Pregnant Workers for two years prior to the enactment of the Pregnancy Discrimination Act.¹⁶⁰

Similar to South Korea, the U.S. previously had special protections set forth for women that did not actually achieve their desired result. In 1908, prior to the enactment of the Pregnancy Discrimination Act, “the Supreme Court upheld a law restricting the number of hours women could work in laundries on the theory that the state was justified in acting to protect the ‘maternal functions’ of women.”¹⁶¹ However, the protection was merely a pretext for “preserving better jobs for men and did not affect all women equally.”¹⁶² This only began to change in the 1970’s “when women’s rights advocates succeeded in establishing a constitutional right of sex equality and the statutory ban on sex discrimination in Title VII began to take shape.”¹⁶³ Similar to the conditions in the U.S. before the passage and enactment of the Pregnancy Discrimination Act, the current South Korean laws enacted to “protect maternal functions of women” may simply be a pretext to justify the discrimination taking place in the workplace.

South Korea cannot turn a blind eye to the recurring problem of gender discrimination, as the culture has already started to change. On August 8, 2016, female employees of Samsung staged the largest walk out both Samsung and South Korea had ever seen in protest due to wage discrimination and unequal treatment.¹⁶⁴ As one report on the event indicated, “Nearly 30,000 women discarded their employee badges on the floor of the main lobby chanting, ‘Together We Are One, Without Us Nothing!’”¹⁶⁵ “Nearly every single female employee from Samsung HQ . . . vacated the[ir] office,” and fellow female employees located in global offices expressed their interest in joining the protest to bring solidarity to this issue of inequality.¹⁶⁶ The 30,000 females voiced their position by making it “clear that they . . . [would] not return until all female employees’ salaries are matched with their

160. *The Pregnancy Discrimination Act, 25 Years Later: Pregnancy Discrimination Persists*, *supra* note 159.

161. Brake & Grossman, *supra* note 102 (citing *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

162. Brake & Grossman, *supra* note 102 (first citing Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1237-38, 1239 (1986); and then citing David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 115 (1992)).

163. Brake & Grossman, *supra* note 102 (first citing *Reed v. Reed*, 404 U.S. 71 (1971); and then citing *Craig v. Borden*, 429 U.S. 190 (1976)).

164. Mike Kim, *Women of Samsung Walk Out—National Strike for Equal Pay Hits Korea*, MEDIUM (Aug. 9, 2016), <https://medium.com/@mikekimsf/women-of-samsung-walk-out-national-strike-for-equal-pay-hits-korea-22a185bdd3f7#4xzaqwf8y>.

165. *Id.*

166. *Id.*

male counterparts and 3 females are added to the Board of Directors.”¹⁶⁷ Due to this protest, the company became nearly inoperable as Senior Executives left offices and “global offices . . . also . . . [began] to shut down.”¹⁶⁸ Samsung accounts for nearly 25% of the Nation’s GDP, and is a role model for many small businesses.¹⁶⁹

This recent strike is one example that the mindsets of female employees are rapidly changing, and that the Confucian corporate culture cannot stay for long. This is a clear sign that South Korea must change their laws to adapt to women’s changing mindsets. South Korea should take an active role in reevaluating and rewriting the laws to instill a culture of equality in the workplace.

VI. CONCLUSION

South Korea should adopt United States labor laws, which provide more workable, far-reaching protections and tougher enforcement to better protect women from discrimination in the workplace.

167. *Id.*

168. *Id.*

169. *Id.*

TREATING THE INTERNATIONAL CHILD SEX TOURISM INDUSTRY AS A CRIME AGAINST HUMANITY

*Raven Washington**

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* J.D., May 2018, Southwestern Law School. I chose this topic after exploring the popular Red Light District of Amsterdam. The faces of the young girls in the windows inspired my research. I would like to thank my family and friends for their endless support during the writing process. I would also like to thank the Journal's faculty advisors, particularly Professor Johnathan Miller for encouraging me to critically think through my arguments and reach my end result. I would like to dedicate this paper to my amazing mother, Artrice, who sacrificed so much to give my siblings and I the world. Ye are of God, little children, and have overcome them: because greater is he that is in you, than he that is in the world.

I. INTRODUCTION

Child prostitution and sex trafficking have gained increased visibility throughout the world in recent years. Though we travel the world to find its beauty, in this modern interconnected world, children are more at risk than ever of being sexually exploited or sold to foreign travelers.¹ The United States Department of Justice defines the extraterritorial sexual exploitation of children as the act of traveling to a foreign country and engaging in sexual activity with a child in that country.² This is often referred to as “international sex tourism.”³ Sex tourism occurs over domestic waters and “across international frontiers—affecting victims, communities and nations across the globe.”⁴

According to End Child Prostitution in Asian Tourism (ECPAT), an international child advocacy organization based in Bangkok, child sex tourism in developing countries is a culturally embedded problem significantly exacerbated by foreign tourists.⁵ Numerous nationalities are affected by child sex tourists and many tourists come from nations (“sending countries”) that enjoy a standard of living much higher than the countries to which they travel (“destination countries”).⁶ Many tourists are identified as Americans who evade punishment, both abroad and in the United States.⁷ Some countries try to extraterritori-

1. See Najat Maalla M'jid (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Report of the Special Rapporteur on the Sale of Children, Child Prostitution, U.N. Doc. A/HRC/25/48* at 10 (Dec. 23, 2013); *Child trafficking, exploitation on the rise, warns UN expert*, U.N. NEWS CTR. (Mar. 13, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47346#V9DOKullgdU>; *Sexual exploitation of children: Global response urged to increasingly global crime*, U.N. HUM. RTS. OFF. COMMISSIONER (Mar. 13, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14363&LangID=E>.

2. *Extraterritorial Sexual Exploitation of Children*, U.S. DEP'T JUST., <https://www.justice.gov/criminal-ceos/extraterritorial-sexual-exploitation-children> (last updated Jan. 25, 2016).

3. See Jan Jindy Pettman, *Body Politics: International Sex Tourism*, 18 THIRD WORLD Q. 93, 96 (1997) (“The growth of military-base sex and of international air travel and tourism has increased the demand for paid hospitality, and for paid sex.”).

4. Miriam Cohen, *The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction*, 16 BUFF. HUM. RTS. L. REV. 201, 202-03 (2010).

5. See CATHERINE BEAULIEU, *EXTRATERRITORIAL LAWS: WHY THEY ARE NOT REALLY WORKING AND HOW THEY CAN BE STRENGTHENED* 4 (2008), http://ecpat-france.fr/centre_research/2-etudes_et_rapports/9-Legislation_relative_a_ESEC/4-Extraterritorial_laws_ECPAT-08.pdf.

6. Daniel Edelson, *The Prosecution of Persons Who Sexually Exploit Children In Countries Other than Their Own: A Model For Amending Existing Legislation*, 25 FORDHAM INT'L L. J. 483, 485 (2001) (citing Margaret A. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of the Children as Mandated by International Law?*, 18 FORDHAM INT'L L. J. 1852, 1853 n.11 (1994)).

7. Edelson, *supra* note 6, at 483-84 (citing *Poverty, Aids Fear Promote Sex Trade*, SEATTLE-POST INTELLIGENCER, Nov. 27, 1995, at A7).

ally extend their domestic laws against the sexual exploitation of children.⁸ Unfortunately, this expansion only holds nationals⁹ liable for offenses committed in countries other than their own, potentially leaving a gap for offenders to escape criminal liability.¹⁰

Article 1 of the Draft Optional Protocol of the United Nations Convention of the Rights of the Child Concerning the Elimination of Sexual Exploitation and Trafficking of Children (“Draft Optional Protocol”) recognizes the extent of the problem of sexual exploitation crimes and child trafficking, and identifies the need for both national and international legal responses to alleviate it.¹¹ All countries but two have signed the Draft Optional Protocol, making it one of the most universally ratified of all U.N. Conventions.¹² Article 1 of the Optional Protocol imposes the more specific obligation of criminalizing child prostitution, and Article 3 requires that this be so, whether or not the acts occur domestically or transnationally.¹³ Given the lack of central authority to enforce these international obligations, practical effectiveness is dependent on implementation through domestic legal frameworks.¹⁴ However, the United States has never sent the treaty to the Senate for consent and approval.¹⁵ The United States’ failure to ratify the Draft Optional Protocol proves the need for an amendment of current legislation that encompasses universal jurisdiction.

8. Edelson, *supra* note 6, at 484 (citing Mahesh Uniyal, “Sex Tourists” Face Prosecution at Home, INTER PRESS SERV., Aug. 23, 2000).

9. A national is someone “who is legally a citizen of a country or a nation.” *National*, COLLINS, <https://www.collinsdictionary.com/dictionary/english/national> (last visited Jan. 22, 2018).

10. See CHIEF FEDERAL MAGISTRATE PASCOE, FED. MAGISTRATES CT. AUSTRAL., THE PROBLEM OF ENFORCEMENT IN EXTRATERRITORIAL LAWS RELATING TO SEX TOURISM 5 (2012) (Chief Federal Magistrate Pascoe “[A]ssesses the effectiveness and desirability of extraterritorial sex tourism laws enacted in Australia, Japan, South Korea and Singapore”).

11. Douglas Hodgson, *Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies*, 19 MELB. U. L. REV. 512, 512 (1994).

12. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (as of June 2, 2010, only two nations have not signed the Convention, for a total of 193 parties); Adam Graycar, *Introduction* to Fiona David, *Child Sex Tourism*, AUSTRALIAN INST. CRIMINOLOGY, June 2000, at 1.

13. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography art. 1 & 3, *opened for signature* May 25, 2000, 2171 U.N.T.S. 227, 248.

14. Marianna Brungs, *Abolishing Child Sex Tourism: Australia’s Contribution*, 8 AUSTRALIAN J. HUM. RTS. 101, 107 (2002).

15. See Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US*, AM. CIV. LIBERTIES UNION (Nov. 20, 2015, 1:30 PM), <https://www.aclu.org/blog/speak-freely/theres-only-one-country-hasnt-ratified-convention-childrens-rights-us>.

Who are these sex tourism victims? Children have always been one of the groups most vulnerable to exploitation in the world. The subjects of the sex trafficking industry are children who cannot in any way express significant forms of legal consent.¹⁶ A universal definition of a child does not exist; therefore, the definition of “child” varies among countries.¹⁷ The United Nations Convention on the Rights of the Child (“U.N. Convention”), as well as the United States, defines the age of majority as eighteen years old.¹⁸ Varying ages of consent frustrate the prosecution of a person for sexual crimes committed against children in other countries.¹⁹ Defendants are likely to raise the defense of legal consent under laws of the country where the incident occurred to a child of a varying age.²⁰

Sex tourism, however, “is not an ordinary crime with transnational dimensions” and can be ranked among one of the “most serious crimes of concern to the international community as a whole.”²¹ Domestic bans on prostitution are almost impossible to enforce. Therefore, sex tourism with minors should be treated as a crime against humanity with universal jurisdiction where any country can bring charges against an offender.²² Specifically, the U.S. Department of Justice should take legislative and enforcement measures to hold Americans accountable for the mistreatment of children overseas. In addition, Congress should modify its current legislation to expand and apply the concept of universal jurisdiction to the lesser age of sixteen and under and prosecute those who participate. Under universal jurisdiction, any nation will be able to prosecute foreign offenders for sexual acts committed abroad against non-nationals.

The purpose of this article is to encourage the U.S. legislature to expand current laws and push other countries to adopt universal jurisdiction and treat sex tourism as a crime against humanity. First, this article will begin with an examination of the definition of “sex tour-

16. FARHAD MALEKIAN & KERSTIN NORDLOF, PROHIBITION OF SEXUAL EXPLOITATION OF CHILDREN CONSTITUTING OBLIGATION *Erga Omnes* 145 (2013).

17. Margaret A. Healy, *Child Pornography: an international perspective*, COMPUTER CRIME RES. CTR. (Aug. 2, 2004), <http://www.crime-research.org/articles/536/> (paper prepared for the World Congress against Commercial Sexual Exploitation of Children).

18. G.A. Res. 44/25, art. 1, Convention on the Rights of the Child (Nov. 20, 1989); *Age of Majority Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/a/age-of-majority/> (last visited Jan. 22, 2018).

19. Edelson, *supra* note 6, at 490.

20. *See id.*

21. Tome Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 INT'L & COMP. L. Q. 445, 445 (2005).

22. *Cf. id.* at 448-53 (making the argument that sex trafficking can be considered a crime against humanity).

ism” and describe the international nature of the industry. It will examine the extent of the problem around the world and the specific cause of children’s involvement. Second, this article will analyze the need for universal jurisdiction and how it will help combat the growing sex tourism industry. It will examine the evolution of child sex tourism legislation in the U.S. Third, just as universal jurisdiction is appropriate in slavery and torture, child sex tourism will be analogized to slavery and torture in the modern world.²³ Finally, this article will describe why universal jurisdiction would make the ultimate difference in taming the problem of child sex tourism.

II. INTERNATIONAL NATURE AND PROBLEMATIC EXTENT OF SEX TOURISM

Child sex tourism is a global problem. It is difficult to measure the exact number of children affected by sex tourism and the exact number of sex tourists.²⁴ The problem with sex tourism has exponentially increased due to globalization, poverty, organized crime, government corruption, and the growth of the global commercial sex industry.²⁵ The sex tourism problem is still beyond the reach of the laws created to help combat it.²⁶

ECPAT International defines child sex tourism as “the sexual exploitation of children by a person or persons who travel from their home district, home geographical region, or home country [to a foreign country] in order to have sexual contact with children.”²⁷ Participants of child sex tourism usually come from the United States, Japan,

23. *Cf. id.* at 453-56.

24. *See, e.g.,* Office of the Spokesman, *The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*, U.S. DEP’T ST. (Dec. 24, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/16216.htm> (“We do not know how many millions of children in the world are victimized in the multi-billion dollar commercial sex trade, since most of this criminal activity is hidden.”).

25. *See* KATHRYN CULLEN-DUPONT, *HUMAN TRAFFICKING* 3-9 (2009).

26. Caitlyn S. Goodman, *Human Trafficking: Modern-Day Slavery in Need of a Modern-Day Solution* (Dec. 2014) (unpublished M.A. in Government thesis, Johns Hopkins University) (on file with the Sheridan Libraries, Johns Hopkins University), <https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/37297/GOODMAN-THESIS-2014.pdf> (first citing Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 34 *J. Soc. & Soc. WELFARE* 57 (2007); and then citing Amy Farrell & Stephanie Fahy, *The Problem of Human Trafficking in the U.S.: Public Frames and Policy Responses*, 34 *J. CRIM. JUST.* 617 (2009)).

27. ECPAT INT’L, *COMBATING CHILD SEX TOURISM: QUESTIONS & ANSWERS* 6 (2008), http://www.ecpat.org/wp-content/uploads/legacy/cst_fa_q_eng.pdf.

Australia, and many European countries.²⁸ “Destination countries include Cambodia, Fiji, the Philippines, Sri Lanka, Thailand, Vietnam, several African countries, and countries in Central and South America.”²⁹ Tourists focus on these destination countries because their laws “protect children less rigorously.”³⁰

The means of participation in child sex tourism vary. Some tourists visit countries as a part of an organized sex tour; others are a part of an organized international pedophile ring; still, others visit and “become involved on a casual experimental basis”³¹—first for the beauty of the land and suddenly falling into curiosity. Some tourists believe that their sexual encounters with children help the children financially better their families and themselves, while others engage in sex tourism because “they enjoy the anonymity and security that comes with being in a foreign land.”³²

Eva Klain, author of *Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Response*, states that “children in other countries enter prostitution [and consequently the sex tourism industry] through exploitation of their lack of emotional security and self-esteem, homelessness, unemployment, or abuse and neglect.”³³ Other contributing factors of sex tourism include poverty, the expansion of the Internet, travel opportunities, and weak law enforcement.³⁴

28. Edelson, *supra* note 6, at 485 (first citing Laurie Nicole Robinson, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures via Article 39 of the United Nations Convention on the Rights of the Child*, 5 IND. J. GLOBAL LEGAL STUD. 239, 242 (1997); and then citing Defense for Children International, *Extraterritorial Legislation as a Tool to Combat Sexual Exploitation of Children, End Child Prostitution, Pornography and Trafficking for Sexual Purposes (“ECPAT”) Europe Law Enforcement Group* (1999) [hereinafter DCI Report]).

29. Edelson, *supra* note 6, at 485 (citing Healy, *supra* note 17, at 1854).

30. *Id.* at 485-86 (first citing Serge Kovaleski, *Sexual Exploitation in Latin America Soars as Tourism Does*, COM. APPEAL, Jan. 4, 2000, at A10; then citing Tom Hilditch, *The Price of Innocence*, SCOTSMAN, June 23, 2001, at 10; and then citing Uttara Choudhury, *India to Compile Foreign Paedophile Blacklist*, AGENCE FRANCE PRESSE, June 20, 2001 (Lexis Advance)).

31. Hodgson, *supra* note 11, at 515-16 (first citing Bernadette McMenamin, *Child Prostitution: A Tourism Industry Issue*, TRAVELWEEK, July 21, 1993, 6; and then citing ECPAT AUSTRALIA, *CHILDREN IN PROSTITUTION/VICTIMS OF ASIAN TOURISM: A MULTIDISCIPLINARY APPROACH 2*).

32. *Extraterritorial Sexual Exploitation of Children*, *supra* note 2.

33. EVA J. KLAIN, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, AM. BAR ASSOC. CTR. ON CHILDREN & THE LAW, *PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES* 36 (1999).

34. *See id.* at 36, 37.

Poverty is considered to be the root cause of child sex tourism and trafficking.³⁵ Author Ron O'Grady believes "poverty may be a consequence of population pressures, a lack of natural resources, an over-spending military and/or a compulsive drive for rapid modernization whose so-called 'trickle-down benefits' fail to reach those who need them most."³⁶ Unfortunately, many poor countries encourage the growth of their tourism industry to generate revenue while willfully ignoring the problem sex tourism generates.³⁷ Many children enter the industry because they are poor, illiterate, and lack the protection of a structured family.³⁸ As such children and their families search desperately for employment, they "become easy game for sex procurement agents who scour impoverished areas" in search of young children from financially struggling families.³⁹ In an effort to provide for their family, poverty stricken parents often sell their children or force them to leave their homes because brothel owners "convince them that their children will be performing legitimate jobs in the cities."⁴⁰ The introduction of Western goods in places where they were previously unavailable encourages parents and children to desire "modern comfort and luxury items[.]" further exacerbating poor parents' willingness to allow or encourage their children to enter the industry.⁴¹

Globalization and the ease of traveling has allowed the child sex tourism industry to both develop and flourish.⁴² The ease and affordability of international travel has allowed for the mobility of individuals to travel abroad and engage in sex tourism with children.⁴³ In

35. Vitit Muntarbhorn (Special Rapporteur on the Sale of Children), *Rep. on the Sale of Children*, ¶ 34, U.N. Doc. E/CN.4/51 (Jan. 28, 1991).

36. Hodgson, *supra* note 11, at 516 (citing RON O'GRADY, *THE CHILD AND THE TOURIST* 123 (1992)).

37. Amy Fraley, *Child Sex Tourism Legislation Under the Protect Act: Does it Really Protect?*, 79 ST. JOHN'S L. REV. 445, 454 (2012).

38. Nancy Beyer, *The Sex Tourism Industry Spreads to Costa Rica and Honduras: Are These Countries Doing Enough to Protect Their Children from Sexual Exploitation?*, 29 GA. J. INT'L & COMP. L. 301, 306 (2001).

39. *Id.*

40. Fraley, *supra* note 37, at 453 n.47 (citing Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 401 (1996)).

41. Kathy J. Steinman, *Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists*, 13 HASTINGS WOMEN'S L. J. 53, 57 (2002) (citing and quoting Healy, *supra* note 17, at 1870).

42. See Arielle K. Eirienne, *Child Sex Tourism: "Us" and "Them" in a Globalized World*, INQUIRIES J. (2009), <http://www.inquiriesjournal.com/articles/34/child-sex-tourism-us-and-them-in-a-globalized-world>.

43. See *id.* (citing JEREMY SEABROOK, *NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION* xi, 104 (2000)).

addition, “[m]odern technology makes child sex tourism easier.”⁴⁴ Often, the Internet acts as the marketplace where sex tourists find children to engage with sexually in other countries, and “also enables child sex tourists to provide each other with [relevant] advice and encouragement.”⁴⁵ These chat rooms and message boards provide detailed instructions on how to partake in the child sex tourism industry.⁴⁶ Tourists can now speak directly to their victims using social media channels with near immediacy.⁴⁷ They are able to groom and procure children before arrival by the click of a button.⁴⁸ According to researchers, “[i]n a country like South Korea, where advanced communication technologies are widespread, more than 95 percent of commercial sexual exploitation of children is arranged over the Internet.”⁴⁹ There is no accurate number of sex tour travel agents and sex tour websites that exist worldwide;⁵⁰ however, in 1999, it was estimated that there were “over twenty-six businesses in the United States that offered and arranged sex tours.”⁵¹

In many of the destination countries, local laws are not seriously enforced against foreign tourists, resulting in lax punishment.⁵² Low-paid law enforcement and other government officials have “been known to accept bribes from sex tourists” and many “are even part owners of brothels and prostitution enterprises.”⁵³ Seemingly as a result, “The worst sanction . . . sex tourists face is deportation which sometimes results in the offender travelling to another . . . [destination] country to continue the abuse of children.”⁵⁴ Sex tourists are rarely, if ever, convicted by the destination country.⁵⁵ Some sex tour-

44. Edelson, *supra* note 6, at 487 (citing SEABROOK, *supra* note 43, at 122).

45. Edelson, *supra* note 6, at 487 (first citing Joshua Kurlantzick, *Harm's Way: Child Sex Tourism Feeds Thailand's Economy*, THESE TIMES, Aug. 7, 2000, at 6; then citing SEABROOK, *supra* note 43, at 122; then citing Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community*, 4 J. GENDER RACE & JUST. 15, 19-20 (2000); and then citing Rod Nor-land & Jeffrey Bartholet, *The Web's Dark Secret*, NEWSWEEK, Mar. 19, 2001, at 44).

46. KLAIN, *supra* note 33, at 37.

47. *New Tech Fuelling Global Boom in Child Sex Tourism: Study*, AGENCE FRANCE PRESSE, May 12, 2016 (Lexis Advance).

48. *Id.*

49. *Id.*

50. Linda M. Ambroise, *Regulatory Space and Child Sex Tourism: The Case of Canada and Mexico*, in SEX AND THE SEXUAL DURING PEOPLE'S LEISURE AND TOURISM EXPERIENCES 81, 87 (Neil Carr & Yaniv Poria eds., 2010).

51. *Id.*

52. See KLAIN, *supra* note 33, at 37.

53. *Id.*; Fraley, *supra* note 37, at 456.

54. Hodgson, *supra* note 11, at 518.

55. *Id.* (citing Paul Ehrlich, *Asia's Shocking Secret*, READER'S DIG., Oct. 1993).

ists even jump bail and disappear without a trace during the prosecutorial stage.⁵⁶ This is not so shocking since the lucrativeness of the sex trade industry “attracts criminal syndicates and networks worldwide.”⁵⁷ Douglas Hodgson, author of *Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies*, identifies additional reasons for the lack of serious enforcement in the destination countries, including: “under-resourced police agencies and labour inspectorate, legal loopholes or lacunas, and the unwillingness of prostituted children to co-operate in police investigations due to a fear of prosecution and possible retaliation by the underworld.”⁵⁸

III. THE NEED FOR UNIVERSAL JURISDICTION

The complexity of the sex tourism industry requires multiple, long-term coordinated strategies including: enforcement of the law, co-operation of national and international governments and their law enforcement agencies, the involvement of tourist and governmental agencies, and the more efficient targeting of foreign development assistance.⁵⁹ Because of a lack of resources, many developing countries do not regularly enforce a prostitution ban, and are known destinations for sex tourists. Although there are federal crimes against sex tourism, the industry has continued to thrive. In order to combat this issue, the extraterritorial sexual exploitation of children should be treated as a crime against humanity and given universal jurisdiction because of its heinous nature.

The International Justice Resource Center defines universal jurisdiction as:

the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect.⁶⁰

Typically, universal jurisdiction results when more conventional criminal jurisdiction does not exist; for instance, when “the defendant

56. Hodgson, *supra* note 11, at 518 (citing Ehrlich, *supra* note 55).

57. KLAIN, *supra* note 33, at 37.

58. Hodgson, *supra* note 11, at 518 (first citing *Rep. on the Sale of Children*, *supra* note 35, ¶ 48; and then citing Justice Elizabeth Evatt, *Legal Responses to Child Prostitution and Tourism*, paper presented at the End Child Prostitution in Asian Tourism Conference, Melbourne, Australia, Nov. 1992, 5).

59. Hodgson, *supra* note 11, at 522.

60. *Universal Jurisdiction*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Jan. 26, 2018).

is not a national of the State, the defendant did not commit a crime in that State's territory or against its nationals, or the State's own national interests are not adversely affected."⁶¹

The doctrine of universal jurisdiction was originally created as a means to repress piracy.⁶² Since piracy occurred in the high seas, it was seen as outside the territory or traditional jurisdictional reach of states.⁶³ Pirates attacked ships, destroyed international navigational commerce, and thus created both a physical and economic threat to all nations.⁶⁴ Furthermore, these attacks were universally viewed as "grave" crimes because they involved heinous and wicked acts.⁶⁵ As a result, the basis for the claim that all states would be justified in exercising jurisdiction over pirates was formed.

The nature of crimes like piracy has been heavily relied on as a basis for expanding universal jurisdiction to other offenses.⁶⁶ As a result, what was developed was the "gravity of the harm" rationale, which views certain crimes as so heinous as to constitute an attack on the international order, and therefore, justifying states to prosecute alleged offenders in the interests of the international community.⁶⁷ This rationale has been invoked to expand the application of universal jurisdiction by analogizing the heinous nature of piracy with that of modern human rights.⁶⁸ Like pirates once did, the sex tourists move easily between countries without the fear of prosecution by universal jurisdiction. Sex tourists, like pirates, may evade justice and cause chaos in new locations. Thereby, based on the heinous nature of child sex tourism and its global impact, universal jurisdiction should apply to child sex tourism.

61. *Id.*

62. A. Hays Butler, *The Doctrine of Universal Jurisdiction: A Review of the Literature*, 11 CRIM. L.F., no. 3, 2000, at 353, 355 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (1962)).

63. See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 154 (2004).

64. See *id.* at 152-54.

65. See, e.g., *Trials of Major Bonnet and others 1718*, in 15 STATE TRIALS (HOWELL) 1231, 1235 (indicating that "As for the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reason of all men[.]" when discussing a case involving piracy).

66. See, e.g., M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 103, 107, 108-12, 152-53 (2001).

67. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 58-59 (1994).

68. See M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39 (Stephen Macedo ed., 2004).

Currently, “[m]ore than twenty countries legislate extraterritorially against the sexual exploitation of children.”⁶⁹ Extraterritorial legislation allows a sovereign country to apply and enforce its laws upon nationals for activities that occur outside of its territorial boundaries.⁷⁰ “[Extraterritorial] laws increase the likelihood of successfully prosecuting child sex tourists, because the legislation denies the tourists a safe haven in their home countries.”⁷¹ However, extraterritorial legislation is not the ultimate solution to abolishing the child sex tourism industry because extraterritorial legislation traditionally only covers nationals and their conduct that has a substantial effect within the national’s own country.⁷² Restatement § 402 states the bases of state’s jurisdiction:

- (1)
 - (a) conduct that, wholly or in substantial part, takes place within its territory;
 - (b) the status of persons, or interests in things, present within its territory;
 - (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.⁷³

Thus, to prosecute participating sex tourists, regardless of where they are or come from, universal jurisdiction should apply to the crime of child sex tourism.

A. *United States Legislation and Enforcement*

Even a limited U.S. statute has enabled some prosecutions and forced sex tourism underground. As a “sending country,” the United States “enables the international child market to flourish by providing

69. Edelson, *supra* note 6, at 493 (citing Defense for Children International, *supra* note 28).

70. Edelson, *supra* note 6, at 493 (citing Mark Weisburd, *Due Process Limitations of Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT’L L. 379, 383 (1997)).

71. Edelson, *supra* note 6, at 494 (first citing Heather C. Giordanella, *Status of § 2423(B): Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries*, 12 TEMP. INT’L & COMP. L.J. 133, 155 (1998); and then citing *Rep. on the Sale of Children*, *supra* note 35, ¶ 167).

72. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (AM. LAW INST. 1987).

73. *Id.* § 402(1)-(3).

a wealthy and willing customer base.”⁷⁴ The U.S. has adopted extensive legislation and other measures to curb the international exploitation of children and protect children.⁷⁵ “In order for these statutes to apply, the conduct must fall under federal jurisdiction.”⁷⁶

1. Participation in International Conventions

International conventions include provisions against child sexual exploitation.⁷⁷ In 1989, the United Nations adopted the seminal U.N. Convention on the Rights of the Child (“U.N. Convention”).⁷⁸ It is a human rights treaty that sets forth the civil, political, economic, social, health, and cultural rights of children.⁷⁹ After its introduction, 196 countries ratified the U.N. Convention.⁸⁰ The U.S. signed the U.N. Convention in 1995, but Congress has yet to ratify it.⁸¹ Articles 19, 34, and 35 of the U.N. Convention address the sexual exploitation of children, and require ratifying states to ensure that adequate legislative and enforcement measures exist to protect and to treat child victims of sexual abuse.⁸² There is no good reason for the United States not to ratify the U.N. Convention. However, “Ratifying the convention is not just saving face in the international community”—the U.S. must confront truths about the terrible treatment of children and how to bring laws and practices in line with human rights.⁸³

74. Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. LAW & CRIMINOLOGY 415, 415, 422, 428 (2004) (first citing LAURA BARNITZ, *COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: YOUTH INVOLVED IN PROSTITUTION, PORNOGRAPHY AND SEX TRAFFICKING* 16 (2d ed. 2000); and then citing Emily Nyen Chang, *Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 621 (2001)).

75. See, e.g., Mann Act, 18 U.S.C. §§ 2421-2423 (2016).

76. KLAIN, *supra* note 33, at 19.

77. See, e.g., Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Child Rights Convention]; G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959).

78. Child Rights Convention, *supra* note 77.

79. See *id.* art. 2, 3, 4, 8.

80. *11. Convention on the Rights of the Child*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf> (last visited Jan. 27, 2018, 7:30 AM) (detailing that 196 parties have ratified the Convention).

81. See *id.* (indicating that, although the “United States of America [signed the Convention on] 16 Feb. 1995[.]” the United States has not yet ratified the convention, which is apparent by the lack of notation under the “ratification” column).

82. See Child Rights Convention, *supra* note 77, art. 19, 34, 35.

83. Mehta, *supra* note 15.

2. Specific Legislation and Enforcement

Federal law makes it a crime for American citizens and U.S. residents to travel between states or to a foreign country “with the intent to engage in any form of sexual conduct with a minor (defined as persons under 18 years of age).”⁸⁴ The U.S. Department of Justice, in accordance with 18 U.S.C. § 2251, declares it illegal to assist or help another person travel for these purposes.⁸⁵ A conviction could land offenders with high fines and up to 30 years in prison.⁸⁶

Eva Klain points out that, “Proof of actual sexual acts is not required; only proof of travel with the *intent* to engage in sexual acts with a minor.”⁸⁷ For successful prosecution based on one’s intent to engage in sexual acts with a minor, intent must have formed prior to traveling; “and such intent may be difficult to prove without direct evidence such as travel arrangements booked through obvious child-sex-tour networks or operations.”⁸⁸ However, countries that have strengthened their national laws against child sex tourism have taken very different approaches. Combining the laws that have worked for other nations with the existing laws of the U.S. and universal jurisdiction should be effective in combating sex tourism, with the aim of eliminating the industry altogether.

The United States’ Mann Act (“Act”), which was extended in 1994 with the Child Sexual Abuse Prevention Act, criminalizes traveling in foreign commerce with the purpose of committing a sexual act with a child.⁸⁹ Section 2423(b) states:

(b) Travel with intent to engage in illicit sexual conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person [who is younger than 18 years old] shall be fined under this title or imprisoned not more than 30 years, or both.⁹⁰

Section 2423(b) punishes a defendant who travels “for the purpose of engaging in any sexual act” with a minor, even if no transpor-

84. *Extraterritorial Sexual Exploitation of Children*, *supra* note 2; 18 U.S.C. § 2251(a) (2016).

85. *Extraterritorial Sexual Exploitation of Children*, *supra* note 2; 18 U.S.C. § 2251(b)-(c)(1) (2016).

86. *Extraterritorial Sexual Exploitation of Children*, *supra* note 2; *see* 18 U.S.C. § 2251(e) (2016).

87. KLAIN, *supra* note 33, at 45 (emphasis added).

88. *Id.*

89. *See* 18 U.S.C. §§ 2421-2424 (2016).

90. *Id.* § 2423(b).

tation of a minor occurred.⁹¹ Application of the Act allows the U.S. to effectively prosecute sex tourists before they harm a child.⁹² To establish a defendant's criminal "purpose" in traveling, the government need only prove that engaging in a sexual act with a minor was the defendant's significant purpose, but not necessarily the sole purpose, of travel.⁹³ However, prosecution under the Mann Act has several issues including "the defendant's intent to engage in sexual activity, the purpose of interstate travel, and the defendant's knowledge of minor victim's age."⁹⁴ In 2002 and 2003, respectively, the United States effectively strengthened the Mann Act by passing the Sex Tourism Prohibition Act of 2002, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act") and the Trafficking Victim's Protection Reauthorization Act, which removed the "intent" requirement and criminalized the actions of sex tour operators as well as increased the maximum sentence for a violation from fifteen to thirty years.⁹⁵

IV. MODERN DAY SLAVERY AND THE SEX TRAFFICKING OF CHILDREN

The trafficking and exploitation of children can be viewed as an act of modern day slavery. The term "slavery" is a recognized term under international law which is given universal jurisdiction.⁹⁶ The Slavery Convention of 1926 defines slavery as "the status or condition of a person over whom any or all of the powers attached to the right of ownership are excised[.]" meaning that a "slave" is a person in such condition or status.⁹⁷ Farhad Malekian and Kerstin Nordlöf describe in their book titled *Prohibition of Sexual Exploitation of Children Constituting Obligation Erga Omnes*, "The term [slavery] implies the position of a person who has been denied any rights of her/his own and who is forcefully taken by another person or organization in order to be sold, exploited and used in whatever manner deemed necessary for the benefit of the owner."⁹⁸ The authors point out that, histori-

91. *See id.*

92. Edelson, *supra* note 6, at 527 (Healy, *supra* note 17, at 1906 n.391).

93. Edelson, *supra* note 6, at 529 (citing *United States v. Miller*, 148 F.3d 207, 211-13 (2d Cir. 1998)).

94. KLAIN, *supra* note 33, at 20.

95. *See* 18 U.S.C. §§ 2421-2423 (2016).

96. *See* Stephen Macedo et al., *The Princeton Principles on Universal Jurisdiction* 11, 29 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

97. Slavery Convention, art. I, § 1, Sept. 25, 1926, 60 L.N.T.S. 253.

98. MALEKIAN & NORDLÖF, *supra* note 16, at 123.

cally, the sex trafficking and exploitation of children has been likened to “white slave traffic.”⁹⁹

The White Slave Traffic Act, also known as the Mann Act, was signed into law by President Taft in 1909. Legislators sought to combat forced prostitution by making it illegal to transport a woman across state lines for “prostitution or debauchery, or for any other immoral purpose.”¹⁰⁰ In 1986, Congress amended the Act. The amendment further protected minors and replaced “debauchery” and “any other immoral purpose” with “any sexual activity for which any person can be charged with a criminal offense.”¹⁰¹ The term “white slavery” became popular to describe the predicament women faced.¹⁰² It was alleged that men would trick, coerce, and drug females to get them involved in prostitution and then force them to stay in brothels.¹⁰³

One of the most important sections of the Mann Act covering minors is Section 2423(a), which prohibits:

(a) Transportation with intent to engage in criminal sexual activity.—A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.¹⁰⁴

Because Section 2423(a) outlaws the transfer of children across state lines for the purpose of prostitution, the statute essentially criminalizes modern day slavery.

In addition, there are a number of international conventions related to abolishing slavery and suppressing sex trafficking to protect and secure the position of women or minors and to prevent and

99. *Id.* at 120.

100. *Knockout, The Mann Act*, PBS (Jan. 2005), <http://www.pbs.org/unforgivableblackness/knockout/mann.html>.

101. Eric Weiner, *The Lone, Colorful History of the Mann Act*, NPR (Mar. 11, 2008, 2:00 PM), <https://www.npr.org/templates/story/story.php?storyId=88104308>.

102. See generally *White Slavery*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20slavery> (last updated Mar. 15, 2018) (defining the term as “enforced prostitution”); *White Slave*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20slave> (last updated Mar. 15, 2018) (defining the term as “a woman or girl held unwillingly for purposes of commercial prostitution”).

103. Hannah Spruce, *Methods of Human Trafficking and Recruitment*, THEHUB (Feb. 15, 2017), <https://www.highspeedtraining.co.uk/hub/methods-of-human-trafficking/>; see *Sex Slavery/Trafficking: Frequently Asked Questions*, SOROPTIMIST, <https://www.soroptimist.org/trafficking/faq.html> (last visited Jan. 20, 2018).

104. 18 U.S.C. § 2423(a) (2016).

criminalize all acts of slavery or similar slavery practices.¹⁰⁵ The International Convention for the Suppression of the Traffic in Women and Children was adopted in 1921 to criminalize the sexual exploitation of women and children.¹⁰⁶ The convention omitted the term “white slave trafficking” and broadened the view for the criminalization of the sexual exploitation of women and children.¹⁰⁷ However, the international laws and conventions have not fixed the overall problem.

In the context of traveling to a foreign country to engage in sex with a minor, subsequent exploitation can easily be regarded as slavery because the right of ownership is fully exercised and retained when people are exploited in the sex industry of destination countries. The children are forcibly kept and are “exploited through acts which are neither permitted by law nor by custom.”¹⁰⁸ Often times, the children are kept drugged to comply. And the issue is prevalent, as “This modern form of slavery is the fastest growing organized crime and considered the third most profitable trafficking activity in the world”¹⁰⁹

Sex tourism can be analogized as slavery and should therefore be given universal jurisdiction. The majority of children being sold for sex are girls between the ages of twelve and fourteen.¹¹⁰ They are abducted, lured or forcibly taken by traffickers and then repeatedly raped, beaten into submission, and sometimes even branded.¹¹¹ If girls tried to escape, traffickers often tortured and/or gang raped them.¹¹² This twenty-first century form of slavery causes victims to be fearful and resistant to reporting this large invisible crime against human-

105. MALEKIAN & NORDLÖF, *supra* note 16, at 121.

106. See International Convention for the Suppression of the Traffic in Women and Children, *approved* Sept. 30, 1921, 9 L.N.T.S. 415.

107. MALEKIAN & NORDLÖF, *supra* note 16, at 135.

108. *Id.* at 126.

109. Goodman, *supra* note 26, at 3 (citing Pinghua Sun & Yan Xie, *Human Trafficking and Sex Slavery in the Modern World*, 7 ALB. GOV'T L. REV. 91, 93 (2014)).

110. See RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U. S., CANADA AND MEXICO 17 (2001), <http://www.gems-girls.org/Estes%20Wiener%202001.pdf>.

111. Heather J. Clawson et al., *Human Trafficking into and Within the United States: A Review of the Literature*, OFFICE ASSISTANT SECRETARY PLANNING & EVALUATION (ASPE) (Aug. 30, 2009), <https://aspe.hhs.gov/report/human-trafficking-and-within-united-states-review-literature#>.

112. *Girls, Human Trafficking, and Modern Slavery in America*, THINKPROGRESS (Oct. 6, 2012, 2:00 PM), <https://thinkprogress.org/girls-human-trafficking-and-modern-slavery-in-america-65ccb08523a/>.

ity.¹¹³ Since universal jurisdiction exists against slave trade, it should exist for child sex trafficking, which is categorized as a modern form of slavery. Therefore, universal jurisdiction over sex tourism and sex trafficking would effectively prosecute offenders and abolish this crime as a modern-day form of slavery.

V. TORTURE AND PSYCHOLOGICAL CONSEQUENCES ON CHILDREN

The crime of sex tourism can also be analogized to the crime of torture. Sex with a minor is rape.¹¹⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in Article 1:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹⁵

United States Code § 2340 provides the following definitions in relation to torture, beginning with defining torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

113. See Joachim Hagopian, *Global Human Trafficking, A Modern Form of Slavery*, GLOBALRESEARCH (Apr. 15, 2014), <http://www.globalresearch.ca/global-human-trafficking-a-modern-form-of-slavery/5377853>.

114. E.g., CAL. PENAL CODE § 261.5 (West 2012); see, e.g., Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal System of Home States*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION 503 n.51 (Craig M. Scott ed., 2001).

115. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality¹¹⁶

The United States has jurisdiction over any alleged offender who is a citizen of or present in the U.S., regardless of the victim or alleged offender's respective nationalities.¹¹⁷ Since the crime of torture permits international jurisdiction,¹¹⁸ it would not be a leap to apply universal jurisdiction to the crime of sex tourism due to its similar nature. Aida Alayarian, a Clinical Director of the Refugee Therapy Centre in the United Kingdom, defines torture as "a strategic means of limiting, controlling, and repressing basic human rights of individuals and communities that is often covert and denied by authorities."¹¹⁹ Alayarian further explains, "The impact of tortured children varies depending on the child's coping strategies, support, and cultural and social circumstances"¹²⁰ This means that, because destination countries are typically on the lower end of global economic prosperity, children from destination countries, who are most affected by child sex tourism, are most prone to being impacted by forms of torture.

The abuse of power involved in a child's "decision" to prostitute themselves to foreign tourists becomes clear when considering the conditions under which many children make such a "decision."¹²¹ The pimps and brothel owners intentionally inflict pain and suffering on the children to coerce them to have sexual encounters with stran-

116. 18 U.S.C. § 2340(1) (2012).

117. *Id.* § 2340A(b).

118. *Id.*

119. Aida Alayarian, *Refugee Therapy Centre, Children, Torture and Psychological Consequences*, 19 *TORTURE* 145, 145 (2009), https://irct.org/assets/uploads/Children_torture_and_psych_consequences.pdf; see also *Torture*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.").

120. Alayarian, *supra* note 119.

121. Sornarajah, *supra* note 114.

gers.¹²² This intentional infliction of severe mental or physical suffering is done for the demand and financial gain.¹²³ Unfortunately, the childrens' lack of education prevents them from defending themselves from the torture. For the minors involved, these acts have devastating consequences, which may include "long-lasting physical and psychological trauma, disease (including HIV/AIDS), drug addiction, unwanted pregnancy, malnutrition, social ostracism, and even death."¹²⁴

The psychological impact upon the victim is hard to measure. Nevertheless, many children suffer from a myriad of both emotional and physical problems.¹²⁵ The children live in constant fear because they are forced to endure violence regularly. The children are fearful of not only the physical abuse inflicted, but the fear of their next client and possible apprehension by the police.¹²⁶ In fact, many children are beaten and starved if they do not earn enough money.¹²⁷

Some children are so removed from the reality of the situation due to their abuse that they "believe that the sexual abuse is their fault[;]" others believe "that their pimp is really their boyfriend who loves them."¹²⁸ Many children are simply looking for the love and affection from their family, who may have encouraged sexual exploitation in the first place.¹²⁹ In order to cope with the ongoing torture, many children turn to drugs while others commit suicide to escape.¹³⁰ As shown above, the child sex tourism industry results in the sexual exploitation and torture of children.

122. See UNICEF & DEP'T OF WOMEN & CHILD DEV., *MANUAL FOR SOCIAL WORKERS: DEALING WITH CHILD VICTIMS OF TRAFFICKING AND COMMERCIAL EXPLOITATION* 10-11 (2005).

123. See Mohamed Y. Mattar, Adjunct Professor of Law and Co-Director of The Protection Project at Johns Hopkins University, School for Advanced International Studies, Speech at the "Child Sexual Tourism: The Appropriate Legal Response" Conference (Aug. 26-27, 2003) (transcript available online through the Protection Project), <http://www.protectionproject.org/wp-content/uploads/2010/09/Sex-Tourism-Response.pdf>.

124. *What is Trafficking in Persons?*, U.S. DEP'T ST. (June 27, 2017), <https://www.state.gov/jtip/rls/fs/2017/272003.htm>.

125. See *id.*

126. See *Child Sexual Exploitation in Developing Countries*, 44 REV. INT'L COMMISSION JURISTS 42, 45 (1990).

127. Berkman, *supra* note 40, at 402-03.

128. Fraley, *supra* note 37, at 450-51 (quoting *FAQ*, ECPAT, <http://www.ecpat.org/faq/> (last visited Mar. 8, 2018)).

129. See Fraley, *supra* note 37, at 451, 454 (citing KLAIN, *supra* note 33, at 7).

130. See KLAIN, *supra* note 33, at 9.

VI. THE END ALL BE ALL OF THE SEX TOURISM INDUSTRY: AGENDA FOR THE UNITED STATES

In order to combat sex tourism, extraterritorial sexual exploitation of children should be treated as a crime against humanity because of its heinous nature, but not necessarily created as a new crime under the Rome Statute.¹³¹ The International Crimes Database defines crimes against humanity as “inhumane acts – which would constitute crimes in most of the world’s national criminal law systems – committed as part of a widespread or systematic attack against civilians.”¹³² As a result, the sex tourism industry’s widespread and international effect justifies the simpler application of universal jurisdiction to the cause of that effect, sex tourism.¹³³

The traditional jurisdictional principles under international law—based on territoriality, nationality of the offender or the victim, or the essential interest of the State—have not been the most effective approach to apprehend traffickers who operate in many states and relocate often. The United States’ legislation against child sex tourism provides a basis for universal jurisdiction but, although the U.S. has begun to act, it is still insufficient. The U.S. should amend its existing legislation to incorporate universal jurisdiction to provide a guideline for other countries to follow. Thus, universal jurisdiction can become a useful tool to suppress a growing enterprise that plagues the world.¹³⁴

Classifying sex tourism as a crime against humanity and applying universal jurisdiction would serve the symbolic purpose of emphasizing its seriousness and would avoid oversimplifying the nature of sex tourism by categorizing it within other crimes of universal concern. Sex tourists, like pirates, are highly mobile individuals because of the growing technology and inexpensive air-travel. Sex tourism constitutes a serious violation of fundamental human rights.¹³⁵ Its heinous

131. This is because, generally, creating a crime against humanity requires an approved international definition. *Crimes Against Humanity*, INT’L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity> (last visited Jan. 19, 2018). As discussed, countries vary in their definitions and enforcement of laws. Instead, if the United States amends its laws, then other countries will likely follow.

132. KLAIN, *supra* note 33, at 9.

133. *See id.*

134. *See* Antonio Maria Costa, *Preface* to U.N. Off. on Drugs & Crime, *Global Report on Trafficking in Persons* 6, 7 (Feb. 2009), https://www.unodc.org/documents/Global_Report_on_TIP.pdf.

135. *See* CHERYL THOMAS ET AL., *DEVELOPING LEGISLATION ON VIOLENCE AGAINST WOMEN AND GIRLS* 214 (May 2011), <http://www.endvawnow.org/uploads/modules/pdf/1355776748.pdf>.

nature is magnified by the fact that it has a harmful physical and emotional impact on children. Universal jurisdiction will eliminate the problem areas that are lacking within national laws. To eliminate sex tourism entirely, a few changes should be made to current legislation and adapted by all countries to create the universal jurisdiction that this crime deserves. If the U.S. implements these small changes into current legislations when prosecuting sex tourism, all other countries are likely to follow.

A. Age of Protection: Consent

Since there is no universal age of consent, an international uniform age of consent to safeguard children is required. Generally, countries around the world have set their age of consent between the ages of thirteen and seventeen.¹³⁶ The differences in statutory age of consent between countries render extraterritorial prosecution of human trafficking and ultimately child sex tourism difficult.¹³⁷ Therefore, the United States should lower its consenting age of eighteen to sixteen, and encourage other countries to adopt this uniform age of consent. Universal jurisdiction and a uniform age of consent will allow consistent enforcement of the law of sexual exploitation of children. Tourists will no longer be able to use the defense of the alleged victim's legal consent under the laws of the country where the incident occurred.¹³⁸ The U.S. should expand and implement the changes to its current legislation.

B. Victim Testimony

The children who testify against their exploiters should be afforded the greatest protection and support possible. As proposed by Klain, victims' "testimony should be facilitated with the least disruption to their lives and rehabilitation[.]" in order to allow proper prosecution of sex tourists and secure victims' safety.¹³⁹ Legislation to protect children should have provisions that make testimony easier on the child, especially since the child often speaks a different language or does not understand the complexities of the foreign legal system. International interpreters should be easily accessible to translate a child's testimony.

136. KLAIN, *supra* note 33, at 45.

137. Edelson, *supra* note 6, at 534.

138. *See id.* at 490 (citing DCI Report, *supra* note 28, at 257).

139. KLAIN, *supra* note 33, at 46.

The victim's testimony is the most important evidence for litigation. It may be extremely hard for the child to come forward and relive their experience so it is understandable why children avoid testifying altogether. Telling their story can be done easier when victims are not pressured and intimidated by the presence of lawyers, judges and their oppressor. Author Daniel Edelson contends that the testimony process can be made easier if victims are "allowed to testify via video-link."¹⁴⁰ This is the perfect compromise to the fear of testifying.

The advancement of technology has allowed courts to bring video conferencing to the court room.¹⁴¹ The jury can see the victim's demeanor while testifying and the child's reaction to questions. In addition, the travel expense is non-existent when the child is not required to appear in court. With video testimony, victims can tell their story uninterrupted in an environment that is comfortable. There will still be a need under U.S. law to protect the defendant; however, safeguarding the interests of the child is the ultimate goal.

C. Effective Co-Operation and Communication Between Sending and Destination Countries

To facilitate evidence collection and successful prosecutions in cases of child sex tourism, countries must communicate effectively with each other. The U.S. is an influential country that many countries often follow. If the U.S. creates an effective line of communication, other countries are likely to follow suit. Thus, the U.S. should create a shared database accessible by all other countries. This database can be updated with relevant prosecution information to put other countries on notice of alleged sex tourists. Knowledge of potential tourists who travel in order to sexually exploit children should be globally known. Countries need to ensure that their police forces co-operate with each other to detect and apprehend offenders and investigate offenses.¹⁴² It has been proposed that co-operation between countries can effectively prevent actors in the sex tourism industry from merely relocating from one country to another.¹⁴³ In fact, Klain argues that "National legislation should promote strong extradition agreements and other arrangements to ensure that a person who exploits a child

140. Edelson, *supra* note 6, at 539.

141. See, e.g., Adam Bloomberg, *How Do I Present My Expert Witness In the Courtroom By Video Conference (AKA: Skype)?*, LITIG. INSIGHTS (Oct. 21, 2016), <http://litigationinsights.com/trial-technology/present-witness-courtroom-video-conference-skype/>.

142. See Hodgson, *supra* note 11, at 539-40.

143. *Id.* at 540.

for sexual purposes abroad is prosecuted in another country.”¹⁴⁴ The U.S. should train overseas police officers so that they are better able to investigate cases of child sexual exploitation and to care for victims. The U.S. should provide assistance to help destination countries enforce their domestic legislation against child sexual exploitation.

In addition to countries communicating with each other, countries should also communicate with the access channels of sex tourists. Currently, access channels—such as tour operators, travel agencies, airlines, and travel and tourism companies, as well as sending countries—have “developed information materials to inform their customers that CST [child sex tourism] is a problem that not only exists in multiple tourism destinations, but is illegal and has dire consequences for children[,]” which is communicated to travelers in several methods.¹⁴⁵ However, awareness should be brought to the forefront regarding the channels for reporting offenses by other tourists because it is not enough that these tourists be warned of the legal consequences of child sex tourism.¹⁴⁶ EPCAT groups provide safe reporting of incidents through email and telephone hotlines, which should be expanded to all nations as an available form of reporting.¹⁴⁷

D. *Strict Sentences*

The criminal justice system was created to deter bad decisions. Author Amy Fraley asserts that “the length of incarceration against child sex tourists must be severe enough to serve as true deterrents of the heinous behavior.”¹⁴⁸ The U.S. sentencing of 30 years is reasonable and severe for universal jurisdiction, and fines should be incorporated as well. The strict sentence allows for a true reflection of their heinous crime and keeps the sex tourist on a travel restriction. Further, the fines may not fully restore the victim’s psychological state, but they compensate the victim for injuries and emotional distress. While this may be seen as overreaching and not perfectly effective, strict sentences and incorporated fines would make it easier to oversee prosecutors and protect the children.

144. KLAIN, *supra* note 33, at 47.

145. ECPAT INT’L, *supra* note 27, at 27.

146. *Id.* at 28.

147. *See id.*

148. Fraley, *supra* note 37, at 466.

VII. CONCLUSION

Generally, crimes are subject to universal jurisdiction because of the extraordinary or aggravated level of heinousness.¹⁴⁹ The enduring violations against each individual victim's autonomy, liberty and basic human rights underscore the aggravated heinousness of child sex tourism. The lucrative financial gain increases the crime's abhorrence.¹⁵⁰ Additionally, child sex tourism affects most, if not all, nations. Because child sex tourism affects all states, it stands to reason that all states should be motivated to combat it.

Through an examination of sex tourism's international nature and cause, the problems with current legislation, and by comparing sex tourism to slavery and torture, the application of universal jurisdiction would close the loopholes in countries' laws that have allowed sex tourists to evade prosecution up to this point.

According to the U.N. News Center, in spite of real efforts and continued commitments, "significant efforts need to be done to protect, rehabilitate and reintegrate victims, provide reparation to children for the damage they have suffered, sanction those responsible, change social norms, and ultimately to prevent the exploitation."¹⁵¹ Acts of child trafficking occur domestically as well as across international frontiers¹⁵²—affecting victims, communities and nations across the globe. The complex nature of sex tourism, the failure of certain States to prosecute offenders, and the high mobility of offenders reveal the need to define it as a crime against humanity and expand the jurisdictional reach of States to suppose this phenomenon. It is up to the United States to push the boundaries to establish the principle of international law and produce co-operation among other countries. No place is too distant nor too remote to escape universal jurisdiction.

149. See, e.g., Kontorovich, *supra* note 63, at 136 (citing Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 184, 205 (2004)).

150. See KLAIN, *supra* note 33, at 37; see also *Child trafficking, exploitation on the rise, warns UN expert*, *supra* note 1.

151. *Child trafficking, exploitation on the rise, warns UN expert*, *supra* note 1 (quoting a statement made by Najat Maalla M'jid, the Special Rapporteur on the sale of children, child prostitution and child pornography, during her presentation to the U.N. Human Rights Council in 2014).

152. See *id.* (quoting a statement made by Najat Maalla M'jid, the Special Rapporteur on the sale of children, child prostitution and child pornography, during her presentation to the U.N. Human Rights Council in 2014).