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2019-2020

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International Focus at Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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PROTECTION OF RELIGIOUS AND ETHNIC MINORITIES BEFORE THE GENOCIDE CONVENTION

Mustafa Aijazuddin[1]

I. Introduction

International law is a body of rules established by custom or treaty and recognized by nations as binding in their relations with one another. International law "governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will."[2]

Customs are traditionally a major source of international law. Societies, individually, develop customs as a method to maintain order in society.[3] These customs, having developed into rules, are maintained frequently through "means of social pressure."[4] However, on an international level, Brigit Schlütter believes that "customs, together with treaties, is the most or second most important source of legal norms. This is commonly credited to the fact that the international legal order lacks a formal legislature or other centralized governmental organ."[5]

As such, for a custom to become international law, otherwise known as Customary International Law, there must exist: (1) evidence of State practice; and (2) *opinio juris*.[6] This means that for acts, social norms, or other implied social convention to be considered Customary International Law, the custom must amount to a settled practice, and must also "be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[7] Furthermore, State practice only contributes to forming Customary International Law when the State practice is consistent, widespread, and is shown to exist in an array of different legal systems.[8]

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[1] B.A., 20th Century European Geopolitics, University of Illinois at Chicago, 2016. J.D., The John Marshall Law School, 2019. Special thanks to Stuart Ford and William B.T. Mock for their support throughout the writing process.

[2] SS "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, at 18 (Sept. 7 1927).

[3] 62 BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA 10 (2010).

[4] *Id.* (citing MALCOLM N. SHAW, INTERNATIONAL LAW 68-69 (5th ed. 2003).

[5] *Id.*

[6] Statute of the International Court of Justice art. 38, ¶1(b).

[7] North Sea Continental Shelf (Ger. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶77 (Feb. 20, 1969).

[8] Statute of the International Court of Justice,); *see also supra* note 5; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2), §102(2) cmt. b (AM. LAW INST. 1987) (stating that "[c]ustomary international law results from a general and consistent practice of states" and further explaining that "practice of states" includes such things as "diplomatic acts and instructions . . . other governmental acts and official statements of policy"); *see also* WILLIAM MOCK, INTERNATIONAL LAW (Carolina Academic Press) (forthcoming) (manuscript at ch. 4, 5) ("To contribute to the formation of CIL, state practice must be consistent, widespread, and shown to exist in sources from a variety of different countries (both geographically and politically). Furthermore, the relevant state ac-

This paper reviews the existence of a custom, or norm, in international law that prohibits State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities. It does so by reviewing six treaties, one of which is a collection of treaties known as the Minority Treaties, and the actions of the ad hoc tribunal established to determine the guilt of Peter von Hagenbach on charges of wartime atrocities. The treaties analyzed are: The Concordat of Worms, 1122; the Edict of Nantes, 1598; the Peace of Westphalia, 1648; the Treaty of Küçük Kaynarca, 1774; the Treaty of Berlin, 1878; and the Minority Treaties. In doing so, this paper determines that there may have in fact existed ample support for the existence of such a norm.

The Concordat of Worms helps develop a norm by laying the groundwork for a State's intervention and prevention in other States. The Concordat is unrelated to a norm protecting ethnic or religious minorities; instead it brokered the respective sovereign powers between the Holy Roman Empire and the Catholic Church. However, this is where the norm starts to develop; the norm that eventually becomes a norm against State-sanctioned mass murder, harm, or oppression of minorities.

Next, the trial of Peter von Hagenbach is also an essential step that helps develop the above-mentioned norm. With the Concordat starting to create a norm that allows a sovereign to interfere with the affairs of another sovereign, especially in the governance of a country, the trial of Peter von Hagenbach takes this norm one step further. The trial created a recognition amongst sovereign States that some actions are so egregious as to warrant international intervention.

The Edict of Nantes supplements the norm against a State committing sanctioned mass murder of people, specifically a Huguenot minority, by taking decisive steps to extend and start develop an explicit right of a State to protect minorities inside and outside of its political borders, and by creating an external obligation on other States to prohibit the same conduct.

Similarly, the Peace of Westphalia ("the Peace") provides strong evidence of the signatories' intent to extend the Peace to include protections for religious minorities, in and outside of their own territories. It supplemented a norm that had begun to form; wherein States were entrusted to protect not only their homogenous citizens, but also people who held different religions, creeds, and ethnic backgrounds.

Furthermore, the Treaty of Küçük Kaynarca ("The Treaty") is another example of where States acted to ensure the protection of religious minorities. The Treaty was intended to protect Orthodox Christians traveling through and residing in the Ottoman Empire from State-sanctioned mass murder, harm, or other forms of oppression. It further supplemented a growing norm of protecting religious and ethnic minorities within the political territory of a different State by granting a right of intervention if a State failed to adhere to the tenants of the treaty or their obligation to protect said minorities under the treaty.

tions must be such that they arose out of a sense of legal obligation, not simply habit or national self-interest.").

Also, the Treaty of Berlin was intended, in part, to protect religious minorities in the newly recognized Balkan States after the Russo-Turkish War, 1877-78. The intent of the treaty was to create protection and a condition precedent to officially recognizing these Balkan States. These States had to agree to legally protect religious minorities before they would, or could, be officially recognized.

The last set of treaties that will be probed are collectively known as the Minority Treaties. These treaties required States to take steps to protect ethnic, religious, and linguistic minorities by prescribing that these people were to be viewed equally under the law and have the free exercise of their religion, language, and culture in their homes and societies. These treaties are a culmination of international protections against State-sponsored mass murder, harm, or oppression and expressly lay out the intent of nations to actively and effectively protect religious and ethnic minorities.

In determining the existence of this norm, all of the evidence provided has to fall within the criteria of customary international law, i.e. State practice and *opinio juris*. By reviewing the evidence in light of these criteria, there seems to exist a norm that prohibits States from engaging in state-sanctioned mass murder, harm, or oppression of ethnic and religious minorities. These treaties are the clearest form of evidence that exist, and they expressly represent the intent and understanding of each State involved in the treaty. They go to show observers, more accurately, other States, that the contracting parties believe that a norm exists which the contracting parties are bound to. The treaties show a statement of a norm through a wide period of time, 1474 to 1923. The treaties and trial span centuries, a multitude of different ethnic backgrounds and religions. Furthermore, States moved to include language and clauses in these treaties to protect ethnic and religious minorities and prohibit States from attempting to harm them in any form. This shows that these parties were aware that there, at the very least, may exist a norm that requires the protection of minorities. The evidence supports this because the treaties were the attempts of the States to ensure compliance with an existing norm.

II. Customary International Law: How the Progression of Law as Applied Creates Precedent for Preventing State-Sanctioned Atrocities

To be considered Customary International Law, there must exist evidence of: (1) State practice; and (2) *opinio juris*.[9] Customary International Law is "international custom, as evidence of a general practice accepted as law."[10] This means that for acts, social norms, or other implied social conventions to be considered Customary International Law, it must amount to a settled practice, and "must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[11] However, there is currently no consensus as to "how long a rule must be in

[9] Statute of the International Court of Justice, *supra* note 6. R

[10] *Id.*

[11] North Sea Continental Shelf, 1969 I.C.J. 3 at ¶77.

existence, the number of nations that must endorse it, whether the endorsement must take the form of actions or simply statements of support, or whether the endorsement must be made out of a sense of legal obligation or simply given as an expression of policy preference."[12]

A. State Practice

To form Customary International Law ("CIL"), there must exist evidence of State practice, or "general practice."[13] To determine State practice, it is beneficial to look at what States do in their relations with one another. State practice is about considering how States interact with one another and how they treat each other, geopolitically. Accordingly, general practice indicates that there must be a showing of a "common and widespread practice among States" in order for there to be a finding of CIL.[14] However, State practice does not need to be universally recognized or implemented; it can also be a representation of major political and economic systems that help create one custom.[15]

Under State practice, factors may be also used to help determine the extent of "common and widespread." According to Manley O. Hudson, a Special Rapporteur of the International Law Commission, State practice can be determined when there is evidence of the following factors:

(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;

(b) continuation or repetition of the practice over a considerable period of time;

(c) conception that the practice is required by, or consistent with, prevailing international law; and

(d) general acquiescence in the practice by other States.[16]

Courts have considered different sources that may establish evidence of CIL. These sources include: treaties, judgments and opinions of international or national judicial tribunals, national legislation, diplomatic correspondences, and general declaration of foreign policies.[17] Mark Villiger[18] argues that comments made, under official capacity, may constitute evidence of State practice as well. He claims that "[i]n the *Nicaragua Case*, the court had no hesitation to rely on statements made at diplomatic conferences" as evidence constituting State practice.[19] He claims that the court "referred to other *written texts*, for instance . . .

[12] Jon Kyl, Douglas J. Feith & John Fonte, *The War of Law: How New International Law Undermines Democratic Sovreignty*, FOREIGN AFFAIRS July/Aug. 2013, at 125.

[13] Statute of the International Court of Justice, *supra* note 6. **R**

[14] 28 MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 29 (fully rev. 2d ed. 1997).

[15] *Id.* (citing *North Sea Continental Shelf*, 1969 I.C.J. at ¶73. . .).

[16] Manley Hudson, *Article 24 of the Statute of the International Law Commission*, (1950) 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/16.

[17] VILLIGER, *supra* note 14, at 17. **R**

[18] Mark Villiger is a former judge of the European Court of Human Rights (2006-2015).

[19] VILLIGER, *supra* note 14, at 20. **R**

constitutions of international organizations, and *treaties*, when establishing the customary nature of norms."[20]

As such, one of the earliest examples of CIL being applied, in any court, is *The Paquete Habana* case heard in front of the United States Supreme Court in 1900.[21] During the Spanish-American War, the American navy seized a Spanish fishing vessel off the coast of Cuba.[22] The United States government then sold everything on the boat as well as the boat itself.[23] The court, attempted to determine, whether under international law, coastal fishing vessels peacefully engaged in catching and transporting fish were exempt from capture as a prize of war.[24]

The court analyzed obligations that may exist under international law that prohibited coastal fishing vessels, including their equipment, supplies, cargoes, and crews, which are unarmed and honestly pursuing their trade of catching and transporting fish, from capture as a prize of war.[25] There are a number of instances that the court cites where coastal fishing vessels engaged in commercial fishing, along with their cargoes and crews, were recognized as protected from capture as prizes of war.[26] King Henry IV of England, in 1403 and 1406, ordered the protection of fishermen from France, Flanders, and Brittany from capture by British soldiers, only in so far as the boats were engaging in fishing activities.[27] France reciprocated this practice.[28] Furthermore, both the United States and Great Britain recognized a similar practice during the Revolutionary War in 1776.[29] During that war, soldiers were ordered not to disturb fishermen from both sides as long as their vessels were full of fresh fish, did not contain offensive weapons or signs of providing aid to the enemy.[30] Similarly, in 1785, the United States and Prussia signed a treaty that provided that if war should arise between the two countries, all unarmed fishermen would be allowed to continue their employment uninterrupted.[31]

Historically, the only exception to this general protection for fishermen occurred due to the United States' suspicion of French and English fishermen during the French Revolution in 1789.[32] However, the United States again recognized this protection during the 1846 wars with Mexico.[33]

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[20] *Id.* (emphasis added. . .).

[21] *The Paquete Habana*, 175 U.S. 677, 678 (1900).

[22] *Id.* at 678.

[23] *Id.* at 679.

[24] *Id.* at 696.

[25] *Id.*

[26] *Id.* at 687-88.

[27] *Id.* at 687.

[28] *Id.* at 688.

[29] *Id.* at 689.

[30] *Id.* at 690-1.

[31] *Id.*

[32] *Id.* at 692.

[33] *Id.* at 696-7.

This same protection is also recognized in international law, and is discussed by French, Argentine, German, Dutch, English, Austrian, Spanish, Portuguese, and Italian writers on international law.[34] The wealth of information written about the subject by multiple nations suggests that it is an established rule of international law that coastal fishing vessels, including their equipment, supplies, cargoes, and crews, which are unarmed and honestly pursuing their trade of catching and transporting fish, are exempt from capture as a prize of war.

The *Paquete Habana* court determined that there existed ample evidence of widespread State practice prohibiting States from seizing fishing boats off the coast of a country, including Cuba. There was no sign that the *Paquete Habana* and the other fishing boat in question were not peacefully pursuing their normal fishing trade off the coast of Cuba, and thus they are protected from capture by the United States, as a prize of war.

Another example of international law is treaties. Treaties are, as defined by the Vienna Convention on the Law of Treaties ("Vienna Convention"), international agreements that are concluded between different States, bilaterally or multilaterally, in written form and governed by international law.[35] Treaties can also be laid out as a single instrument or in multiple related instruments and still be binding as a single treaty.[36] This article discusses treaties and the formation of customary international law through treaties in more detail below, under Section B – *Opinio Juris*.

This paper heavily considers treaties and the decisions of an ad hoc international judicial tribunal to establish evidence of State practice. Treaties, it has been claimed, are applicable examples of State practice.[37] Villiger claims that "when the customary rule has eventually developed, the written text may *reflect, or provide evidence of, the customary rule*."[38] The following treaties provide evidence of State practice that may have helped to form a custom against nations engaging in State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities within a State's own territory: The Concordat of Worms, 1122; the Trial of Peter von Hagenbach; the Edict of Nantes, 1598; the Peace of Westphalia, 1648; the Treaty of Küçük Kaynarca, 1774; the Treaty of Berlin, 1878. It will also briefly review, collectively, the Little Treaty of Versailles; the Austrian-Czech-Yugoslav Treaty of St Germain-en-Laye (1919); the Romanian Treaty of Paris (1919), the Greek Treaty of Sèvres (1920); the Hungarian Treaty of Trianon (1920), the Bulgarian Treaty of Neuilly-sur-Seine (1919), and the Turkish Treaty of Lausanne (1923).[39]

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[34] *Id.* at 694-707.

[35] Vienna Convention on the Law of Treaties, United Nations, art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[36] *Id.*

[37] VILLIGER, *supra* note 14, at 26. **R**

[38] *Id.* (emphasis added).

[39] *Paris Peace Conferece, 1919*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Paris_Peace_Conference,_1919 (mentions what is collectively known as the Twentieth Century's Minority Treaties).

i. Concordat of Worms, 1122

The Concordat of Worms, signed in 1122, was one of the first instances of a written accord that impliedly allowed sovereign States to exert control over the subjects of another State.[40] The Concordat granted the Papal States, specifically the Pope, a secondary authority to appoint and/or approve the appointment of clerics, including but not limited to bishops and abbots, in the lands of each Prince of the Holy Roman Empire.[41]

Prior to 1122, and the Concordat of Worms, a struggle existed concerning the spiritual and corporal authority over people.[42] The Catholic Church attempted to exert influence over the citizens of other sovereign States claiming that as the spiritual authority of all people, the Church was superior to any earthly authority,[43] thus, superseding the authority of kings and emperors. This struggle eventually led to the Concordat of Worms, where the Papal States and the Holy Roman Empire came to an agreement over two concurrent spheres of influences.[44]

The Concordat expressly addresses the privileges and obligations of the Papal States under Pope Callixtus II.[45] The Concordat of Worms claims, as to these privileges and obligations, that the States agrees to:

> . . . grant to thee beloved son, Henry . . . the elections of the bishops and abbots of the German kingdom, who belong to the kingdom, shall take place in thy presence . . . The one elected, moreover, without any exaction may receive the regalia from thee *through the lance*, and shall do unto thee for these what he rightfully should. But he who is consecrated in the other parts of thy empire[46] shall . . . receive the regalia from thee *through the lance*, and shall do unto thee for these what he rightfully should. Excepting all things which are known to belong to the Roman church . . .[47]

As a consequence of the Concordat, two political authorities were created within Germany that existed concurrently. The first was the right of the king, or emperor, to appoint a bishop or abbot with secular authority, "the lance," within his own domain. The Concordat expressly required the Papal States to recognize this authority. The Papal obligations required "the [bishop] elected, moreover, without any exaction" to "receive the regalia from [the emperor] through the

40 *Documents Relating to the War of the Investitures Concordat of Worms; September 23, 1122*, THE AVALON PROJECT DOCUMENTS IN LAW, HISTORY, AND DIPLOMACY (2008), http://avalon.law.yale.edu/medieval/inv16.asp (hereinafter Concordat of Worms).

41 *Medieval Sourcebook: The Concordat of Worms 1122*, FORDHAM UNIVERSITY (Jan. 1996), https://sourcebooks.fordham.edu/source/worms1.asp.

42 Samuel W. Bettwy, *United States - Vatican Recognition: Background and Issues*, 29, THE CATHOLIC LAWYER 225, 229 (2017).

43 *Id.*

44 *Id.*

45 *Concordat of Worms*, *supra* note 40. R

46 *Id. (*here, the *Concordat of Worms*, is intentionally silent as to the other kingdoms, principalities, dukedoms, comte, margraviates, bishoprics, abbacy, etc., that fell outside of the political borders of the German Kingdom.).

47 *Id.*

lance."[48] Meaning, the Papacy could no longer appoint a cleric without the consent of the emperor. Furthermore, the State created an obligation for itself when it confirmed the emperor's feudal rights by asserting that the emperor "shall do unto thee for these what he rightfully should."[49] The king, then, was invested with every feudal right and privilege that came with being the sovereign lord of these clerics. He was able to levy military support, have the bishop conduct administrative duties for the empire, and other tasks that were required by the emperor to effectively operate the empire. The Papal States, thus, were forbidden from interacting with clerics in any political capacity.

However, the Concordat of Worms granted the Papal States the privilege to appoint bishops and other clerics in territories that fell squarely outside of the Kingdom of Germany. This privilege had not existed, on such a widespread scale, prior to the Concordat. The Concordat expressly asserts that the right of the king, or emperor, to appoint bishops only extends within the borders of the Kingdom of Germany. It states, "the elections of the bishops and abbots of the German kingdom, who belong to the kingdom,"[50] but intentionally excludes any mention of the other kingdoms, principalities, and other feudal realms. The result of this exclusion was that the Pope was able to exert significant influence within the Holy Roman Empire without violating the Concordat.

The Concordat of Worms was one of the first instances that a sovereign State was able to exert influence and control over another State. The Papal States were able to exert influence over the Holy Roman Empire and ensure that the emperor adhered to Papal will. The Concordat resulted in bishops owing their allegiance in worldly matters both to the Pope and to the king because it gave secular authority, "by the lance," to the Holy Roman Emperor, but it allowed the Pope, as the head of the Papal State, to exert influence, through ensuring that the spiritual integrity was superior to corporal authority.

Thus, the Concordat helped to develop a norm where one State is able to influence the actions of another. This norm eventually grew into States creating a prohibition on other States from engaging in State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities within a State's own borders. The Concordat of Worms was merely the first step in this developing norm.

ii. The Trial of Peter von Hagenbach, 1474

The trial of Sir Peter von Hagenbach was one of the first instances of when Nation-States came together to place offending States on notice that actions committed against people, both citizens and non-citizens, were violations of an established norm.[51] The decision rendered by that court was vital to the development of the norm prohibiting States from engaging in State-sanctioned mass murder of civilians. This ad hoc tribunal determined that von Hagenbach had "trampled

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Gregory S. Gordon, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law* (2012), https://ssrn.com/abstract=2006370.

under foot the laws of God and man."[52] Through these actions, the court created an implied norm that placed commanders and other sovereigns on notice that they may be under an international obligation to abstain from raping, sacking, and killing people.[53]

Peter von Hagenbach was a commander in the service of Charles the Bold, Duke of Burgundy, in 1474.[54] He was given the status of governor of Alsace by Charles and tasked with maintaining Charles' authority in his recently acquired holdings from the Archduke of Austria, Sigismund von Habsburg.[55] Though the reason for the cities', specifically Breisach's, rebellion is unknown, Professor Cherif Bassiouni believed that Breisach rebelled because of the Duke's "[u]ninterest in the fate of the distant German townspeople," and that "[he] ordered Peter to collect massive exactions" of taxes.[56] He levied heavy taxes and controlled his new possessions hard-handedly; territories who, up until then, had been subjects of an absentee monarch in distant Austria. Charles sent von Hagenbach to Breisach to enforce his will and von Hagenbach used that position to "murder, rape, pillage, [and] wonton[ly] confiscate" people's property.[57] Von Hagenbach brutalized the Alsatians under Burgundy's control when there was no war nor an external conflict. He controlled Charles' Alsatian territory as if Burgundy was occupying Alsace under military occupation during a war.[58]

When he was finally captured, von Hagenbach was arrested by Freidrich Kappelar, a citizen of Breisach, and held to await the judgment of Sigismund, Archduke of Austria. Sigismund, however, made an unprecedented decision for his time, and ordered a trial be to convened to have von Hagenbach answer for the raping, pillaging, and murders committed by him and his troops; a trial that would be tried by twenty-eight representatives of the surrounding sovereign States.[59] He was eventually charged with murder, conspiracy to commit murder

[52] *Id.* at 177 n. 2127 (*citing* Jules Deschenes, *Toward International Criminal Justice*, in ROGER S. CLARK & MADELEINE SANN, THE PROSECUTION OF INTERNATIONAL CRIMES: A CRITICAL STUDY OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 30 (2003)).

[53] *Id.* at 7-9.

[54] Sources differ on whether von Hagenbach was a *condottiere* hired by the Duke to specifically enforce the Duke's authority in the Alsace, including the city of Breisach, or whether he was already in service of the Duke at the time that he committed the charged crimes. *Id.* at 17 n. 21, *citing* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 298 (2010).

[55] Many sources differ on how and why Charles the Bold acquired these territories, including the city of Breisach. However, a majority claim that Charles acquired these holding because the Archduke of Austria found himself on the brink of financial ruin and could not pay the Swiss or maintain control over his possession in the Upper Rhine. Thus, he mortgaged his Rhinish holdings on both sides of the of the Rhine, including: The Landgraviate of Alsace, the counties of Ferrette and Hauenstein, the towns of Breisach, Ortenburg, Rheinfelden, Seckingen, Lauffenburg, and Waldshut. Sigismund, out of this arrangement, received 50,000 Rhenish florins and a promise from Charles that he would pay the Swiss reparations in the sum of an additional 10,000 Rhenish florins. RICHARD VAUGHAN, CHARLES THE BOLD: THE LAST VALOIS DUKE OF BURGUNDY 84, 85-89 (Woodbridge: The Boydell Press 2002).

[56] Bassiouni, *supra* note 53 at 298.

[57] Gordon, *supra* note 51, at 7. **R**

[58] *Id.*

[59] Sigismund ordered such a trial because of von Hagenbach's station as a governor and representative of the Duke of Burgundy. These States included the cities of Breisach, Strasbourg, Sélestat, Colmar,

to exterminate the citizens of Breisach, perjury, and rape of numerous women and girls, including nuns.[60]

During von Hagenbach's trial, the prosecutor argued that von Hagenbach had "trampled under foot the laws of God and man," when he decided to rape, murder, and pillage the people he was sent to govern.[61] The prosecutor claimed that von Hagenbach's actions, as a representative of the Duke, violated the "the privilege he swore to protect when taking his oath of office"[62] and that his actions went against "God, [and] justice."[63] Kelly Dawn Askin argued that rape is an instance where "customary norms of warfare . . . considered [rape] a serious violation and commanders could be held personally responsible for failing to halt these crimes."[64] Even then, rape had been considered a crime and was held to be punishable for anyone who would violate it, including the nobility.[65]

As a result of these actions, the international community interceded to bring an end to von Hagenbach's reign. Austria, along with the 28 other States, tried von Hagenbach for his crimes because they recognized that some actions, like rape, that were so egregious that warranted international intervention from other States. The trial of Peter von Hagenbach served to advance a developing norm where States intervened to protect ethnic and religious minorities when other States engaged in actions so egregious as to warrant international intervention.

iii. The Edict of Nantes, 1598

The Edict of Nantes further supplemented the norm against State-sanctioned mass murder of people, specifically minorities.[66] The Edict was the culmination of the preceding events, the Concordat of Worms and the 1474 trial of Peter von Hagenbach, that helped shape the foundation of a developing norm. The Concordat of Worms allowed a sovereign of an independent nation to exert powerful political influence within the territories of another State.[67] Similarly, the trial of Peter von Hagenbach gave rise to States acknowledging that a prohibition against

Basel, Thann, Kenzingen, Neuburg am Rhein, Freiburg im Breisgau, Berne, as a member of the Swiss Confederation, and Solothurn, an ally of Berne. *Id.* at 30.

60 VAUGHAN, *supra* note 55, at 285; *see* JOHN FOSTER KIRK, HISTORY OF CHARLES THE BOLD, DUKE OF BURGUNDY 411 (Philadelphia: J.P. Lippincott & Co. 1864); *see also* GABRIELLE CLEAR-STAMM, PIERRE DE HAGENBACH: LE DESTIN TRAGIQUE D'UN CHEVALIER SUNDGAUVIEN AU SERVICE DE CHARLES LE TEMERAIRE 11 (Société d'Histoire du Sundgau 2004). R

61 Gordon, *supra* note 51, at 31-32. R

62 *Id.* at 44.

63 *Id.* ("Also, he had overwhelmed by force and against their will many married women, maidens, even nuns in the state of Brisacensis and had done the same things against God, justice, and all honesty not only there, but also in many other towns and villages").

64 Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 5, 28-29 (M. NIJHOFF PUBLISHERS 1997).

65 Jordan J. Paust, *ISLA Panel Oct. 18, 2003, At Loyola University New Orleans-Panel On History Of International Tribunals Prior To Nuremberg: Selective History Of International Tribunals And Efforts Prior To Nuremberg*, 10, ILSA J. OF INT'L & COMP. LAW, 207, 207-213 (2003).

66 HUGUENOT SOCIETY OF AMERICA, *Tercentenary Celebration of the Promulgation of the Edict of Nantes*, APRIL 13 ARTICLE 52 (New York: The Huguenot society of America, 1900).

67 *See* Section 1 of this paper.

certain conduct, like rape, had "been considered a . . . crime for centuries, and punishable as such;" thus, acknowledging that some actions warrant international intervention.[68] Following these defining moments, the Edict of Nantes then took the first decisive step to extend and start developing an explicit right of a State to protect a religious, ethnic, or racial minority.[69]

The Kingdom of France, prior to the passage of the Edict of Nantes, found itself in the grasps of the Wars of Religion.[70] France had been ravaged by internal religious conflicts between the dominant Catholic and young Protestants Huguenots[71] However, Huguenots were more than just Protestants; they were Protestants of French descent who followed the Reformed tradition.[72] This identity eventually allowed them to become an ethno-religious group that predominantly operated in France and surrounding territories, such as the Kingdom of Navarre. However, this ethno-religious group faced severe political backlash from French Catholic leaders moved quickly brand this new group as heretics and a "religion of rebels".[73] As result, France was thrown into chaos because of this religious disunity.

The Edict, for the most part, granted the Huguenots substantial rights that had been reserved for Catholics at the time. In the edict, Henry IV de Bourbon aimed to promote civil unity by separating it from religious unity. Hence, the Edict granted the Huguenots a new right in the form of an international level of protection that had not been seen before. The Edict asserted:

> His Majesty will write to his ambassadors to solicit for *all* his subjects, even for the said pretended Reformed religion, that they may not be

[68] Gordon, *supra* note 51, at 8 (quoting Thom Shanker, *Sexual Violence*, in ROY GUTMAN, DAVID RIEFF, & ANTHONY DWORKIN, CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 323 (2d ed. New York: W.W. Norton & Co. 2007)). R

[69] It is worth noting that the Edict of Nantes, 1598, does not in any express language states France's actual ability to enforce the Edict outside of its own territories. HUGUENOT SOCIETY OF AMERICA, *supra* note 66 at 52-105 for a complete translation of the Edict, accompanying documents, and a discussion on the Edict's scope.

[70] The Wars of Religions were internal conflicts within France that dated from 1562–1598.

[71] Ethnoreligious is identified as people whose religion and ethnicity are intertwined. In the first case, termed "ethnic fusion," "religion is the foundation of ethnicity, or, ethnicity equals religion, such as in the case of the Amish and Jews." Yang Fenggang and Helen Rose Ebaugh, *Religion and Ethnicity among New Immigrants: The Impact of Majority/Minority Status in Home and Host Countries*, J. FOR THE SCI. STUDY OF RELIG., Vol. 40, No. 3 367–78, 369 (2001), http://www.jstor.org/stable/1388093. As such, the Huguenots were protestants of French descent whose religion was the basis of their identity; to be Huguenot was to be French and Protestant. There is no way to differentiate a Huguenot's identity separately.

[72] The Reformed tradition is also known as Calvinism, a religious subsect of Protestantism that follows the teachings of Jehan Cauvin, also known as John Calvin. Daniel Peterson, *The Protestant Reformation's other great writer*, Deseret News, September 17, 2017, https://www.telegram.com/news/20170917/protestant-reformations-other-great-writer.

[73] The history of the Huguenots in France is much more complicated than this statement purports it to be. However, this historical component does not lead into an understanding of how the Edicts of Nantes, 1598, ensured protections of this new ethnoreligious minority. As a synopsis: Francis I of France attempted to navigate a middle path when he was confronted with Catholic resistance to the arrival and promulgation of the Protestant faith in the form of Calvinism, Lutheranism, etc. However, after the Affair of the Placards – a series of events, starting in 1534, where Protestant extremists began pinning up anti-Catholic posters including the bedroom door of the French King – Francis began taking a hard-line stance on the political dissidence of the Protestant faith.

> forced to do anything against their conscience, nor be subject to the Inquisition, going, coming, travelling and trading in foreign countries, the allies and confederates of this Crown, provided, always, that they do not offend against the laws of the country in which they may be.[74] (*Emphasis added*)

Looking at Article 53 shallowly, it seems that Henry created an international right of protection for all subjects of the kingdom while traveling abroad or conducting business in foreign countries. It states, "they may not be forced to do anything against their conscience nor be subject to the Inquisition, going, coming, travelling and trading in foreign countries."[75] The Article, thus, conferred to the sovereign the authority to protect minorities, in this specific case, the Huguenots, from being mistreated, seized, charged, tried, murdered, raped, or harmed in any way. Because Protestants are a minority in France, the Article was Henry's attempt to exercise his authority outside of France's borders to protect Protestants, while abroad, from any problems they may face from other Catholic nations or the Catholic Church.

However, looking at Article 53 on a deeper level, it conferred to the king the authority to deny another State from engaging in activities that would been seen as detrimental to the Huguenots, and seek remedies. The Article, theoretically, gave the king an implied right to seek remedies against an offending State that detrimentally harmed the Huguenots. As a consequence, the authority of the Papal States, and the Pope, was curbed by the Edict because it prevented the Pope, and his inquisitors, from harming Huguenots both inside and outside of France. The shift that occurred from the Concordat of Worms to here was the king now exerted political power and influence externally to *every* State that was an "all[y] and confederat[e]" of France, whereas the Concordat targeted one specific State.[76]

Thus, the Edict of Nantes supplemented the norm against a State, or another State, committing sanctioned mass murder of people, specifically a Huguenot minority, by taking decisive steps to extend and develop an explicit right of a State to protect minorities inside and outside of its political borders, and by creating an external obligation on other States to prohibit the same conduct.

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[74] ANN MAURY, MEMOIRS OF A HUGENOT FAMILY: TRANSLATED AND COMPILED FROM THE ORIGINAL AUTOBIOGRAPHY OF THE REV. JAMES FONTAINE, 492, (New York: G. P. Putnam & Sons, New Ed., (1872) 1658, https://babel.hathitrust.org/cgi/pt?id=hvd.32044020052973;view=1up;seq=12. Furthermore, different translations sometimes have different specific phrasings for Article 58. The Huguenot Society of America in 1900 released a book titled *Tercentenary Celebration of the Promulgation of the Edict of Nantes*, translated the Edict slightly differently; they instead translated it as:

> His Majesty will write to his ambassadors to see to it, in respect to all subjects, and especially to the said, so-called Reformed religion, that they shall not be molested for matters of conscience, nor be subject to the Inquisition, going, coming, sojourning, negotiating, trafficking in all foreign countries in alliance and confederates with this crown, provided that they give no offense to the police of the countries where they may be.

HUGUENOT SOCIETY OF AMERICA, *supra* note 66, at 103-04. **R**

[75] *Id.*

[76] *Id.*

iv. Peace of Westphalia, 1648

The Peace of Westphalia was another instance in which influential States convened together to recognize and prescribe inherent rights, more importantly, protections guaranteed to religious minorities in Europe. Besides being the progeniture of the modern system and concept of State sovereignty, the Peace of Westphalia was also a treaty that ended two concurrent wars of religion that were being fought in Europe during the late 16th century and early 17th century, the wars were the Thirty Years' War and the Eighty Years' War.

The Thirty Years' War was fought between Protestant powers, such as Sweden, Denmark, the Dutch Republic, and many minor Holy Roman Principalities, who allied themselves with France,[77] and Catholic powers, such as the Habsburgs and their allies. The Eighty Years' war was fought between Catholic Spain and the Protestant Dutch Republic, ending when Spain formally recognized Dutch independence. Thus, the Peace was signed between May and October of 1648 in the cities of Münster and Osnabrück.[78]

The Peace of Westphalia was designed, in part, to end the religious violence in Europe by guaranteeing some level of protection for religions minorities in different States. The Peace asserts:

> . . . all others of the said Confession of Augsburg,[79] who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.[80]

Thus, Article 28 allowed people from any State the freedom of religion by guaranteeing the "free[ ] Exercise of their Religion."[81] The Peace, however, leaves out the scope to which this freedom of religion applies; it does not discuss where or to whom this freedom applies, and who must actively ensure the protection of this undiluted right. The Peace does acknowledge that members of relig-

[77] *Id.* (explaining that the French involvement in the Thirty Years' War was much more complex. France, in the 17th century, was a Catholic nation. However, its involvement with the War was not in an effort to promote the interest of Catholicism. France's involvement, on the side of the Protestant powers, was, instead, its efforts to fight against the growing, vast power of the Habsburgs. France, in the 17th century, had been flanked by Habsburgs, as the Kings of Spain and the Emperors of the Holy Roman Empire. This disadvantageous position is partially what led the French to supporting the Protestants during the Thirty Years' War.).

[78] *The Peace of Westphalia*, LUMENLEARNING, https://courses.lumenlearning.com/suny-hccc-worldhistory/chapter/the-peace-of-westphalia/ (last visited Feb. 04, 2020).

[79] *How did the Peace of Augsburg (1555) lead to the Thirty Years War (1618-1648)?*, DailyHistory.org (Oct. 28, 2019), https://dailyhistory.org/How_did_the_Peace_of_Augsburg_(1555)_lead_to_the_Thirty_Years_War_(1618-1648)%3F (criticizing the Peace for directing different states to recognize the religion of the prince and treat that as the de facto religion of the state).Also known as the Peace of Augsburg. A criticism that arises out of this Peace is that the Peace directed the different states to recognize the religion of the prince of said state and that the religion of the prince would be the de facto religion of his state.

[80] Treaty of Westphalia, Article art. 28, Oct. 24, (1648), Richard Cavendish, *The Treaty of Westphalia*, HISTORYTODAY, Oct. 1998. http://avalon.law.yale.edu/17th_century/westphal.asp.

[81] *Id.*

ious minorities are to be protected by ensuring their right to exercise their religion, their ability to congregate in the worship of their religion, and to engage in rituals, as determined by their priests. Also, the Peace prescribes a very straightforward, albeit implied, protection: protection of life and liberty, and protection from being molested for their beliefs.

Furthermore, the Peace of Westphalia created an obligation for signatories to ensure that all of the articles are enforced and ensure these protections, so far as Article 28 is concerned, for religious minorities in different States. It claims:

> . . .the concluded Peace shall remain in force, and all Part[ies] in this Transaction shall be oblig[ed] to defend and protect all and every Article of this Peace against any one, without distinction of Religion; and if it happens any point shall be violated, the Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.[82]

The obligation, thus created for all signatories, is to "defend and protect all and every Article," including Article 28.[83] Thus, considering Articles 28, a reasonable interpretation holds that European States, following the Peace of Augsburg, understood that States had a duty to respect and allow individuals to practice the religion of their choice.[84] But considering Article 28 within Article 123, this evidence supports the claim that States, through this treaty, created an active obligation toward one another to ensure that no State, as a signatory State, would be permitted to violate any of the provisions of the Peace of Westphalia, including Article 28.[85] Article 123 states "all parties . . . shall defend and protect all and every Article . . . against any one, without distinction of Religion."[86] Even more so, Article 28, in conjunction, creates an implied prohibition against States being the instigators and perpetrators of atrocities against religious minorities, both internally and externally. The Article intentionally states "against any one" without providing any distinctions. The use of this phrase, as stated, evidences an intention to have States hold one another accountable and to ensure that States were not engaging in vast mistreatment of religious minorities.

Therefore, looking at the Peace of Westphalia, specifically Articles 28 and 123, conjunctively, the Peace provides strong evidence that the signatories intended to protect religious minorities, within and outside of their own territories, from State-sanctioned mistreatment of these minorities. It supplemented the new norm that that States were entrusted to protect not only its homogenous citizens, but also people who held different religions, creeds, and ethnic backgrounds.

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[82] *Id.* at art. 123.

[83] *Id.*

[84] LUMENLEARNING, *supra* note 78. R

[85] Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, MICH., 25 Mich. J. INT'L L. 981, 983 (2004). ("The sovereign State which it prescribed was Janus-faced, its government staring both inward at its subjects, over which it had supreme authority, and outward beyond the state's borders, where no rival authority was entitled to force a change in the governance of its inhabitants.).

[86] *Treaty of Westphalia*, *supra* note 80. R

v. The Treaty of Küçük Kaynarca, 1774

The Treaty of Küçük Kaynarca, signed in 1774, was one of the first instances that, in application at least, a sovereign State was expressly prohibited from engaging in mistreatment of a religious minority within its own political borders by another sovereign State. In this case, the Russian Empire, through the application of the Treaty, placed severe limitation on the Ottomans and their treatment of Orthodox Christians.[87] Furthermore, the Russians, through the Treaty and their interpretation of it, became the protectors of the Orthodox Christians and retained a right to intervene in the affair of the Ottomans if there was a direct, negative effect on that religious minority.[88]

The Treaty of Küçük Kaynarca ended the Russo-Turkish War, which was fought between the Ottoman Empire and the Russian Empire from 1768-74. The War ended with the crushing defeat of the Ottomans at Kozludzha. As a result, the Russians were able to force the Ottomans to acquiesce to any conditions they placed on them; including the return of Wallachia and Moldovia to the Ottomans for an even better concession from the Ottomans. Russia received the inalienable right to protect Orthodox Christians in the Ottoman Empire and the right to intervene if Christians were mistreated.

The first assertion of Russia's right to ensure the protection of Orthodox Christians comes in Article 7 of the Treaty. The Treaty emphasizes:

> The Sublime Porte promises to protect constantly the Christian religion and its churches, and it also allows the Ministers of the Imperial Court of Russia to make . . . representations . . ., as on behalf of its officiating ministers, promising to take such representations into due consideration, as being made by a confidential functionary of a neighbouring and sincerely friendly Power.[89]

In Article 7, the Russian Empire forced the Ottomans to capitulate to State-sanctioned protections of religious minorities in the Ottoman Empire, specifically Christians. They forced the Ottomans to "promise to protect" Christians and their churches.[90] This promise, more or less, was the Russian's attempt to ensure the protection of the Orthodox Christians through proper legal protections that could not, without Russian intervention, be easily countermanded by the Ottomans later.[91] Furthermore, the Article, besides confirming the Sublime Porte's[92] obligation, also indirectly proscribes the Ottoman Empire from engaging in any ac-

[87] J. C. Hurewitz, The Middle East and North Africa in World Politics: A Documentary Record 936 (Yale Univ. Press, 2d ed. Rev. vol. 1, 1979).

[88] Paul W. Schroeder, The Transformation of European Politics: 1763-1848 (Oxford Univ. Press,1994).

[89] Treaty of Küçük Kaynarca, art. 7, (Jul. 21, 1774), Great Britain, *Parliamentary Papers, 1854*, vol. 72.7 (1774), http://www.fas.nus.edu.sg/hist/eia/documents_archive/kucuk-kaynarca.php.

[90] *Id.*

[91] Schroeder, *supra* note 88, at 22. **R**

[92] *Id.* at 736 (defining Sublime Porte).The royal palace of the Sultan of the Ottoman Empire and the seat of the Ottoman Government.

tions contrary to the obligation created under Article 7. The obligation to protect the Christian minority created a direct responsibility for the Ottomans to refrain from engaging in activity that would be harmful to the religious minority.[93]

Article 7 takes the protection of Christians a step further when it allows the representatives of the "Imperial Court of Russia to . . . make representations . . . on behalf of the officiating ministers."[94] This means that the Russians gave themselves an active authority to be the representatives of the Orthodox faith, and not just the representatives of the Russian Empire. Including this phraseology, within Article 7, meant that the Russians, as they interpreted later, viewed this representative right as bestowing onto them the right to further intervene to promote the protection of the Orthodox faith in the Ottoman Empire.[95]

Furthermore, Article 8 has a similar effect as Article 7. However, Article 8 covers a new area of protection for the Christian minority that are temporarily within the Ottoman Empire. The Russians assert:

The subjects of the Russian Empire, as well laymen as ecclesiastics, shall have full liberty and permission to visit the holy city of Jerusalem, and other places deserving of attention. No *charatsch*,[96] contribution, duty, or other tax, shall be exacted from those pilgrims and travelers by any one whomsoever, either at Jerusalem or elsewhere, or on the road . . . During their sojourn in the Ottoman Empire, they shall not suffer the least wrong or injury; but, on the contrary, shall be under the strictest protection of the laws.[97]

Through Article 8, the Russian Empire forces the Ottomans to provide legal protection for Christians who are traveling in the Empire to visiting holy sites, including Jerusalem. The Article goes further than specifying that the legal protections apply only to "the subjects of the Russian Empire;" it moves to include non-subjects of the Russian Empire who are "laymen" acting as "ecclesiastics" in that protection as well.[98] From the contexts of the article, it may be deduced that the "laymen as ecclesiastics" would include the average practitioner of Christianity who engages in religious worship that is beyond the everyday worship, i.e. going on a pilgrimage to holy sites. Asserting "During their sojourn in the Ottoman Empire, they shall not suffer the least wrong or injury; but, on the contrary, *shall be under the strictest protection of the law,"*[99] the article codifies Russia's intent to force the Ottomans to create legal protections for Christians, including the Christian citizens and non-citizens of Russia, in order to be in compliance with the Treaty.

However, the first instances of an *express* right of protection and intervention is noted in Article 14. Russia compels the Ottomans to:

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[93] Such actions are discussed in the succeeding paragraphs of this article.

[94] Treaty of Küçük Kaynarca, *supra* note 89. **R**

[95] Andre Gerolymatos, *Turkish Straits: History, Politics and Strategic Dilemmas, The*, 28 OCEAN Y.B. INT'L L. 58, 62 n. 15 (2014).

[96] Treaty of Küçük Kaynarca, *supra* note 89 (defining charatsch as *Haraç* or military-exemption tax). **R**

[97] *Id.* at art. 8.

[98] *Id.*

[99] *Id.* (emphasis added).

After the manner of the other Powers, permission is given to the High Court of Russia, in addition to the chapel built in the Minister's residence, to erect in one of the quarters of Galata, in the street called Bey Oglu, a public church of the Greek ritual, which shall always be under the protection of the Ministers of that Empire, and secure from all Coercion and outrage.[100]

This Article is the basis for Russia's later claims of protection of the Orthodox faith within the Ottoman Empire.[101] Article 14 requires the Ottomans to acknowledge the absolute authority of the Russian ministers', in the Empire, to protect the "public church of Greek ritual."[102] This right is conferred to the "High Court of Russia" and allows them to "secure" the protection of Orthodox Christians "from all Coercion and outrage." Through this, Russia, essentially, gave itself the right to intervene in the affairs of the Ottoman Empire if the latter engaged in activities that were a threat to the security of the Orthodox faith and church, or engaged in any coercive or outrageous conduct that would be harmful to the said community.

Furthermore, looking at this article in the context of the preceding articles, precisely Articles 7 and 8, the right to protect Orthodox Christians seems to be derived from here. Article 14, finally and expressly provides to the Russians the right to intervene to protect Greek Orthodox churches in the Ottoman Empire. After all, what is a church if it is not the people, their faith, their community, and a shared sense of understanding and experiences? Though the right, as stated, is to protect public churches of the Orthodox faith, construing this Article in the context of the Articles 7 and 8, and reviewing Catherine the Great's understanding of the Treaty[103], Article 14, creates an overarching right to intervene in the affairs of another sovereign State, the Ottomans, when it comes to protecting members of the Orthodox Christian faith.

Articles 16 §2 and 17 §2 also created a right for the Russian Empire to intervene, based on the concept of *pacta sundt servanda*, when they declared that Russia would return the land it had occupied during the Russo-Turkish War, including all the territories in Bessarabia, the islands of the Archipelago, and the Principalities of Wallachia and Moldavia, but only when the Ottomans "solemnly promis[ed] to keep" the following conditions "religiously":

. . . To obstruct in no manner whatsoever the free exercise of the Christian religion, and to interpose no obstacle to the erection of new churches and to the repairing of the old ones, as has been done heretofore . . .[104]

. . . That the Christian religion shall not be exposed to the least oppression any more than its churches, and that no obstacle shall be opposed to the erection or

[100] *Id.* at art. 14.

[101] Schroeder, *supra* note 88. R

[102] Greek ritual refers to the Greek Orthodox Church, which may be interchangeable with the Orthodox Christian Faith.

[103] *The Cambridge History of Islam* 815 (P.M. Holt et al. eds., Cambridge University Press 1977).

[104] Treaty of Küçük Kaynarca, *supra* note 89, at art. 16, §2. R

repair of them; and also that the officiating ministers shall neither be oppressed nor insulted.[105]

These two sections, collectively, state Russia's express intent to ensure the protection of the Orthodox Christians in these territories of the Ottoman Empire. They expressly enjoined the Ottomans from engaging in any activity that would obstruct "the free exercise of the Christian religion," from creating "obstacles" to the building of new churches or even fixing churches, and by requiring them to refrain from oppressing or harming Orthodox Christian ministers. Articles 16 §2 and 17 §2 are express commands to the Ottomans that if they wanted the return of their occupied territories, then the Ottomans could not engage in State-sanctioned mass oppression or harm of this religious minority in the Empire. If, in fact, the Ottomans failed to abide by these sections, or intentionally violated these sections, this would allow the Russian Empire to intervene to protect the Orthodox Christians.[106]

Lastly, Article 16 §9, claims that:

The Porte allows each of the Princes of these two States to have accredited to it a Chargé d'Affaires, selected from among the Christians of the Greek communion, who shall watch over the affairs of the said Principalities, be treated with kindness by the Porte, and who, not withstanding their comparative want of importance, shall be considered as persons who enjoy the rights of nations, that is to say, who are protected from every kind of violence.[107]

After the signing of the Treaty of Küçük Kaynarca, the Ottomans effectively became the nominal government/administrators of Orthodox Christians. The Ottoman Empire's every step and action was watched by the Russian Empire because any infraction of the terms of the treaty would allow the Russians to intervene to protect the Orthodox Christians in the Ottoman Empire. All in all, Articles 7, 14, 16 §2, 16 §9, and 17 §2 opened a door for foreign interference, specifically from the Russian Empire, in the Ottoman Empire and how it dealt with its own subjects.

As a consequence, Catherine, Empress of Russia, did in fact use these Articles, as *she* interpreted them, to intervene in the Ottoman affairs relating to its subjects and vassals. Russia used the treaty first to intervene in the Crimean Khaganate, which had been granted independence in 1774 but nominally remained a vassal of the Ottoman Empire. Russia sent troops to support the Khan of Crimea, who established himself as a pro-non-Muslim khan supported by Christians in the Crimea. As a result of this anti-Muslim stance, the Khan faced an uprising to remove him from power.[108] The Russians sent troops to protect the Christians

[105] *Id*. at art. 17, §2.

[106] Franz Thugut, the Austrian diplomat to the Ottoman Empire, noted that the treaty's clauses that related to the Russian claims to intervene and protect the Orthodox Christians in the Ottoman Empire had been "emblematic of the 'Russian skill' and 'Turkish imbecility.'" CAROLINE FINKEL, OSMAN'S DREAM: THE STORY OF THE OTTOMAN EMPIRE, 1300-1923, 379 (2007).

[107] Treaty of Küçük Kaynarca, *supra* note 89, at art. 16 §9. R

[108] FINKEL, *supra* note 106, at 380.

who feared reprisal for their involvement.[109] The Russian Empire, again, intervened in the Crimea in 1782, when the same Khan's brothers led a revolt.[110] This right to intervene was also used by the Russians during the 1840s when Russia used the pretext of protecting Orthodox Christians, both traveling and residing in the Ottoman Empire, when it demanded that the Ottomans fully recognize "Russian pre-eminence in the Holy Sites and recognition of Russia's right over Ottoman Orthodox subjects."[111] Confronted by this ultimatum, the Ottoman Empire declared war on Russia in July of 1877, and Russia responded by claiming their right to intervene.

Thus, the Treaty of Küçük Kaynarca was intended to protect the Orthodox Christians traveling through and residing in the Ottoman Empire from State-sanctioned mass murder, harm, or other forms of oppression. It further supplemented a growing norm of protecting religious and ethnic minorities within a different sovereign State by granting a right of intervention if a State failed to adhere to the tenants of a treaty or their obligation to protect said minorities under the treaty. Here, this meant that Russia, through the treaty, was given the power to intervene if the Ottoman Empire failed to, de facto or de jure, protect Orthodox Christians within its Empire.

vi. The Treaty of Berlin, 1878

The Treaty of Berlin helped recognize the norm against State-sanctioned mass murder, harm, or oppression when it conditioned the recognition of independent sovereign States on the acceptance, by said States, of an incontrovertible prohibition against deadly, harmful, or oppressive actions against religious or ethnic minorities. The Treaty of Berlin initially ended the Russo-Turkish War, 1877-8, and included Great Britain, France (as the French Third Republic), Austria-Hungary, the German Empire, the Kingdom of Italy, the Russian Empire, and the Ottoman Empire as signatories to the treaty.

The Treaty continuously states, as a condition, the phrase:

> . . . the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights . . . The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to the . . . State, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs. The subjects and

[109] To the extent that they were actually involved, which is unknown.

[110] FINKEL, *supra* note 10.6, at 380. However, this time, Catherine's forces did not leave the Crimea. Instead, she swiftly moved to have the Crimea annexed into the Russian Empire.

[111] *Id.* at 457.

> citizens of all the Powers, traders or others, shall be treated. . . without distinction of creed, on a footing of perfect equality.[112]

This phrasing is used a total of four times and is in reference to Roumania (Romania), Bulgaria, Montenegro, and Servia (Serbia). The Treaty, and the high contracting parties, attempted to ensure that the newly liberated States[113] in the Balkans would guarantee and promote the protection of religions and ethnic minorities that would be found in these territories. Articles 5, 27, 35, and 44 all conditioned that if Romania, Bulgaria, Montenegro, and Serbia wanted independence, and maintain it, then they would have to agree to refrain from discriminating, harming, or otherwise oppressing religious minorities. They were required to accept their role in ensuring the "freedom and outward exercise of all forms of worship" and that religious minorities would "be treated . . . without distinction of creed, on a footing of perfect equality."[114] The Treaty was intended to require that the new States would not move to exclude, in any way, life threatening or otherwise, minorities from being civilly and politically protected. Thus, the Treaty solidified a special legal status for religious minorities. It stipulated that the newly independent Balkan States had to recognize the non-Christians, including Jews and Muslims, as fully protected citizens. No action could be taken against these citizens, either de facto or de jure, that threatened, harmed, or led to the deaths of these religious minorities within Bulgaria, Montenegro, Romania, and Serbia.

The Treaty was also the attempt by high contracting parties' to ensure that ethnic minorities would also be protected in Romania, Bulgaria, Montenegro, and Serbia. Great Britain, France, Austria-Hungary, the German Empire, the Kingdom of Italy, the Russian Empire, and the Ottoman Empire demanded that "subjects and citizens of all the Powers" would be equally protected without any distinction of their religious or ethnic background within these new States.[115]

In theory, the idea was that the contracting parties would enforce the articles of the Treaty of Berlin on the newly recognized Balkan States. These Balkan States were encouraged to abide by the terms of the treaty and ensure the protection of the religious and ethnic minorities within their territories. A violation of these terms would then require some level of enforcement from the high contracting parties.

Thus, the Treaty of Berlin was intended, in part, to protect religious and ethnic minorities in the newly recognized Balkans States after the Russo-Turkish War,

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[112] Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East: Signed at Berlin, July 13, 1878 (hereinafter "Treaty of Berlin") art. 4, 27, 35, and 44, AM. J. INT'L L., Vol. 2, No. 4, 424, 419 (1908).

[113] I have included Montenegro into this accounting even though, technically speaking, Montenegro had been independent well before 1878. I include it here because as a result of the Treaty of Berlin, Montenegro received two major concessions; these were: (1) Acknowledgement of its independence, acknowledge by Turkey; and (2) territory.

[114] Treaty of Berlin, *supra* note 112, at art. 20. (Similar phraseology was used in Article 20, relating to the province of Eastern Roumelia. The Treaty, again, provided for the protection of religious and ethnic minorities in this province by requiring the Ottomans to: undertake to enforce there the general laws of the Empire on religious liberty in favor of all forms of worship . . .). R

[115] Treaty of Berlin, *supra* note 112, at art. 8. R

1877-8. Articles 5, 27, 35, and 44 ensure that these Balkan States would protect ethnic and religious minorities in their territories. Furthermore, the direct consequence of this protection was that these States, based on the doctrine of *pacta sundt servanda*, could not engage in activities that would result in State-sanctioned murder, harm, or oppression of these minorities. The Treaty also supplemented the norm against such actions by created a condition precedent to officially recognizing these Balkan States. These States had to agree to legally protect ethnic and religious minorities before they would be officially recognized.

vii. Twentieth Century Examples

The historical precepts provided above are but the most apropos examples of sovereign States actively engaging in instances to ensure the protection of minorities in their own political borders, and more importantly, in the borders of other sovereign States. These precepts are foundational illustrations of the protection of minorities levied against States; however, they are limited, in time frame, to instances dating before the twentieth century. There are numerous more examples from the twentieth century that help develop a claim that preventing States from engaging in mass, State-sponsored, murder or other harms has been a part of customary international law. These examples range from The Little Treaty of Versailles; the Austrian-Czech-Yugoslav Treaty of St Germain-en-Laye (1919); the Romanian Treaty of Paris (1919), the Greek Treaty of Sèvres (1920); the Hungarian Treaty of Trianon (1920), the Bulgarian Treaty of Neuilly-sur-Seine (1919), and the Turkish Treaty of Lausanne (1923).[116]

These treaties where drawn up after the conclusion of World War I when national political borders were redrawn without considering the different ethnicities within each State. Redrawing these borders broke up ethnic groups and subjected them to murder, harm, or oppression. This series of treaties, thus, functioned as a barrier to States by ensuring the protection of ethnic and religious minorities in these States.

As such, this set of treaties ensured the "protection of life and liberty" and the free exercise of religion in the territories of all the contracting parties.[117] These treaties also required States to take steps to protect ethnic, religious, and linguistic minorities by recognizing them as:

(a) equal in the eye of the law; (b) free use of the mother tongue . . . in regard to religion, the press and publications, and also at public meetings and in the courts of laws; (c) the right to establish at their own expense charitable, religious, social or educational institutions; (d) in towns and districts, in which the minority constitutes a considerable proportion of the population, instruction in the primary schools . . . in the language of that minority . . .[118]

[116] Jennifer Jackson Preece, *Minority Rights in Europe: From Westphalia to Helsinki*, 23 REV. OF INTERNATIONAL STUDIES 75, 75-92 (1997).

[117] Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AM. J. INT'L L. 641, 648 (1923).

[118] *Id.* at 649.

Furthermore, these treaties were intended to give the minority inhabitants of the different contracting States protections regardless of their ethnicity, religion, or language. They were meant to protect the minority from the majority, or the State, engaging in State-sanctioned mass murder, harm, or oppression.[119] The new States that emerged after World War I had to take steps to ensure that they did not discriminate against minorities.[120] These new States had to accept these conditions and incorporate them as "fundamental laws of State . . . over which no other laws shall prevail" in order to be recognized, diplomatically, as independent, sovereign States.[121] As such, these successor States were unrecognized, or they had not been "created" *until* their acquiescence to the treaties.[122]

The responsibility of ensuring compliance with this undeniable protection was then given to the League of Nations.[123] The League was also tasked with determining the admission of new States into the League. However, the condition precedent to admission was that new States needed to "take the necessary measures to enforce the principles of the minorities treaties."[124] Eventually, Finland, after appending its constitution to include express protections for minorities, Albania, after ratifying a declaration similar to the Minority Treaties, and Estonia, Latvia, and Lithuania signed on and were subsequently admitted.[125]

The Minority Treaties brought international recognition to and created an international joint effort in protecting ethnic and religious minorities who had existed outside of the normal political membership and thus, outside of legal protection. These treaties required additional guarantees from States that minorities would be protected from State-sanctioned mass murder, harm or oppression.[126] States were inexplicably aware, at this point, that religious and ethnic minorities were to be protected inside and outside of a State's own borders. The norm had developed, by this point, to ensure that States took no actions that would be detrimental to the continued existence of minority communities. Even more so, successors States, and to some degree, existing States, became aware that their own existence was conditional upon the prohibition of State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities. Thus, the Minority Treaties furthered the norm against such behavior by creating conditions upon recognition of independent States and by creating a widespread legal obligation on States.

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[119] *Id.*

[120] John Quigley, *Russian Minorities in The Newly Independent States*, 3 ILSA J. OF INT'L AND COMP. L. 455, 456 (1997).

[121] Rosting, *supra* note 117, at 641, 649. **R**

[122] OSCAR I. JANOWSKY, THE JEWS AND MINORITY RIGHTS (1898-1919) 419, 342 (1933).

[123] Rosting, *supra* note 117, at 649. **R**

[124] *Id.* (citing the report of the 25th Plenary Meeting of the First Assembly).

[125] *Id*. at 650-53.

[126] Preece, *supra* note 116, at 75-92. **R**

B. Opinio Juris

To form CIL there must exist evidence of *opinio juris sive necessitatas*[127], or just *opinio juris*, along with State Practice. Article 38 §1(b) requires not only State practice, but practice that must also be "accepted as law."[128] For example, where the French government challenged, as a violation of international law, the Turkish court's action in arresting, fining, and imprisoning a French sailor who had caused the deaths of Turkish sailors, the *Lotus Case* court held that "States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."[129] Similarly, where Colombia sought to transport an asylum seeker residing in the Colombian Embassy in Peru to Colombia, the *Asylum Case* court held that the Colombian government failed to show that States were obligated to grant safe passage to asylum seekers from the embassy "as a duty incumbent on them and not merely for reasons of political expediency."[130]

Thus, *opinio juris* will only be satisfied if there exist acts that are "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[131] There exists a subjective element where States act in accordance with the legal obligation because it feels that it must conform to the proscribed behavior.[132]

Furthermore, the concept or doctrine of *pacta sundt servanda* also affects *opinio juris*. *Pacta sundt servanda* generally translates to "agreements must be honored."[133] However, the rule, as applied in international law, more so requires that every treaty that is enforced is "binding upon the parties to it and must be performed by them in good faith."[134] As such, *pacta sundt servanda* creates an expectation among States that each party will actively upholds its obligations under a treaty.[135] The Vienna Convention, asserts that these obligations must be fulfilled in good faith, thus creating both a legal and moral obligation on the parties.[136] Furthermore, the Permanent Court of International Justice, when interpreting treaty clauses that prohibited States from engaging in State-sanctioned discrimination against minorities, claimed that these clauses must be applied in a

[127] *Opinio juris sive necessitats* means "an opinion of law or necessity," thus, *opinio juris* means "opinion of law."

[128] Statute of the International Court of Justice, *supra* note 6. R

[129] SS "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18, 28 (Sept. 7, 1927).

[130] Asylum Case (Colom. v. Peru), Judgment,1950 I.C.J. Rep. 266, 15 (Nov. 20, 1950).

[131] North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.),, 1969 I.C.J. Rep. 3, 44 (Feb. 20, 1969).

[132] *Id.*

[133] BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 92 (Mortimer N.S. Seller & Elizabeth Andersen, NY: Cambridge University Press, 2010).

[134] VCLT, *supra* note 35, at art. 2.1(a). R

[135] MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW, 107 (Cambridge University Press, 1999).

[136] LEPARD, *supra* note 133. R

manner that evidenced the absence of discrimination de facto, not just de jure.[137] Thus, because a State must fulfill its obligations under treaties both in fact and in law, a State must ensure that it does not engage in any action, de facto, that would be counter to its obligation under a treaty.

All of this means that *opinio juris* implies a subjective obligation that a State is bound to the law in question. The State's actions must be such that it arose out of that State's *belief* in a sense of legal obligation, not out of habit or national self-interest.[138]

This paper, in most part, discusses the existence of CIL and *opinio juris* through analyzing treaties. According to the Vienna Convention, a treaty is "an international agreement concluded between States in written form and governed by international law."[139] Treaties provide evidence of CIL in two ways. First, a treaty is a codification of what States believe to be the norm, or an already existing legal obligation.[140] This existing legal obligation amounts to CIL and, thus, the treaty may be binding on the signatories independently.[141] The second is by helping create new CIL.[142] States, generally, including non-parties, may come to regard the provisions in a treaty as binding on all States as part of CIL.[143] Article 38 of the Vienna Convention, states "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law"[144] and the International Law Commission's comment, from 1966, provided the Hague Convention as an example.[145] Even more so, the *North Sea Continental Shelf Case* court determined that:

. . . as a norm-creating provision, which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origins, has since passed into the general *corpus* of international law, as is now accepted

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[137] U.N. Conference on the Law of Treaties*, Draft Articles of the Law of Treaties with Commentaries Adopted by the International Law Commission at its Eighteenth Session*, art. , Article 23, U.N. Doc. A/CONF.39/11/13Add.2, (19661971); *see Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* Advisory Opinion, 1932 P.C.I.J., (Ser. A/B) No. 44, at 28 (Feb. 4) ("It should be remarked in this connection that the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition"); *see also Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J., (Ser. A/B) No. 64, at 19 (Apr. 6) ("Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment, of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph I of Article 5.").

[138] VILLIGER, *supra* note 14*,* at 47-48. **R**

[139] Vienna Convention on the Law of Treaties, *supra* note 35, at art. 2.1(a). **R**

[140] LEPARD, *supra* note 133, at 30. **R**

[141] *Id*.,at 31.

[142] *Id.*

[143] *Id.*

[144] Vienna Convention on the Law of Treaties, *supra* note 35, at art. 38. **R**

[145] LEPARD, *supra* note 133, at 31. **R**

as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties . . .[146]

Furthermore, treaties are an articulation of existing norms that are "better than any other practice of States" and properly evidence, or satisfy, the *opinio juris* requirement.[147] As such, any generalizable statements in treaties may be deemed to be rules of law that have become customary.[148] However, it is not just the statements in treaties that evince *opinio juris*; *opinio juris* may also be evidenced through the existence of the treaty itself, as a bilateral or multilateral treaty. The Restatement (Third) of Foreign Relations Law of the United States asserts that a "wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law."[149] The *Continental Shelf Case (Libya v. Malta)* court even goes as far as promulgating that multilateral conventions are important because they record and define rules that are derived from customs.[150] After all, what is a treaty if not the act of expressing the views of States, governments, and anyone else who makes decisions regarding foreign affairs? Villiger even claims that "written text may *reflect, or provide evidence of, the customary rule*."[151] Thus, States' express statements, like treaties, regarding obligations under law, may provide the "clearest evidence as to the State's legal conviction."[152]

Reviewing the above-mentioned treaties (the Edict of Nantes, the Peace of Westphalia, the Treaty of Küçük Kaynarca, the Treaty of Berlin, and the Minority Treaties) within this scope, the signatories of the treaties had an intent to sign and be bound to terms in the treaties. Regardless of the contexts in which signatories found themselves, when signing, the treaties are still binding upon the signatories.

The Edict of Nantes was one of the first instances in which a State attempted to limit its authority and ensure that France would not engage in conduct that would be harmful to people residing in France. The Edict proscribed France's behavior and that of other States; or to look at it another way, it created more protections for its own people on the basis of their religion. France's intent is obvious because France took the initial steps, without any involvement from external powers, to create this protection for Huguenots; it chose to provide more protections at the cost of limiting its own interests. Furthermore, the Edict expressly spelled out how the Kingdom was limiting its own authority when it

146 North Sea Continental Shelf Case (Ger. v. Den.; Ger v. Neth.), 1969 I.C.J. Rep. 3, ICJ 41, ¶71 (Feb. 20, 1969).

147 ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, 160-161 (NY: Cornell University Press, 1971).

148 *Id.*; *see also* LEPARD, *supra* note 133, at 32 (*citing* Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: I,* INT'L. JUDICIAL LAW, .422 (1957). R

149 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102, cmt. i (AM. LAW INST.1986); *see* Ger. v. Den.; Ger v. Neth., 1969 I.C.J. Rep. at 28-29, 37-43.

150 North Sea Continental Shelf Case (Libya v. Malta), Judgment, 1985 I.C.J. Rep. 13, 29-30, ¶27 (June 3, 1985).

151 Villiger, *supra* note 14. R

152 *Id.* at 51.

granted the Huguenots an international level of protection that had not been seen before. The Edict asserted that "*all* [the king's] subjects, even for the said pretended Reformed religion . . . may not be forced to do anything against their conscience, nor be subject to the Inquisition, going, coming, travelling and trading in foreign countries."[153] This Edict gave France the authority to prohibit other States from engaging in activities that would have been seen as detrimental to the Huguenots and it gave the king an implied right to seek remedies against an offending State. The fact that France issued the Edict to limits its own authority by creating stronger protections, inside and outside of France, is evidence that is contrary to its own interest. France would not have moved to protect Huguenots if it did not believe that it had to conform to some obligation. Thus, this evidence provides strong support to the fact that there had to have existed some norm that would have prohibited State-sanctioned mass murder, harm, or oppression of ethnic and religious minorities.

The Peace of Westphalia is another instance in which influential States convened to recognize and proscribe a state's behavior towards religious minorities in Europe. The Peace ensured that people "shall have the free Exercise of their Religion."[154] It acknowledged that members of religious minorities were to be protected by ensuring their right to exercise their religion, their ability to congregate in the worship of their religion, and to engage in rituals as determined by their priests. The Peace also prescribes a very straightforward, albeit implied, protection; the protection of life and liberty, and protection from being molested for their beliefs. The Peace created the obligation for signatories is to ensure that all of the articles of the treaty are enforced and ensure the protection, of religious minorities in different States in Article 28. It requires "all Part[ies] . . . to defend and protect all and every Article of this Peace against any one, without distinction of Religion."[155] Thus, under the Peace, European States had a duty to respect and allow individuals to practice their religion of choice.[156] Also, the Peace created an active obligation towards each State to ensure that no State, as a signatory, would be permitted to violate any of the provisions of the Peace of Westphalia, including Article 28.[157] Article 28, in conjunction with Article 123, creates an implied prohibition against States being the instigators and perpetrators of atrocities against religious minorities, both internally and externally. Lastly, the Peace requires States to hold each other accountable for these proscribed behaviors.

The Treaty of Küçük Kaynarca, on the other hand, expressly prohibited a sovereign State from engaging in mistreatment of a religious minority within its own political borders. In this case, the Russian Empire, through the application of the

[153] Edict of Nantes art. 53, April 13, 1598, THE HUGUENOT SOCIETY OF AMERICA, TERCENTENARY CELEBRATION OF THE PROMULGATION OF THE EDICT OF NANTES 103-104 (The Huguenot Society of America, 1900).

[154] Treaty of Westphalia, *supra* note 80, at art. 28. R

[155] *Id*. at art. 123.

[156] Christenson, *supra* note .78, at 743-44.

[157] Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 Mich. J. Int'l L. 981, 983 (2004), https://repository.law.umich.edu/mjil/vol25/iss4/11.

treaty, placed severe limitation on the Ottomans and their treatment of Orthodox Christians.[158] Interpretation of the treaty allowed the Russians to become the protectors of the Orthodox Christians with the right to intervene in the affair of the Ottoman Empire if there was a direct, negative effect on that religious minority.[159] The Treaty forced the Ottomans to make "promises to protect constantly the Christian religion and its churches."[160] This promise was the Russians' attempt to ensure the protection of the Orthodox Christians through proper *legal* protection.[161] Also, the Treaty indirectly proscribes the Ottoman Empire from engaging in any actions contrary to its obligations created under Articles 7, 8, 14, 16 §2, and 17 §2. Article 14 required the Ottomans to acknowledge the absolute authority of the Russian ministers to protect the "a public church of Greek ritual."[162] Russia, essentially, was given the right to intervene in the affairs of the Ottoman Empire if the latter engaged in activities that were a threat to the security of the Orthodox faith and church. The right to intervene could also be used if the Ottoman Empire engaged in any coercive or outrageous conduct that would be harmful to the Orthodox community. Similarly, Articles 16 §2 and 17 §2 created a right for the Russian Empire to intervene, based on the concept of *pacta sundt servanda*, when they declared that Russia would return the lands it had occupied, during the Russo-Turkish War of 1768-74, but only when the Ottomans agreed to "the free exercise of the Christian religion, and to interpose no obstacle to the erection of new churches and to the repairing of the old ones."[163] Furthermore, the Ottomans had to agree that the "Christian religion shall not be exposed to the least oppression any more than its churches."[164] The Ottomans understood that they were expressly enjoined from engaging in any activity that would qualify as state-sanctioned mass murder, harm, or oppression of the Orthodox faith. Thus, the Treaty of Küçük Kaynarca further supplemented a growing norm of protecting religious and ethnic minorities within a different sovereign State by granting a right of intervention if a State failed to adhere to the tenetts of a treaty or their obligation to protect said minorities under the treaty.

Another treaty that provides evidence of a developing norm on the prohibition of State-sanctioned mass murder, harm, or oppression is the Treaty of Berlin. The high contracting parties used the treaty to ensure the newly established States in the Balkans would promote the protection of religions and ethnic minorities found in these territories. Articles 5, 27, 35, and 44 all conditioned that if Romania, Bulgaria, Montenegro, and Serbia wanted independence, and wanted to maintain it, they would have to agree to refrain from discriminating, harming, or otherwise oppressing religious minorities. These States were required to protect

[158] Hurewitz, *supra* note 87. R

[159] Schroeder, *supra* note 88. R

[160] Treaty of Küçük Kaynarca, *supra* note 89, at art. 7. R

[161] Schroeder, *supra* note .88, at 22.

[162] Greek ritual refers to the Greek Orthodox Church, which may be interchangeable with the Orthodox Christian Faith.

[163] Treaty of Küçük Kaynarca, *supra* note 89, at art. 16 §2 (emphasis added). R

[164] *Id.* at art. 17 §2 (emphasis added).

the "freedom and outward exercise of all forms of worship" and guarantee that religious minorities would "be treated . . . without distinction of creed, on a footing of perfect equality."[165] The Treaty was intended to require the new States to protect minorities civilly and politically. Furthermore, the direct consequence of this protection was that these States, based on the doctrine of *pacta sundt servanda*, could not engage in any activity that would result in state-sanctioned murder, harm, or oppression of these minorities. The Treaty also supplemented the norm by creating a condition precedent to officially recognizing these Balkan States. The Treaty helped signatories determine the existence and legitimacy of States; meaning that an existing and legitimate State cannot, and should not, engage in State-sanctioned mass murder, harm, or oppression of an ethnic or religious minority if it wanted to continue being recognized as an existing and legitimate State.

The Minority Treaties are the culmination of all the preceding treaties. These treaties were made up of six treaties[166] and were the direct result of the 1919 Paris Peace Conference. These treaties functioned as a barrier against State-sanctioned mass murder, harm, or oppression of minorities by confirming the protection of ethnic and religious minorities in all States. The treaties were promulgated to guarantee the "protection of life and liberty" and the free exercise of religion in the territories of all the contracting parties.[167] The treaties required States to take steps to protect ethnic, religious, and linguistic minorities by prescribing that these people were to be viewed equally under the law and have the free exercise of their religion, language, and culture in their homes and societies.[168] To be recognized as independent, sovereign States the new States that emerged after World War I had to take steps to ensure that they did not discriminate against minorities.[169] Their independence was only recognized when they accepted the conditions in the Minority Treaties and incorporated them as "fundamental laws of State . . . over which no other laws shall prevail."[170] The Minority Treaties took it one step further than the other treaties mentioned above by creating a system of compliance through the League of Nations.[171] The League determined membership based on whether the State seeking admittance complied with the Minority Treaties and by investigating noncompliance regarding minority protections. The League absolutely needed to ensure that its States took "the necessary

[165] Similar phraseology was used in Article 20, relating to the province of Eastern Roumelia. The Treaty, again, provided for the protection of religious and ethnic minorities in this province by requiring the Ottoman's to: undertake to enforce there the general laws of the Empire on religious liberty in favour of all forms of worship. Treaty of Berlin, *supra* note 112, at art. 20. **R**

[166] The Little Treaty of Versailles; the Austrian-Czech-Yugoslav Treaty of St Germain-en-Laye (1919); the Romanian Treaty of Paris (1919), the Greek Treaty of Sèvres (1920); the Hungarian Treaty of Trianon (1920), the Bulgarian Treaty of Neuilly-sur-Seine (1919), and the Turkish Treaty of Lausanne (1923).

[167] Rosting, *supra* note 117, at 648. **R**

[168] *Id*. at 649.

[169] Quigley, *supra* note 120, at 456-57.

[170] Rosting, *supra* note 117, at 649. **R**

[171] *Id.*

measures to enforce the principles of the minorities treaties."[172] The Minority Treaties brought international recognition to the problems faced by ethnic and religious minorities.[173] States knew, or should have known, at this point, that religious and ethnic minorities were to be protected inside and outside of a State's own borders. The norm had developed, by then, to prevent States taking actions against minorities that would be detrimental to the continued existence of those communities; and a norm where international bodies would hold violating nations accountable. Thus, the Minority Treaties furthered the norm by proscribing actions that resulted in State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities. It did so by creating conditions upon recognition of independent States and by creating a widespread legal obligation on all States.

Furthermore, it is also important to note how this norm was promulgated in its development by the Concordat of Worms and the trial of Peter von Hagenbach. The Concordat was one of the earliest examples where a State exerted influence and power within the territories of another sovereign State. Through the Concordat, the Pope was able to exert political influence over the actions of the Empire. This power to exert influence was later implemented in attempting to protect minorities in the political borders of other sovereign States.

Similarly, the trial of Peter von Hagenbach helped develop this norm by creating an international level of recognition that some actions are so egregious as to warrant international intervention from other States. The Trial consisted of about 28 different principalities within the Holy Roman Empire who all came together because they understood that rape was a crime that could not be tolerated in any forum. The judges found von Hagenbach guilty because they understood that certain actions should be prohibited, like rape, because they are more of a detriment to society than they can ever be useful. Thus, the Trial of Peter von Hagenbach and the Concordat of Worms helped develop the norm against State-sanctioned mass murder, harm, or oppression of religious and ethnic minorities by recognizing that certain actions must be prevented, and that States may intervene in the affairs of other sovereign States to ensure compliance with minority protections.

III. Conclusion

Looking at the treaties and the trial above, there is ample evidence that supports the formation of a norm against State-sanctioned mass murder, harm, or oppression of ethnic and religious minorities and the authority of other States to intervene or prohibit such actions against said minorities. That being said, the question of when the norm was actually established, and more precisely realized, still remains uncertain. No consensus exists as to when or what date the norm became a prominent, intertwined part of international law. At the very least, it is evident that a norm did *not* already exist at the time of the Concordat of Worms, the trial of Peter von Hagenbach, or even the Edict of Nantes. Conversely, the

[172] Rosting, *supra* note .117, at 648.

[173] Preece, *supra* note .126 at 75-93. R

closest estimation that can be given, especially in this paper, is that this norm became an unequivocal and pervasive part of international law somewhere between the Treaty of Küçük Kaynarca, signed in 1774, and the Treaty of Berlin, signed in 1878.

As stated above, for there to exist a customary international norm against mass murder, harm, or oppression, there has to exist evidence of: (1) State practice; and (2) *opinio juris*.[174] The Edict of Nantes, the Peace of Westphalia, the Treaty of Küçük Kaynarca, the Treaty of Berlin, and the Minority Treaties evidenced State practice. These treaties are the clearest form of evidence that exist, and they expressly represent the intent and understanding of each State involved in the treaty. The treaties, however, go one step further by showing observers, more accurately, other States, that from the contracting parties' stance there is a norm that prohibits and proscribed State behavior to ensure that States act in accordance with specific treaty terms, and do not engage in actions contrary to a treaty's purpose. These instances show a consistent statement of a norm through a wide period of time, from 1474 to 1923.

However, for all of the evidence that this paper has supposed, it also raises one concern: that there is a lack of evidence from a broad array of legal and political systems. The treaties and trial stated above are predominantly from the European theatre or involve European affairs. This paper has not provided evidence from the Americas, Africa, or Asia because sources from these areas are scarce or have been co-opted by European Jurisprudence as a result of European Imperialism. More precisely, it shows that there may not be enough evidence of a consistent, widespread, or systematic norm, prohibiting and proscribing State-sanctioned mass murder, harm, or oppression of ethnic and religious minorities, to amount to evidence of State practice for a global norm. The evidence supports the existence of this norm as more of a regional custom.[175]

Regardless, given the abundance of evidence already provided, a strong claim for the existence of this norm, as a global norm, does in fact exist. Because there are no set criteria to determine when a norm is consistent, widespread, or systematic enough, the evidence provided may be enough to support this norm.[176] These

[174] Statute of the International Court of Justice, *supra* note 6. **R**

[175] "Commentators have long asserted that a custom can, in principle, be restricted to a geographically linked group of countries. Such a rule would bind only the states in that area, leaving nations elsewhere unaffected." Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 572 (2016), citing *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20); *see also* Restatement (Third) Foreign Relations Law of the United States, *supra* note 7, at §102, cmt. e (1987) ("The practice of states in a regional or other special grouping may create "regional," "special," or "particular" customary law for those states inter se. It must be shown that the state alleged to be bound has accepted or acquiesced in the custom as a matter of legal obligation, 'not merely for reasons of political expediency.' *Asylum Case* (Colom. v. Peru), (1950) I.C.J. Rep. 266, 277. Such special customary law may be seen as essentially the result of tacit agreement among the parties.")

[176] Restatement (Third) Foreign Relations Law of the United States, *supra* note 7, §102, cmt. b (1987) ("The practice necessary to create customary law may be of comparatively short duration, but under Subsection (2) it must be 'general and consistent.' A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.")

treaties and trial span five-hundred and forty-nine years, and a multitude of ethnic backgrounds and religions. This evidence may be enough to prove the norm in the context of the norm itself. The norm concerns religious minorities; these treaties cover Protestants, Catholics, Orthodox Christians, and Muslims. It covers two of the largest and geographically widespread religions of the world, Islam and Christianity. The norm also concerns a wide array of ethnic minorities; these treaties cover Huguenots, French, Turks, Russians, Romanians, Bulgarians, Austrians, Germans, Hungarians, Brits, Armenians, Poles, Serbs, Greeks, Bosniaks and many more ethnic groups.[177] In this context, the norm may have been consistent, widespread, and systematic enough to be evidence of State practice.

The existence of a consistent, widespread, and systematic State practice is also evidence of *opinio juris*.[178] Because contracting states moved to include language and clauses in these treaties to protect ethnic and religious minorities, and prohibit states from attempting to harm them in any form, this shows that there was an awareness from States that there may exist a norm that required the protection of minorities. The treaties are evidence that States believed that a norm existed and, as such, required them to comply. The treaties attempt to proscribe State behavior, even if the proscription may only be implied at best. States complied with the norm because of what they may have believed was already required of them. The fact that these treaties take bold stances to ensure the equal, fair, and just treatment supports the existence of a norm that would prohibit States from engaging in any actions that would be contrary to ensuring equality, fairness, and justice.

[177] See Edict of Nantes, art. 52; Treaty of Westphalia, art. 28 & 123; Treaty of Küçük Kaynarca, art. 7, 14, 16 §2, 16 §9, and 17 §2; The Treaty of Berlin, art. 5, 27, 35, and 44; *see also* the Minority Treaties (The Little Treaty of Versailles; the Austrian-Czech-Yugoslav Treaty of St Germain-en-Laye (1919); the Romanian Treaty of Paris (1919), the Greek Treaty of Sèvres (1920); the Hungarian Treaty of Trianon (1920), the Bulgarian Treaty of Neuilly-sur-Seine (1919), and the Turkish Treaty of Lausanne (1923)).

[178] *See* Douglas Guilfoyle, *International Criminal Law* 21 (2016) ("The very process of treaty negotiation and drafting may allow States to clarify an unclear or disputed customary rule by reaching agreement on what the rule is. After all, the process of treaty negotiation is an action of State practice, and in the course of debates many statements of *opinio juris* might be made. This process could 'crystallize' the emergency of a customary rule. . .Put simply, if enough States agree in a given forum that a rule is part of a custom, then it very likely is a part of custom.")

Somalia and Legal Pluralism: Advancing Gender Justice through Rule of Law Programming in Times of Transition

Roisin Burke

I. Abstract

War frequently results in the erosion of the rule of law. Gender inequality is ubiquitous in many legal systems, but gendered rights abuses are often even more pervasive during and post-conflict, with the frequent re-patriarchalization of societies. Such abuses are evident in respect of civil and economic rights, property and inheritance, and in the public and private spheres. Sexual violence, land grabbing, displacement, and widespread human rights violations are also features of conflict. The UN Security Council has passed several

Resolutions on Women, Peace and Security since 2000, stressing the need to mainstream gender considerations into all aspects of peace-building, including rule of law reform - in part to foster sustainable social and legal transformations. Over recent years increased focus is being placed on rule of law reform programming in post-conflict states, by actors such as the

UN, in partnership with local actors. Activities have tended to concentrate on formal legal systems, often with lessor focus on the broader plural legal contexts often prevalent. Customary and religious justice systems are core to societal regulation in many conflict-affected states. In Somalia, for instance, there co-exists customary, Shari'a and formal legal systems. The Somali context will be used to explore rule of law programming processes with respect to advancement of gender justice. Somalia gives rise to interesting considerations regarding the interplay between formal and customary legal systems when dealing with the issue of gender justice. In this context, the paper explores opportunities to advance gender justice in transitions from conflict. In doing so, it will consider the extent to which gender considerations are considered central to the design and implementation of rule of law reform initiatives, and what they focus on as they engage with both formal and informal legal systems, and possible lessons learned.

II. Introduction

War frequently results in the erosion of the rule of law ('RoL').[1] Gender inequality and gendered rights abuses are ubiquitous in many legal systems in terms of laws and institutional make-up. However, gendered rights abuses are often even more pervasive during and post-conflict, with the frequent re-patriarchalization of societies. Such abuses are often structural and are evident in respect of

[1] Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* (Oct. 2006), http://documents.worldbank.org/curated/en/537621468137719257/Rule-of-law-reform-in-post-conflict-countries-operational-initiatives-and-lessons-learnt (last visited Oct. 15, 2018).

civil and economic rights, and in the public and private spheres. Land grabbing, mass displacement, poverty, and widespread human rights violations are features of conflict. Police and armed forces are often weak, corrupted, or involved in human rights abuses, and prison and court systems in a state of collapse.[2] Sexual violence is rampant and used as a tactic of war, to disempower, and it is more likely to be targeted at women and children.[3] Men and boys, in turn, are more likely to be pressured into combatant roles and have higher mortality rates.[4] These violations impact on societies long after war comes to an end.

Conflict often also causes shifts in gender roles. Women often take on roles frequently stereotyped as male, including as combatants, decision-makers, and heads of households. Strategies should be devised to capitalize on shifts in gender relations that frequently coincide with conflict in a transitional context.[5] However, women are frequently marginalized in the state reconstruction process, including efforts to engage in security sector and RoL reform. This is also evident in activities supported by international actors. These processes are often androcentric in nature. Gender justice traditionally has not perceived as a priority and/or limited largely to sexual violence. Ignoring gender in the reconstruction of states' security and justice sectors in the aftermath of conflict risks reproducing systems based on the subordination of women.[6] Moreover, as highlighted by the CEDAW Committee, '[p]olicies developed and decisions made by men alone reflect only part of human experience and potential.'[7]

The Security Council has passed a number of resolutions on Women, Peace and Security ('WPS') calling for an end to conflict-related sexual and gender-based violence ('SGBV') and the need for women's participation in peace processes, including RoL reform.[8] Resultantly, these Resolutions are encouraging changes in modes of operation as gender considerations increasingly have to be integrated into plans, resource allocations, and goals across UN programmes and RoL work, and indeed those of states and other organisations.[9] National Action

[2] *Id.*

[3] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 U. CAL. BERK. INT. L. 288 (2003).

[4] *See*, eg, Shelley Inglis ET AL., CEDAW and Security Council Resolution 1325: A Quick Guide (2006), http://www.unwomen.org//media/headquarters/media/publications/unifem/cedawandunscr1325 eng.pdf?la=EN&vs=1006. (Last Visited would add specificity)

[5] Carolyn Graydon, *Time to Get Serious About Women's Rights in Timor-Leste: Wrestling Change from the Grassroots Up*, in WILLIAM BINCHY (ED.), TIMOR-LESTE: CHALLENGES FOR JUSTICE AND HUMAN RIGHTS IN THE SHADOW OF THE PAST 386, 386 (2006).

[6] Patricia Jagentowicz Mills, *Feminist Critical Theory, Reviewed Work(s): Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory by Nancy Fraser Justice and the Politics of Difference by Iris Marion Young*, 58 SCIENCE AND SOCIETY 211–217 (1994).

[7] CEDAW Comm., General Recommendation 23: Political and Public Life, UN Doc A/52/38 (1997) [13].

[8] S.C. Res. 1325 (Oct. 31, 2000); *See* also, S.C. Res. 1888 (Sept. 30, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 1889 (Oct. 5, 2009); S.C. Res. 2122 (Oct. 18, 2013).

[9] U.N. Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities,* U.N. Doc. A/66/133 (Aug. 8, 2011); *NATO/EAPC Policy for Implementing UNSCR 1325 on Women, Peace and Security, and Related Resolutions* (June 2007) <https://www.nato.int/cps/en/natohq/official_texts_76395.htm>.

Plans on WPS are an emerging trend in many post-conflict states, but also in many other states. These in essence set out country specific or institution specific plans of action for mainstreaming gender across programmes and institutions relevant to WPS.[10] Security Council Resolution 1889, for example, highlights the need for adequate financing for initiatives that enable women's participation in peace-building.[11] It emphasizes that continued marginalization of women in public and socio-economic spheres undermines prospects for durable peace, security and reconciliation.[12]

The WPS Resolutions do not create new legal norms, but rather re-articulate and build on those already contained in international human rights instruments, not least the Universal Declaration on Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic Social and Cultural Rights ('ICESCR'), the Convention on the Rights of the Child ('CRC') and Convention Against the Elimination of Discrimination Against Women ('CEDAW'), and are the result of decades of advocacy by women's movements.[13] In essence, the WPS resolutions might be viewed as tools aimed at enhancing adherence to pre-existing human rights norms on gender equality and justice. Inglis et al observe:

UNSCR 1325 helps to broaden the scope of CEDAW's application by clarifying its relevance to all parties in conflict and in peace. CEDAW, in turn, provides concrete strategic guidance for actions to be taken on the broad commitments outlined in UNSCR 1325. Drawing on these instruments together will enable advocates to maximize the impact of norms and standards for gender equality in all conflict and post-conflict interventions.[14]

However, international treaties on human rights do not always specify gender rights abuses, and some states limit the scope of application of human rights instruments. Some reference cultural and religious belief systems for entering reservations or they simply do not ratify them; a prominent example being CEDAW.[15] CEDAW, on the other hand, has been criticized for marginalizing

[10] For details on some of these National Action Plans (NAPs) on WPS, *see*, Peace Women <http://www.peacewomen.org/member-states>.

[11] S.C. Res. 1889 (Oct. 5, 2009).

[12] *Id.*

[13] 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, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171*; See further* OHCHR, *Women's Rights are Human Rights,* <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶37. U.N. Doc. A/CONF.157/23 (July 25, 1993).

[14] *Supra* note 4.

[15] Askin, *supra* note 3, 294-295; Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 G.W.U. Int. L. Rev. 605, 606 (2002); Eve M. Grina, *Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings*, 17 Wm. & Mary J. Wonmen & L. 435, 443–444 (2011); Eric Engle, *Universal Human Rights: A Generational History*, 12 Annual Survey of Int. and Comparative Law 219, 226–227 (2006).

women's rights from mainstream programmes.[16] This silo effect, when it comes to gender and its equation with women's issues, rather than being concerned with relationships between men and women, can still be seen in many spheres despite the WPS agenda.

Nevertheless, as a number of feminist scholars note, transitions from conflict to peace presents opportunities for reforming legal systems to promote gender justice and women's empowerment.[17] The early stages of reconstruction from peace negotiations to constitutional and legislative reform and state-building offer opportunities to redefine the state and its legal system and institutions along gender equitable lines and in conformance with international human rights standards.[18] But in line with the WPS agenda, this necessitates mainstreaming gender considerations in reviewing all legal instruments and institutions, so as to identify weakness that undermine gender justice.[19] Such opportunities do not arise often in states not affected by conflict, and they offer a rare opening to engage with underlying structures of inequality and attitudes that underpin them. These attitudes are often rooted in traditions and sometimes are associated with conceptions of identity in the face of real or perceived Western imperialism. The question, however, is how effective and transformative are RoL programmes in ensuring better access to justice for women and girls? How are these programmes being implemented and are they able to have an impact, particularly in plural legal contexts? Much depends on who is bought into and left out of RoL reform processes.

This paper explores some of the dynamics and intricacies around RoL programming as it relates to gender justice in states transitioning from conflict. The paper considers the extent to which RoL reform programmes have been or could be used as an enabling framework to advance gender justice in states transitioning from conflict to peace. It discusses whether and how RoL reform programmes engage with the issues of gender justice in these contexts. Focus is placed primarily on the UN and national actor cross engagements. A small sample of initiatives from the plural legal system context of Somalia is drawn on to exemplify some aspects of these dynamics. In doing so, some observations and recommendations are made for strengthening RoL programming efforts.

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[16] *Transforming the Mainstream: Gender in UNDP* (2003), http://iknowpolitics.org/sites/default/files/transforming20the20mainstream20-20part201.pdf.

[17] Niamh Reilly, *Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach*, 3 INT'L L. J. IN CONTEXT 155–172 (2007); *See also* Elena A. Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 BOSTON B.C. L. REV., 1 (2009); Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Justice Discourses in Transition*, 13 SOCIAL & LEGAL STUDIES 305–328 (2004); Christine Chinkin & Hilary Charlesworth, *Building Women into Peace: The International Legal Ftramework*, 27 THIRD WORLD QUARTERLY 937–957 (2006); Laura Grenfell, *Legal Pluralism and the Rule of Law in Timor Leste*, 19 LEIDEN J. OF INT'L. L.305–337 (2006); FIONNUALA NÍ AOLÁIN, DINA FRANCESCA HAYNES & NAOMI CAHN, ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS (2011); Vasuki Nesiah, *Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice*, 15 COLUMBIA. J. Gender & L. 812 (2006).

[18] *Supra* note 4 at 25.

[19] Eve M. Grina, *Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings*, 17 WM. & MARY J. WOMEN & L. 435, 443–444 (2011).

Examining how programming in the area of rule of law is conducted is useful in developing programming policy so that it might better effectuate gender equitable outcomes.[20] It ought to be stressed that each transitional state requires a tailored approach to rule of law reform and programmes, not least given the complexities of history, legal systems, customs, cultures and religions have on rule of law in any given context.

Part I of this article provides an overview of the context and methodology. Part II introduces the concept of rule of law and RoL programming, and theory around norm adoption dynamics and their relationships to advancement of gender justice in the context states transitioning from conflict. In Part III, the case of Somalia is discussed in terms of legal pluralism. While numerous RoL programming initiatives have been implemented in Somalia, Part IV focuses on one. An entry point with respect to gender justice and RoL programming has been the use of 'one-stop' centres as part of a strategy to support victims of SGBV. This example illustrates the centrality of local intermediaries and partnerships with grassroots organisations in RoL programme delivery.

In Part V it is argued that in plural legal contexts, advancement of gender justice requires engagement with informal justice systems. Simply put, despite their weaknesses, these systems are in reality what are used by the majority of the population in many contexts. It is argued that this necessities finding avenues to work with local elders and religious leaders and consideration of harmonization strategies between varying levels of plural legal systems. A number of concluding observations will be made in Part VI in terms of RoL programmes, engagements in plural legal contexts and advancing gender justice.

A. Context and Method

This research is exploratory and policy-orientated in nature. The author is interested in how RoL programming deals with legal pluralism and gender justice, in the early stages of a state's transition from conflict to peace. Large parts of Somalia, in particular South Central, are still transitioning from conflict. Somalia, like many post-conflict and transitional states, has a plural legal system, which gives rise to interesting considerations with respect to the relationship between formal, customary and religious (Shari'a in Somalia) legal systems when dealing with the issue of gender justice. The United Nations, amongst others, has spent years running RoL programmes aimed at legal system reform and rebuilding of justice sector institutions throughout Somalia, with varying levels of partnership with local actors. 70% of Somalis live in rural areas.[21] UN ability to deliver RoL programmes in these areas relies heavily on local partners and remote manage-

[20] Richard Strickland, *Gender, Human Security, and Peacebuilding: Finding Links Between Policy and Practice- Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women* (Nov. 9, 2003) https://www.un.org/womenwatch/daw/egm/peace2003/reports/CASESTUDY.pdf.

[21] Mobile Courts Workshop Opens in Mogadishu (Dec. 16, 2015), <http://www.so.undp.org/content/somalia/en/home/presscenter/pressreleases/2015/12/16/joint-press-release-mobile-courts-workshop-opens-in-mogadishu.html>.

ment.[22] This is particularly the case beyond Somaliland and Puntland. The UN mission in Somalia relocated to Nairobi for a number of years due to attacks on its Mogadishu compound in 2013.[23] A number of interviewees stressed severe restrictions on movement outside protected areas inhibits programme delivery, and puts a strain on relationships with local partners who have difficult in accessing these protected areas.[24]

The UN and its various departments, increasingly are trying to mainstream gender considerations in RoL reform efforts. RoL programming in Somalia has focused on criminal and civil law; mobile court initiatives, with a view to increasing access to formal justice in rural communities; programmes aimed at enhancing access to justice for victims of SGBV; and capacity-building of legal aid networks. For the purpose of this paper comments will be limited to women's access to justice in the context of SGBV and 'one stop' centres; and comment on some engagements with the traditional customary and religious justice systems which make up the broader legal cultures in these societies.[25] The term 'informal justice' system is often used to refer to customary justice systems and other forms of non-state justice systems. However, in reality, in many states 'informal justice' systems are broader and some may have been imbued with a degree of semi-formality within state restructures, particularly where there have been efforts to integrate or harmonise various aspects of a plural legal system.[26]

The dynamics examined in this paper are approached through a gendered lens of analysis, in examining the gendered context and potential transformative effects of RoL programmes. This lens enables a bottom-up approach to RoL programming, which it is argued leads to greater likelihood of gender equitable outcomes and sustainable peace and development.[27] Feminist critiques of the rule of law movement, in addition to literature on norm socialisation and translating processes, post-conflict reconstruction, transitional justice, custom, peace-building and access to justice underpin research findings. An extensive desk research was conducted, examining a board spectrum of literature in the area, along with

[22] UNDP Somalia Country Programme 2011-2015, <http://www.undp.org/content/dam/somalia/docs/Project_Documents/Democratic_Governance/UNDP_CPD%20Booklet%20A4_AB_PM.pdf>.

[23] UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, 1-2, http://www.undp.org/content/dam/undp/documents/projects/SOM/00060507_Gender%20Strategy%20for%20Somalia%20Final.pdf.

[24] Skype Interviews with New York and Kenya (2013-2014). *See*, also, Róisín Burke, *Rule of Law Reform Initiatives: Impact on Gender Justice in Fragile, Conflict-Affected States* (2016), www.ruleoflawexchange.org.

[25] *Supra.* note 24.

[26] *See* Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (2006), https://www.scribd.com/document/30433456/Doing-Justice-How-informal-justice-systems-can-contribute (last visited Oct. 15, 2018).

[27] Sarah Douglas, *Gender Equality and Justice Programming: Equitable Access to Justice for Women*, PRIMERS IN GENDER AND DEMOCRATIC GOVERNANCE 3, 25 (2007), https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/gender-equality-and-justice-programming-equitable-access-to-justice-for-women/GenderGovPr_Justice_2.pdf.

UN doctrine and institutional practice[28], NGO and international organization reports, and other pertinent primary and secondary source documents.

Findings also partly draw on qualitative research interviews conducted as part of a broader project which related to both Somalia and Timor Leste, with both male and female stakeholders involved in RoL programming at UN headquarters and in the case study contexts. This was to allow for a better contextual understanding of and insights into RoL reform programming as it relates to gender justice within the legal systems under review.[29] This was also to permit a triangulation of findings. As noted by Genn, Partington and Wheeler '[e]mpirical legal research is valuable in revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions. . .and on citizens.'[30] Interviews took anywhere from approximately thirty minutes to ninety minutes, depending on the respondent, their areas of expertise, and their responses to the semi-structured questions posed. Transcripts were coded for emerging themes and used in developing and confirming a number of the observations made in this paper. The vast majority of the seventeen research interviews were conducted either in-person (in Kenya) or via Skype, with the security situation in Somalia limiting the scope of this research. Actors engaged with were located across Somaliland, Puntland and South Central, and primarily, although not invariably, operating from urban centres. Rural RoL programming engagements in Somalia are implemented primarily through local Somali networks, particularly outside of Somaliland and Puntland. Nevertheless, the interviews, while limited, provide some useful insights. A further ten interview sessions were held in New York so as to get an insight on RoL programming at a strategic level. Twenty-six parallel interviews were also conducted throughout Timor Leste, but are not drawn on here.

B. Rule of Law and Gender in times of Transition

As a prelude, it is important to note that 'gender' is a highly fluid social construct, which does not relate to sex or biological differences between males and females, but refers rather to socially ascribed roles and opportunities in any given society.[31] Conceptions of gender roles are malleable and change with location, influences and time. Moreover, gender invariably intersects with other variables

[28] GUGLIELMO VERDIRAME, *The UN and Human Rights: Who Guards the Guardians* 57–58 (2011).

[29] Important Concepts Underlying Gender Mainstreaming, UN Women, http://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf>(understanding the term gender is itself related to both males and females, and the relationship between them, and necessitating representative discussions of RoL programming and gender justice).

[30] HAZEL GLENN, MARTIN PARTINGTON & SALLY WHEELER, *Law in the Real World: Improving Our Understanding of How Law Works* (Nov. 2006), https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/law_in_the_real_world_-_improving_our_understanding_of_how_law_works.pdf.

[31] Designing and Evaluating Land Tools with a Gender Perspective: A Training Package for Land Professionals, (2011); https://unhabitat.org/sites/default/files/download-manager-files/Designing%20and%20Evaluating%20Land%20Tools%20with%20a%20Gender%20Perspective.pdf ;); Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse', in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, 167, 167 (Julie Peters and Andrea Wolper eds.,1995); VERDIRAME , *supra* note 28, at 3.

which can result in discriminatory practices, such as class, race, poverty, ethnicity and age.[32] Cultural norms and attitudes around gender affect the manner in which women are bought into or marginalized from peace-building processes. There is increasing recognition in the international sphere that mainstreaming gender considerations into all aspects of RoL programming in conflict-affected states is central to sustainable peace and security. These programming activities are generally conducted via partnerships between international and domestic actors. 'Gender mainstreaming' in RoL programming includes ensuring both men and women's participation across all aspects of the justice system. It entails examining roles of men and women in any given context and assessing why these roles are defined as they are and how this impacts on societies' differential needs, vulnerabilities, capabilities and access points.[33] Gender mainstreaming is a process rather than an end in itself.[34] It necessitates addressing legal, political, economic and social injustices.

C. Rule of Law and Programming

RoL reform programmes are fundamental to enhancing human security in the aftermath of conflict. Indeed this process often commences even before the end of conflict, and gender considerations need to be integrated even in this early phase.[35] Human security is centred on the human element, individual and collective, of security. The notion of 'human security' moves beyond traditional male dominated perceptions of security, which focus on military intervention, protection of state sovereignty and immediate protection from physical violence, shifting the focus to good governance, human rights, individual empowerment, and economic, political, social, ecological, and gender inequalities, which feed into insecurity during conflict and transition.[36] It involves freedom from fear, want and danger. For sustainable peace and security the rights of people need to be protected and social justice assured.[37] As Samuels notes, restoration of security occurs in two, often simultaneous phases, the first relating to the immediate need to restore some degree of law and order, and the second the longer term develop-

[32] For a more extensive explanation of the terms 'gender', 'gender mainstreaming' and 'gender equality', see, OSAGI Gender Mainstreaming - Concepts and definitions, http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm (last visited Oct 15, 2018).

[33] Gender Approaches in Conflict and Post-Conflict Situations, 9 (UNDP, 2001), http://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-approaches-in-conflict-and-post-conflict-situations-.html (last visited Oct 15, 2018).

[34] Rekha Mehra and Geeta Rao Gupta, *Gender Mainstreaming: Making It Happen* (International Centre for Research on Women, February 2006), <http://www.icrw.org/ publications/gender-mainstreaming-making-it-happen>.

[35] SHEILA MEINTJES, ANU PILLAY & MEREDETH TURSHEN, THE AFTERMATH, WOMEN IN POST-CON?ICT TRANSFORMATION (2001).

[36] RICHARD STRICKLAND, GENDER, HUMAN SECURITY, AND PEACEBUILDING: FINDING LINKS BETWEEN POLICY AND PRACTICE - PEACE AGREEMENTS AS A MEANS FOR PROMOTING GENDER EQUALITY AND ENSURING PARTICIPATION OF WOMEN, U.N. Division for the Advancement of Women, EGM/PEACE/2003/EP.9, 5 (2003), http://www.un.org/womenwatch/daw/egm/peace2003/reports/CASESTUDY.pdf; HUMAN SECURITY NOW, Commission of Human Security, 4 (2003), http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf.

[37] UNDP 1994 HUMAN DEVELOPMENT REPORT (UNDP, 2003).

ment of state institutions capable of maintaining and further developing rule of law in the state and guaranteeing human security.[38] Access to justice, in turn, entails the 'ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.'[39]

Law is a social construct and a framework embodying power but that it can be used as a tool for advancing certain norms and behaviors in society. There are many criticisms of the RoL in feminist literature, given law's propensity to be used as an instrument of oppression by elite actors with an interest in maintaining power over those it oppresses. Some argue that RoL reinforces the divide between the public and private spheres, with the later sphere being the site of much SGBV.[40] The problem is not with law itself, but rather with law that is made with unequal participation of diverse actors in society, including women. More equitable participation should render the law a more just and effective framework from within which to regulate societal relations. There are many instances where law can and is used to undermine human rights, and reinforce inequalities in governance and certain sectors of societies' power over others. Moreover, it is often underpinned by social, political, patriarchal, cultural and religious influences which reinforce gender inequality.[41] Law is not divorced from political, social and cultural belief structures in which gender inequality may be embedded. Nevertheless, law can constructively also be used to empower.[42] Law's transformative potential depends on many variables, but also who is bought into and influences its construction and processes. This may include external actors, such as the UN; the state's government or political elite; national actors and NGOs; civil society and grassroots organizations; religious leaders; and customary or traditional justice actors in plural legal contexts.

There is no universally accepted definition of the 'rule of law' ('RoL'). The literature refers to both 'thin' and 'thick' conceptions of the rule of law. Thin definitions of the rule of law generally refer to formal legal and procedural rules, which often tend to be minimalist. Thick definitions of the rule of law go towards the broader contours of justice and human rights, including gender justice.[43] Rule of law is a system wherein each and every individual has access to a just and equitable justice system, that is accountable, trustworthy, accessible, transparent,

[38] SAMUELS, *supra* note 1 at 8.

[39] *Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights Based Approach to Access to Justice*, (UNDP, 2005), https://www.un.org/ruleoflaw/blog/document/programming-for-justice-access-for-all-a-practitioners-guide-to-a-human-rights-based-approach-to-access-to-justice/.

[40] Grina, *supra* note 15 at 450; Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L. J. 379, 383 (1991).

[41] Roisin Burke, *Rule of Law Reform Initiatives: Impact on Gender Justice in Fragile, Conflict-Affected States*, BINGHAM CENTRE FOR THE RULE OF LAW GLOBAL RULE OF LAW EXCHANGE PAPERS (2016), www.ruleoflawexchange.org.

[42] See, Nesiah, *supra* note 17.

[43] U.N. Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, U.N. Doc. S/2011/634 (Oct. 12, 2011), § 8.

entails a culture of compliance with the law, and ensures human rights are complied with on an equal basis for all.[44]

RoL programming in the past decades has taken a primarily technocratic and state centric approach, concentrating on state institutions and formal legal system institution-building, legal reform and training of legal personnel. This was often to the neglect of other interrelated issues, such as the informal justice sector, gender justice, and the private sphere.[45] Moreover, it has been at times conducted without full cognizance of domestic culture, religion, traditions, and gender dynamics in particular country contexts. The latter need to inform RoL programming from the early planning phases, otherwise programmes fail to address broader realities of a state's regulatory system. However, RoL actors often enter with Western type legal training and legal structures in mind. Their experience of regulation often derives from these. Moreover, these actors are deployed with increasingly complex mandates and restrictive timeframes for output implementation and must act with performance based budgets in mind. RoL programming activities are generally inter-agency efforts, conducted by an array of UN agencies and other external actors. In utilizing a technocratic, top-down approach, RoL programming has sometimes proven to have had limited effect, at least substantively, in environments where formal legal institutions and judicial reforms do not necessarily reach the core of societal regulation.[46] Golub stresses the need for the poor to be considered partners in the process of legal change, and that they play a key role in setting priorities for legal reform. This Golub argues may go beyond the boundaries of formal legal structures, and that law is just one mechanism to achieve legal empowerment and change.[47]

Wong argues, 'the weak association between rule of law and gender equality results from dysfunctional legal institutions.'[48] She further notes that the impact of rule of law on gender equality is largely dictated by how rule of law is defined and that thin definitions are far less likely to achieve this end than think definitions of the rule law. Moreover, while law may potentially impact on gender relations and social interactions a variety of other societal factors and institutions also impact on these relations, and these may well have greater effect than the law[49], particular where justice systems are weak. Ni Aolain aptly notes:

What Western policy makers and political observers are overlooking in their enthusiasm for the rule of law as a response to troubled transitions is that move-

[44] Grina, *supra* note 15 at 438–439.

[45] Ryan S. Lincoln, *Recent Developments Rule of Law for Whom? Strengthening Rule of Law as a Solution to Sexual Violence in the Democratic Republic of Congo*, 26 BERKELEY J. OF GENDER L. & JUST.159, 160–161 (2011).

[46] Stephen Golub*, Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative.* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, https://carnegieendowment.org/2003/10/14/beyond-rule-of-law-orthodoxy-legal-empowerment-alternative-pub-1367 (last visited Oct. 15, 2018).

[47] *Id.* at 4.

[48] Josephine Wong, *Gender Inequality: The Interplay Between Rule of Law and Social Norms* 181, 186 (CONSTITUIÇÃO, ECONOMIA E DESENVOLVIMENTO: REVISTA DA ACADEMIA BRASILEIRA DE DIREITO CONSTITUCIONAl, 2010), http://www.abdconst.com.br/revista2/Gender.

[49] *Id.* at 185.

ment from a state of weak or absent rule of law to the achievement of the rule of law involves far more than getting judges trained, putting modern police equipment in place, and re-printing and distributing legal texts. It is a transformative process that changes how power is both exercised and distributed in a society and thus a process inherently threatening to existing power holders. It also involves basic changes in how citizens relate to state authority and also to each other.[50]

Transformation is made up of legal and political engagements between internal and external actors, all with different and often competing agendas.[51] In plural legal contexts these inevitably will need to include customary and religious justice sector actors.

The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) is the central body responsible for gender mainstreaming across UN work, yet this is also the responsibility of all other UN entities. SC Resolution 1889 requires that UN, and indeed other entities, in cooperation with national partners, take into account women's empowerment in post-conflict needs assessments and planning.[52] Moreover, it notes the need to track and monitor funding targeting such empowerment.[53] Of course, actual RoL reform is the role of the state's authorities and local actors. Nevertheless, the UN, and indeed other bodies, are influential in this process in providing assistance in RoL reform to local partners. Often the input of UN agencies will depend on their mandates. Detailed programming documents are used. In these plans, it is now typical to see gender mainstreaming efforts and language integrated into programmes. UNDP has adopted a country specific Gender Strategy for integrating gender considerations across programmes.[54] UNDP RoL programmes, are subject to sets of gender indicators and markers in design and output.[55] In more recent years a Gender Equality Certification Seal has been established to encourage UNDP country office performance in gender mainstreaming across all their programmes.[56] That stated, norm diffusion when it comes to gender justice in plural legal contexts is not easily measurable in terms of outputs, which may to an extent contribute to avoidance of more holistic engagements.

The UN is often one of the first actors to provide technical assistance to national governments on reforming their legal systems in conflict-affected states. As such, it plays a role in encouraging the advancement of gender justice in

50 Fionnuala D. Ni Aolain & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J.OF INT'L L. 380, 386, fn 27 (2009).

51 *Id.* at 398.

52 S.C. RES. 1889, UNSCOR, 6196TH MTG, U.N. DOC. S/RES/1889 (Oct. 5, 2009).

53 *Id.*

54 *Id.*; UNDP held a staff workshop titled 'Overcoming Resistance to Gender' in which a handbook on mainstreaming gender in programming was presented. UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, 8, http://www.undp.org/content/dam/undp/documents/projects/SOM/00060507_Gender%20Strategy%20for%20Somalia%20Final.pdf.

55 A gender mainstreaming guide was produced by UNDP to guide programme design. Id; Somalia Gender Progress Report, *supra* note 23.

56 *Gender-mainstreaming Made Easy* (UNDP, 2013), at iv, 16, http://www.undp.org/content/dam/somalia/docs/Project_Documents/Womens_Empowerment/Gender%20Mainstreaming%20Made%20Easy_Handbook%20for%20Programme%20Staff1.pdf.

transitional periods, in partnership with local actors and others. Assistance from external actors, such as UNDP, tends to be in the form of funds, technical support and capacity-building. Rule of law components and Gender Units have been deployed across UN operations. Several UN entities have made use of gender markers at least on a trial basis. Others have institutionalized their use in looking at budget allocation.[57] The importance of financing gender sensitive rule of law activities was highlighted by a number of interviewees.[58] Past evidence has shown that only marginal financing is afforded to activities post-conflict aimed at enhancing gender equality and women's empowerment.[59] In 2006, the UN established the Rule of Law Coordination and Resource Group which is supported by the Rule of Law Unit, but RoL programming is cross-departmental and intersectoral as it is relevant to so many different areas.

Efforts to re-establish the rule of law often commence prior to a period where a conflict can not necessarily be said to have ended. As noted by UN Women, 'it is never too early in a transition context to prioritize women's empowerment and gender equality.'[60] That stated, many scholars remain critical of an overly optimistic view of the law's capacity to alter gender relations.[61] As Ni Aoláin and Hamilton observe, rule of law programming during transition involves frequent legal and political engagements between state and international and other actors, who often articulate a multitude of interests and are involved in their prioritization.[62]

RoL programmes need to delve deeper into the gendered dynamics of power, inequality, conflict and resultant violence.[63] As stated by Strickland, '[t]he interface of peace and gender relations is central to the holistic conceptualization of peace incorporating aspects of economic and social justice, equality, and human rights.'[64] As noted, women's experiences in the aftermath of conflict are not only physical or related to sexual violence, but they are also structural, and failure to address broader structural violence, will have serious impacts on livelihoods, peace, security and development in the long run. Yet the focus of RoL programmes dealing with gender and women has traditionally been on SGBV. SGBV is hugely problematic during conflict and its aftermath, and programming efforts are focused on immediate violence and security problems. This is partially due to

[57] Women's participation in peacebuilding – Report of the Secretary-General, U.N. SCOR, 65th sess, U.N. Doc. A/65/354-S/2010/466 (7 September 2010), at 54; Women, Peace and Security Statistics: Where We Stand and How to Move Forward, UN Women, Peace and Security Section, Fifth Global Forum on Gender Statistics, November 2014, UNSTATS, at 6, http://unstats.un.org/unsd/gender/Mexico_Nov2014/Session%207%20UNW%20paper.pdf.

[58] Interview, 2013-2015. On file with the author.

[59] U.N. Secretary General, Women's participation in peacebuilding, *supra* note 57 at ¶34–36.

[60] UN Women, Gender and Post-conflict Governance: Understanding the Challenges (October 2012) 2 http://www.unwomen.org/~/media/Headquarters/Media/Publications/en/05CGenderandPostConflictGovernance.pdf.

[61] Ni Aolain and Hamilton, *supra* note 50 at 382.

[62] *Id.* at 389.

[63] STRICKLAND, *supra* note 36 at 4.

[64] *Id.* at 9.

the need to regain stability and order in the aftermath of conflict. However, sexual violence and impunity for such is often rooted in institutionalised and socialised structural violence and gender inequalities in the public and private spheres.[65]

D. Norm Transfusion and Putting Rights in the Vernacular

In light of the above the author is therefore interested in the processes by which transnational norms in relation to gender justice can influence RoL reform in transitional contexts for more gender equitable outcomes. There are a number of theories on this. From the perspective of politics and international relations, Finnemore and Sikkink refer to the notion of 'strategic social construction', wherein 'actors strategize rationally to reconfigure preferences, identities or social context'.[66] In their view, what occurs is a normative lifecycle, where agreement must obtain a critical mass amongst stakeholders, reach a tipping point, and then is adopted on scale, through norm internalization.[67] The connection between international and domestic norms is central; many international norms begin as domestic ones, and domestic norm adoption draws on the international.[68] Levitt and Merry posit, that this often occurs through activities of 'norm entrepreneurs' who initially 'frame' or name the norms. These norm will generally go through a process of contestation. Various 'intermediaries' play a role in norm internalization and adaption at international and domestic levels.[69] These processes can been seen in relation to gender justice and the WPS agenda, with the UN acting as a platform for 'norm entrepreneurs' or women's right movements to garner support. It acts as a supportive medium, amongst other actors, in working towards the internationalization of these norms at international and domestic levels. Norm adaption results for a variety of reasons, including both internal and external pressures, morality, ideation, altruism and desires for legitimacy and good reputation in domestic and international spheres.[70]

The Constitution provides an initial point from which women may claim their rights, and it acts a spur for more positive gender equal and responsive legislative reforms. It is therefore integral that gender considerations and women's human rights protections are adequately integrated in Constitutional reforms post-conflict.[71] When it comes to broader legislative reforms, Grina suggests that international actors should provide transitional states with sample laws that promote

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65 Mills, *supra* note 6, at 209; Hilary Charlesworth, *What Are "Women's International Human Rights"?, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 65, 69 (*Rebecca Cook* ed., 1994).

66 Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887–917, 888 (1998).

67 *Id.* at 892.

68 *Id.* at 893.

69 Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441–461 (2009); Finnemore and Sikkink, *supra* note 67 at 897.

70 Finnemore and Sikkink, *supra* note 67 at 898.

71 UN Women, Gender and Post-conflict Governance, *supra* note 60 at 5.

gender justice. She notes that gender neutral laws are often inadequate in achieving gender justice, particularly in areas subject to frequent gender discrimination such as property rights and family law.[72] Such model laws are already available, for instance, in the area of criminal law, through the Model Codes for Post-conflict Criminal Justice.[73] In practice in the programming context, external actors supporting governments in the process of legal system reform often draw on the laws of other countries, civil or common law, depending on context. The difficulty, however, is that framing the laws on the basis of laws existing in other states is that it ignores the context these laws have to regulate. Practice shows that those engaged in RoL reform activities should not attempt to conduct legal transplants, given that such reforms do not survive in the long-run. This is because they do not adequately take into consideration domestic customs and plural legal frameworks.[74] Law reforms must remain conscious of, and be tailored to, the local context in which such laws must operate, particularly in plural legal contexts. Changes to the legal system and laws must be done in cooperation with local actors, with broad representative participation of local stakeholders, men and women, and include the marginalised and poor.

Women's equal participation should be central to reform of the state. Legal system reforms should have as a primary goal women's legal and *de facto* empowerment. This may require putting in place affirmative action measures to promote gender equality both in society and in the state's institutional and political structures. In a recent UN study, women in post-conflict states attributed their lack of faith in the justice sector to the lack of women's participation in justice sector institutions.[75] Account should be taken of different challenges faced by both women and men in both urban and rural areas.[76]

While law may influence gender relations, a variety of other societal factors and institutions also impact on this, particularly where the formal justice system is weak. Reform of the formal legal system alone is inadequate in states with plural legal systems, where customary and religious laws prevail. RoL programmes and activities need to factor this into account if gender justice is to be advanced.

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[72] Grina, *supra* note 15 at 471; Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 JOURNAL OF LAW AND SOCIETY 351, 351–385 (2000).

[73] These were drawn up in the context of a project led by the United States Institute of Peace and the Irish Centre for Human Rights, in collaboration with the UN Office of the High Commissioner for Human Rights and the UN Office on Drugs and Crime. See, Model Codes for Post-Conflict Justice, United State Institute for Peace, Model Codes for Post-Conflict Justice, https://www.usip.org/publications/model-codes-post-conflict-justice (last visited Oct. 15, 2018).

[74] In the case of Timor Leste, until 2009 when the Penal Code was adopted, the country still relied on Indonesian criminal laws ill-suited to the Timorese context. John C. Reitz, *Export of the Rule of Law Symposium: Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429–486, 464 (2003); Madhavi Sunder, *Piercing the Veil*, 112 YALE LAW JOURNAL 1399 (2003).

[75] Women Count for Peace: The 2010 Open Day on Women, Peace and Security (UNIFEM, 2010), 16, http://www.unifem.org/materials/item_detail672d.html?ProductID=183; However, it cannot be assumed that women's mere presence in justice sector institutions will result in gender sensitivity. DOUGLAS, *supra* note 32.

[76] Burke, *supra* note 25 at 3.

It must be emphasized that external actors cannot simply impose their will in terms of advancing gender justice outcomes. RoL reform needs to come bottom-up from the local population, and in practice from those in power. Without buy-in from the local population, men and women, RoL reforms will have little impact in the long-run when external actors withdraw.[77] Grina notes that, 'the goal in a gender-mainstreamed rule of law initiative must be to understand the cultural norms surrounding gender, decipher how those norms are infused into the legal framework, and identify ways those norms can be adapted to promote gender equality.'[78]

Norms set out in the WPS agenda and those promoted in the RoL programming context are an exercise in transnational norm diffusion by an array of actors, national and international. In reality in the programming context, international actors implement many of their RoL programmes and activities in partnership with national governments, other national and international bodies, NGOs, civil society organizations, grassroots women's and men's groups, amongst other stakeholders (frequently on the same or related project). This is evident in Somalia with respect to SGBV.

Merry and others have addressed the role of intermediaries in relation to what they term the 'vernacularization' and translation of human rights norms to suit local contexts and easier adaption to local traditions, value systems and ways of life.[79] How ideas are phrased or framed to both suit but also challenge local contexts and perceptions is important if change is to occur. Similar dynamics appear to be occurring in relation to RoL programming broadly, but also in the specific context of advancing gender justice. Nevertheless, RoL programmes often find it challenging to adapt to local cultures and religions, particularly when it comes to dealing with issues of gender justice.[80] But culture is something that is dynamic and it changes across space and time.

Even where the law equally protects the rights of both men and women at a national level if may be very difficult to apply at a localized level where tensions with local practices and power structures exist. Stakeholders in the Somalia related interviews spoke of the population's alienation from the human rights and gender equality discourses given the use of unfamiliar human rights or legal language, which is often not well understood or is considered a foreign import and thus not legitimate.[81]

Moreover, while laws may exist promoting equality, they may not always be well understood or supported by those in the justice sector, whether formal or informal, in the absence of sufficient training and norm socialization. A norm is fully socialized wherein people adhered to it habitually. As stipulated by Risse

[77] Grina, *supra* note 15 at 436.

[78] *Id.* at 437.

[79] Levitt and Merry, *supra* note 70 at 446–447.

[80] Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture rules: The foundations of the rule of law and other norms of governance*, 35 JOURNAL OF COMPARATIVE ECONOMICS 659–688, 682 (2007).

[81] Interviews, 2013-2015, on file with the author.

and Sikkink, 'When we stop at a red traffic light, we usually do not question the normative implications of the rule we are just following.'[82] This is because the norm has been fully socialized and only a minority will breach it. NGOs, local grassroots actors, amongst others play a useful role here in the translation of legal norms to the local context or what Merry terms the vernacular. In defining vernacularization, Merry stipulates that:

Vernacularizers convey ideas from one context to another, adapting and reframing them from the way they attach to a source context to one that resonates with the new location. Vernacularizers are people in between, conversant with both sides of the exchange but able to move across borders of ideas and approaches.[83]

Local actors are agents in this process and they impact on the degree to which norms influence local practices.[84] They have a better understanding of local cultural and religious belief systems and are therefore better placed to push the process of norm adaption at the local level, including in rural areas. In promoting norms they may need to be repackaged and the language of norms posed in terms that resonate with local cultures and religions, and synergies drawn, where feasible.[85] Training and norm socialization activities should be monitored and evaluated for impact, and so as to inform further RoL programming activities.

Societies need be prepared for changes in laws relating to gender justice and gender relations, least this result in further violations of the rights of women and girls. Many feminist scholars view culture and religion as unchangeable, and that both are frequently used to oppose gender equality and justice in many spheres, including legal, social, political and economic.[86] RoL reform involves changes to legal institutions in the context of broader reform of political and state institutions, which will inevitably involve power shifts. This necessitates bringing both men and women on board if transformation is to occur. This might be done, for instance, through gender training of men and women representing broad cross sectors of society, media programmes, theatre, law enforcement personnel, judicial actors, civil servants, customary leaders and integrating it into school educational programmes. This should include training these personnel on international human rights standards, while linking them to the local context. It ought to be borne in mind that women themselves sometimes resist change, wherein pushes for gender justice and equality can been perceived as undermining traditional value systems, religious beliefs, identity erosion, and even a form of Western imperialism. Indeed, this was very much the case with respect to the global wo-

[82] Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE, 17 (*Thomas* RISSE AND KATHRYN SIKKINK, ed., 1999).

[83] Levitt and Merry, *supra* note 70 at 449.

[84] Jacqui True & Michael Mintrom, *Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming*, 45 INT'L. STUD. Q. 27, 34 (2001).

[85] Burke, *supra* note 25 at 3; UNDP, Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision-making Processes in the Context of Legal Pluralism (Justice System Programme, UNDP Timor Leste, 2013), xiv–xv.

[86] Grina, *supra* note 15 at 451.

men's suffrage movement, wherein women had to be convinced that voting rights were in their interest.[87]

E. Somalia Legal Pluralism and Context

Legal pluralism refers to situations wherein a number of legal systems, formal and informal, exist within one state. Legal pluralism is a reality for many conflict-affected states. In locations such Somalia, informal justice systems, particularly customary, pre-existed the formal legal system, colonisation, and any legal transplants that occurred. Moreover, these systems are often what remains intact in regulating societies during conflict. They are often considered legitimate, understood and are integral to the lives of local populations, including females.[88] That stated, informal justice systems are often under or unregulated and may violate the rights of marginalised groups, with respect to whom power differentials exist, including women, minorities, the young, weaker clans, IDPs and others. However, in the aftermath of conflict the formal legal itself suffers from these weaknesses, it is often not trusted, and/or may have been implicated in rights abuses and used as an instrument of oppression.

Somalia has a complex, fragmented, plural legal system, rooted in years of colonisation[89], war, power vacuums, culture and custom, and religion. The vast majority of the population reside in rural areas, difficult to reach due to poor infrastructure and, in significant portions of Somalia, security. Large portions of Somalia's population are traditional nomadic, pastoralist and agro-pastoralist.[90] Somalia is a patriarchal society. Its formal legal systems remain weak beyond the main cities and even within them. The customary justice system or *xeer* is heavily relied upon by the local populations. Given the place of customary and religious justice systems in societal regulation they cannot be overlooked, irrespective of the challenges they may pose, in RoL programming.

In the case in Somalia, conflict has resulted in an almost complete collapse of the rule of law and formal governance structures. Human rights violations are rampant, with a particular impact on women and other marginalized groups such as IDPs. Land, displacement and poverty are central to the conflict, as is clan warfare. Societal interactions are underpinned by clan dynamics, deeply embedded traditional structures and customs, and Shari'a law. Present day Somalia consists of eighteen regions, including the autonomous regions of Puntland, Somaliland. Somaliland has declared independence from Somalia but this has yet to be recognized by the international community.[91] Both Somaliland and Pun-

[87] Finnemore and Sikkink, *supra* note 67 at 898–899.

[88] Leila Chirayath, Caroline Sage & Michael Woolcock, Customary law and policy reform?: engaging with the plurality of justice systems 1, 2 (2005), http://documents.worldbank.org/curated/en/675681468178176738/Customary-law-and-policy-reform-engaging-with-the-plurality-of-justice-systems (last visited Oct. 15, 2018).

[89] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 The Am. J. of Comp. Law 163–203, 165 (2003).

[90] National Authorities, Somalia: National Development Plan 2017-2019 (2018), http://www.refworld.org/docid/5b4315554.html (last visited Oct 15, 2018).

[91] Three other regions have been formed thus far: Jubbaland, Southwest and Galmudug. *Id.*

tland are increasingly stable, but the security situation remains poor in the remainder of Somalia, with Al Shabaab still maintaining a strong presence.[92] Poverty, famine and displacement remain widespread in many parts of Somalia.[93]

The British established the Somaliland Protectorate in 1886, so many remnants derived from the British common law remain in its formal legal system, which operates alongside the customary system or *xeer*, and Shari'a law. Southern Somalia was colonized by Italy from 1893, and the region adopted many laws from the Italian civil law legal system.[94] The colonial administrations in Somaliland and Italian Somalia at the time, gave recognition to the application of Shari'a law, in particular with regards to civil law matters, such as divorce and inheritance.[95] Somaliland and Somalia were amalgamated in the 1960s. During this period there were attempts to unify the various justice systems, but the result was fragmentation and little legal coherence.[96]

The Barre regime in the 60s and 70s also attempted to implement a number of Socialist type reforms to the Somali system, amongst which was women's empowerment, and educational and economic advancement.[97] Possibly most controversial was a Family Law (1975) which many religious clerics amongst others regarded as a subversion of Islamic values.[98] The regime also sought to take powers away from the *xeer* and religious justice systems; do away with *diya* paying and blood compensation; and to reorganise the traditional system of control over land. This resulted in societal revolt and ultimately the overthrow of the Barre regime.[99] A resurgence of conservative Islamic norms or interpretations thereof is attributed by some to influences on Somali migrant workers while having spent time working in the Gulf in the 70s. Many young, educated, Somalis returned to serve as Imams in mosques throughout Somalia, and many of these, and *ulama* (religious leaders) called for a return to more conservative Islamic values and norms, such as the adoption of the hijab.[100] Somalia's Transitional Federal Government ('TFG') was agreed, following negotiations in Kenya in

[92] After Years of Progress, A Deadly Setback in Somalia, NEW YORKER, Oct. 17, 2017, https://www.newyorker.com/news/news-desk/after-years-of-progress-a-deadly-setback-in-somalia.

[93] Somalia: Rights Priorities for New Government, HUMAN RIGHTS WATCH, May 2, 2017, https://www.hrw.org/news/2017/05/02/somalia-rights-priorities-new-government.

[94] ANDRE LE SAGE, STATELESS JUSTICE IN SOMALIA: FORMAL AND INFORMAL RULE OF LAW INITIATIVES 17 (2005), https://www.files.ethz.ch/isn/20303/Somalia_stateless_justice.pdf.

[95] Le Sage, *supra* note 94.

[96] *Id.* at 18.

[97] Iman Abdulkadir Mohamed, *Somali Women and the Socialist State*, 4 JOURNAL OF GEORGETOWN UNIVERSITY-QATAR MIDDLE EASTERN STUDIES STUDENT ASSOCIATION, 31 March 2015, at 3.

[98] *Somaliland Family & Personal Law*, SOMALILANDLAW.COM, http://www.somalilandlaw.com/family___personal_law.html (last visited Oct. 15, 2018); Abdurahman M. Abdullahi, (Baadiyow), *Women, Islamists and the Military Regime in Somali*a*, in* PEACE AND MILK, DROUGHT AND WAR: SOMALI CULTURE, SOCIETY, AND POLITICS ESSAYS IN HONOUR OF I.M. LEWIS 137, 152–154 (Markus Hoehne and Virginia Luling eds., 2010).

[99] Le Sage, *supra* note 94, at 20; Mohamed, *supra* note 97, at 6.

[100] Academy for Peace and Development Hargeysa, Somaliland, *Women's Rights in Islam and Somali Culture*, UNICEF, (Dec. 2002), at 1, 6.

2004. The TFG was replaced by the Federal Government of Somalia ('FGS'), and a new Provisional Constitution, on 20 August 2012.[101]

The various regions of today's Somalia maintain a complex plural legal system, consisting of *xeer,* a nascent formal legal system, and shari'a law, with significant jurisdictional overlap and contradictions between these.[102] Structural biases severely restrict women's access to justice in both the formal and informal legal systems, which are underpinned by patriarchal value systems. Other forms of justice mechanisms have also featured in Somalia, including community-based vigilante groups, warlord administrations and private arbitration.[103] In many parts of Somalia, however, the formal legal system has only limited clout beyond the main cities, and even within urban areas.

The traditional *xeer* system it often left to deal with economic, social and cultural rights issues. *Xeer* is a polycentric, unwritten legal system, passed down orally by clans through the past several centuries, based on decisions made by consensus by male clan elders. Women have little to no role in this process.[104] Somali society is organized and sub-divided along clan and sub-clan lines. A key sub-unit is the *diya* paying/lineage group who undertake a form of collective responsibility for wrongdoings of members of their groups, which traditionally served regulatory, security and conflict-management functions in Somali society.[105] Retribution or blood compensation (such as a retaliatory murder) is avoided by payment of compensation to the *diya* group of the victim. Conceptions of justice in Somalia do not always align with Western perceptions of justice which tend to centre on the individual, whereas in Somalia justice revolves around notions collective responsibility and maintaining societal harmony. The first port of call for dispute resolution is often the family or clan. Where disputes remain unresolved, they then go to the customary level. Compensation for a crime, including violence against a female, will go to male members of the group.[106] Once women marry, their allegiance to origin clan and family versus the husband's clan, is often considered in flux as they are not fully a part of the new lineage or *diya* paying group as they retain ties also to their origin group.[107] A number of interviewees spoke at length about clan dynamics and how dominant clans have integrated into state and local power structures, both formal and informal.[108]

Xeer is a relatively flexible system, which varies in its application from one area to the next. There are particular rules that regulate society under the *xeer* system on water usage and access, pastoral lands, inheritance and family rights

[101] Le Sage, *supra* note 94, at 24–25.

[102] *Somaliland Law: An Overview*, SOMALILANDLAW.COM, http://www.somalilandlaw.com/introduction_to_somaliland_law.html.

[103] Le Sage, *supra* note 94, at 49–51.

[104] *Id.* at 16.

[105] *Id.*

[106] *Gender in Somalia Brief,* UNDP SOMALIA, at 1, 4.

[107] *Women's Rights in Islam and Somali Culture*, *supra* note 100, at 5.

[108] Interview with Somalia/Kenya, (Aug. 2014).

and use of other natural resources. Often these systems favor males. Nevertheless, in rural areas in particular, but also urban areas, the *xeer* system if heavily relied upon by the population, including during the Barre period. The *xeer* system is overseen by elders, known *as xeer begti*.[109] *Xeer* cases are usually held under a tree, and are open to the public. Those negotiating and mediating between the parties, need no legal or other official qualification, but are recognized by their clans as being of high reputation and having the ability to speak on their behalf. The process does present evidence and witnesses, and permits cross-examination. The elders or *xeer beegti* sit separately from their clans to avoid bias. It is possible to appeal and in extreme cases go to higher levels in the clan structure, with decisions first been made at lower levels, but again this is on a collective basis.[110] Women have no role as decision-makers or advocates in this process. Not only are women marginalized in the *xeer* processes, other groups such as weaker clans or minorities are also discriminated against, and do not wield equivalent negotiating powers. On occasion minority clan complainants may be represented or 'sponsored' by an elder from a majority clan but those in IDP communities will be much less likely to have such ties.[111] Formal laws have little reach into IDP camps, and the customary system is also weak in these areas. Women and children represent up to 80% of IDPs are often widowed.[112]

Each region recognizes the supremacy of Shari'a law, which governs issues of family law, inheritance and minor civil law disputes. Somalis are predominantly Muslims, from the Shafi'i school of Sunni Islam. Shari'a is relied on heavily in the *xeer* system, yet *xeer* also diverges at points based on clan traditions.[113] Religious leaders are invariably male and may apply more than one school of Islam, with many not having been formally educated.[114] The application of Shari'a and custom is largely *ad hoc* and dependent on the knowledge base of the decision-maker. Somali laws otherwise draw largely on those existing pre-Barre but these are gradually being redrafted, with those effecting immediate stability being prioritized.[115]

The United Nations Operations in Somalia (UNOSOM I and II) and others, made various attempts at RoL programming engagements in the early to mid-1990s, with little avail. One of the problems with these initial engagements was that they focused predominantly on reform of the formal legal system, largely side-lining the broader plural legal context in which they had to operate.[116]

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[109] Le Sage, *supra* note 94, at 32–33.

[110] *Id.* at 35–36.

[111] Maria Vargas Simojoki, *Evaluating the Effectiveness of Legal Empowerment Approaches to Customary Law Reform in Somaliland and Puntland,* UNDP SOMALIA, 2010, at 1, 2-3.

[112] *See also* Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, UNDP, at 1, 5.

[113] Le Sage, *supra* note 94, at 16.

[114] Mohamed Diriye Abdullahi, *Culture and Customs of Somalia* 59–61 (2001).

[115] See generally, National Authorities, *supra* note 90, at 14.

[116] *Id.* (For instance, in Somaliland, the UNDP Rule of Law and Security (ROLS) programme is engaged in training of legal personnel on legal analysis, trial practice and evidence standards. ROLS is

Gender justice in itself is contentious in Somalia. It is notable across Somalia, that gender justice was a point of contention during the Barre regime, and that it was a contributory factor in its overthrow, with some seeing aspects of a the 1975 Family Law as contrary to Islamic and traditional belief systems. So how does one bring local stakeholders on board and how might this manifest in local processes of contestation and negotiation? Somalia today ranks one of the most unequal countries in the world on the Gender Inequality Index for Somalia, being a mere 0.776, with 1 representing complete inequality.[117] Early marriages, infibulations (a severe form of female genital mutilation ('FGM')), rape and other forms of abuse against women are still commonplace. Gender and access to justice intersects with clan affiliation and likely geographic belonging. As noted, those from minority clans, which weld less power in customary justice processes, are vulnerable to greater injustices. This is also true of IDP communities, who are particularly vulnerable to rights abuses.

Somali women and men often indicate a preference for the customary justice system. The *xeer* system is seen as both authoritative and legitimate by the Somali people. The formal legal system, in contrast, for many is a more alien construct, brought in from the outside, and predicated on years of conflict, upheaval, and colonization. However, the *xeer* system is dominated by male elders. Women's and children's voices are often marginalized. Women are represented in the process by males from their clans. In turn, under Shari'a principles in Somalia, it takes two women to provide testimony. Women's participation as legal professionals and judges is to a large extent an alien concept divorced from tradition and customary practice which is ingrained in Somali society.

In Somalia, particularly in rural areas, there continues to be poor awareness by women and children, and indeed men, of the rights afforded to them by law, or of the formal legal system. The customary and religious justice systems are what are primarily or at least significantly used by the population. Disregarding customary justice may well effect a woman's security within and connection with her community. For women and girls, there are many socio-economic risks with taking a claim out of the customary system and to a formal legal system which all too often is sub-optimal in guaranteeing enforcement of rights, particularly in areas of the country where its control is very weak. This means that even were a court decides a case in favour of a woman, there may be very limited ability to enforce that decision.

i. Entry Point: Sexual and Gender-based Violence GBV

SGBV is a significant RoL problem in Somalia. According to UNDP Somalia, 7,293 incidents of Gender-based Violence were report in 2016 alone, with the incidence likely being much higher given an overall lack of reporting. 99% of the incidents reported involved violence against women, with 73% involving female

financially supporting harmonization of the secular legal code; it is developing legal clinics; and supporting lawyers associations, amongst other activities.)

[117] *Gender in Somalia Brief*, *supra* note 106, at 2.

IDPs.[118] 98% of little girls (7 to 11yrs old) as of 2016 are reported to undergo FGM.[119] UNFPA and UNDP, and others, have ran several RoL initiatives aimed at strengthening the response and sensitivity of justice sector personnel to SGBV.[120] To a more limited extent there have efforts to engage in community and customary elder awareness raising.[121] In partnership with government improved SGBV reporting mechanisms have been established, there are police officers specifically trained to deal with SGBV in some locations, and case management systems have been established.[122] A key initiative, supported by the UN, has been the establishment of mobile courts within the formal legal system aimed at bringing justice closer to rural communities, but also to promote better understanding of the formal legal system.[123] Actors such as the UN, provided technical assistance in the redevelopment of Somalia's National Gender Policy.[124]

RoL programming actors have established in partnership with local actors a few 'one stop' centres across Somalia, to provide victims of SGBV with medical, psychological and legal supports. There is little access to safe houses however, particularly given security and threats to providers of these services. One such Centre is located at Hargeisa Group Hospital in Somaliland. In South Central, they are ran by SWDV, the Elman Centre and SSWC.[125] Numerous NGOs are involved in providing other supports to victims, including assistance in navigating the formal and informal legal systems. During 2016 UNDP supported legal aid services for approximately 7,180 persons, 4,982 of whom were men. This included, 149 cases of SGBV.[126] In Puntland, an SGBV referral pathway was established in 2013 to link UNDP and UNFPA programmes to a network of NGOs and civil society organizations in order to better connect survivors of SGBV with police and health services.[127] Partnerships with civil society or-

[118] *Gender Equality Progress Report*, UNDP, 2016, at 1, 5 (1,700 cases of sexual violence were documented by the UN in IDP camps around Mogadishu between January and November 2012 alone. .);. .) *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia,* LEGAL ACTION WORLDWIDE, October 2014, at 1, 32.

[119] *Gender Equality Progress Report, supra* note 118, at 5.

[120] *See, e.g.*, *UK's National Action Plan on Women, Peace, and Security 2014-2017,* FOREIGN AND COMMONWEALTH OFFICE, at 1, 19.

[121] Skype Interviews New York, Kenya (2013-2014); *See also* UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, *supra* note 112.

[122] Skype Interviews with New York, Kenya (2013-2014).; *See also Id.*

[123] Burke, *supra* note 24, at 6, 9.

[124] Skype Interviews with New York, Kenya (2013-2014); *See also* UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, *supra* note 112.

[125] *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia*, *supra* note 118 at 41; Burke, *supra* note 24.

[126] UNDP, Global Programme on Strengthening the Rule of Law and Human Rights for Sustaining Peace and Fostering Development, 2016 Annual Report, 104, http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/rule-of-law-annual-report-2016.html?

[127] *See* UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, *supra* note 112.

ganisations and NGOs have proven key to the delivery of RoL programmes aimed at addressing SGBV.

However, reporting SGBV is highly stigmatized and actual prosecution rates remain dismally low, adding to a lack of incentive to report in the first instance.[128] In Hargeisa, Somaliland, there has been in an increase in the number of rape cases reported. 21 men were convicted of gang raping two women in Hargeisa in 2013, and 20 were sentenced to 10 years in jail, and one to five years.[129] In Somaliland, 326 SGBV survivors were provided with assistance by 'Baahikoob', the sexual assault referral centre. 171 SGBV cases went to Court in 2013, with 54 successful prosecutions, and others pending.[130] In South Central, 2 of 1,600 rape allegations made in 2013 resulted in convictions, highlighting inadequacies in overt focus on formal legal system reform alone. There remain serious weaknesses in terms of forensics, capacity to maintain evidence, inadequate training of justice sector personnel, threats to those providing legal aid, lack of safe housing, and interference by clans, religious and customary authorities.[131] Claims going to the formal legal system are often diverted back to the informal or customary systems by the courts and the police, irrespective of legislation providing otherwise. This is seen in cases of SGBV.[132] Moreover, there is a lack of safe houses as security cannot be guaranteed.[133] This means that those reporting SGBV may have nowhere to go. Understanding the environment and social context are very important to RoL programing approaches and advocacy for use of formal and informal justice mechanisms must be done with this in mind, least it do more harm than good for victims.

Cases of SGBV still remain predominantly within the *xeer* system. Female victims are represented by males.[134] In Somalia, there is certain tolerance in society of domestic violence so long as it does not cause unrest in the community, beyond that relationship.[135] Indeed, domestic violence is not explicitly dealt with by the outdated Somali Penal Code.[136] Female victims of rape can be forced to marry their attacker, so that a dowry is paid and harmony restored between clans, thereby avoiding further violence. Under to the *xeer* system your worth as a woman, and the resultant compensation owed to your clan is dependent on your

[128] UNDP, Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia: Report and Recommendations, *supra* note 119 at 30.

[129] UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, *supra* note 112, at 3.

[130] *Id.* at 4.

[131] *Id.*; *Legal Aid Providers Supporting Gender Based Violence Survivors in Somalia: Report and Recommendations*, *supra* note 118 at 30; Burke, *supra* note 24.

[132] Interviews on will with the author. (2013-2015)

[133] 'Engaging communities in promoting women's rights, security and peace in South Central Somalia' (Seminar, CISP and International Alert, Oct. 30, 2015)

[134] Maria Tungaraza, *Women's Human Rights in Somaliland*, NAGAAD (2010), http://www.progressio.org.uk/sites/default/files/Womens-human-rights-in-Somaliland.pdf.

[135] LE SAGE, *supra* note 94, at 38.

[136] *See Penal Code, Legislative Decree No. 5* (Dec. 16, 1962), <http://www.somalilandlaw.com/Penal_Code_English.pdf>.

status. Status depends on whether you have children, with male children worth more than female; and whether you are a virgin, and unmarried. In the later scenario marriage may be enforced and a dowry paid to the clan, exposing the victim to further abuse. Rape is conceived as an honour crime[137] and marriage is perceived as a mechanism for reducing societal shame. There is no individual punishment of the perpetrator per se. While this may enable clan reconciliation it clearly violates human rights, and exposes the victim to further violence. Moreover, it violates prohibitions on forced marriage.[138]

UNDP, Legal Action Worldwide ('LAW'), UNFPA and UNHCR have also focused programming efforts on the provision of technical support to government in drafting the Sexual Offences Bill in Somaliland, Puntland and South Central.[139] The Puntland Sexual Offences Act (2015) was passed into law in Puntland in August 2016.[140] In Somaliland the Sexual Offences Bill was passed in January 2018.[141] Jubaland also has a draft Sexual Offences Bill. LAW, UNFPA, external experts and the Ministries had a significant role in assisting with the drafting process, which was led by Somali legislative drafters. The drafting process drew on extensive consultations with civil society, religious leaders, law enforcement, and customary elders, in the various states.[142] The Federal Government of Somalia's Sexual Offences Bill was only passed in May 2018, but it is viewed favorably by experts in terms of its comprehensiveness, including provisions regarding protection of survivors of SGBV such as trafficking victims. It also contains broadly progressive definition of situations involving military presence and coercive circumstances.[143] That stated, the legislation gives deference to Shari'a should contradictions arise between the two, thus limiting the potential effectiveness of the legislation in areas such as domestic violence. There are also

[137] *See further Somalia, Events of 2017*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2018/country-chapters/somalia?>.

[138] LE SAGE, *supra* note 94, at 38.

[139] *See further* Sexual Offences Bill, LEGAL ACTION WORLDWIDE, http://www.legalactionworldwide.org/somalia-2/sexual-offences-bill/ (last visited Oct. 15, 2018) (at a Federal level the drafting process was led by the Ministry of Women and Human Rights Development).

[140] UNDP, *Gender Equality Progress Report*, *supra* note 118, at 4.

[141] Legal Action Worldwide, *LAW Welcomes the Passage of the Sexual Offences Bill by the Somaliland House of Elders Calling It "An Essential Step in Providing Justice For Victims of Sexual Violence*", Somalia RELIEF WEB (April 12, 2018), https://reliefweb.int/report/somalia/law-welcomes-passage-sexual-offences-bill-somaliland-house-elders-calling-it; *Puntland Enforces Sexual Offences Law*, UNFPA SOMALIA (Jan. 31, 2017), http://somalia.unfpa.org/news/puntland-enforces-sexual-offences-law; Sexual Offences Bill, LEGAL ACTION WORLDWIDE, *supra* note 138; For a feminist analysis of the SGBV violence in Somalia, and critique of the sexual offences laws see further: McMaines, *Translating Feminist Norms and Strategies Through Sexual and Gender-based Violence Programming in Somalia: An Explorative Approach to Understanding Norm Internalization*, No. 9 NORWEGIAN CENTRE FOR HUMAN RIGHTS: OCCASIONAL PAPER SERIES (2017).

[142] McMaines, *supra* note 141, at 35–37.

[143] *Id.*; Antonia Mulvey, *By balancing Sharia Law and the New Sexual Offences Bill, Somalia is Legislating For the 21st Century LSE Women*, LSE PEACE AND SECURITY BLOG (June 14, 2018), http://blogs.lse.ac.uk/wps/2018/06/14/by-balancing-sharia-law-and-the-new-sexual-offences-bill-somalia-is-legislating-for-the-21st-century/.

weaknesses in the legislation in relation to child marriages and therein sexual relations with a child, and rape within marriage.[144]

Implementation of the Puntland Sexual Offences Act (2015) has been poor, with rape allegations still not being dealt with adequately, if at all. Other cases have been diverted under clan pressures from the formal legal system to the Shari'a courts or *xeer* system. In some reported decisions of the Shari'a courts dealing with rape claims, the courts appear to have dealt with the allegations far more robustly than the *xeer* system. However, there is little consistency in approaches and expected outcomes for would-be perpetrators.[145] Puntland government officials and civil society led by the Talawadaag Women Movement, Maatokaal one stop centre, the UNFPA one stop centre, members of the medical profession, amongst others on 25 January 2017, organized a high-level forum advocating for intensified efforts from law enforcement in Puntland to implement the Puntland Sexual Offences Act.[146] There have also been discussions with religious leaders, government, experts and communities on how best to achieve implementation of the legislation led by the Ministry of Justice, Religious Affairs and Rehabilitation.[147] Political instability has been a problem in terms of pushing gender programmes in Puntland in recent years, which, according to a recent UNDP report, local government often does not view as a priority, and where resistance to the introduction of gender policy was vocalized by religious leaders in Cabinet.[148]

Under the Somaliland National Justice Reform Strategy and Action Plan (under UNDP's Rule of Law and Security programme) there have been efforts to increase the number of women in the legal profession, including through university scholarships.[149] There are now a small number of women working as prosecutors and Attorney Generals.[150] Women, with the support and training of UNDP are also being integrated into the civilian police in Somaliland to enable more gender responsive, and SGBV sensitized, policing.[151] UNDP has been supporting the Somaliland Women's Network ('NAGAAD') in improving capacity of paralegals and gender sensitization amongst service providers and NGOs, in addition to the establishment of a Judicial Monitoring Tool to monitor SGBV cases. Advancements are not as evident in other regions of Somali. Notably, however, a

144 McMaines, *supra* note 141, at 35–37.

145 Human Rights Watch, Country Somalia, https://www.hrw.org/world-report/2018/country-chapters/somalia; *Gender Equality Progress Report*, UNDP, *supra* note 118, at 5.

146 *Puntland enforces sexual offences law*, UNFPA SOMALIA, (Jan. 31, 2017), https://somalia.unfpa.org/news/puntland-enforces-sexual-offences-law.

147 *Id.*

148 *Gender Equality Progress Report*, UNFPA SOMALIA, *supra* note 119, at 3, 10.

149 SOMALIA'S GENDER EQUALITY AND WOMEN'S EMPOWERMENT STRATEGY (2011-2015): PROGRESS REPORT 2013, UNDP, *supra* note 112, at 5.

150 STRENGTHENING THE RULE OF LAW IN CRISIS-AFFECTED AND FRAGILE SITUATIONS 100-01 (UNDP 2011), https://www.undp.org/content/dam/undp/library/crisis%20prevention/Global%20Programme%20Phase%20II%20-%20FINAL.pdf

151 SOMALIA'S GENDER EQUALITY AND WOMEN'S EMPOWERMENT STRATEGY (2011-2015): PROGRESS REPORT 2013, UNDP, *supra* note 112, at 5.

SGBV Unit has been established with the Puntland Police Criminal Investigation Department.[152]

The above efforts, according to some interviewees, are driving subtle shifts in access to the formal justice for women, making it more approachable.[153] That stated, it this has had little impact with respect to the informal justice system where the majority of disputes are resolved and primarily by males whose respective bargaining power is also clan based. Moreover, as already stressed, rights protection of women and girls, and indeed men, in the Somali customary system is not only influenced by gender but intersects with clan affiliations and related power structures in Somali society. Women and girls from minority clans and in IDPs camps are particularly vulnerable to a lack of access to justice, be it for SGBV or otherwise. Therefore broader strategies for a more holistic engagement with the plural legal system need to be focused on and devised.

Partnership dynamics across actors are key to RoL programming efforts. Support for one-stop centres and SGBV referral networks enhance SGBV survivors access to the justice system but also, more holistically, other psycho-social and medical supports. Livelihood supports also need to be built into programmes. Access to courts without these supports is unlikely to be attractive to SGBV survivors who have the possibility of losing access to livelihood supports for their families and themselves, and even access to their children. Local partners, with the support of actors such as the UN, are key to the delivery of SGBV services, particularly in volatile environments where accessing the justice system or medical care is risky for SBGV survivors and service provides alike. Locals have greater cultural and linguistic awareness. They may therefore be more approachable, linguistically accessible[154], and discretely accessed.

There is a need for gender sensitization training for all actors within the formal and informal justice systems likely to have interactions with those affected by sexual and domestic violence, or other forms of SGBV. Terminology used in legislation but also through training, media, capacity-building and other outlets needs to be cognizant of delinking sexual violence from morality and categorise the offence simply as a violent crime. This should be done to start to address societal attitudes around sexual violence, which often result in the victim being stigmatized and shun from societies, rather than the perpetrators.

Disregarding customary justice may well effect a woman's security within and connection with her community. For women and girls, there are many socio-economic risks with taking a claim out of the customary system and to a formal legal system which all too often is sub-optimal in guaranteeing enforcement of rights, particularly in areas of the country where its control is very weak. This means that even were women have a judgment go in their favour the formal system may lack the ability to enforce it. Moreover, where a female makes a complaint of having been raped, she runs the risk of being prosecuted for extra martial sex. There is also a strong possibility of backlash, including divorce,

[152] *Id.*

[153] Interviews with New York, Kenya and via Skype, on file with the author (2013, 2014).

[154] Wojkowska, *supra* note 26, at 16.

where a woman takes her husband to court for domestic abuse. Addressing SGBV requires a holistic and bottom-up approach, engaging a broad spectrum of local stakeholders, in order to locate entry points and local leadership.

III. Custom, Harmonization and Engagement: Legal Pluralism

There is a clear need to re-conceptualize our understanding of what constitutes justice systems in the first instance so as to provide more appropriate RoL programming supports in conflict-affected states. Focus on formal legal structures alone is not an effective approach in the reality of complex plural legal systems, with multi-layered cultural, clan and elite power dynamics. Throughout Somalia there are serious limitations on the state's ability to provide justice, particular beyond the capitals. RoL programme plans need to examine the power and regulatory regimes actually in place and have regard to what customary, religious and other informal systems are actually operative, particularly in areas substantively beyond the reach of the state.

As described, in the various regions of Somalia there are complex and multi-layered webs of regulatory institutions. The state is structured on legal pluralism, and power structures and norms are diffuse. International or external actors are not always well placed to engage in legal institution-building in these environments, and this is something that is still in the early stages of being acknowledged. With respect to Somalia, some interviewees spoke about infiltration of the clan system into formal government power structures and their interference with the formal justice system from the level of the police to the courts. Respective loyalties too often are linked to clan affiliations and dynamics rather than with the state. One interviewee observed at length that one must start by looking at clan dynamics which infiltrate governance structures in Somalia. Only then, with this understanding, can you begin to start looking at RoL reform and gender justice.[155] When addressing interference with cases by clans, one needs to reflect on local perceptions of justice and how this is negotiated, which traditionally did not just involve individuals but rather was for and on behalf on clans, which individuals view largely as an integrated whole.

Moreover, Somalia's history, akin to that of many states, of colonization and oppressive governments has led to little trust in the formal legal system by the people, many of whom view it as a form of Western interventionism and a system of oppression. There is a strong risk for RoL reform programmes to be viewed with superstition and be met with reluctance of society to engage with these processes. Additionally, the existence of multiple justice systems can also result in forum shopping, something which may prove easier for those who exercise greater power, which will rarely be women, children, minorities, IDPs or other marginalised groups.

Nevertheless, the reality for Somalia is that the formal legal systems are weak and mistrusted. In these contexts focus on formal systems alone will not improve access to justice and rights protection were they remain suboptimal and have

[155] Interview by Author with ex senior official, Somalia, Kenya (August 2014).

little rural reach. RoL programmes need to engage with regulatory systems that actually exist and function, even if seriously flawed. Only then can you begin to address these flaws and attempt to find spaces for women's voices within these processes. Moreover, there are certain strengths in traditional and religious legal systems that might be drawn on to support the rights of women and girls. These might be identified with the participation of local actors, including women whose rights are in question. For instance, there is greater protection for females in terms of inheritance rights under Shari'a than may be recognised under customary norms. Training needs to be provided to customary actors on gender justice and related formal laws. There is some but far from adequate recognition of the need for these engagements.[156] Nevertheless, there have been several initiatives throughout Somalia to engage customary justice actors or clan elders, in efforts to push for the advancement of gender justice and gender sensitization in the informal justice system. These have already engaged some support of customary leaders in addressing SGBV, which we will address presently. It is clear that addressing SGBV in RoL programmes requires a whole of system and society approach so that normative adaption can occur. A more gender equitable justice system requires buy-in from customary and religious leaders.

A. Harmonization

Principles embedded within customary justice systems are not always human rights compliant. That stipulated, in certain areas it may be feasible to work with informal justice structures to ensure better human rights compliance, including with regards to gender justice. These engagements may also allow for the development of better oversight mechanisms, accountability and participation of actors within these systems. Moreover, failing to engage with customary and religious legal systems will not necessarily make their use less prevalent nor will it address any weaknesses in their compliance with human rights standards on any logical level, including with respect to gender justice. A number of interviewees pointed to the potential of Shari'a to be drawn on to challenge practices and norms that allow for forced marriage, dis-inheritance, and other violations of women's rights, where these and other customary practices also contravene principles of Islamic law. In essence, this is a process of negotiation and norm translation by local actors.

Customary justice resonates with cultural belief systems, perceptions of justice, and notions of community reconciliation aimed at restoring social balance and harmony. A number of interviewees noted that one of the attributes of customary justice systems is that they are malleable and therefore flexible.This may leave greater space for norms to enter the domestic normative framework, rather than solidifying practices in legal codes. Moreover, there is no single set of customary practices and norms in Somalia, which to a large extent makes it very difficult to codify.[157] Others argue that codification and training customary actors

[156] U.N. Security Council, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (2004).

[157] Interviews in Somalia/Kenya (August 2014).

to apply state law through adopting a top-down approach will not be effective and sustainable, as they do not sufficiently account for deeply entrenched customary norms and practices nor enable them to operate. Legal empowerment comes from the bottom-up[158] and it necessitates a rights based approach, including both duty bearers and rights holders at a national level to pursue legal reform.[159] That stated, no interviewee, international or local, contended that codification of *xeer* or *adat* is the way forward, not least because its principles diverge in harmonizing the system. Moreover, codification detracts from the fluidity of customary justice systems and their ability to alter with time and developments in society. This includes ability to incorporate human rights norms and avoid entrenchment of power.

Consideration needs to be given to the possible division of jurisdiction between the formal and informal legal systems. Some argue for a limited incorporation model that allows for lower level disputes to be resolved by the informal justice system, but with an integrated appeals process to the formal.[160] Of course, this would require extensive consultations with stakeholders in light of particular plural contexts. It may also permit the development of mechanisms of monitoring for human rights compliance, and encourage more equitable levels of societal representation. Informal justice systems should also be encouraged to create written records or their decisions and reasons behind them on a less formal basis than the formal legal system, cognizant of frequent educational, literacy and resource limitations at these local levels. RoL programmes should provide trainings in this regard, along with training of formal laws. Codes of Ethics might also be adopted, and internal self-assessment processes.

Its notable that a National Declaration by the customary elders in Somaliland, discussed below, committed to individual responsibility for rape and murder and that these crimes be dealt with by the formal legal system.[161] There are certain types of cases that should be taken out of the informal system to be dealt with by the formal, including those which are particularly serious in nature, and in which lack of imprisonment could place the victim and society at serious risk. These include serious assaults, murder and sexual violence. Moreover, one needs to reflect on the enforcement reach of the informal justice systems, which is often localised.

B. Some Initial Engagements

There have been a number of RoL programmes ran through internal and external partnerships, aimed at engaging with the customary justice sector to initiate a programme of reform, with a view to increased human rights compliance of the customary justice systems in Somalia. This includes efforts to find parallel lan-

158 Simojoki, *supra* note 111, at 5.

159 Wojkowska, *supra* note 26, at 13.

160 *Id.* at 28.

161 Simojoki, *supra* note 111, at 4-5.

guage on gender justice and rights issues cognizant with traditional belief systems, in essence vernacularizing these norms.[162]

A series of regional conferences, with the participation of those operating in the *xeer* system, were held from 2003 to 2006 to discuss how to reform aspects of *xeer* that are not compliant with Shari'a and human rights norms.[163] The Danish Refugee Council ('DRC'), UNDP and UNHCR assisted with the organization of a Somaliland national conference in 2006[164], in which a National Declaration was passed by the Elders, aimed at reforming the *xeer* system for improved compliance with human rights and Shari'a. The dialogue in part focused on treatment of women and minorities; problematic aspects of *diya* payments and punishment of the *diya* groups collectively; and property, amongst other salient issues. A similar process has since been carried out in Puntland and a Declaration was adopted in 2009.[165] The National Declaration and the process by which the Declaration was achieved is an example of a bottom-up initiative that commenced initially in Somaliland, at the instigation of a number of traditional leaders acting as change agents in translating human rights norms in a manner accessible to the local context. Nevertheless, this norm adoption process often morphs the norm resulting in something that looks somewhat different, so suit the local context. One interviewee indicated disquiet with the process, suggesting that the exercise was mere lip service to gender justice.[166]

The role of civil society actors, in particular women's groups, in pushing for advancement of gender justice and women's participation in the political and justice spheres has been, and continues to be, of pivotal importance throughout Somalia.[167] Somali women are best placed to drive dialogue and change strategies, while navigating Somalia's cultural and religious intricacies where given the capacity and space to do so.[168] The UN has engaged in efforts to start empowering and integrating Somali women into the justice and political sectors, including through capacity-building. That stated, Somali women have an uphill battle in having their voice heard and acted uponin RoL reform, particularly in the informal system.

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[162] UNDP, *Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision-making Processes in the Context of Legal Pluralism*, *supra* note 85, at xiv–xv.

[163] Ahmed A. Omar Dharbaxo & Joakim Gundel, *The predicament of the 'Oday'*: The role of traditional structures in security, rights, law and development in Somalia Final Report Somali counterpart* (Danish Refugee Council & Novib/Oxfam, November 2006) 20–21, http://www.logcluster.org/sites/default/files/documents/Gundel_The%2520role%2520of%2520traditional%2520structures.pdf.

[164] *See* Tanja Chopra & Deborah Isser, *Women's Access to Justice, Legal Pluralism and Fragile States*, Peter Albrecht et al. (eds.) PERSPECTIVES ON INVOLVING NON-STATE AND CUSTOMARY ACTORS IN JUSTICE AND SECURITY REFORM (DIIS, 2011); Simojoki, *supra* note 111, at 4–5.

[165] Simojoki, *supra* note 111, at 4.

[166] Interviews *supra* note 157.

[167] *See* NAGAAD, http://www.nagaad.org/ (last visited Oct. 15, 2018); *Somalia's Gender Equality and Women's Empowerment Strategy* (2011-2015): PROGRESS REPORT 2013, UNDP, *supra* note 112, at 16–17.

[168] Andra Nahal Behrouz, *Women's Rebellion: Towards a New Understanding of Domestic Violence in Islamic Law*, 5 UCLA JOURNAL OF ISLAMIC AND NEAR EASTERN LAW 153, 164 (2007).

C. Concluding Observations and Recommendations

What can be stated is that RoL programme engagements are highly context specific and while some strategies may exist, there are no templates. Plural legal systems take on varied forms across countries and states, and are very much integrated with custom, culture and religion. The local customary justice system in many parts of Somalia is what exists in maintaining some form of security and rule of law in fragile environments. To dismantle or ignore these structures in RoL programming efforts therefore may put people and stability at further risk. Rights concepts and justice systems need to come from the bottom-up. Norms and systems need to be seen as legitimate by local actors, particularly those rights bearers they aim to assist. Norm socialization is a gradual process and will have different methods and manifestations depending on the local context. That stated, there is a need for participatory approaches in developing and defining the justice system in terms of advancing gender justice, if change is to occur.

D. Challenges

Of course, there remain numerous barriers and challenges for RoL attempting to advance gender justice in transitional states. Programming efforts are limited by funding, mandates, cross-departmental and inter-sectoral dynamics, security, access and local buy-in. There will always be those who oppose change, particularly when they stand to lose power or resources in changing the status quo. Social perceptions of gender often may result in even the most artfully worded laws not being enforced by beautifully crafted formal justice institutions. This needs to be addressed not only throughout the legal system, but through education programmes for society more generally so as to promote adherence to and respect for the law.

Security in accessing the justice system in the first instance is difficult for many in conflict-affected states, particularly for women. Travel exposes them to further risks of violence. They also often lack resources, including finances, and are susceptible to backlash from husbands, family members and their communities. This needs to be factored in RoL reform strategies.

Perceptions of gender justice and navigating the spaces between culture, religion and gender in any given context, requires working with local experts operating in this space to try to identify roots of gender inequalities and appropriate entry points to start addressing gender justice issues. Engagements with customary and religious justice sector actors, irrespective of their flaws, cannot be avoided. It ought to be borne in mind that formal legal systems and their institutions also have endemic weakness and a history of non-compliance with international human rights norms, including with respect to gender justice issues. However, some of these engagements will likely challenge Western perceptions in allowing indigenous discourses to also enter this space. This is partly given that indigenous, traditional and non-Western communities perceive rights as being linked to the collective as oppose to the individual. There is a tendency in the human rights discourse, including in relation to gender justice, to assume that the collective interest is antithesis to that of the individual. Of course, there will

always risks of dilution or transformation of values. However, it is pertinent that gender justice is framed in a manner which is cognizant of and conversant with the local context and culture. This framing needs to come from local women and men, while bearing in mind that spaces need to be made for women's voices to be heard, given that they can also often be marginalised or silenced in communities and informal justice mechanisms, which are traditionally patriarchal.

E. Outlets

i. Customary and religious systems

There is a need to find points in culture and religion that align with similar value systems as those pushed for in the WPS agenda and RoL reform as it relates to gender justice.[169] There is a need to encourage men's participation as allies. Putting gender in a box, like a present wrapped just for women, will not result in attitudinal and behavioural changes.[170] Push for change has to come from men and women coming from states where RoL programmes are being implemented. This means that conceptions of gender justice and equality as articulated by even local women, may not necessarily align with Western conceptions of the same. Moreover, given the prominence of these customary regulatory systems in Somalia, but also in many other parts of the world, failures to create a discourse with them and to find entry points to better address justice means that law reforms aimed at enhancing gender justice and women's legal empowerment will be doomed to fail.

Customary and religious leaders and elders are often respected, considered figures of authority and regulation, and are highly influential persons within their communities, which is evident in the context of Somalia. While some would argue this may perpetuate gender inequalities, we cannot really address gender justice and mainstream gender across RoL reform without so engaging. If the informal system has little or no knowledge of the existence of legal and human rights standards, then it is illogical to expect compliance. Focusing RoL programming efforts on informal justice systems may assist in engaging with a dialogue about how problematic practices, that are not human rights compliant, might be incrementally altered. This should include training and capacity-building, but also working more broadly with these systems where feasible.

Of course, while there are some attributes but also serious limitations in customary justice systems, but also to an extent religious, include:

Often cheaper and more accessible for marginalised groups, particularly in rural areas and given the security situations.

They are considered legitimate so decisions more likely to be adhered to where the formal justice system remains weak.

They are linguistically more accessible.

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169 Wojkowska, *supra* note 26.

170 *See* James Lang, *Gender Is Everyone's Business: Programming with Men to Achieve Gender Equality*, OXFAM (2002), https://xyonline.net/content/gender-everyones-business-programming-men-achieve-gender-equality-2002 (last visited Oct. 15, 2018).

These systems are culturally and locally connected, and therefore they often have better awareness of local problems and their root causes.

These systems are seen as linked to local identity and maintenance of community, family, clan, religious or spiritual beliefs and broader societal networks.

These systems have survived and maintained strong levels of societal regulation for numerous generations in the case study contexts, including in periods of upheaval and violent conflict. Indeed in Somalia it was the Shari'a and customary systems that remained when the formal system 'failed'.

On the flipside, and as has been touched on in this paper, customary and religious justice systems also have serious weaknesses. Some have stressed that strengthening them could inadvertently serve to support unequal power hierarchies and elite capture. It may further undermine gender justice, and the rights of vulnerable and marginalised groups, if not done appropriately.[171]

As noted, certain types of groups are not equally treated by customary justice, and indeed religious justice systems. This has been illustrated in the Somali context, where gender and clan affiliation creates power differentials that intersect with other variables, in the customary and religious justice system processes. Individual's rights, including those of females and minorities, are often subordinate to the collective interest of social harmony, which in turn is often dominated by male perceptions of such.[172]

Moreover, those elders, and indeed religious advisers, often do not possess formal qualifications, legal or otherwise. Therefore, outcomes of processes in these systems can depend on the moral compasses, beliefs, and value systems of individual decision makers, which will vary. It will also vary as to the degree to which these individuals are open to external influences such as clan pressure and corruption. Nevertheless, the latter can also be said of the formal justice sector.

In Puntland, the Ministry of Justice, Religious Affairs and Rehabilitation has engaged in discussions sessions with religious leaders, experts, government officials and community members on sensitization to and implementation of the Sexual Offences Law in Puntland.[173] Local feminist scholars and lawyers must also play a central role in pushing for gender justice in a manner cognizant of religious belief systems and identify entry points or norms that can be used to support this agenda.[174]

IV. Partnerships with Grassroots Civil Society Organisations, NGOs and other Outlets

Grassroots civil society organizations, including women's groups and NGOs, play a fundamental role in providing links between state and external actor rule of law programmes and beneficiaries on the ground. They also contribute to

[171] Wojkowska, *supra* note 26.

[172] See, eg, *Id.* at 21.

[173] UNFPA Somalia, *supra* note 146.

[174] *See* Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 Law & Social Inquiry 1, 8 (2004).

oversight and monitoring of local level justice, and legal awareness raising on human rights issues and the law, including with respect to gender justice. They often provide key services in assisting claimants, including women, to navigate the plural legal system, promote legal awareness, and do so in a manner that is fully cognizant of the local context in which they operate linguistically, culturally, economically, geographically and otherwise.[175] In Somalia, for example, UNDP has also partnered with locals in running community conversations aimed at challenging beliefs underlying the practice of FGM, through local buy-in, including by female circumcisers.[176] There needs to be continued support for these partnerships and local run activities by external actors engaged in RoL programming.

Lawyer and paralegal training should be provided to local women and girls to better position them advocate for gender justice in their own societies. Moreover, this training may also empower those working through NGOs and grassroots organisations, to demand adherence to human rights standards, including accountability of both formal and informal justice institutions. This needs to be coupled with broader opportunities for women, girls and other marginalised groups to obtain more equitable access to education programmes. Furthermore, the presence of women may make accessing the formal legal system less intimidating for females.

The media often plays a significant role in perpetuating gender stereotypes[177] Contrarily it can also be used to counter gender stereotypes, disseminate information on laws and rights issues, and create dialogue on issues in gender justice. An interviewee in Timor Leste noted efforts to engage in community conversations, using local figures and community call-ins, on issues such as domestic violence. One interviewee on Somaliland notes:

> . . ..for example the best progress we have ever made in Somaliland, its female genital mutilation. . .when women worked very effectively with religious leaders and you have religious leaders siting on TV saying there is nothing in Islam that condones this practice. You have people sitting up because when you have a young British-Somali girl shaking the hand of a General-Secretary of the UN they just think (some kind of gesture made that had no audio).[178]

Local media should be also be provided training on the legal system and human rights norms and their capacity enhanced in this area.

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[175] Wojkowska, *supra* note 26, at 33 (In Timor Leste, for instance, Centro Feto, a local NGO in Oecusse, engages in this type of work, in addition to lobbying the customary system for compensation payments to be paid directly to victims of SGBV rather families).

[176] GENDER EQUALITY PROGRESS REPORT, *supra* note 118, at 5–6.

[177] Grina, *supra* note 15, at 461.

[178] Interviews *supra* note 157.

V. Conclusion

SC Resolutions on WPS are having an impact on RoL programming at the UN level, not least through the use of gender markers in RoL programming documents and the introduction of UNDP's Gender Equality Seal for UNDP country office performance on gender mainstreaming. UNDP RoL programming during periods of transition in conflict-affected states may spur processes, connect actors at international and national levels in RoL reform, build national capacity, offer technical support, and engage stakeholders. However, a top-down approach cannot be adopted. What is required is for RoL reforms to come from the bottom-up. National intermediaries that are actually representative of civil society are central to the vernacularisation and adoption process.[179] This is evident, for example, in the case of one-stop centres and SGBV.

Many activities conducted in the context of RoL are often premised on Western conceptions of justice which may or may not translate well to the local context. The formal justice system is often not well understood, particularly in plural legal contexts and rural areas. What is apparent is that pre-existing regulatory systems such *Xeer* and Shari'a law continue to play important roles in regulating Somali society. Working with these informal systems and understanding the traditions that underlie them is extremely important for efforts to advance gender justice least they frustrate the same. However, frequently this is under-prioritized by those engaged in RoL programming. These systems are what many of the people use in reality and cannot simply be ignored. However, these systems do not always adequately protect females. RoL programming actors must understand cultural contexts[180] and devise strategies for working with formal justice systems on gender justice issues, where feasible.[181]

Sustainability of impacts of RoL programming with intended gender justice outcomes requires ownership and participation at the various levels of the plural legal systems. Moreover, connections need to be drawn between these systems formally if there is to be an effective impact on rights enforcement rather than entity silos. In Somalia, navigating between various parts of the plural legal systems and coming up with relationships between them so as to create a coherent legal system as a whole will not only involve an extremely difficult task of harmonization between these systems, but will involve complex political and power dynamics. The issue of gender justice, and to an extent what it represents for some, adds yet another layer of complexity. Nevertheless, to fail to mainstream gender considerations to the extent possible at all levels of RoL engagements within this plural legal context will undermine the ability to achieve gender justice in the long-term as processes and norms solidify.

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[179] *See* United Nations General Assembly, Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice, U.N. Doc. A/HRC/27/21 (June 30, 2014).

[180] UN Economic and Social Council, Report of the Economic and Social Council for 1997, U.N. Doc. A/52/3 (Sept. 18, 1997), 28; Levitt and Merry, *supra* note 70, at 446–447.

[181] *See*, e.g., Lincoln, *supra* note 45, at 160–61; *See also*, 'Gender Equality', United Nations Rule of Law, 28, http://www.unrol.org/article.aspx?article_id=28; Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* 6 (2013), /core/books/promoting-the-rule-of-law-in-postconflict-states/DE28FDF516DBA3C308AA0B5D5D3D6E8E (last visited Oct. 16, 2018).

Implementation, successes and failures of RoL programmes and the WPS agenda are premised on government and civil society partnerships[182], local buy-in[183], and local ownership.[184] Only these will ensure sustainability of any RoL programming efforts in terms of advancing gender justice. The promotion of gender justice in transitional states relies heavily on partnerships between international actors, government and grassroots organizations.[185] This is particularly the case where the state is still unstable and rural areas are difficult and often dangerous to reach for RoL actors, most vividly external.[186] Local intermediaries are pivotal to programme reach, acceptance, norm translation and impact. In the context of SGBV and gender equality the role of national actors is critical for any transformation to occur.

These partnership dynamics are clear with respect to 'one stop' centres. This necessitates activities such as public dialogues, gender training, and engagement with traditional authorities.[187] One stop-centres offering increased access to justice for SGBV survivors are useful RoL programming tools, where appropriate safe-guards are in place and local contexts accounted for. But care must be taken not to do harm by promising justice but failing to deliver. RoL programmes need to be regularly monitored for effectiveness in increasing access to justice for women and girls, in particular in remote areas and IDP camps, including through local perception surveys and consultations.

Across all,RoL's programming impact on the advancement of gender justice across Somalia, or indeed any transitional state, will inevitably be incremental. Structures, society, capacity and attitudes will not change overnight. The translation of norms with respect to gender justice and WPS is a long-term project, requiring negotiation with cultural and religious actors. With a formal legal system that is likely to remain weak in Somalia for the coming years or decades, RoL programming needs to take a holistic view of the plural legal system in which it operates and see where advances in gender justice can be made through other reforms and partnerships also beyond the formal legal system. RoL programmes and reforms need to be tailored to the local context, remaining conscious of local culture and religious belief systems, in addition to international human rights law.

RoL programming priorities vary according to country context and phases in transition from conflict. Security will often be a priority focus in a peacekeeping context over longer-term development, for instance. Many parts of the legal sys-

[182] *See* Analytical study focusing on gender-based and sexual violence in relation to transitional justice, *supra* note 179.

[183] UNDP Somalia's Gender Equality and Women's Empowerment Strategy (2011-2015): Progress Report 2013, *supra* note 112 at 10–11, 18–19 (UNDP in Somalia has adopted a Community Capacity Enhancement – Community Conversations Methodology to engage communities in identifying their own problems and priorities).

[184] Grina, *supra* note 15, at 436.

[185] Analytical study focusing on gender-based and sexual violence in relation to transitional justice, *supra* note 179, at 9.

[186] Interviews *supra* note 157.

[187] Finnemore and Sikkink, *supra* note 66, at 898-99.

tem in Somalia remain weak. In many areas of Somalia the security situation remain precarious, in particular in South Central Somalia, where al-Shabaab still exert control over some areas and capacity for asymmetrical warfare. Therefore, certain legal reforms will inevitably need to be prioritized in different environments, with the aim of laying some foundations necessary for longer term impact projects. A house cannot be built until the foundations are established, and those building it have obtained the necessary skills and resources. However, workable solutions have to be home-grown and require the buy-in of domestic stakeholders. This requires the crafting solutions that are acceptable to local actors and can grow from the bottom-up, while gradually building on accountability and human rights compliance across all aspects of the justice system, formal and informal. Finally, all solutions and initiatives must be tailored to the specific environment they are to be employed in, and directed by local priorities and ownership. Normative and cultural shifts take time and require locals, men and women, and government non-government, to lead legal system reform with respect to gender justice, if they are to have an effective impact.

The Profitability of Ending the Marital Rape Exception: Ugandan societal norms impeding women's right to say no

Ali Roberson

I. Abstract

Gender-based violence (GBV) is a global issue, particularly egregious in developing nations. Social norms often protect men who commit certain GBV offenses. One offense men in developing countries are often protected from is marital rape. In Uganda, married women have no protection from rape committed by their spouses. This leads to a pattern of violence between partners in the home. By empowering married women and providing protection from the impunity of marital rape, social norms surrounding GBV will shift. New generations will emerge with the mindset that violence towards one's wife is no longer socially acceptable. The frequency of violence towards women as a whole would be impacted by this mindset which would empower women. Empowered women raise empowered children, making social change that lasts. The cost of GBV to the global economy is significant. By protecting married women and shifting the social norm surrounding marital rape, there will be an impact on the social norm of GBV and the cost associated with it. Empowered women fuel economic prosperity, which will in turn benefit both the local and global economy.

"As a man, you need to discipline your wife. You need to touch her a bit, tackle her, and beat her somehow, to streamline her. If you leave her unpunished, she may become an undisciplined wife and this practice of not beating women has actually made them stubborn."

-Onesmus Twinamatsiko, Member of Ugandan Parliament, March 10, 2017.[1]

II. Issues

In Uganda, the offense of rape carries the maximum punishment of the death penalty.[2] Currently, marriage is a defense to the crime of rape, but the law is complicated. Despite the fact that marital rape is a widespread issue,[3] there is no recorded evidence of a marital rape case ever being brought against a spouse in Ugandan case law.[4] The basis of the defense is deeply rooted in Ugandan social norms. A woman would never bring a case against her husband for the crime of

[1] U.S. Dep't of State, Uganda 2018 Hum. Rts. Rep. 23 (2018), https://www.state.gov/wp-content/uploads/2019/03/Uganda-2018.pdf.

[2] Benjamin Odoki, The Constitution (Sentencing Guidelines for Courts of Judicature) Directions (2013).

[3] Uganda, 31 Ann. Hum. Rts. Rep. Submitted to Cong. by U.S. Dep't St. 593, 606 (2007) [hereinafter Human Rights Report].

[4] Bart M. Katureebe et al. The Gender Bench Book 57 (2016).

rape, not because the law precludes her, but because society precludes her. Impunity abounds when a Ugandan man rapes his wife, and in addition to the grave violation of human rights and human decency, it is also growing to become a severe detriment to the economy.

Marital rape, in Uganda, as in many other developing countries, is a largely unspoken crime that is a driving factor in the persistence of gender-based violence (GBV). Fifty-six percent of women in Uganda who have ever been married have experienced physical, sexual or emotional violence by their spouse/partner with forty-six percent of ever-married women saying that they live in fear of their spouse some or most of the time.[5] The issue is making a negative impact on the potential of the economy for many reasons, such as, the costs associated with the after-effects of the crime and the effects it has on female participation in the work force.

Married women are not afforded the right to refuse sexual intercourse with their husbands. Men are not punished for sexual violence towards their wives. Sixty-eight percent of the time when a woman experiences sexual violence in Uganda it is from a current or former spouse.[6] Women are afraid to report their husbands' crimes for fear of financial instability and community backlash, so they endure it.[7] Ugandan men are aware of this, and many take full advantage of it, using fear as a motivating factor for housework, cooking and employment.

A married woman in Uganda has no right to say no to her husbands' sexual advances, although this lies in direct contrast to the principle of fundamental rights afforded to women by the Ugandan Constitution.[8] This also violates the rights set aside and agreed upon by Uganda in the UN Declaration on the Elimination of Violence Against Women (DEVAW), and in the due diligence standard of international law.[9] Socially motivated factors prevent Ugandan women from attaining this right.

GBV is a global issue. Regardless of gross domestic product or geography, almost all nations tackle the issue in different ways. For many countries, that means complying with the UN mandates in place to protect women, yet violence persists. Certain crimes have become integral parts of society and culture to the point that they are never addressed. For reasons such as their taboo nature or societal norms, the issues become untouchable and unspoken of, and this is what has happened in the case of marital rape in Uganda.

By addressing the unspoken crime of marital rape, it is easier to understand the driving cultural motivations which lie behind the persistence of GBV. From there, steps can be taken to educate citizens and reform legal systems to deal with the root of the GBV issue. A large shift in social norms is needed, and that will require effort from government leaders, law enforcement, grass roots non-gov-

[5] Uganda Bureau of Statisitics, Uganda Demographics Health Survey 2016, 313 (2016).

[6] *Id.* at 329.

[7] Amy Shupikai Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* 241 (2003).

[8] Uganda. Const. art. 21.

[9] *Id.* at 166.

ernment organizations (NGOs) and international non-government organizations (INGOs).

Additionally, a deeper look will be taken into how fighting for the equality of women benefits the local and global economy. Where women live in homes free from fear of violence, women prosper, and we know that where women prosper, the economy prospers as a result. When married women are seen as human beings, with equal rights and the right to say no to sexual intercourse, the Ugandan economy will reap the benefits and affect the global economy in return.

III. Origins

Uganda subscribes to the concept of marriage as a defense to rape because Ugandan legal roots lie in the English Common Law system. The martial rape exception was created in 1736 by Lord Hale, an English barrister, and author of "History of the Pleas of the Crown".[10] In his thoughts, which were published 60 years after his death, Hale declared women "subservient chattel" who surrender all rights to revoking consent to sexual intercourse once married.[11] In his treatise he states,

"But husbands cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[12]

Because the marital rape exception has its origins in 18th century English Common Law, it has been deeply engrained in Ugandan society since the time of British colonization of Uganda in 1860. The social concept of women being lesser than men has been passed on from generation to generation, creating the societal norm of male dominance. Although the marital rape exception was overruled in England in 1991[13] in favor of a more modern approach, the opinion is still seen as good law by the Ugandan government which has yet to make definitive law against marital rape.[14]

Today, marital rape is mentioned very little within the Ugandan judicial system.[15] A social stigma related to the crime prevents most lawmakers from bringing up the topic, which also keeps women from implicating their husbands. The issue is only discussed a handful of times in recorded Ugandan jurisprudence. Many lawmakers or legal professionals would argue that the country is not socially ready to deal with the issue. Although, it seems that through the "nearly marital rape" cases which will be discussed in Part VII, the Ugandan judiciary is ripe to create change if the opportunity were to present itself. However, social stigma keeps a case from being brought to court.

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[10] Sir Matthew Hale, The History of the Pleas of the Crown: In Two Volumes, VOLUME 1 628 (W. A. Stokes & E. Ingersoll eds., 1847) (1736).

[11] *Id.*

[12] *Id.*

[13] R. v. R. (1991) 93 Cr. App. R. 1 (U.K).

[14] Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law,* 41 BROOK. J. INT'L L. 172, 172 (2015).

[15] Katureebe et al., *supra* note 4, at 1.

IV. Defining the Concepts

Beginning from a macro perspective, gender-based violence (GBV) encapsulates both domestic violence and marital rape. Violence against women is defined by the United Nations in the DEVAW as,

"Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life."[16]

Domestic violence and marital rape are both forms of gender-based violence which lie under this definition. Uganda ratified the DEVAW, which is a document that came to a consensus on what international law considered to be the fundamental rights of women.[17] Marital rape is classified in the DEVAW as a form of violence against women, and sexual autonomy is recognized as a fundamental human right under international law.[18] The due diligence standard included in the DEVAW is the international legal standard to correct violations of fundamental rights.[19] States are held to the due diligence standard to ensure their active role in the protection of women.

States have an obligation to prevent gender-based violence under international law because of this due diligence standard and because GBV is a violation of a fundamental right. Since Uganda has ratified and signed the DEVAW, they therefore agree to be held to the due diligence standard.

The due diligence standard is a two-prong standard, containing protective and proactive requirements.[20] In addition to the obligation of prevention, ratifying states also agree to conduct investigations, enforce punishments, and create remedial measures to further combat the issue of gender-based violence.[21] The measures are standard regardless of who committed the acts and they are required even if there was state involvement.[22] International law is not ambiguous about its requirement to criminalize marital rape.[23]

Uganda signed and adopted the DEVAW in 1995, meaning that since 1995 they have been in violation of the due diligence standard, which they agreed to be held to, regarding the prevention of gender-based violence. Uganda has accepted combating domestic violence as its duty. Now it is time for Uganda to act on the influences which are currently preventing real change from happening. Since the due diligence standard is a two-prong standard, the government of Uganda

16 G.A. Res. 48/104, art. 1, *Declaration on the Elimination of Violence against Women* (Dec. 20, 1993).

17 *Id*. at art. 3.

18 *Id*. at art. 2 §(a).

19 *Id.* at art. 4 §(c).

20 *Id.*

21 *See* Randall, *supra* note 14, at 166.

22 *Id.*

23 *See* Randall, *supra* note 14, at 195.

should be acting to take protective and proactive measures to combat the issue.[24] Marital rape is occurring at high rates in Uganda because of the lack of action for both prongs of the due diligence standard. As a country which affirms the DEVAW, Uganda is in violation every day it persists without criminalizing marital rape.

The Ugandan Penal Code Act of 1950, which lays the foundation for the crime of rape, defines it as,

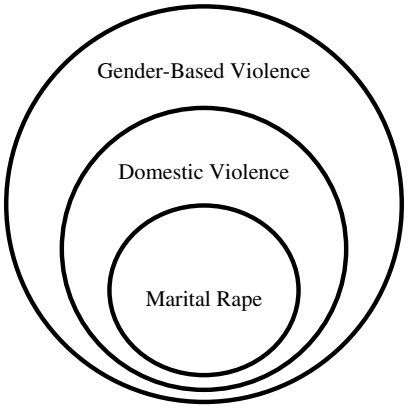
"anyone who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm."[25]

The Ugandan constitution affords women the same rights as men, but this equality is an illusion.[26] In the eyes of the constitution, men and women are equal, yet without protecting married women from sexual violence, society sees the genders as far from equal.[27]

V. Spheres of Influence

A. The Plumb Line Effect of Marital Rape

In ancient architecture, before the invention of modern equipment, a tool known as a "plumb line" was used to determine absolute straightness.[28] The plumb line was a line or string with a weight attached to the bottom. Gravity would pull the weight down and the tension in the line displayed what perfect vertical was.[29] An entire building would be built using the small tool as a guide. The relationship of the line and the weight determined perfect vertical for the entirety of the structure.



[24] *Id.* at 169.

[25] *Ugandan Penal Code* §123.

[26] *See* Ugandan Constitution, *supra* note 8.

[27] *Id.*

[28] Laurene Keane, LA TIMES, *Commentary: Biblical 'plumb line' remains a relevant allegory* (2016), https://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-0724-commentary2-20160718-story.html.

[29] *Id.*

In the social constructs of Ugandan society, the relationship of the average married man and woman is the plumb line which determines the trajectory of how men are expected to treat women in society as a whole. The marital rape exception and the prevalence of marital rape knocks off the necessary verticality of a healthy relationship between a husband and wife. In most cases, young boys are first exposed to the socially acceptable way of treating women by watching their fathers. From there they go on to marry and treat their own wives the way they saw their fathers (or uncles or grandfathers) act. This ripples out into society in the way all men treat women.

The high prevalence of sexual assault and rape in the country can be blamed largely in part on how boys were raised watching men treat women, namely their own fathers and mothers. This plumb line relationship of man and wife in Ugandan society affects domestic relationships as a whole and it affects GBV prevalence. The marital rape exception of the law has caused a society to be built based on a crooked principle which places women in a vulnerable position. All of society—religion, government, business— is affected by this relationship. When the plum line is not perfectly straight, then society is built in a distorted manner. By straightening the plum line, and restoring a respectful relationship between man and wife, social norms will shift and women will grow in empowerment. Boys will be raised to respect women's thoughts, ideas and most importantly, their bodies. The creation and enforcement of rigid marital rape laws would straighten the plumb line of Ugandan societal norms regarding the way women are treated.

B. Prevalence

According to the 2006 Annual Human Rights Report of Uganda conducted by the U.S. State Department, seventy percent of Ugandan women (regardless of marital status) have been physically or sexually abused at some point.[30] More recent Human Rights Reports are no longer numerical in their findings, but rather they annually report the continuing lack of protection married women have under Ugandan Law.[31] The social norm of the issue is displayed in the acceptance of the practice across both genders. Ugandan women have come to understand beatings and male dominance as a normal practice in the marital setting. In Uganda, sixty percent of men said they condone wife beating and 70 percent of women agree with the practice.[32] The culture has distorted women to believe that domestic violence is normal and that they have less value than their husbands or partners. The most common reasons women justify their intimate partners use of domestic violence include, "a woman going out without telling her husband" and "a woman neglecting the children", both actions which are normalized if the genders were reversed.[33]

[30] *See* Human Rights Report, *supra* note 3.

[31] Uganda 2018 Hum. Rts. Rpt. (2018), 22, https://www.state.gov/wp-content/uploads/2019/03/Uganda-2018.pdf.

[32] *See* Human Rights Report, *supra* note 3.

[33] CEDOVIP. *Economic Costs of Domestic Violence in Uganda*. DFID: 2012, 6.

Women in Uganda tolerate and accept domestic violence as a social norm.[34] They have never known a culture without it and because of it they are suffering physically, financially and mentally. The issue is nationally widespread, but rural areas of Uganda have a higher prevalence of gender-based violence.[35] Furthermore, the social norms of rural areas in Uganda, particularly eastern rural areas, tend to be more extreme. Eastern tribal regions are where the practice of female genital mutilation, or female circumcision, is often still a requisite for marriage, even though it is illegal. Additionally, bride prices and child brides are common in some tribal regions of this area.[36]

In 2010, a Domestic Violence Act (DVA) was instated in Uganda to attempt to combat the prevalence of domestic violence. Four years before the DVA, the prevalence of domestic violence in Uganda was sixty percent for women ages 15-49 years old.[37] In Eastern Uganda, specifically, seventy-two percent of women of the same age range say they have experienced physical violence in a domestic context.[38] A year after the DVA was instated, domestic violence rates reduced to twenty-seven percent for women ages 15-49.[39] With the creation of the DV, one could assume national rate of domestic violence would be on the decline. However, the issue persists, effecting millions of women every year.[40]

The most recent reports to date, a 2016 Uganda Demographics and Health Survey, found that fifty-six percent of Ugandan women had experienced spousal violence and twenty-two percent of women admitted to enduring sexual violence in relationships.[41] These numbers display that even with the efforts taken, there has been no real impact on social norms. The efforts taken have been too insignificant. They have not made the impact necessary for a change in the deeply rooted social structure.

It is also known that women who are victims of domestic violence are likely victims of more than one incident. Fifty-two percent of Ugandan women who say that they were victim to domestic violence say they were victimized on multiple occasions, proving the notion that most intimate partners who are violent typically display a pattern of violence.[42] Additionally, of the Ugandan women who reported experiencing violence, seventy-four percent reported multiple violent sexual incidents.[43]

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[34] *Id.*

[35] *See* Human Rights Report, *supra* note 3, at 607.

[36] *Id.* at 606.

[37] *Uganda Demographics and Health Survey* (2006).

[38] *See* CEDOVIP, *supra* note 33.

[39] *Id.* at 13.

[40] *Id.* at 21.

[41] *Uganda Demographic and Health Survey* (2016).

[42] ICRW & UNFPA, *Intimate Partner Violence- High Cost to Households and Communities* (2009).

[43] *Id.*

Marital rape is often paired with many other forms of spousal abuse.[44] This link to other forms of abuse is another compelling reason why protecting women from sexual violence in the home is pivotal for women's empowerment. Protecting women in their homes would help close the gap between cultural rights that society appropriates to women and those appropriated to them by their own constitution.

The marital rape exception cannot be abolished without enforcing the law, as well. Currently, the Ugandan constitution affords women "equality and freedom from discrimination" by establishing that "a person shall not be discriminated on the grounds of sex."[45] Additionally, women and men are given equal rights in marriage by the Ugandan Constitution.[46] It is evident through the statistics, that equal rights in marriage are not occurring in practice.

C. "Nearly Marital Rape" Cases in Ugandan Case Law

Marital Rape was mentioned in Ugandan case law for the first time in the 2002 case of *Uganda v. Yiga Hamidu.*[47] The second time it is mentioned occurs in 2016 in the case of *Uganda v. Lomoe Nakoupet.*[48] Both of these cases consist of similar fact patterns where the man raping the woman was the woman's betrothed, but the woman was not consenting to the marriage or the sexual intercourse. In both instances, the future husband, paired with the family, forced the woman to have sexual intercourse to consummate the marriage.

Gruesome detail in the *Nakoupet* case displays how the bride's family members physically restrained the bride while the perpetrator forcefully had intercourse with her.[49] In the *Hamidu* case, which was the first case ever to bring up the concept of marital rape in the Ugandan courts, the bride did not consent to the marriage or the consummation of the marriage because there was speculation that her betrothed was HIV positive. The woman resisted sexual contact because she did not want to contract HIV.[50]

In both cases, acts were committed grossly against the will, and without the consent, of the women. Additionally, they were done in a violent manner, which the judiciary did not turn a blind eye to. In both cases, the men attempted to use the defense of marriage to avoid being convicted of rape. It is important to note that in both instances, the perpetrator had not yet finished paying the dowry or

[44] World Health Organization, *Global status report on alcohol and health*, Geneva, Switzerland (2014).

[45] *Ugandan Constitution* (1995) Chapter 4, Section 21.

[46] *Id.*

[47] *Uganda v. Yiga Hamidu and 4 Others,* Crim. Case No. 005 of 2002 UGHCCRD 5 at 2 (9 February 2004).

[48] *Uganda v. Lomoe Nakoupet*, Crim. Case No. 109 of 2016 UGCOMMC 13 at 2 (13 February 2019).

[49] *Id.*

[50] *See Uganda v. Yiga Hamidu*, *supra* note 47.

bride price, which is a cultural step before marriage in most parts of Uganda.[51] This implies that there was, in fact, no marriage yet completed.[52] Therefore, neither case was factually considered marital rape, because the rape occurred in the consummation of the marriage. This means the marital defense to rape was never officially abolished. These cases established that the woman's right to consent is protected in forced marriage consummation encounters.

When a proper marital rape case is finally brought by the prosecution to Ugandan Court, if no law has been made criminalizing marital rape, then the strongest legal argument lies in the judge's opinion from the 2002 "*Nearly Marital Rape Case*" where Judge V.F. Musoke-Kibuuka states his opinion that rape in the Penal Code Act,

"does not make any exception to a married person. . .It clearly appears to me that the existence of a valid marriage between an accused and a complainant. . . no longer constitutes a good defense against a charge of rape".[53]

Judge Musoke-Kibuuka then goes on to cite the equal rights in marriage given by the Ugandan Constitution commenting,

"The presumption of consent, even when a man and wife are validly married, in my humble view, appears to be wiped out by the provision of the constitution which I have. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the party of any of the two which is affront to those rights in relation to the other, can be sustained by a court of law."[54]

Fourteen years after this judicial opinion on equal rights in marriage, the second "Nearly Marital Rape" case appeared in court. This time, it was being handled as a case in a special Sexual and Gender-Based Violence session of court. It is evident that the presiding Ugandan judge, Judge Batema, was passionate about the now rampant issue of marital rape through this excerpt of his 2016 judicial opinion where he states that,

"most women and girls in the Karamojo region [the northeastern-most region of Uganda, which is a rural region with the highest rates of marital rape and domestic abuse.[55]] are victims of the old culture of abduction and rape. It is accepted and tolerated as long as one pays cows to the parents. It is common to hear rapists pleading not guilty and saying, "I only made her my wife". The women and girls are never treated as full human beings. They are stereotyped as mere sex commodities or possessions!"[56]

In the same year as this opinion, the 2016 Domestic Violence Act (DVA) was instated in Uganda, which, in effect, created the offense of marital rape. But, according to the 2016 Ugandan Gender Bench Book, the Ugandan Directorate of

[51] Jamil Ddamulira Mujuzi, *Bride Wealth (Price) and Women's Marriage – Related Rights in Uganda: A Historical Constitutional Perspective and Current Developments*, 24 INT'L J.L. POL'Y & FAM. 414, 430 (2010).

[52] *Id.*

[53] *See Uganda v. Yiga Hamidu*, *supra* note 47.

[54] *Id.* at 10.

[55] *See* Human Rights Report, *supra* note 3.

[56] *See Uganda v. Lomoe Nakoupet*, *supra* note 48, at 4.

Public Prosecution and law enforcement have yet to put the DVA to the test.[57] Not a single perpetrator has been accused of the crime of marital rape in recorded history in Uganda. Furthermore, according to the DVA, domestic violence of any kind renders a maximum sentence of two years imprisonment.

If a case was ever brought to a Ugandan court that expressly overturned the marital rape exception, then the current DVA would limit prison time for the guilty husband to two years. Contrast this with the current maximum sentence for the crime of rape in Uganda, apart from marriage, which is the death penalty.[58] This is cause for new legislation.

These "Nearly Marital Rape" cases show the progression that Uganda is making while contrasting with the blatant opposition to progress seen in the social structures of the country and the sentencing guidelines of the DVA. The cases and the DVA create a weak foundation for future legislation or litigation, but there is, in fact, a small foundation already laid. This foundation should be strengthened so that it can withstand the weight necessary to protect half of the country's population from violence in their homes.

VI. The Cost of Marital Rape

Evaluating the cost of domestic violence and marital rape and its effect on the local and global economy involves making approximations from multiple data sources which each utilize different variables and figures. The numbers vary within the literature and research and so its main effectiveness should not lie in its exactness, but rather in the sum of sources which all agree on one thing—the cost of domestic violence to the individual, the country and the global economy is great.

Rape is the most costly of all domestic violence and gender-based violence crimes.[59] Because of the severity of the immediate injuries, the injuries which sustain long after the incident and the mental/emotional trauma associated with the crime, it is both costly to the individual and the economy. HIV is an expensive additional financial factor for victims of marital rape and domestic violence.[60] Additional negative effects of marital rape and domestic violence include miscarriage, reproductive health problems, and depression.[61]

GBV in Uganda costs the Ugandan economy approximately USD 22 million (UGX 77 billion) annually.[62] Domestic violence specifically costs healthcare providers, other service providers and duty bearers USD 15.5 million annually (UGX 56 billion).[63]

[57] Bart M. Katureebe et al. *The Gender Bench Book,* §3.2.1, n. 50 (2016).

[58] *See* Sentencing Guidelines, *supra* note 2.

[59] *See* CEDOVIP, *supra* note 33, at 16.

[60] *Id.* at 3.

[61] *See* IPV Cost, *supra* note 42, at 12.

[62] *See* CEDOVIP, *supra* note 33, at 4.

[63] *Id.*

Among Ugandan women who experienced domestic violence of any kind in a yearlong time span, the average woman had to take off 11.8 work days as a result.[64] From days lost, the estimated value lost to the economy is estimated to be USD 8.7 million (UGX 22 billion).[65] Additionally, a study from the World Bank shows that in 2011, USD $87.76 million Dollars total productivity was lost in Uganda as a direct result of domestic violence.[66]

These out of pocket expenses for women affect their immediate needs and their economic potential. In 2011, it is estimated that Ugandan women spent over USD 7.8 million (UGX 19.5 billion) in out of pocket expenditures.[67] This money is being spent on things like additional healthcare and seeking safe shelter. Women are forced to spend money seeking medical help for the injuries sustained in their own homes, instead of investing in a business or education for themselves or their children. The high cost of domestic violence and marital rape is holding abused women back from achieving their economic potential.

Another negative effect of GBV is a link between sexual violence and the spread of HIV.[68] Because of the prevalence of HIV in Ugandan society, many couples are often faced with HIV as a daily battle. Often, marriages include one HIV-positive partner and one HIV-negative partner. Marital rape in this case threatens any effort to remain HIV-free on the part of an uninfected wife. In the Ugandan National Action Plan on Women, Girls, Gender Equality and HIV & AIDS, a strategic action plan was formed to address GBV.[69] The strategic actions included the necessary education and training to combat not only GBV but its violent after-effects, namely an increase in HIV victims.[70] Yet, marital rape, the arguable social root of the domestic violence and GBV issue, was not addressed in this action plan.

There are non-monetary costs associated with domestic violence as well. Of Ugandan women aged 15 years and above, 44.5 percent claim to have been victimized by domestic violence at one point in their lives.[71] That is over a quarter of the 15 and older population in Uganda. Additionally, of female domestic violence victims, 65.2 percent of women found it difficult to enjoy daily activities, 8.3 percent said their daily work suffered as a result and 11.1 percent considered taking their own lives as a result of the violence they experience.[72] The lawless nature of marital rape and domestic violence affects society in many ways. Mon-

64 *Id.* at 11.

65 *Id.* at 15.

66 Nata Duvvury et. al., *Intimate Partner Violence: Economic Costs and Implications for Growth and Development* 39 (Women's Voice, Agency, and Participation Research series No. 3, Report Number 82532, 2013).

67 *See* CEDOVIP, *supra* note 33, at 15.

68 Karen Stefiszyn, *A Breif Overview of Recent Developments in Sexual Offences Legislation in Southern Africa,* UNDAW (May 12, 2008), at 1.

69 THE WHITE HOUSE, THE UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, AND SECURITY 9 (June 2016).

70 *Id.*

71 *See* Duvvury, *supra* note 66.

72 *See* CEDOVIP, *supra* note 33, at 11.

etary figures point to one of the most tangible effects the violence has, but the non-monetary costs of domestic violence also affect the economy and women's economic potential.

VII. Barriers

A. The Woman's Role

Women in developing countries often do not want to leave abusive spousal situations for many reasons. A consistent abusive relationship creates low self-esteem in a woman, along with loss of self-trust and the ability to trust others, which makes leaving her home difficult.[73] Most women hold on to the hope that things will eventually get better. Women do not want to risk giving up all they have to leave the home if their circumstances will eventually turn around and recover.[74]

The social stigma in Uganda related to women sets girls at a disadvantage from the day they are born. Women are given the aspiration to be wives, mothers and housekeepers, which limits their educational ambitions. This stigma is encouraged by teaching young girls the importance of passivity and emotional dependence. Girls are taught to believe they are inferior to boys. It is often women who resist this male dominance dichotomy who are frequently the victims of domestic violence in the home.[75]

Social norms put men in a position of sexual dominance, teaching women that their role is passive and insignificant. Overt levels of masculinity are taught and displayed to young boys in social settings by older men who display inappropriate sexually dominant behaviors. Extra-marital affairs and violence against women are behaviors Ugandan men often take pride in.[76]

The concept of the bride price is a widely-used concept in Uganda that requires a man to pay the parents of the woman he wants to marry before her can marry her.[77] This concept dehumanizes women and is a further example of the societal notion of women as chattel. The tradition of the bride price is dwindling but remains prevalent, particularly in rural areas of Uganda.[78]

For example, in sexual assault cases where the victim is an unmarried minor, the dispute is often never taken to court. Instead, when young girls are raped, their perpetrator will pay reparations to the father of the daughter.[79] This is because many girls are seen to only be as valuable as their bride price. Deflowering a young girl would make her less valuable. Therefore, the violent act is not seen as a crime committed against the young girl, but rather an act of dishonor, effec-

[73] AMY SHUPIKAI TSANGA, TAKING THE LAW TO THE PEOPLE: GENDER, LAW REFORM AND COMMUNITY LEGAL EDUCATION IN ZIMBABWE 241 (2003).

[74] *Id.*

[75] *See* WHITE HOUSE, *supra* note 69.

[76] *Id.* at 11.

[77] *See* Human Rights Report, *supra* note 3, at 608.

[78] *Id.*

[79] *See* Human Rights Report, *supra* note 3, at 607.

tively stealing from the father. These practices further dehumanize women and make crimes more about the family then the woman.

Women in Uganda are left helpless because of the lack of power they hold in comparison to men. Social norms dictate that the man is the one who holds the power when it comes to land and property. Women often feel trapped in abusive relationships because of their lack of power.[80] Although legally many of these things have changed in recent years, the after-effects still linger in the social norms which seem to restrict women's access to education, health and credit services, making life without the protection of a man seemingly impossible.[81]

B. INGOs Neglecting Grassroots' Vital Role

Improving GBV statistics requires a two-fold approach of engaging local-level grassroots organizations that understand the specific culture's needs, and unifying a global movement to put men and women on the same playing field.[82] Upon the introduction of a marital rape law and/or tougher domestic violence laws the two-fold approach of local level and national/international involvement is vital. The collaboration of grassroots organizations and INGOs is essential to ensure the education and enforcement of new laws.

Organizations like the UN or international development agency USAID, while financially powerful and capable of change on a global scale, fail to understand the needs at a level required for changing social norms. Social norms are specific, unique and individual to geographical areas as small as a neighborhood.[83] The lack of grassroots involvement prevents INGOs from understanding the actual road blocks in the system. By getting in on the ground level, local organizations can see where the real issues lie and enlist the help of larger NGO's who work from a national or global perspective. Local organizations can then formulate change that is effective.[84] In the Harvard Women's Law Journal, Margareth Etienne discusses how, "international Organizations, despite their lack of formal coercive power, can effectively lobby for internal change by stigmatizing countries that actively or passively encourage abuse against women."[85]

The impact of large organizations is vital, but real change cannot be made without the detailed work of grassroots organizations. The lack of community women's shelters, domestic violence victim support groups or access to psychosocial therapy leaves many victims in Uganda feeling as if they have nowhere to turn. INGO's should be reaching out to, investing in and partnering with grassroots organizations which are the best responders to incidents of violence like

[80] *See* WHITE HOUSE, *supra* note 69.

[81] *Id.*

[82] Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 Harv. Women's L.J. 139, 170 (1995).

[83] Margarita Puerto & Bethany Kriss, *An Effective Legal and Refferal System is Critical to Addressing Gender Based Violence*, WORLD BANK BLOGS (Feb. 5, 2019), https://blogs.worldbank.org/nasikiliza/an-effective-legal-and-referral-system-is-critical-to-addressing-gender-based-violence.

[84] *Id.*

[85] *See* Etienne, *supra* note 82, at 160.

marital rape. Through the support of small organizations, larger organizations are able to understand the difference in specific needs of communities, both large and small.

Furthermore, organizations with a grassroots case structure are highly sought after by small local resources such as women's shelters and children's shelters. The shelters reach out to the legal organizations, seeking relief for their clients who have come to them often fleeing from threats of imminent abuse or imminent death by their abuser. Grassroots legal work can expedite the Ugandan response to the marital rape issue, by shedding light on the issue and putting pressure on the government to intervene.[86]

The legal entities, such as legal INGO International Justice Mission,[87] provide assistance to impoverished clients or non-profit organizations attempting to help clients in need. Hands-on experience is an effective resource for understanding how the system could be fixed. By handling actual casework, gaps in the specific community-level systems can be found and addressed. An organization that is on the ground, actively working its way through the legal system to bring victims to justice, is aware of much more than a helicopter organization such as the UN or USAID. Therefore, once the issue is addressed on a national level by the establishment of new laws, there must be follow up on a community level if women are to ever truly be protected.[88]

C. Violence Impeding the Impact of Development Programs

Women who are subject to violence are not able to properly use the resources provided by other organizations. Violence impedes the impact of other development programs when it renders a woman physically injured or in danger for her safety, and this stifles the economy further by wasting foreign aid dollars.

Women without protection from violence cannot take full advantage of organizations that help with basic needs like clean water, free or low cost healthcare, free schooling, etc. A battered wife lives in constant shame of her husband's actions and only seeks medical treatment 10.5% of the time that there is a violent situation.[89]

Micro loan programs for women to start businesses have recently grown in understanding and popularity in the NGO sphere. But a woman recovering from her husband's violent outbursts would be unable to make it to the market to sell the goods she made using her micro loan from the local NGO. A woman who is married to a man who abuses her often lacks the confidence to apply for or take advantage of such programs.

Violence with impunity keeps an injured or fearful woman from being able to safely walk to the closest clean water well. Marital rape prevents a young bride from walking to school the day after a violent assault, and it keeps a fragile

[86] *See* Etienne, *supra* note 82, at 161-62.

[87] *See* Puerto, *supra* note 83.

[88] *See* Etienne, *supra* note 82, at 160-61.

[89] *See* IPV Cost, *supra* note 42, at 8.

woman from believing that she has the potential to learn and succeed. Where there is GBV, other development programs cannot be effective. If volunteer doctors offer their services in a village but a mother who suffered wounds during her husband's forced sexual contact is too afraid to leave her home to visit the clinic, then the aid has no impact.

Development programs are vital for providing basic needs to impoverished peoples, but all of the development programs are useless if there is no protection from impunity. The culture of GBV in Uganda starts in the home and extends far beyond it. By making the home a lawless space where sexual and physical violence reigns, the government is perpetuating the social stigma that men have an entitlement to physically control women. By failing to create overt laws which criminalize marital rape, the government is telling women that they are not as valuable as men and they are not worthy of protection.

VIII. Changes to Be Made

A. Looking Comparatively

The global issue of marital rape and GBV means that there are many other countries to look to in reference to past legal discourse regarding marital rape. In the United States, the first marital rape case was upheld by the New York Court of Appeals in 1984, when marital rape was declared unconstitutional.[90] Anti-Marital Rape Laws were not enacted by all 50 states in the U.S. until 1993. In developing nations, the shift towards following the western lead of abolishing marital rape has had much slower momentum. Countries with specific statutes calling marital rape illegal or unconstitutional often fail to prosecute the perpetrators, or women fail to report the offenses out of fear.[91]

The Philippines, a developing nation similar to Uganda, is an example of the lag that exists between the creation of a new law and the implementation, social acceptance, and trusted use of the law. The Philippines abolished marital rape through their *Anti-Rape Laws of 1997.*[92] Even so, the first court case did not reach the Supreme Court of the Philippines for 17 years. In 2014, *People v. Jumawan* established the validity of marital rape as an illegal offense for the first time in Philippine history.[93] Equality takes time, but it also requires action.

While the origins of Uganda's marital rape exception lie in English common law, the marital rape exception was rejected in England by the English House of Lords in 1991. In the case of *R v. R,* an English man was convicted of rape committed against his wife.[94] Although rejected by its country of origin, it is this

[90] *People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984).

[91] *See* IPV Cost, *supra* note 42, at 12 (study compares the rate of abused women seeking care in Uganda, Bangladesh and Morocco; all comparatively show that less than 15% of women seek help of any kind after a violent incident with their incident partner).

[92] *The Anti-Rape Laws of 1997,* Rep. Act 8353, Philippines (1997).

[93] Giselle Jose, *People v. Jumawan: Examining the Law's Silent Treatment of Marital Rape*, 89 Phil. L.J. 328 (2015) (addressing Philippine legal literature in regard to *People v. Jumawan*, G.R. No. 187495, 722 SCRA 108, Apr. 21, 2014).

[94] R. v. R. [1991] 3 WLR 767 (HL).

precise defense, that continues to be used in countries like Uganda to create a social stigma which knocks equality between genders off balance. Furthermore, due to colonization and the establishment of the English Common Law system as the model for the Ugandan system, the defense of marital rape is now deeply embedded in the social norms of Ugandan society. The impact of marital rape as an accepted social norm, in a broader sense, affects how all women are treated, married or unmarried, young or old.

B. Finding Governmental and Cultural Gaps

Discrepancies between the constitutional backbone of the nation and the cultural norms of a nation are the gaps which must be addressed in order for change to be made. No country is without some size gap in social norms and rights afforded by its constitution. In the developing world, there is a gap in the way women are culturally treated and the way their government prescribe their treatment.

A statement taken from a lead judgement made by Ugandan Justice Alice Mpagi-Behigeine encapsulates this principle well—

"The 1995 constitution is. . . fully in consonance with the international and Regional Instrument relating to gender issues. . .. Be that as it may, its implementation has not matched its spirit. There is urgent need for Parliament to enact the operational laws and scrap all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real, substantial equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises."[95]

The current Ugandan law which protects women from rape has a maximum sentence of the death penalty. However, this law is not consistently enforced.[96] Many rapes are not reported or not properly investigated.[97] According to a 2008 study, 13% of women who are victims of domestic violence seek help from the police and only 0.19% of domestic violence victims seek legal redress in court.[98] Corruption also plays a role in keeping women from speaking about and seeking help.[99] Perpetrators have been known to bribe justice systems and victims to keep quiet. In some cases, the father of the girl violated is bribed into keeping quiet. Threats of violence, intimidation and fear instilled in the victim by the perpetrator also keep victims from seeking justice for their injuries.[100] Corrupt justice systems and the prevalence of perpetrators bribing judges or other officials make

[95] *Uganda Association of Women Lawyers and Others v. Attorney General*, Constitutional Petition No. 2 of 2003.

[96] *See* Human Rights Report, *supra* note 3.

[97] *Id.*

[98] *See* KASIRYE, *supra* note 33, at 13.

[99] *Id.* at 16.

[100] *Id.*

it unlikely that the new law would be enforced without a protective mechanism in place.[101]

C. Implementing New Laws

Ugandan law should adapt itself to changing attitudes. A shift in social norms can be propelled by a legal framework which expressly criminalizes martial rape. The status of women has slowly been changing out of recognition of marriage as partnership of equals and no longer one in which the wife must be subservient chattel of the husband.[102] The law should be a reflection of the emerging society it represents. The expressive function of the law reflects the societal views of a country.[103] As the values of the people adapt, that adaptation should be displayed through new laws tailored to societal needs.[104]

By changing the laws, the Ugandan government can lead the way to reformative social change. Creating new laws that protect all women would overtly and covertly grow Ugandan societies to greater levels of acceptance.[105] Tendencies which are ingrained in a society require transformative policies which can only be created and implemented by a government which is willing to think in a different and more creative way.[106] Through examples like the "Nearly Marital Rape" cases and the DVA, it is evident that the shift has begun within the Ugandan judiciary.

Law and the changing legal discourse of a country shape the conscience which in turn creates the social norms of a place.[107] As mentioned earlier, this must begin by changing the understanding of rape as a crime committed against an individual, rather than how it is currently seen as a crime against the public, or against morality and honor.[108]

Uganda agreed to abide by the due diligence standard of international law, which requires protection and proactive measures against the violation of women's rights.[109] By implementing laws and statutes which protect women from rape, even if committed by their husbands, Uganda would be adhering to the due diligence standard for protecting fundamental rights. Ugandan government must first get the protective law instated, then it can move to focusing on other issues that present themselves, like the social barriers that will be slow to adapt.

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[101] *Id.*

[102] S.W. v. United Kingdom, App. No. 20166/92, Eur. Ct. H.R. (1995).

[103] Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 643 (2009).

[104] *Id.*

[105] *Id.*

[106] *Id.* at 671.

[107] Mark Kessler, *Lawyers and Social Change in the Postmodern World,* 29 LAW & SOC'Y REV. 769, 772 (1995).

[108] *See* Randall & Venkatesh, *supra* note 14, at 197-98.

[109] *Id.* at 169.

D. Ensuring the Enforcement of New Laws

In a recent article, The World Bank recognized the specific role local level response structures play for issues to be effectively addressed.[110] There is a trust disparity between the public and the response systems in place. As a result, women in Uganda tend to seek help from local councils rather than through formal law enforcement avenues.[111] This is how issues arise like perpetrators paying off the fathers of rape victims.[112] For change to be made, a trust network needs to be built so that citizens believe in the capacity of local government institutions to protect them and take care of their needs. If the police in a village are known for corruption and lack of enforcement, then the villagers are not likely to seek help. If social workers have a reputation for ineffectiveness and inattentiveness, then the public will fear their complaints being pushed to the wayside. If health care workers are known for being under-resourced and showing little compassion to victims of rape, then those victims are less likely to seek medical attention. Most important is the integral necessity that government and community responders collaboratively play.[113]

Systematic technical trainings would require working together and would effectively bring change at both a local level and a national level. Trainings like these are expensive and that is where INGO's play a role. Without the financial and educational capacity INGO's bring, the local entities would not be able to effectively prepare for the implementation, enforcement and outcry that will result from changing the social norms which lie around marital rape. Once women are empowered to know they have a voice, incident reporting will increase. All players must have the capacity to handle this increased reporting or the system will continue to fail. This will require the collaborative efforts of law enforcement, government prosecutors, medical professional and psychosocial support professionals. All these measures will ensure that women have the right to seek justice for the wrongs committed against them.

In order for light to be shed on GBV, there must be effective response structures in place to be able to handle the outcry that will happen as a result of new law being instated.[114] As the community begins to have faith in the justice system, and as the trust gap between law enforcement and victims is closed, the response and outcry from victims will increase at unprecedented rates. Women will begin to feel protected and empowered in their homes, a shift in the power imbalance will occur and the economy will be affected as women become more educated than ever before and begin to pour in to the work force.

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110 *See* Gomez, *supra* note 83.

111 *See* IPV Cost, *supra* note 42, at 8.

112 *See* Human Rights Report, *supra* note 3, at 608.

113 *See* Gomez, *supra* note 83.

114 *Id.*

IX. Conclusion

Gender-based violence in Uganda is costing the economy at the expense of the woman. The root of the issue lies in the lawlessness of the domestic relationship. This lawlessness does not lie solely in the legal structure, but it is engrained in the social structure as well. Impunity and social acceptance for abusive husbands must end if the economy and society will ever grow in prosperity. There is no ambiguity in the requisite set by international law for all countries to criminalize GBV, and this includes marital rape. Marital rape violates a fundamental right all women possess and, by not criminalizing it, Uganda is in violation of the international agreement to which they are a party.[115]

The effects of the criminalization of marital rape will ripple out into society and affect perceptions of domestic violence, gender-based violence and gender equality. Protected women are empowered women, and empowered women fuel economic prosperity.

Through the outright criminalization of marital rape, the government would send the message that domestic violence is not tolerated and that women have a voice in Uganda. Men would no longer be able to beat women into submission with social impunity protecting their violent sexual actions. Through the collaborative efforts of grassroots organizations, NGOs and INGOS, and by analyzing the specific needs of communities, reformative change can be made.

Married women in Uganda deserve to be given their voice; they deserve to be empowered. Empowered women will create economic prosperity that will push Uganda forward as a leading country in Sub-Saharan Africa.[116]

[115] *See* Randall, *supra* note 14, at 195.

[116] End Note: After the completion of this paper, its findings were brought to a board comprised of Ugandan Women who work for NGO's as Social Workers and Lawyers. This was done with the hopes of using the Ugandan NGO network to find a Marital Rape case to bring before the Constitutional Court of Uganda. After much discussion and debate, further action was decided against. This decision was made under the belief that Uganda was not socially ready for this magnitude of change. Thus, the women of Uganda remain unprotected from daily violence within their own homes, with the hope for change not yet on the horizon.

Gone Girls: Exploring The Systematic Misunderstanding of Women in ISIS and Resulting International Security Concerns

Evan Colleen Jones

I. Abstract

Evidence confirms that both women and men are engaged in extremist and terrorism-related activities at similar rates. Yet internationally there are disparate responses when a suspect is female. Within the United States this is seen in judicial and political responses, as biased research and policy analysis, and presented as tropes in communication to the public. This is commonly because of perceived gender roles, bias which leaves a critical gap in national security while hindering the duty of the United States to investigate and prosecute citizens for contributions to ISIS and its conflicts. That same evidence reveals the differential treatment they receive, from investigations to arrests through sentencing and post-conflict resolution. Many woman are victims of the terrorist group, but others have demonstrated their resolution to use violence to promote ISIS' mandates and ideology.

This article will attempt to illuminate the roles of women within ISIS, explore the challenges in presenting comprehensive data, and present domestic and international responses. Exploring possible legal mechanisms within the U.S. for prosecuting members of ISIS, it argues it is the responsibility of the country to repatriate its citizens and provide due process. An act in recognition of responsibility and a path to justice, both a carrot and a stick. The country's obligation stems from its own precedent, is highlighted in international cases, and is made more obvious by the country's continued involvement in the region. When evaluating ad hoc tribunals or courts within the area of conflict, it becomes clear that the most judicially and economically efficient response is the repatriation and prosecution of citizens to their native countries.

It is the presence of U.S. troops and citizens in areas of ISIS conflict, along with its precedent and Department of Justice mandates, that ultimately require the country to repatriate its female citizens as equally as males. Ultimately, properly addressing the contributions of American female ISIS members through legal action will require an amalgamation of the military efforts, humanitarian aid, media education, and diplomacy. The challenges are present beyond the battlefield and necessitate actors, from investigators to journalists to legal professionals, to note and check gender biases. Counterterrorism measures and national security efficacy require the contributions, and dangers, of female ISIS associates not be ignored.

II. Understanding the Players: Background on ISIS and the Yazidis

A. U.S. Statements And Actions Lead to Reevaluation of Female ISIS Supporters

Public attention returned to the American citizens in ISIS' so-called Caliphate in 2019, when two American, female supporters of ISIS abandoned the Caliphate and expressed their desire to return to their homelands.[1] The women, 20-year old Hoda Muthana and Kimberly Gwen Polman, 46, traveled to join ISIS despite the group's well-documented crimes of beheadings, beatings, and systematic rape.[2] The two befriended each other while surviving in the last six square miles of ISIS's stronghold.[3] Their situation became more dire and though they felt that they had "burned bridges" the women decided to flee ISIS.[4] After multiple attempts, both were able to escape, surrendering to American troops and asking to be returned home.[5] Their cases immediately became politically charge and earned more attention with a tweet from U.S. President Donald Trump.[6] Just four days after pressuring other countries to repatriate their citizens in Syria,[7] Trump publicized his direction to the Secretary of State "not to allow Hoda Muthana back into the Country!"[8] Later, a judge ruled that questions of diplomatic status and birthright citizenship technicalities meant Ms. Muthana was not an American citizen.[9] She and her child must remain among the declining conditions in Syria.[10] Another woman and her toddler received a similar reception:

[1] Rukmini Callimachi & Catherine Porter, *2 American Wives of ISIS Militants Want to Return Home*, N.Y. TIMES, Feb. 19, 2019, https://www.nytimes.com/2019/02/19/us/islamic-state-american-women.html [hereinafter *Wives of ISIS Militants*] (The deputy director of the George Washington University Program on Extremism confirmed the United States has an obligation to bring Ms. Muthana home — "albeit in handcuffs.").

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019, 3:05 PM), https://twitter.com/realDonaldTrump/status/1098327855145062411.

[7] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 16, 2019, 9:51 PM) https://twitter.com/realdonaldtrump/status/1096980408401625088.

[8] *Id.* (President Trump did not mention other American women who had also married ISIS fighters whom the U.S. has also not returned.).

[9] Charlie Savage, *American-Born Woman Who Joined ISIS Is Not a Citizen, Judge Rules*, N.Y. TIMES, Nov. 14, 2019, https://www.nytimes.com/2019/11/14/us/hoda-muthana-isis-citizenship.html; *See also* Rukmini Callimachi & Alan Yuhas, *Alabama Woman Who Joined ISIS Can't Return Home, U.S. Says*, N.Y. TIMES, Feb. 20, 2019, https://www.nytimes.com/2019/02/20/world/middleeast/isis-bride-hoda-muthana.html (Ms. Muthana was born in the United States, which would ordinarily guarantee her and her child's citizenship. But her father was a Yemeni diplomat. Children born in the U.S. to active diplomats do not earn birthright citizenship because diplomats remain subject to the jurisdiction of their home countries. Ms. Muthana's father was discharged a month before her birth. Ms. Muthana says she applied for and received a United States passport before leaving for Turkey.).

[10] *See* Vanessa Romo, *Woman Who Left U.S. To Join ISIS Denied Request To Expedite Her Case To Return*, NPR, March 5, 2019, https://www.npr.org/2019/03/05/700585612/woman-who-left-u-s-to-join-isis-denied-request-to-expedite-her-case-to-return (Their case won't be expediated, despite the pair moving once due to threats from ISIS.).

despite living in that same war zone, a judge remained unconvinced that the two would face "irreparable harm" if their case stayed on a normal litigation schedule.[11] A U.S. lawmaker declared that "those who betray the country and fight for ISIS have to suffer the consequences for their actions."[12]

Amidst these rulings and tweets, two other American women with ties to the Islamic State and six children were repatriated from northeast Syria at the request of the U.S. government.[13] U.S. public officials publicly stressed the importance of other countries taking responsibility for their own citizens caught in Syria.[14] The administration's policy on suspected terrorists shifted from detention and prosecution, centered at Guantanamo Bay, to a heavier reliance on the civilian court system.[15] And U.S. troops left their bases in northeastern Syria, prompting "jubilation among Islamic State supporters."[16] These shifts in domestic policy and on-the-ground-strategy demanded careful and consistent attention, while the public interest in cases of American women supporting ISIS refocused the attention on the status of all foreign supporters and their impact on national security.

B. Terrorism From *AQI* to *ISIS*: A 30,000 Foot View

ISIS is a fundamentalist Salafi-Jihadist militant organization whose goal is the establishment and expansion of a territorial caliphate in Iraq and Syria and the creation of a global Islamist movement.[17] Framework was laid by Abdulrahman al-Qaduli, an Iraqi teacher who formed a proto-Islamic state with former stu-

[11] *Id.*

[12] Anna Beahm, *Judge grants expedited hearing for Alabama ISIS bride Hoda Muthana*, ADVANCE LOCAL, Feb. 26, 2019, https://www.al.com/news/2019/02/judge-grants-expedited-hearing-for-alabama-isis-bride-hoda-muthana.html.

[13] *2 American women captured with ISIS sent back to U.S. with 6 kids*, June 5, 2019, CBS NEWS, https://www.cbsnews.com/news/isis-women-kids-sent-back-us-from-syria-kurdish-officials-say-today-2019-06-05/.

[14] Savage, *supra* note 9.

[15] Warren P. Strobel & Gordon Lubold, *U.S. Is Bringing Home Citizen Suspected of Fighting for ISIS*, WALL ST. J., July 18, 2019, https://www.wsj.com/articles/u-s-is-bringing-home-citizen-suspected-of-fighting-for-isis-11563496749.

[16] David D. Kirkpatrick et al., *ISIS Reaps Gains of U.S. Pullout From Syria*, N.Y. TIMES, Oct. 22, 2019, https://www.nytimes.com/2019/10/21/world/middleeast/isis-syria-us.html.

[17] Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, 19 CENTER FOR MIDDLE EAST POLICY AT BROOKINGS 1, 4 (2015) (ISIS is also known as the Islamic State of Iraq and Syria, Daesh, and The Islamic State of Iraq and the Levant). *See also* MAHER HATHOUT, JIHAD VS. TERRORISM (2002) (discussing the Islamic traditions of internal spiritual struggles, explaining that the word "jihad" in Arabic literally translates to "struggle" and further explaining the misconceptions Western media have of the term because of the misappropriation of groups like ISIS is one of the many challenges present when pursuing an accurate account of justice in an armed conflict); *see also* Bernhard Warner, Tech Companies Are Deleting Evidence of War Crimes, THE ATLANTIC, May 8, 2019, https://www.theatlantic.com/ideas/archive/2019/05/facebook-algorithms-are-making-it-harder/588931/; Louise Hansen, *In war zone, law is spotty, but lawyers are plentiful*, VIRGINIAN-PILOT, Oct. 4, 2007, https://www.pilotonline.com/military/article_c0dca20b-c3d1-5dbd-8581-1fac3877040f.html (describing challenges include the gathering and preservation of evidence and witnesses, the presence of practitioners, and decimated infrastructure.).

dents.[18] He is often recognized by his *nom de guerre*, Abu Ali-al-Anbari.[19] Anbari's extremist views, later mirrored by ISIS, were forged before the American invasion of Ira and before he met another crucial figure in ISIS history, Abu Musab al-Zarqawi.[20] al-Zarqawi trained militants in 1999 in Afghanistan.[21] Militants became a substantial portion of the Iraqi insurgency during the American occupation of Iraq.[22] Anbari and Zarqawi's groups pledged themselves to Al Qaeda in 2004, becoming Al Qaeda in Iraq (AQI).[23] Abrahim Awwad Ibrahim Ali al-Badri al-Samarrai, *nom de guerre* al-Baghdadi, became the group's leader in 2010.[24] AQI filled the power vacuum left by the withdrawal of American troops from Iraq and the beginning of the Syrian Civil War in 2011, allowing the group to reemerge after a decline in power.[25]

The name "Islamic State in Iraq and Syria (ISIS)" was unveiled in 2013 as the group was capturing substantial territory.[26] Its interpretation of Islam was imposed over one-third of Iraq and nearly half of Syria from late 2012 to the summer of 2014, where the group condemned a Jordanian pilot to immolation; Yazidis who came in contact with the group were massacred or enslaved; and two tribes in Syria and Iraq were massacred as a warning against rebellion.[27] It continued to fight Syria's government forces and rebel groups, Kurdish peshmerga groups, and Iraqi military and militia.[28] al-Qaeda formally disavowed ISIS in 2014.[29] That same year, Al-Baghdadi declared the creation of a caliphate,[30] creating the Islamic State (IS).[31]

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[18] *Mapping Militant Organizations*, *The Islamic State*, Stanford University. Last modified Sep. 2019. https://cisac.fsi.stanford.edu/mappingmilitants/profiles/islamic-state [hereinafter *Mapping Militant Organizations*]; *The True Origins of ISIS*, *infra* note 21.

[19] *Id.*

[20] *Id.*

[21] Hassan Hassan, *The True Origins of ISIS*, THE ATLANTIC, Nov. 30, 2018, https://www.theatlantic.com/ideas/archive/2018/11/isis-origins-anbari-zarqawi/577030/. [hereinafter *The True Origins of ISIS*] (explaining that Al-Zarqawi's presence in Iraq was used by the U.S. as proof of a link between Saddam Hussein and al-Qaida in 2003); *see also*, Lauren Smith, *Timeline: Abu Musab al-Zarqawi*, THE GUARDIAN, June 8, 1006, https://www.theguardian.com/world/2006/jun/08/iraq.alqaida1 (discussing the intelligence that cast doubt on this justification).

[22] *Mapping Militant Organizations*, *supra* note 18.

[23] *The True Origins of ISIS*, *supra* note 21.

[24] Rukmini Callimachi & Falih Hassan, *Abu Bakr al-Baghdadi, ISIS Leader Known for His Brutality, Is Dead at 48*, N.Y. TIMES, Oct. 27, 2019, https://www.nytimes.com/2019/10/27/world/middleeast/al-baghdadi-dead.html.

[25] *Mapping Militant Organizations*, *supra* note 18.

[26] *Id.*

[27] *Id.*

[28] *Mapping Militant Organizations*, *supra* note 18.

[29] *The True Origins of ISIS*, *supra* note 21.

[30] Joseph Krauss, *Al-Baghdadi's death a blow, but ISIS has survived other losses*, MILITARY TIMES, Oct. 27, 2019, https://www.militarytimes.com/flashpoints/2019/10/27/al-baghdadis-death-a-blow-but-isis-has-survived-other-losses/.

[31] *Mapping Militant Organizations*, *supra* note 18.

ISIS fought Syrian government forces and rebel groups, Iraqi military and militias, and Kurdish peshmerga groups.[32] The Iraqi military, certain Syrian rebel groups, and the Kurdish peshmerga groups were supported by U.S. airpower and weapons.[33] These forces retook territory from ISIS between 2015 through the declared destruction of the caliphate in March of 2019.[34] The group was once an unrecognized proto-state,[35] operating multitudes of dispersed foreign fighters, functioning with meticulous a bureaucratic and financial system, and maintaining a strong online media presence.[36] Since the last ISIS territory was seized in Syria in March 2019, it has reoriented as a decentralized, guerilla-style insurgency.[37] ISIS continues to carry out attacks through sleeper cells in globally through its network of organizations, "colonies," and individuals.[38]

The definition of terrorism is shaped by the context in which it is being discussed.[39] In the U.S., the Federal Bureau of Investigation characterizes international terrorism as acts "perpetrated by individuals [or] groups inspired by or associated with designated foreign terrorist organizations or nations (state-sponsored)."[40] It is codified in the U.S. within 18 U.S.C. §2331 as activities "dangerous to human life. . .intended to intimidate or coerce a civilian population; to influence the policy of a government. . .or to affect the conduct of a, or intended to intimidate or coerce the locale in which their perpetrators operate or seek asylum."[41] Similarly, the International Convention for the Suppression of the Financing of Terrorism states that it is influenced by international laws' definitions, and in particular those of the United Nations (U.N.).[42]

Because the U.S. recognizes the influence on its domestic laws by the U.N., and because this comment addresses international acts, this comment will work through the lens provided in the definition supplied by the U.N. The U.N. condemns as terrorism any attacks "that specifically target innocent civilians and

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* Seth J. Frantzman, *After ISIS 'defeat,' what comes next? – Analysis*, THE JERUSALEM POST, Mar. 24, 2019, https://www.jpost.com/Middle-East/ISIS-Threat/After-grueling-battle-ISIS-defeated-in-Syria-584346; *see also* Bethan McKernan, *"Isis defeated, US-backed Syrian Democratic Forces announce",* THE GUARDIAN, Mar. 23, 2019, https://www.theguardian.com/world/2019/mar/23/isis-defeated-us-backed-syrian-democratic-forces-announce.

[36] *Mapping Militant Organizations*, *supra* note 18; *see also* Rukmini Callimachi, *"ISIS Caliphate Crumbles as Last Village in Syria Falls"*. N.Y. TIMES, Mar. 23, 2019, https://www.nytimes.com/2019/03/23/world/middleeast/isis-syria-caliphate.html.

[37] *Id*. *Mapping Militant Organizations*, *supra* note 18; s*ee also* Jason Motlagh, *The Betrayal of the Kurds*, ROLLING STONE, Dec. 18, 2019, https://www.rollingstone.com/politics/politics-features/trump-betrayal-of-the-kurds-927545/.

[38] *Mapping Militant Organizations*, *supra* note 18.

[39] U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, ¶157, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

[40] *What We Investigate: Terrorism*, FBI, https://www.fbi.gov/investigate/terrorism (last visited Nov. 20, 2019).

[41] 18 U.S.C. § 2331 (2018).

[42] 18 U.S.C. § 2339C (2006).

non-combatants."[43] This includes "action. . .intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose. . .by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".[44]

ISIS has been declared a terrorist organization by the U.S. and United Nations.[45] Sixty partners participate in the Global Coalition to Counter the Islamic State of Iraq and the Levant.[46] U.N. Security Council Resolution 2170, adopted unanimously on August 15, 2014, calls on member states to take "all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts . . . perpetrated by individuals or entitles associated with ISIL" and bring them to justice.[47] International and domestic jurisdictions provide the structure for federal prosecution. In addition, the federal record on terrorism prosecution in the U.S. is that of a high conviction rate.[48] It relies heavily on preventative law enforcement and material support statutes.[49] Material support cases represented 80% of federal ISIS-related prosecutions from 2014–2016.[50]

But those statutes are applied differently depending on whether the defendant is female or male.[51] While women continuously provide essential support to ISIS, the U.S. has rejected opportunities to repatriate and prosecute or reintegrate its female citizens.[52] Gaps in data and bias concerning gender and conflict inform political and judicial responses to terrorism.[53] This undermines the concept of the uniform application of law, denies justice to victims of crimes committed by U.S. citizens, leaves an intelligence gap, and a chasm in national security.

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[43] *A More Secure World*, *supra* note 39.

[44] *Id.*

[45] John W. Rollins, *Foreign Terrorist Organization (FTO)*, 2019 CONG. RES. SERV., https://fas.org/sgp/crs/terror/IF10613.pdf; U.N. Office on Drugs and Crime, Education for Justice University Module Series: Counter-Terrorism – Module 1: Introduction to International Terrorism (2018), https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINALpdf.pdf.

[46] Press Release, U.S. St. Dep't, Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting (Dec. 3, 2014).

[47] S.C. Res. 2170 ¶ 6 (Aug. 15, 2014).

[48] *Terrorist Trial Report Card*: *SEPT.11,2001 - SEPT. 11, 2011*, CTR. ON LAW & SEC., N. Y. UNIV. SCH. OF LAW (2011), https://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf.

[49] *Id*.

[50] Center on National Security at Fordham Law, CASE BY CASE ISIS PROSECUTIONS IN THE UNITED STATES AT 2, March 1, 2014 - June 30, 2016, https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case£y+Case+-+July2016.pdf.

[51] *Id*.

[52] *Wives of ISIS Militants*, *supra* note 1.

[53] Ester Strommen, *Jihadi Brides or Female Foreign Fighters? Women in Da'esh – from Recruitment to Sentencing*, PEACE RESEARCH INSTITUTE OSLO (2017), https://www.prio.org/News/Item/?x=2164. [Hereinafter Stronmen].

C. The Contributions of Women in ISIS: State-Building and Support

Factions of women aiding ISIS are often categorized as plotters, supporters, and travelers.[54] Plotters facilitate, attempt, or carry out attacks domestically.[55] Supporters create and broadcast propaganda, obtain and provide material support, or conceal information about impending attacks.[56] Travelers move abroad in order to participate in the movement directly.[57] This comment focuses specifically on American female travelers, but roles often overlap and evolve.[58]

Typical roles for women in the so-called Caliphate include that of wife, mother, medical care provider, propogandist, and community builder.[59] Women do not typically pursue or assume violent roles, but exceptions do occur.[60] Women's participation may be necessary for an operation, the group's needs may call for additional assistance, or the operation may be outside the direct control of the leader.[61] This latter is increasingly the case for ISIS, which continuously supports and relies upon lone or directed attacks.[62] As an additional value, misconceptions and gender stereotypes often obscure the scope of women's participation and commitment, ultimately benefiting an organization with an underestimating target.[63]

It may feel counterintuitive "to accept women as perpetrators and supporters of violence within organizations that subordinate women and employ gender-based violence."[64] A more traditional socio-ideology can be seen as especially unreceptive to female participation.[65] But "even within the constraints of relig-

54 *See infra* note 109, *Cruel Intentions* at 2, 3.

55 *Id*.

56 *Id*.

57 *Id*.; *see also* Farhana Qazi, *The Mujahidaat: Tracing the Early Female Warriors of Islam*, Women, Gender, and Terrorism, 48 (2011) (Contributions differ based on conflicts and needs of the group.).

58 *Id*.

59 *Id*.

60 *Id*. at 20.

61 Strommen*, supra* note 53 at 3.

62 *See* Complaint, United States of America v. Jaelyn Delshaun Young and Muhammad Oda Dakhlalla, (N.D. MS 2015) (No. 3:15) (A criminal allegation against two college students, planned by the female participant.); *see* Melanie Thortis, *Jaelyn Young to plead guilty to terrorism charge: Mississippi woman planned to join ISIS*, AL.COM (Mar. 29, 2016), https://www.al.com/news/2016/03/jaelyn_young_to_plead_guilty_t.html; Angelique Chrisafis, *Cell of French women guided by Isis behind failed Notre Dame attack*, THE GUARDIAN (Sept. 9, 2016) (A group of women plot a violent attack.).

63 Mia Bloom, *How the Islamic State is Recruiting Western Teen Girls*, THE WASH. POST (Oct.9, 2014) https://www.washingtonpost.com/posteverything/wp/2014/10/09/how-the-islamic-state-is-recruiting-western-teen-girls/.

64 Strommen*, supra* note 53 at 2.

65 Karla J. Cunningham, *Countering Female Terrorism,* 30 STUDIES IN CONFLICT & TERRORISM 113, 114 (2007), https://www.researchgate.net/publication/249035743_Countering_Female_Terrorism (Discussing "conservative stances on gender issues and. . .exclusion of women from leadership and decision-making positions."). [hereinafter *Countering Female Terrorism]* For more examples, *see also* Claudia Brunner, *Female suicide bombers – Male suicide bombing? Looking for Gender in reporting the suicide bombings of the Israeli–Palestinian conflict*, 19 GLOBAL SOCIETY 29, 29-48 (2005), https://www.tandfonline.com/doi/abs/10.1080/1360082042000316031; David Cook, *Women Fighting in Jihad*?, 28 STUD-

ious gender expectation. . .women find room for agentic action."[66] Their presence legitimizes ISIS while giving it a society to operate within.[67] Women's participation [in extremist groups] is increasingly associated with strategic advantages.[68] The contributions and support from wives and mothers, especially in recruiting, provide great value,[69] and non-combative or auxiliary roles are an integral part of ISIS.[70] Though the focus of this comment is on women who actively participate in violence, the legitimacy the mere presence of women within an extremist organization can bring should be recognized.[71] "There is no state if there are no women and children."[72]

D. ISIS and the Yazidi Genocide: Women's Roles In Violent Actions

Because of the amount of wars and battles involving ISIS, this comment will be use examples largely from the Yazidi genocide and displacement.[73] The Yazidis are a Kurdish sect of monotheistic people whose beliefs involve ancient roots with characteristic that are neither Christian nor Muslim.[74] In October of 2014 ISIS published *The Revival of Slavery Before the Hour*, a writing addressing questions of whether its interpretations of Islam meant the Yazidis were "marked for death" or pagans.[75] Determining the Yazidi were pagans, ISIS next examined if it would be a mockery of "the verses of the Koran and the narrations of the Prophet" to oppose enslaving them.[76]

This explanation was necessary because leaders had ultimately determined that the Yazidis were apostates and, in August of 2014, began an organized campaign of executions, enslavement, sexual violence, and forced recruitment of child soldiers upon Yazidis with the goal of eradicating the population.[77] Raids led to

IES IN CONFLICT AND TERRORISM, 375, 375-384 (2005), https://www.tandfonline.com/doi/abs/10.1080/10576100500180212.

66 Reid J. Leamaster & Rachel L. Einwohner, *"I'm Not Your Stereotypical Mormon Girl": Mormon Women's Gendered Resistance*, 60 REV. OF RELIGIOUS RESEARCH 161, 162 (2018) [hereinafter Leamaster].

67 *Countering Female Terrorism*, *supra* note 65 at 114; *see also* Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (March 2015), https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/. [hereinafter *What Isis really wants]*

68 Countering Female Terrorism, *supra* note 65.

69 *Id*. at 115.

70 *Cruel Intentions*, *infra* note at 2.

71 *Id*.

72 *The American Women Who Joined ISIS*, THE N.Y.TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/podcasts/the-daily/isis-american-women.html?showTranscript=1.

73 *List of wars and battles involving ISIL*, https://en.wikipedia.org/wiki/List_of_wars_and_battles_involving_ISIL.

74 N.Y. Times, *Persecuted Yazidis Again Caught in Larger Struggle*, THE N.Y.TIMES (Aug. 11, 2014) https://www.nytimes.com/2014/08/12/world/middleeast/persecuted-yazidis-again-caught-in-larger-struggle.html?action=click&module=relatedCoverage&pgtype=article&region=footer.

75 *What ISIS Really Wants*, *supra* note 67.

76 *Id*.

77 Cetorelli et al, *Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey*, PLOS MED. (2017), https://doi.org/

the deaths of an estimated 5,000, the enslavement of more than 2,000 women and girls, and the displacement of 400,000 people from the Yazidi homelands in Sinjar, the Ninevah plain, and Syria.[78] Other sources say 3,000 Yazidi women were kept as slaves by Islamic State fighters and are still missing.[79] "Hundreds of girls. . .were forced to have children with their captors."[80] The European Parliament, the Parliamentary Assembly of the Council of Europe, the U.S. government and the U.K. House of Commons have all recognized these actions as genocide.[81]

Testimony from many Yazidi survivors exposes participation by female ISIS members in support of systematic cruelty. One younger survivors stated that a woman had "forbidden" her from crying, though her entire family had been massacred.[82] Another was eight years old when she was sold as a sex slave to an American fighter and his wife, along with another two Yazidi girls.[83] Some were forced by ISIS women to recite the Qur'an and denounce their own religion.[84] And others were subjected to whippings or torture: "it's indescribable the pain I felt. . .I was screaming, crying — begging — reciting prayers."[85] Evidence shows Yazidi victims were forced to take oral and injectable contraception, morning after pills, or forced to have abortions.[86] When fighters were unavaila-

10.1371/journal.pmed.1002297. [hereinafter Cetorelli]. *See also What Isis really wants*, *supra* at note 67 ("Yazidi women and children [are to be] divided according to the Shariah amongst the fighters of the Islamic State who participated in the Sinjar operations [in northern Iraq] . . . Enslaving the families of the *kuffar* [infidels] and taking their women as concubines is a firmly established aspect of the Shariah that if one were to deny or mock, he would be denying or mocking the verses of the Koran and the narrations of the Prophet . . . and thereby apostatizing from Islam.").

78 Cetorelli, *supra* note 77.

79 Eur. Consult. Ass., *Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh*, Doc No. 14402 (2017).

80 Isabel Coles & Ali Nabhan, *Nisreen's Choice: Women Rescued From Islamic State Are Told to Leave Children Behind*, WALL ST. J. (Aug. 23, 2018), https://www.wsj.com/articles/nisreens-choice-women-rescued-from-islamic-state-are-told-to-leave-children-behind-1535025600?mod=article [hereinafter Coles].

81 *Id*.

82 Nishita Jha, *The Whole World Is Debating Whether "ISIS Brides" Should Go Home. But Yazidi Women Want Them Brought To Justice*, BUZZFEED NEWS (February 22, 2019), https://www.buzzfeednews.com/article/nishitajha/isis-yazidi-shamima-begum-hoda-muthana?%3Fbftw&utm_term=4ldqpfp%234ldqpfp.

83 Bojan Pancevski, *Yazidi Survivors Are Key to Bringing Islamic State Members to Justice*, WALL ST. J. (Jan. 1, 2020), https://www.wsj.com/articles/yazidi-survivors-are-key-to-bringing-islamic-state-members-to-justice-11577882496 [hereinafter Pancevski].

84 Coles, *supra* note 80.

85 *Id*.

86 Richard Barrett, *Beyond the Caliphate*: *Foreign Fighters and the Threat of Returnees*, THE SOUFAN CENTER (2017), https://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf.

ble to take their *sabaya*[87] to the hospital for such treatment, a women would step in.[88]

These actions against civilians, with the intent of violence to life and person, cruel treatment, or outrages against personal dignity, are war crimes.[89] Their gender subjected women in ISIS to abuses which the fighters perpetrated against women as a whole. But the evidence shows that some women used their comparative power over female Yazidi prisoners to torture and humiliate them.[90] Yazidis have claimed "that the wives of ISIS were worse than the men."[91] Women forced Yazidi prisoners to bathe and put on clean clothes and makeup before they were brought to men to be systematically raped.[92] They were made to complete manual labor and were physically and psychologically tortured.[93]

During its control of Raqua, Syria, in 2014, ISIS formed the al-Khansaa Brigade, an all-female "moral police" that was made of a select group of women, including Western women.[94] This group ensured that women adhered to the ISIS interpretation of Islamic faith, often brutally.[95] It is unclear if American women were a part of the group, but if so their participation may be categorized as "counterinsurgency operations within ISIS-controlled territory. . . in furtherance of a terrorist organization.[96] The Court, in *Holder v. Humanitarian Law Project*, deferred to Congress' finding that there is no meaningful separation between a

[87] Marcia Lynx Qualey, *Rescuing the stolen women*, QANTARA.DE (Apr. 13, 2018), https://en.qantara.de/content/non-fiction-dunya-mikhail's-the-beekeeper-rescuing-the-stolen-women?nopaging=1 ("For Daesh forces, "sabaya" was a word applied to non-Sunni-Muslim women who were considered less-than-human war booty. Hussein Koro, director of the Office of Kidnapped Affairs, explained to Mikhail that, "Daesh calls our men prisoners of war and our women 'sabaya' ".).

[88] Rukmini Callimachi, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Contro*l, N.Y. TIMES (March 12, 2016), https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html. *See also* Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, ICRC (This constitutes a violation of the Geneva Convention.).

[89] *Iraq: Forced Marriage, Conversion for Yezidis*, HUMAN RIGHTS WATCH (Oct. 11, 2014), https://www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis.

[90] *Id*. *See* ISIS 'Slave Market Day' (2019), https://www.nytimes.com/video/world/middleeast/100000003226608/isis-slave-market-day.html ("Questions and Answers on Taking Captives and Slaves", an ISIS pamphlet, gave a "religious" explanation for fighters to rape, sell, buy, or gift Yazidi women and children. It declares that, because they are not Muslim, they are "merely property". Women and girls are sold in markets, including in online marketplaces on Facebook.).

[91] Pari Ibrahim, Free Yezidi Foundation (@Free_Yezidi), PERISCOPE, pscp.tv/Free_Yezidi/1vOGwZqVLRWKB (Ms. Ibrahim is the Executive Director of the Free Yezidi Foundation, an advocacy organization formed to support the Yazidi community and create awareness about their political situation).

[92] *Id*.

[93] Pancevski, *supra* note 83.

[94] Bloom, *supra* note 63.

[95] *Id. See also* Kathy Gilsinan, *The ISIS Crackdown on Women, by Women*, THE ATLANTIC, Jul. 25, 2014, .https://www.theatlantic.com/international/archive/2014/07/the-women-of-isis/375047/.

[96] Elizabeth Buner, *Doing Our Part: Acknowledging and Addressing Women 's Contributions to ISIS*, WILLIAM & MARY JOURNAL OF RACE, GENDER, AND SOCIAL JUSTICE, Volume 22, Iss. 2, Article 8, p. 419-451, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1427&context=wmjowl at 444-445.

terrorist organization's legal and illegal activities, therefore support for one is functionally equivalent to support for the other."[97]

III. From the Data to the Discussion: Why America's Female ISIS Supporters Slip Through the Cracks

A. The Fault in Our Statistics: Lack of Data Leaves a Security Delta

The study of female terrorists is a necessity in the complete understanding of counter-terrorism.[98] The exact number of American women who have successfully made the journey to join ISIS is unknown.[99] This absence of such data related to ISIS stems from the lack of reliable public data[100] but is also a reflection of societies writ large, where research in general has a gender bias[101] and women perform a disproportionate amount of labor in general.[102] Additionally, contributions to science,[103] advocacy,[104] and religion[105] by women are often ignored; while their presence in war[106] and peace efforts are erased.[107] It is hardly

[97] *Id.*

[98] *Countering Female Terrorism*, *supra* note 65, at 113.

[99] Erinmarie Saltman & Melanie Smith, *'Till Martyrdom Do Us Part:'Gender And The Isis Phenomenon* 4 (2015), https://www.isdglobal.org/wp-content/uploads/2016/02/Till_Martyrdom_Do_Us_Part_Gender_and_the_ISIS_Phenomenon.pdf [http://perma.cc/X5TU-PT62] at 4.

[100] *Id.* at III A.

[101] *See* Anita Holdcroft, *Gender bias in research: how does it affect evidence based medicine?*, J. R. Soc. Med. 2007 Jan.; 100(1): 2–3.https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1761670/; Richard Harris, *A Scientist's Gender Can Skew Research Results*, N.P.R., Jan. 10, 2018, https://www.npr.org/sections/health-shots/2018/01/10/577046624/a-scientists-gender-can-skew-research-results, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1761670/; Francesca Happé, *Male slant to research may skew autism's reported sex ratio*, Spectrum, Oct. 18, 2015 https://www.spectrumnews.org/opinion/male-slant-to-research-may-skew-autisms-reported-sex-ratio/; Rachel Gutman, *The Quirk of Collecting That Skews Museum Specimens Male*, The Atlantic, Sept. 11, 2019, https://www.theatlantic.com/science/archive/2019/09/research-specimens-are-mostly-male/597832/.

[102] Payman Taei, *Visualizing Women's Unpaid Work Across the Globe (A Special Chart)*, Medium, Mar. 7, 2019, https://towardsdatascience.com/visualizing-womens-unpaid-work-across-the-globe-a-special-chart-9f2595fafaaa, Carpenter, Julia, *The unpaid work that always falls to women*, CNN Money, Feb. 21, 2019, https://money.cnn.com/2018/02/21/pf/women-unpaid-work/index.html, http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-summary-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf?la=en&vs=949.

[103] Katharine Wilkinson, *The Woman Who Discovered the Cause of Global Warming Was Long Overlooked. Her Story Is a Reminder to Champion All Women Leading on Climate*, Time, July 17, 2019, https://time.com/5626806/eunice-foote-women-climate-science/; Ian Tucker, *The five: unsung female scientists*, The Guardian, June 16, 2019, https://www.theguardian.com/science/2019/jun/16/the-five-unsung-female-scientists-overlook-credit-stolen-jean-purdy.

[104] Chika Uniqwe, *It's not just Greta Thunberg: why are we ignoring the developing world's inspiring activists?*, The Guardian, Oct. 5, 2019, .https://www.theguardian.com/commentisfree/2019/oct/05/greta-thunberg-developing-world-activists.

[105] Catherine Kroeger, *The Neglected History of Women in the Early Church*, Christianity Today, https://www.christianitytoday.com/history/issues/issue-17/neglected-history-of-women-in-early-church.html; Karen L. King, *Women In Ancient Christianity: The New Discoveries*, PBS Frontline, Apr., 1998, .https://www.pbs.org/wgbh/pages/frontline/shows/religion/first/women.html.

[106] Katherine Rivard, *The Service, Sacrifices, and Bravery of Women in Wartime*, National Park Foundation Blog, https://www.nationalparks.org/connect/blog/service-sacrifices-and-bravery-women-wartime.

a wonder that "the success of female terrorists, combined with official reactions, indicates that analysts and leaders failed to anticipate the emergence and range of female militant actors."[108]

Research shows American female involvement in jihadist organizations may be on the rise and that an overarching profile of the American female jihadist is indiscernible.[109] Many of a woman's "motivations are identical to that of their male counterparts (i.e. the search for a personal identity and the desire to build a strict Islamic society), others are specific to women."[110] Women in such extremist organizations hail from 14 different states and range from 15 to 44 years old, (the average age is 27) and are aligned with organizations including the Islamic State, al-Shabaab, the Taliban, and al-Qaeda.[111] "The spectrum of U.S.-based sympathizers' actual involvement with ISIS varies significantly," from those merely inspired by propaganda to those who held mid-level leadership positions.[112]

Scholar and conflict expert Farhana Qazi notes that it is "important to recognize that women who join militant groups face common (and, often, gender-specific) social, cultural, and religious contexts which may motivate their participation or support of violence."[113] If physically present with the group, women serve as recruiters, radicalizers, smugglers, the literal mothers of the next generation of fighters, and facilitators of violence through support to their husbands.[114] They provide crucial functions, such as daily tasks, childrearing, medical assistance, teaching, and fundraising.[115] All of these contribute to the morale, strength, and survival of an organization.[116]

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[107] Nancy Lindbord, *The Essential Role of Women in Peacebuilding*, UNITED STATES INSTITUTE OF PEACE, Nov. 20, 2017, ;https://www.usip.org/publications/2017/11/essential-role-women-peacebuilding; Women Too Often Omitted from Peace Processes, Despite Key Role in Preventing Conflict, Forging Peace, Secretary-General Tells Security Council, Security Council 7793rd Meeting (AM), SC/12561, Oct. 25, 2016, https://www.un.org/press/en/2016/sc12561.doc.htm.

[108] *Countering Female Terrorism*, *supra* note 65, at 113.

[109] Program on Extremism, *Cruel Intentions - Female Jihadists in America*, Audrey Alexander, Nov. 2016, https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/Female%20Jihadists%20in%20America.pdf. p. 2 [Hereinafter *Cruel Intentions*]; s*ee supra* note 99; s*ee also* Edwin Bakker and Seran de Leede, *European Female Jihadists in Syria: Exploring an Under-Researched Topic*, International Centre for Counter-Terrorism– The Hague (ICCT), Apr. 2015.

[110] *ISIS In America* at 7. *See also Profiles of Individual Radicalization in the United States (PIRUS)*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (START), U. OF MARYLAND, 2017 ("Even with marginal, gender-linked caveats in mind, the evidence broadly suggests that radicalized men and women are not so different in the severity of their crimes.").

[111] *Id.* at VII.

[112] *ISIS In America* at IX.

[113] Farhana Qazi, *The Mujahidaat: Tracing the Early Female Warriors of Islam*, at Ch. 2 in *Women, Gender and Terrorism*, 2012, p. 29-56.

[114] Audrey Alexander & Rebecca Turkington, *Treatment of Terrorists: How Does Gender Affect Justice*?, Sept. 2018, Vol. 11, Iss. 8, COMBATING TERRORISM CENTER, .https://ctc.usma.edu/treatment-terrorists-gender-affect-justice/.

[115] *Id.*

[116] *Id.*

Despite their similar motivations and valuable contributions, data often groups women and children together, blurring distinct categories which require multi-faceted responses and considerations.[117] "With IS' military defeat and the fall of its so-called 'caliphate', 7,366 persons have now returned to their home countries (20%), or are reportedly in the process of doing so."[118] But status of many foreign associates, notably particular women and minors, is unknown.[119] This lack of data provides further security concerns for nations who may not even know previous, or current, ISIS members are within their territory.[120]

B. The Pipeline: Differences From Investigations to Sentencing

Tools created for the identification and apprehension of suspects in the U.S. tend to focus generally on men.[121] Interrogations, detentions, and prosecutions reflect the same bias.[122] The justice system in the U.S. ideally functions with safeguards meant to combat bias and discrimination.[123] Yet the federal court system appears to be broadly more lenient on female defendants than their male counterparts.[124] A 2012 review of federal criminal cases determined a considerable gender gap in sentence lengths.[125] A 2015 study later of felony cases showed that women were 58 percent less likely to be sentenced to prison at all compared to men.[126] These studies suggest that judges were inclined to treat female defendants differently when they conformed to traditional gender roles.[127]

For example, authorities arrested and indicted approximately 73 percent of men studied, compared to 66 percent of women.[128] This discrepancy in arrests is a factor adding to the disparity in conviction rates, as courts convict about 38 percent of men compared to 29 percent of women.[129] There are substantial dif-

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117 *Id.*

118 *The Women and Minors of Islamic State*, International Center for the Study of Violent Extremism, https://icsr.info/our-work/women-and-the-caliphate/.

119 *Id.*

120 *Id.*

121 *A Decade Lost: Locating Gender In U.S. Counter-Terrorism*, Center For Human Rights And Global Justice NYU School Of Law 82 (2011), http://chrgj.org/wp-content/uploads/2016/09/locating gender.pdf [hereinafter *A Decade Lost*].

122 *Id.* at 86 (This includes "CIA detention facilities, . . .Guantánamo Bay, [and] terrorism-related prosecutions.").

123 Jill Doerner and Stephen Demuth, *"Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?"* Crim. Just. Pol'y Rev. 25:2 (2014): pp. 242-269.

124 *Id*.

125 Sonja Starr, *Estimating Gender Disparities in Federal Criminal Cases*, U. of Michigan L. Sch., L. and Econ. Res. Paper Series, 2012.

126 Natalie Goulette et al, *From Initial Appearance to Sentencing: Do Female Defendants Experience Disparate Treatment?* J. of Criminology 43:5 (2018): pp. 406-417, https://www.sciencedirect.com/science/article/pii/S0047235215000665.

127 *Id.*; *see also* Alexander *supra* note 111 (Explaining further the discussion of these studies and their implications on security).

128 Alexander, *supra* note 111.

129 *Id*;. *see From Daesh to 'Diaspora'* (Demonstrating a 2018 study which showed 490 international citizens from 80 countries had become affiliated with IS in Iraq and Syria. Roughly 13% were recorded

ferences in the way authorities respond to radical behaviors based on perceived gender norms, leaving "a significant gap in counterterrorism strategy."[130] The efficacy of counterterrorism efforts is compromised when stakeholders ignore women as potential terrorists.[131]

Examining the U.S.' response to terrorism shows that there are attempts at federal prosecution. But it also reveals the ever-present disparities with which each stakeholder in national security wrestles. According to data tracked by the George Washington University Program on Extremism in 2015, some 250 Americans have traveled or attempted to travel to Syria or Iraq to join ISIS.[132] The U.S. has released women serving shorter sentences in for ISIS-related crimes.[133]

C. How We Talk About It: Media and Legal Representation

The gravity with which potential female terrorism supporters are considered stems not only from the lack of recognition of the possibility of women as terrorists but in the dissemination of research and media representation. Early articles on the subject ask stereotypical questions ("why is the hand that once rocked the cradle now sometimes tossing the grenade?"[134]) and provide stereotypical answers ("so many women are becoming terrorists, which is the ultimate of masculine roles. . .[because of] "second best syndrome". . .they want to prove themselves."[135]). But these same publications do recognize that an increased number of terrorists in general includes an increased number of female terrorists.[136] No matter the acknowledgement by researchers or reporters, female operatives have been active in the same efforts as men throughout history, seen more recently in groups such as the Syrian Socialist Nationalist Party[137] or the Ku Klux Klan.[138]

to be women. Under-reporting from countries suggests significant gaps in the true international figures.); *see also* Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, in 14 Y.B. OF INT'L HUMANITARIAN L., (M.N. Schmitt & L. Arimatsu eds., 2011, at 27. *See also* 18 U.S.C.A. § 2331 ("Counterterrorism forces "do not understand the movement, and until we do, we are not going to defeat it.").

130 Susan N. Herman, *Women and Terrorism: Keynote Address*, 31 WOMEN'S RTS. L. REP. 258, 265 (2010).

131 U.N. Secretary-General, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 46, U.N. Doc. A/64/211 (Aug. 3, 2009).

132 Lorenzo Vidino & Seamus Hughes, *ISIS In America: From Retweets to Raqqa*, THE GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM, Dec. 2015, at 2, .https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf; *see supra*, note 93 (Demonstrating that these are similar actions to those of the women who joined the Al—Khansaa Brigade).

133 *Id.* (Explaining why female ISIS associates have likely become displaced from their chosen area of settlement because of ongoing war efforts.).

134 Judy Klemesrud, *A Criminologist's View Of Women* Terrorists, N.Y. TIMES, Jan. 9, 1978, ;https://www.nytimes.com/1978/01/09/archives/a-criminologists-view-of-women-terrorists-dr-freda-adler-right-sees.html; *see also* Kathleen Turner, *Femme Fatale: The Rise Of Female Suicide Bombers,* WAR ON THE ROCKS, Dec. 14, 2015, https://warontherocks.com/2015/12/femme-fatale-the-rise-of-female-suicide-bombers/ (discussing suicide bombings conducted by women as "virtually impossible" to fathom).

135 *Id.*

136 Id.; *see also Countering Female Terrorism*, *supra* note 65.

137 Ya'ardi, Ehud, Behind the Terror, The Atlantic, June 1987, https://www.theatlantic.com/magazine/archive/1987/06/behind-the-terror/376326/.

Mohammad Hussein Fadlallah, commonly linked to Hezbollah, made public statements approving female suicide bombers, which were followed by dozens of women attempting suicide bombings or taking active roles as perpetrators of violence between 2000-2005.[139]

When it comes to ISIS, the term "ISIS brides"[140] has been sensationalized because of its perceived shock value.[141] In general, female attackers receive more media coverage than their male counterparts, while "attacks by women receive eight times the media coverage as attacks by men."[142] Whether in the media or the courtroom, female offenders are regularly described as "naïve, gullible, susceptible targets of violent extremism, even when they admit their culpability by pleading guilty."[143] The stories of women who join such groups are crucial to understanding the organizations, yet such infantilizing language reduces women to a marital status while ignoring the security concerns and true support which they provide. Consider one U.S. woman, described as "a lonely, depressed, anxiety-ridden mother who spent too much time on the internet."[144] Her attorney claimed that "by attempting to relocate to [IS]-held territory and marry [a] fighter, she never gave. . .anything of value – except her love."[145] Certainly a defense is entitled to put forth their client in the best light possible, but this gendered bias bleeds into the logic and outcomes of legal decisions.[146] Additionally, it stands in stark contrast to the intentional decision to travel internationally to join one of the most prolific terrorist organizations in the world.[147] Yet the strategic use of gendered framing continues to exist in legal proceedings, where

[138] Kathleen M. Blee, *Women in the 1920s' Ku Klux Klan Movement*, FEMINIST STUDIES, Vol. 17, No. 1 (Spring, 1991), pp. 57-77 https://www.jstor.org/stable/3178170.

[139] *Countering Female Terrorism*, *supra* note 65, at 116.

[140] Georgia Diebelius, *What It's Really Like Being an Isis Bride,* Metro News (Jul. 18, 2017, 9:03 PM), https://metro.co.uk/2017/07/18/what-its-really-like-being-an-isis-bride-6789334/.

[141] Ben Wedeman & Waffa Munayyer, *Bride of ISIS: From 'Happily Ever After' to Hell*, CNN (Apr. 26, 2017, 10:24 AM), https://www.cnn.com/2017/04/26/middleeast/bride-of-isis-islam-mitat/index.html; Nabeelah Jaffer, *The Secret World of Isis Brides: 'U dnt hav 2 pay 4 ANYTHING if u r wife of a martyr'*, The Guardian (Jun. 24, 2015, 11:59 AM), https://www.theguardian.com/world/2015/jun/24/isis-brides-secret-world-jihad-western-women-syria.

[142] Nino Kemoklidze, *Victimisation of Female Suicide Bombers: The Case of Chechnya*, 181 CAUCASIAN REV. INT'L AFF.,181, 185 (2009).

[143] Alexander, *supra* note 114; *see also* Dominic Casciani, *Derby Terror Plot: The Online Casanova and His Lover*, BBC (Jan. 8, 2018), https://www.bbc.com/news/uk-42370025; *Would-be 'jihadi bride' Angela Shafiq 'a loner,'"* BBC (Sept. 8, 2015), https://www.bbc.com/news/av/uk-england-34186835/would-be-jihadi-bride-angela-shafiq-a-loner; Meghan Keneally, *Teen 'In Love With ISIS Fighter' Met With Authorities 8 Times Before Being Arrested*, ABC News (July 3, 2014, 3:22 PM), https://abcnews.go.com/International/teen-love-isis-fighter-met-police-times-detained/story?id=24414020; *Denver Teens Encouraged to Join ISIS by 'Online Predator,' Friends Say*, Guardian (Oct.23, 2014, 10:10 AM), https://www.theguardian.com/us-news/2014/oct/23/denver-teens-isis-online-predator.

[144] Jeremy Roebuck, *Facing Sentencing, N. Philly Mom Married to Islamic State Soldier Is No Aberration*, Philadelphia Inquirer (Sept. 5, 2017), https://www.inquirer.com/philly/news/pennsylvania/philadelphia/facing-sentencing-n-philly-mom-married-to-isis-soldier-is-no-aberration-20170905.html.

[145] *Id*.

[146] Alexander, *supra* note 114.

[147] Buner, *supra* note 96,96 at 441 (discussing the requisite knowledge Western women possess of the designation of ISIS as a terrorist group and of the group's actions).

even an FBI agent with a top-secret security clearance, who traveled to Syria and married the key ISIS operative she had been investigating, can claim "naivety".[148] The women discussed in this article communicated with those already in the Islamic State, read material and consumed videos online, and left letters for their families back home which justified their decisions.[149] Beyond the social media coverage of ISIS's activities which were a likely factor in their decision to join the organization, many women actively disseminated information about ISIS' activities while in the so-called Caliphate.[150]

Terrorist organizations have targeted women for recruitment for decades, but violent extremism and terrorist radicalization is persistently misconceived to be a male issue.[151] Women's participation is routinely underestimated and devalued.[152] This challenge is present in any discussion of ISIS as well, leaving critical deltas in understanding of the group and diminishing international response.[153] "The foreign women of the Islamic State, while often reduced to simplistic narratives about 'jihadi brides,' 'brainwashing' and 'online grooming,' aided and abetted many of these atrocities and in some cases directly perpetrated them."[154]

The desire to see women who *voluntarily* travel to join ISIS as manipulated and susceptible victims is an inaccurate cliché. These are persons with full agency of their decisions to join the group. The crimes of the organization have been well-documented, including beheading journalists,[155] enslaving and systematically raping women from the Yazidi minority[156], and burning prisoners alive.[157] Female terrorists "have a long history of exploiting gender stereotypes to avoid detection."[158]

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148 Scott Glover, *The FBI Translator Who Went Rogue and Married an ISIS Terrorist*, CNN (May 1, 2017, 11:40 PM), https://www.cnn.com/2017/05/01/politics/investigates-fbi-syria-greene/index.html, (Her attorney. . ."described Greene as "smart, articulate and obviously naïve.").

149 *See, e.g., U.S. v. Jaelyn Delshaun Young and Muhammad Oda Dakhlalla*, Criminal Complaint, Aug. 8, 2015.

150 Buner, *supra* note 95, at 441.

151 *Id.*

152 WOMEN AND TERRORIST RADICALIZATION FINAL REPORT, Organization for Security and Co-operation in Europe (Feb. 2013), http://www.osce.org/secretariat/99919?download=true.

153 Joana Cook & Gina Vale, FROM DAESH TO 'DIASPORA': TRACING THE WOMEN AND MINORS OF ISLAMIC STATE, ICSR Publications (Jul. 23, 2018), https://icsr.info/2018/07/23/from-daesh-to-diaspora-tracing-the-women-and-minors-of-islamic-state/ [hereinafter *From Daesh to 'Diaspora'*].

154 Callimachi and Porter, *supra* note 1.

155 *See CIA says Number of Islamic State Fighters in Iraq and Syria has Swelled to Between 20,000 and 31,500*, The Telegraph (Sept. 12, 2014), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11091190/CIA-says-number-of-Islamic-State-fighters-in-Iraq-an. . . .; *see also* John Simpson, *Ramadi Residents Pay Price as Islamic State Advances in Iraq*, BBC News (May 22, 2015), http://www.bbc.co.uk/news/world-middle-east-32855617.

156 The Telegraph, *supra* note 155.

157 *Id.*; *see also* Buner, *supra* note 95, at 441 (discussing the requisite knowledge Western women possess of the designation of ISIS as a terrorist group and of the group's actions.).

158 Molly Hennessy-Fiske, *Female Terrorists Finding Their Place in Islamic Militants' Ranks*, L.A. Times (Jan. 25, 2015, 8:00 AM), http://www.latimes.com/world/europe/la-fg-france-terror-women-20150125-story.html; *see also* Bloom, *supra* note 62.

D. The Pay Gap: U.S. Aid Focuses on the Fighter, Forgoes Mini-Caliphate

As ISIS entered its final days of retreat many supporters and their families found themselves among the general population in detention facilities controlled by the Syrian Democratic Forces (SDF).[159] Syria's largest camp, al Hol (or Al Hawl), contains nearly 70,000 women and children.[160] Described as a "mini caliphate,"[161] it is reported that female ISIS supporters recreate the group's strict rules, stealing belongings and beating the children of women who remove their niqabs.[162] In an interview inside the camp, two U.S. women associated with ISIS explained that they had not yet been visited by U.S. officials, and revealed the presence of four sisters from Seattle with four children being detained nearby.[163] Eight months after their interview, international authorities raised alarms about extremists operating inside the camp: "a small group of hardcore ISIS sympathizers in an annex of the camp reserved for foreign prisoners is thought to be behind [recent] violence."[164] Officials explained "that there is close cooperation between fighters in some prisons, the families in al Hol, and the units that are still free in the desert area between Iraq and Syria."[165] "At a smaller camp run by the Kurdish Syrian forces, ISIS wives from Western countries are exposed to lectures about how ISIS is not Islam and what ISIS did to Yazidis and other women.[166] But there are no similar programs at al-Hol camp for Syrian and Iraqi ISIS families — and there are very few in Iraq."[167] Although not all the camp's residents are Islamic State supporters, "without an international solution, the next generation of ISIS combatants may emerge from al-Hol."[168]

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159 Elena Pokalova, *Pay More Attention to the Women of ISIS*, Defense One (Oct. 31, 2019), https://www.defenseone.com/ideas/2019/10/pay-more-attention-women-isis/161012/.

160 Richard Hall, *Syrian Camp for Isis Families Described as 'Time Bomb' Following Spate of Violence*, Independent (Oct. 4, 2019, 4:45 PM), https://www.independent.co.uk/news/world/middle-east/isis-al-hol-syria-camp-caliphate-islamic-state-riot-violence-stabbing-a9143401.html.

161 Jonathan Heaf, *Shamima Begum by the Journalist Who Found Her: 'We Should Bring Her Home. We Should Bring Them All Home'*, GQ (Feb. 19, 2019), https://www.gq-magazine.co.uk/article/shamima-begum-isis-bride.

162 *See* Bethan McKernan, *Defiant Women and Dying Children: Isis' Desert Legacy*, The Guardian (Mar. 1, 2018, 8:29 AM), https://www.theguardian.com/world/2019/mar/01/defiant-women-and-dying-children-isis-desert-legacy-al-hawl-refugee-camp.

163 Callimachi and Porter, *supra* note 1.

164 Hall, *supra* note 160.

165 Mitch Prothero, *ISIS Has a Plan to Bust Out 70,000 Supporters from Kurdish Jails Now that the US has Abandoned the Area to the Turkish Military*, Business Insider (Oct. 10, 2019, 6:32 AM), https://www.businessinsider.com/isis-prison-escape-kurdish-jail-us-turkey-2019-10.

166 Jane Arraf, *'We Pray For The Caliphate To Return': ISIS Families Crowd Into Syrian Camps*, NPR (Apr. 19, 2019, 8:42 AM), https://www.npr.org/2019/04/19/714652629/we-pray-for-the-caliphate-to-return-isis-families-crowd-into-syrian-camps.

167 *Id.*

168 Liz Sly, *Syria Camp is at Risk of Falling Under ISIS Control, Kurdish General Says*, Washington Post (Oct. 4, 2019), https://www.washingtonpost.com/world/militant-women-poised-to-take-control-of-isis-camp-syrian-kurdish-general-says/2019/10/04/72985c18-e5ff-11e9-b0a6-3d03721b85ef_story.html.

Though the U.S. provides aid to Syria's local administration for displacement camps, it is a "pittance" compared with the budget for the military campaign.[169] While the U.S. is helping to finance the detention of more than 400 foreign fighters, the Syrian administration has received little help concerning the women and children now held in these camps.[170] The issue becomes more complicated because of the potential risks of "holding seasoned jihadists and the women and children who lived with them in a war zone."[171] A camp supervisor acknowledged that it is generally hard to determine what roles women had under jihadists and ideology the endorsed then and now.[172] "There are some of them who are still following the ideology, and there are some who came because they thought they were coming to heaven and found out it was hell."[173]

This consolidation of people combined with little prospect of betterment leaves open opportunity for further radicalization.[174] At the very least it does little to deradicalize – for an example, *see supra* II. A, referring to Ms. Hoda and Ms. Polman. Both women were evasive when asked about brutal, well-documented crimes of ISIS.[175] Ms. Polman said only "I'm not interested in bloodshed, and I didn't know what to believe. These are videos on YouTube. What's real? What's not real?"[176] Former Director of the CIA John Brennan announced that "as an international community [we have to] come to terms with how we're going to deal with these ideologies and movements that are exploiting the weaknesses of various countries . . . to address some of these factors and conditions that are abetting and allowing these movements to grow."[177]

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169 Callimachi and Porter, *supra* note 1; s*ee also* Abdalaziz Alhamza, *The West Doesn't Want ISIS Members to Return. Why Should the Syrians Put Up With Them?*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/14/opinion/isis-syria-foreign-fighters.html) (noting that the camps and American citizens on Syrian soil do not go unnoticed by Syrians).

170 Callimachi and Porter, *supra* note 1.

171 *Id*.

172 *Id*.

173 *Id*.

174 Heath, *supra* note 161.

175 Callimachi and Porter, *supra* note 1.

176 *Id*.

177 Cohen and Shany, *supra* note 129 (Explaining that "the woman may be a school girl lured away who has spent years as an indoctrinated bride. But she can also speak to the structure of the organization, the movements of its fighters, and the methods they used, in addition to claiming her own torture. American precedent is to prosecute social media publications or communications that aids or abets someone's support of ISIS.")*; see also* Katie Zavadski, *Meet the Female Recruiters of ISIS*, N.Y. Mag. (Sept. 4, 2014), http://nymag.com/daily/intelligencer/2014/09/meet-the-female-recruiters-of -isis.html; Merrit Kennedy, *Thousands of ISIS Fighters Must Be Tried or Let Go, U.N. Rights Chief Says*, NPR (Jun. 24, 2019, 12:59 PM), https://www.npr.org/2019/06/24/735379854/thousands-of-isis-fighters-must-be-tried-or-let-go-u-n-rights-chief-says (The U.N. has adamantly advocated for the release and repatriation of citizens in these camps. Such forced statelessness could arguably raise concerns about violations of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.); *but see 3. Convention Relating to the Status of Stateless Persons*, UNHCR, Sep. 28, 1954, https://www.unhcr.org/en-us/protection/statelessness/3bbb0abc7/states-parties-1954-convention-relating-status-stateless-persons.html; *4. Convention On The Reduction Of Statelessness Signatories*, UNHCR, Aug. 30, 1961, https://www.unhcr.org/protection/statelessness/3bbb24d54/states-parties-1961-convention-reduction-statelessness.html. Note that the United States is not a signatory to either.

IV. Mechanisms for Accountability

The aftermath of the fall of ISIS "is a historic challenge," according to a State Department.[178] It is "a global problem" requiring efforts from "the entire international community . . . to identify appropriate pathways for affected groups; this includes durable solutions for displaced civilians, the repatriation and prosecution of foreign terrorist fighters, and the return, reintegration, and de-radicalization of family members."[179] This section discusses the mechanisms which the U.S. may employ to investigate and prosecute it's female citizens of ISIS.

Prosecution serves national security purposes in two ways. First, it removes repeat offenders from battlefields while serving some deterrence to future violations.[180] The punishment against those who have committed these crimes preserves victims' rights to remedy and emphasizes society's condemnation of the actions.[181] Second, legal redress is the primary means to mitigate the threat, while complementary strategies that offer alternatives to arrest, explore de-radicalization, and emphasize prevention are necessary steps to counter violent extremism by women.[182] Among the many challenges present in building cases against any offender is that of determining who voluntarily supported ISIS as opposed to those compelled or forced to interact with bad actors.[183] ISIS consumed the land over which it held power; residents were forced to adhere to the imposed social order or face harsh repercussions and death.[184] Those challenges are limited somewhat when focusing on foreign citizens who chose to travel from the U.S. to join ISIS.[185] The task instead becomes determining which induvial women chose to more actively participate in ISIS' conflicts.[186]

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[178] Robin Wright, *Despite Trump's Guantánamo Threats, Americans Who Joined ISIS Are Quietly Returning Home*, The New Yorker (Jun. 11, 2019), https://www.newyorker.com/news/news-desk/americas-isis-members-are-coming-home.

[179] *Id.*

[180] Cohen and Shany, *supra* note 129 ("Arguably, a robust system of military investigations and prosecutions may prevent future violations through generating deterrence and removing repeat offenders from the battlefield), and punish those who have committed them in the past.").

[181] *Id.* at 37, 39.

[182] *When Terrorists Come Home* at 13.

[183] Azadeh Moaveni, *ISIS Women and Enforcers in Syria Recount Collaboration, Anguish and Escape*, N.Y. Times (Nov. 21, 2015), https://www.nytimes.com/2015/11/22/world/middleeast/isis-wives-and-enforcers-in-syria-recount-collaboration-anguish-and-escape.html (For example, residents of Raqqa, Syria, called ISIS 'Al Tanzeem', or 'the Organization'. After ISIS began to rule that territory it became clear that every spot in the social order, and any chance for a family to survive, was utterly dependent on the group.).

[184] *Id.*

[185] *Id.*

[186] *See Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, Amnesty International (Oct. 18, 2019), https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/ (discussing additional complexities involved in gathering evidence and information on the situation in the region).

A. Domestic Prosecutions in the United States: Jurisdiction and Precedent

The judicial process is an important part of the war effort, recognizing that war is an accumulation of not only the killing of enemy combatants, but also surveillance, capture, and detention which leads to a trial for any war crimes.[187] It is Congress' direct response to a *modus operandi* which targets citizens in order to "frighten, unsettle, disrupt, and demoralize; to make normal peaceful life impossible and carnage routine."[188] Moreover, "survivors have long argued that a global response to ISIS must include a global commitment to bringing them to justice."[189] "The [U.S.] is committed to taking responsibility for its citizens who attempt to travel or did travel to support ISIS."[190]

Women of ISIS, so long as they are U.S. citizens, could not be tried in military commissions as their citizenship bars them from that route of prosecution.[191] In addition to this jurisdictional technicality, military commission convictions have resulted in only eight convictions since September 2001, one which was partially overturned with three overturned completely.[192] In contrast, federal courts have proven an effective means for prosecutions,[193] resulting in 660 convictions between 2001 and 2018.[194]

The current legal framework in U.S. federal courts heavily relies upon material support statutes, 18 U.S.C.§ 2339A and 18 U.S.C.§ 2339B. § 2339A is broad, designed to prosecute individuals for specific acts, though applicable to general material support.[195] Similarly, § 2339B provides prosecutorial basis for attempting or conspiring to provide material support.[196] Knowledge does not require a showing that the group intended to further any particular illegal activities.[197] The U.S. gains jurisdiction if the accused is a "citizen or permanent resident of the U.S., if the person is brought into or found in the U.S. after the offense, or if the offender aids, abets, or conspires with any person over whom the U.S. has juris-

187 *Id.*

188 *Id.*

189 Pancevski, *supra* note 83. R

190 Wright, *supra* note 178 (explaining that the judicial process heavily favors the prosecution of ISIS returnees because the government the only entity capable of bringing a person home; returnees "are primarily, if not completely, at the mercy of officials for relief. Such a grasp on one's fate presents profound leverage when it comes to extracting confessions to be used in a criminal prosecution."). R

191 10 U.S.C. §§ 948a, 948c (2006); but *see Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2004) (discussing the legal significance of applying the term "enemy combatants" to U.S. citizen detainees and noting that simply designating a U.S. citizen as such may not hold legal significance; *Hamdi v. Rumsfeld* ruled that U.S. citizen detainees are able to challenge their status. The status could signal the intention to hold the detainee indefinitely, likely prompting challenges for them to be freed or charged.).

192 *Myth v. Fact: Trying Terror Suspects in Federal Courts*, HUMAN RIGHTS FIRST, (Feb. 14, 2018), https://www.humanrightsfirst.org/resource/myth-v-fact-trying-terror-suspects-federal-courts.

193 Adam Goldman & Benjamin Weiser, *How Civilian Prosecution Gave the U.S. a Key Informant*, N.Y. TIMES, (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/us/intelligence-gained-from-somali-terrorist-shows-value-of-civilian-prosecutions.html.

194 Pancevski, *supra* note 83. R

195 18 U.S.C. §2339A (2009).

196 18 U.S.C. §2339B (2015).

197 *Id.*

diction."[198] The Suppression of Terrorist Bombings requires all parties ensure any "person who participates in the financing, planning, preparations, or perpetration of terrorist acts or in support of terrorist acts be brought to justice."[199] If necessary for the purposes of extradition, Article 9 states that the offences shall be treated as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction.[200] Article 10 requires state parties to afford one another the greatest measure of assistance in connection with investigations or extraditions.[201] The federal government has exclusive jurisdiction over the killing, attempted killing, or serious bodily injury of U.S. nationals overseas.[202] 18 USC Ch. 113B grants and limits extraterritorial jurisdiction to cases where the violence was intended to coerce, intimidate, or retaliate against the government or civilian population.[203] Depending on the type of material support they may have provided, many of these statutes could apply to female ISIS associates.

Scholars have noted that domestic and international sources of law mutually reinforce the duty to apply criminal or other disciplinary measures to allegations of crimes committed during an armed conflict.[204] Additionally, "the duty to investigate . . . may be independently supported by the need to satisfy victims and afford them with remedies."[205] Domestic law may be the means by which international law obligations are carried out. In that vein, the U.S.'s status as a member of the United Nations and of the Security Council means it is a party to resolutions and treaties that provide jurisdiction.[206] The High Commissioner for Human Rights of the United Nations has written that security of the individual is an international basic human right, creating a fundamental obligation of the government to take positive measures to both protect their nationals against the threat of terrorists and to bring perpetrators of such acts to justice.[207] This creates duties for these states: to ensure the rights of their nationals and others, to take constructive measures to protect against the threat of terrorism, and to bring the perpetrators of terrorist acts to justice.[208] The U.S. successfully levies material support charges (an option also available to military commissions[209]) as an effective legal means to prosecute "targetless" threats from U.S. women of ISIS.[210]

198 Buner, *supra* note 96, at 437-40; 18 U.S.C. § §2339B(d)(1)(A) (2015). R

199 Suppression of Terrorist Bombings United States Department of State, 3-5 (1998).

200 *Id*. at 9.

201 *Id*.

202 18 U.S.C § 2332 (2018).

203 18 U.S.C. §§ 2331, 2334 (2018).

204 Cohen and Shany, *supra* note 129. R

205 18 U.S.C. §§ 2331, 2334; *see also* Cohen and Shany, *supra* note 129, at 48. R

206 S.C. Res.1373 (Sep. 28, 2001).

207 Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, 1 (July 7, 2008), https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

208 *Id.* at 1-2.

209 18 U.S.C. § 2339A-C (2006); 10 U.S.C. § 950t (25) (2006).

210 Buner, *supra* note 96, at 437-51 (analyzing charging American women with material support). R

The crime of material support incorporates the provision of personnel, which can include oneself, or other forms of assistance.[211]

The U.S. repatriated two women and six children with ties to ISIS in 2019,[212] the first publicly confirmed repatriation from Syria to the U.S. since Samantha Elhassani in 2018.[213] Elhassani is alleged to have "navigated a war zone, helped her husband buy three Yazidi slaves, and. . .creating a tale of woe after the fact."[214] The government emphasized that her charges of aiding and abetting and conspiracy "do not require her to be a member of ISIS", but noted "we don't often charge the family members of the people who are seeking to go fight ISIS."[215] Three other men and one woman await trials for various aiding or abetting charges.[216] One has served time and is free again, another is appeal his 20 year sentence, and three more have agreed to plead deals.[217] Nearly all the American men captured in battle have been repatriated, but at least 13 American women and their children have not.[218]

In addition to past repatriation and prosecution or reintegration of U.S. citizens of the so-called Caliphate, the U.S. also has precedent in past conflicts. For example, the U.S. trained 35 Iraqi expatriates as judges and assisted in a post-conflict justice plan which was to include resident Iraqis as well as funding and training for the postwar Iraqi justice system. Focusing on these women and potentially prosecuting them for their contributions to ISIS will not be the panacea to stopping terrorism, but it may provide a useful roadblock to the expansion of ISIS expansion in the long term.

B. International Precedent

Repatriation is a controversial decision for any country, but it is happening. Turkey has repatriated minors whose parents took them to the caliphate, as well as those determined to be innocent of wrongdoing.[219] Similarly, after Iraqi officials determined they had been tricked into joining the Islamic State, a group of four Russian women and 27 children were repatriated.[220] Indonesia took back a family of approximately 15 people.[221] Indonesia has a repatriation and deradical-

211 Rufener, P. Scott, *Prosecuting the Material Support of Terrorism: Federal Courts, Military Commissions, or Both?,* 5 U. MASS. ROUNDTABLE SYMP. L.J. 151, 157, 186-87 (2010) (concluding that military commissions are in fact the better option).

212 *US Repatriates Eight Wrepatriates eightomen and Children From ISIS Cchildren from ISIS amp with Kurdish Help*, THE NATIONAL, (June 5, 2019), https://www.thenational.ae/world/mena/us-repatriates-eight-women-and-children-from-isis-camp-with-kurdish-help-1.870768 [hereinafter *US Repatriates*].

213 *Id.*

214 Wright, *supra* note 178. **R**

215 *Id.*

216 *Id.*

217 *Id.*

218 Callimachi & Porter, *supra* note 1. **R**

219 *Id.*

220 *Id.*

221 *Id.*

ization program.[222] Kazakhstan has repatriated its citizens "by the hundreds," exposing "the weakness of the western European argument that it's too difficult or dangerous to take such suspects back."[223]

In the world's first trial for war crimes and crimes against humanity committed against the Yazidi, Germany recently began the indictment and prosecution of a female member of ISIS for just these crimes.[224] Identified only as Jennifer W., the German citizen traveled to join ISIS, subsequently joining the decision-making and command structure of the moral police, patrolling with the brigade to ensure that women complied with the rules of behavior and clothing.[225] She was responsible with upholding the organization's dress and behavior codes.[226] She carried an AK-47 machine gun, a pistol and an explosive vest.[227] She and her husband, a fighter, bought two prisoners of war, a five year old girl and her mother, to be used as slaves.[228] The child became ill and the husband subjected her to death by chaining her up outside and waiting for her die of thirst.[229] Her husband is to be the first charged in the genocide of the Yazidi.[230] W. is accused of "being a member of the foreign terrorist organization, violations of the War Weapons Control Act, for low motives cruelly killed a person, and thereby committed a war crime."[231]

C. Concerns with Courts in Areas of Conflicts

There are many human rights concerns when it comes to prosecuting crimes in times of armed conflict. In Iraq, for example, special counter-terrorism courts prosecute fighters, bystanders, and relatives.[232] The country's broad law permits a death penalty for anyone convicted of "committing, inciting, planning, financing, or assisting in acts of terrorism."[233] This single-size, expedited approach punishes actual perpetrators of crimes but includes "the cook and the family

[222] Cameron Sumpter, *Returning Indonesian Extremists: Unclear Intentions and Unprepared Responses*, INTERNATIONAL CENTRE FOR COUNTER -TERRORISM – THE HAGUE, (Jul. 12, 2018), https://icct.nl/wp-content/uploads/2018/07/ICCT-Sumpter-Returning-Indonesian-Extremists-July2018.pdf.

[223] Kathy Gilsinan, *Europe Has Turned Its Back on Its ISIS Suspects*, THE ATLANTIC, (Jul 5, 2019), https://www.theatlantic.com/politics/archive/2019/07/trump-administration-pushes-europe-try-isis-suspects/593296/.

[224] Melissa Eddy, *German Woman Goes on Trial in Death of 5-Year-Old Girl Held as ISIS Slave*, N.Y. TIMES, (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/world/europe/germany-isis-trial.html.

[225] *Id*.

[226] *Id*.

[227] *Id*.

[228] *Id*.

[229] *Id*.

[230] Pancevski, *supra* note 83. R

[231] Eddy, *supra* note 224. R

[232] Margaret Coker & Falih Hassan, *A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects*, N.Y. TIMES, (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html.

[233] *Id*.

member with little say in the matter."[234] In 2018, Iraq detained approximately 1,250 foreign women and 580 children.[235] The government expressed its determination to investigate evidence linking them to ISIS.[236] Between 2017 and April of 2018, Iraq completed 2,900 trials with a conviction rate of about 98 percent.[237] One reporter witnessed, within one two-hour period, the trial, conviction, and death sentencing of 14 women.[238] Most are executed in a process "more concerned with retribution than truth or justice."[239]

Senior researcher for Iraq for Human Rights Watch, Belkis Wille, an observer of dozens of trials, presents another concern the U.S. should have for its citizens in such trials: "the system is fundamentally prejudiced against foreign individuals.[240] The presumption is because you are foreign, and you were in ISIS territory, there is no need to provide more evidence."[241] This means American citizens are subject to these same courts, where "foreigners in particular are widely assumed to have been the Islamic State's most fervent adherents since they moved there to join the caliphate trials of hate."[242] A state-appointed lawyer stressed he was not able to prepare for trials because he had no access to the evidence against his trials, as terrorism investigations are classified.[243] The due process being handed to cooks and medical workers also means that courts are not investigating other crimes.[244] "The United National Security Council empowered a special advisor to help Iraq investigate potential war crimes, including mass killings," set to begin in early 2018.[245] Colonel Brahim Attiyah al-Jabbouri, head of civil defense, revealed he did not have the equipment or personnel necessary for an accurate exhumation of mass graves.[246] And the rapid execution of potentially innocent witnesses complicates that already complex job.[247]

Territorial jurisdiction could be present in the courts of Syria, where the majority of detainees are located, potentially allowing the creation of a criminal court system within Syria or nearby countries. Yet the same challenges of resources and institutions in Iraq are also present in Syria, and a U.N. investigation revealed sexual violence, "including rape and forms of sexual torture, has been perpetrated by Government forces and affiliated militia against men, women,

234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*

girls and boys during the Syrian conflict."[248] The international community would likely view court proceedings in such systems with skepticism.

D. Ripple Effect and Responsibility: U.S. Actions And Their Consequences

The U.S. has an ability and an obligation under domestic and international law to investigate its citizens connected to ISIS. Both the presence of U.S. citizens in the region and the country's continued military strategy provide continued responsibilities. Despite predictions that the strategy would result in a fundamentalist terrorist organization from the nation's own intelligence agencies, the U.S. continued to support rebel groups in Syria.[249] Years later, a similar situation arose where "months of warnings" were provided to President Trump, shortly before he removed troops from Syria.[250] What followed was a predicted chaos, including the loss of guards at displacement camps.[251] More than 2,000 foreign ISIS fighters are imprisoned by Kurdish militias in Syria alone.[252] The Kurdish administration is struggling to manage the amount of people in camps as it adjusts to changing troop presence, presenting opportunities for escape.[253] Yazidi victims maintain that many wives of fighters played a role in terrorizing enslaved women and children."[254] Media reports reveal that dozens of ISIS detainees and family members have escaped.[255]

The presence of U.S. citizens and the escalation of the situation because of American action places the responsibility for U.S. citizens in U.S. hands. This is a responsibility the government has argued for. Yazidi activists have called for an international tribunal because of concerns of weaknesses in the justice systems of countries such as Iraq and that Western prosecutors are unable to conduct investi-

248 *Human Rights Situations That Require the Council's Attention*, Human Rights Council, U.N. General Assembly, A/HRC/22/59, (5 February 2013), at 77, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.22.59_en.pdf.

249 U.S. Dept. of Defense, (U) 20120730, Department of Defense Information Report, at 290, (2015). www.judicialwatch.org/wp-content/uploads/2015/05/Pg.-291-Pgs.-287-293-JW-v-DOD-and-State-14-812-DOD-Release-2015-04-10-final-version11.pdf; *see* Ahmed, Nafeez, *Pentagon report predicted West's support for Islamist rebels would create ISIS*, MEDIUM, (May 22, 2015), https://medium.com/insurge-intelligence/secret-pentagon-report-reveals-west-saw-isis-as-strategic-asset-b99ad7a29092.

250 David E. Sanger, *Trump Followed His Gut on Syria. Calamity Came Fast*., N.Y. TIMES, (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/world/middleeast/trump-turkey-syria.html?action=click&module=relatedLinks&pgtype=article.

251 Megan Specia, *Winners and Losers in Trump's Planned Troop Withdrawal From Syria*, N.Y. TIMES, (Dec. 20, 2018), https://www.nytimes.com/2018/12/20/world/middleeast/winners-losers-syria-trumps-troops.html; Megan Specia, *Winners and Losers in Trump's Troop Withdrawal From Syria*, N.Y. TIMES, (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/world/middleeast/trump-syria-troop-withdrawal.html?action=click&module=relatedLinks&pgtype=article.

252 *Yazidi Survivors Are Key to Bringing Islamic State Members to Justice*, *supra* note 83.

253 *US repatriates eight women and children from ISIS camp with Kurdish help*, THE NATIONAL, (Jun. 5, 2019), https://www.thenational.ae/world/mena/us-repatriates-eight-women-and-children-from-isis-camp-with-kurdish-help-1.870768 [hereinafter *US repatriates*].

254 *Id*.

255 Joseph Votel and Elizabeth Dent, *How to Protect America After the Syria Withdrawal: Fighting ISIS just got harder—but it's still possible, and it's necessary*., THE ATLANTIC, (Oct. 21, 2019), https://www.theatlantic.com/international/archive/2019/10/turkey-kurds-syria-trump/600388/ [hereinafter *After the Syria Withdrawal*].

gations in conflict zones.[256] But the U.S. opposes the costs and time constraints, instead arguing that Islamic State members should be tried in their countries of origin.[257] This has been echoed by State Department coordinator for counterterrorism, Nathan Sales, who stated that it is up to the countries of origin of those traveling to Syria and Iraq to fight with ISIS to prosecute those individuals.[258] "[T]hey shouldn't look for other people to solve this problem, but rather should conduct these prosecutions of their citizens themselves."[259] The dangers are so clear that "President Trump criticized allies. . .for not taking back hundreds of ISIS prisoners captured on the battlefield."[260] "The alternative is not a good one in that we will be forced to release them," he warned."[261]

Security experts note that U.S. policy should create and implement programs that facilitate rehabilitation and reentry for violent extremist offenders,[262] because de-radicalization does not necessarily go hand in hand with disengagement.[263] ISIS associates will continue to return home and be released from prison, reentering society in the upcoming years.[264] There is "no formal national rehabilitation and re-entry program" waiting for them, "and little, if any, developed infrastructure to support individuals upon their release."[265] While the investigation, repatriation, and prosecution of any ISIS supporter is necessary, deradicalization and disengagement programs must also be a high priority.[266] "The alternative is to rely solely on the deterrence of prison sentences."[267] This leaves few incentives for incarcerated supporters to renege extremist beliefs; instead they may radicalize others or attempt to build networks while imprisoned.[268]

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256 *Yazidi Survivors Are Key to Bringing Islamic State Members to Justice, supra* note 83.

257 *Id.*

258 Jenna Consigli, *Prosecuting the Islamic State Fighters Left Behind*, LAWFARE, (Aug. 1, 2018), https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind.

259 *Id.*

260 *Wives of ISIS Militants, supra* note 1.

261 *Id.*

262 *When Terrorists Come Home* at 7, 30.

263 Tinka Veldhuis, *Designing Rehabilitation And Reintegration Programmes For Violent Extremist Offenders: A Realist Approach*, INTERNATIONAL CENTER FOR COUNTER-TERRORISM, (Mar. 2, 2012), https://icct.nl/publication/designing-rehabilitation-and-reintegration-programmes-for-violent-extremist-offenders-a-realist-approach/.

264 *Id.*

265 *When Terrorists Come Home* at 6; *see* Brendan Koerner, *Can You Turn A Terrorist Back Into A Citizen?*, WIRED, (Jan. 24, 2017), https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/ (discussing a pilot program was launched called, the terrorism disengagement and deradicalization program, the first government initiative of its kind in the U.S.).

266 Alexander Meleagrou-Hitchens et al, *American Jihadists In Syria And Iraq*, GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM, (Feb. 2018), https://extremism.gwu.edu/sites/g/files/ zaxdzs2191/f/TravelersAmericanJihadistsinSyriaandIraq.pdf.

267 *Id.*

268 *Id.*

V. Repatriation, Alternative Options, And the Reality of Responsibility

The U.S. should begin repatriation efforts for American women (and associated minors), accompanied by necessary investigation, deradicalization, and reentry programs. While continuing to call on other countries to do the same, the U.S. must engage military, diplomatic, and humanitarian professionals to facilitate a broader understanding of the solutions to this multi-faceted problem. This can be combined with financial assistance and training to foreign stakeholders, allowing the process to take the necessary time for due process while ensuring humane conditions in detention facilities and camps. This includes ensuring that International Committee of the Red Cross has proper access to detainees, as its mandate is in securing that humane treatment.

Critics may argue that there are risks of repatriating hardcore ISIS associates with an unsuccessful federal civilian trial. There was public outcry of such during the 2012 acquittals of an al Qaeda operative on all but one of 284 charges.[269] This single charge was sufficient to earn him a life sentence.[270] The remaining charges were unable to be proven without the testimony of a witness the government learned of through C.I.A. interrogation his lawyers allege included torture.[271] Even assuming the detainee was found not guilty, the judge noted that the operative's status as an "enemy combatant" would (and did) "permit his detention as something akin "to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end."[272] Lydia Khalil, a research fellow at the Lowy Institute in Sydney who specializes in the Middle East and international terrorism, acknowledges that "there are certainly threats and risks when you repatriate people," but explains that "there's also risks to not addressing this issue."[273] The long-term threats include those poised by lack of sufficient data and prolonged stays in detention camps.[274] There are few options for deradicalization for those living in limbo in detention camps, and no programs awaiting those that are released from prisons. This is a missed opportunity to prevent further radicalization and to stall or prevent next iteration of ISIS.

States have a responsibility under international law to appropriately investigate, prosecute, or extradite for prosecution suspected culprits of war crimes,

269 Adam Goldman & Benjamin Weiser, *How Civilian Prosecution Gave the U.S. a Key Informant*, THE N.Y. TIMES, (Jan. 2017), https://www.nytimes.com/2017/01/27/us/intelligence-gained-from-somali-terrorist-shows-value-of-civilian-prosecutions.html (Ahmed Khalfan Ghailani was charged in the 1998 bombings of two American Embassies in East Africa.).

270 Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, THE N.Y. TIMES, (Nov. 17, 2010), https://www.nytimes.com/2010/11/18/nyregion/18ghailani.html.

271 *Id.*

272 *Id.*

273 Livia Albeck-Ripka, *Desperate Pleas to Free Women and Children From ISIS Camps in Syria*, N.Y. TIMES, (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/world/australia/isis-camp-syria.html?action=click&module=relatedLinks&pgtype=article; *see also* ALLISON KRUMSIEK, CIVIL LIBERTIES: THE FIGHT FOR PERSONAL FREEDOM, (2017) at 61. (noting that no districts in which terrorism suspects have been tried have been attacked to retaliate that conviction. In contrast, as noted by former Secretary of State John Kerry, "Guantanamo . . . impedes joint counterterrorism efforts with friends and allies.").

274 *Supra* III.

genocide, crimes against humanity, and other international crimes. If the U.S. is unable or unwilling to do so, the International Criminal Court (I.C.C.) is a court of "last resort," meaning it may be an option should the U.S. refuse these obligations. In March 2020, "the Appeals Chamber of the International Criminal Court decided unanimously to authorise the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan."[275] An ad hoc tribunal, like those ones established for the former Yugoslavia and Rwanda, "or 'hybrid' war crimes courts in East Timor and Sierra Leone, where international jurists serve together with local lawyers to try accused war criminals," are also options.[276] However, the U.S. does not recognize the Court's jurisdiction and the Trump administration has publicly countered its efforts.[277] This recent ruling could provide a rocky pathway to a referral through the U.N. Security Council, which would provide the ICC jurisdiction to investigate. But these courts pose the same costs and time constraints that the U.S. objects to. Federal courts have proven cost effective, timely, and effective.

There is no obvious single solution to this challenge, but there are programs and immediate actions that can improve U.S. national security. Failure to detect radicalized women is due to stereotypes both about women being averse to violence and narratives of Muslim women as submissive. An understanding of the active roles women play in political violence is the first step in recognizing the threat that women can pose. Inconsistencies across legal systems are advantageous to female members of ISIS, who are investigated, detained, and prosecuted less than men. Both narratives of counter-terrorism and practitioners within the field are male-centric, preventing an accurate allocation of resources and efforts.

An open court would allow prosecutors what may be the fairest chance to secure a conviction, without compromising legal or ethical norms. These include the victim's right to equal and effective access to justice, effective and prompt reparation for harm suffered, and access to relevant information concerning the violations and reparation mechanisms. The victims of these atrocities have themselves called for this resolution. "What we Yazidis want is for a court somewhere to recognize that these people are guilty of more than just terrorism, that they have committed genocide or crimes against humanity."[278]

Beyond the necessity of repatriation and prosecutorial efforts, managing the aftermath of ISIS is not only a global challenge, it is an institutional experiment. Each of the actors mentioned throughout this comment must recognize their

[275] *Afghanistan: ICC Appeals Chamber authorises the opening of an investigation*, International Criminal Court, ICC-CPI-20200305-PR1516, (March 5, 2020), https://www.icc-cpi.int/Pages/item.aspx?name=pr1516.

[276] Sharon Otterman, *IRAQ: Prosecuting War Criminals*, COUNCIL ON FOREIGN RELATIONS, (Feb. 16, 2005), https://www.cfr.org/backgrounder/iraq-prosecuting-war-criminals.

[277] *'We Will Let The I.C.C. Die:" Bolton Threatens International Court*", THE N.Y. TIMES, (2018), https://www.nytimes.com/video/us/politics/100000006097156/bolton-icc-sanctions.html?searchResultPosition=1.

[278] Ispahani, F., & Shea, N., *Don't Give Jihadi Brides Victimhood Status. Try Them*, REAL-CLEARPOLITICS, (20 March 2019), https://www.realclearpolitics.com/articles/2019/03/20/dont_give_jihadi_brides_victimhood_status_try_them_139795.html.

agency in the perception of female associates. This includes the media, investigators, researchers, policymakers, legislators, prosecutors, judges, and government leaders. "The *entire* international community must now work to identify appropriate pathways for affected groups; this includes durable solutions for displaced civilians, the repatriation and prosecution of foreign terrorist fighters, and the return, reintegration, and de-radicalization of family members" (emphasis added).[279]

VI. Conclusion

As the United States contemplates the latest threat of ISIS and its successors, it is important not to discount the varied contributions of women. A recognition of gender bias is relevant to academic and policymaking audiences, as well as defense, intelligence, and law enforcement agencies. Conscious or unconscious bias may undermine future efforts to prevent terrorist attacks or provide due process in investigations.

These issues do not work alone. Instead, the challenge is interwoven and present in many forms. Studies of radicalization, recruitment, and support which ignore gender or cast women and children into the same faction provide incomplete analysis on both historical and current trends. Legislators and policymakers who exclusively portray women as the victims of conflict are responsible for fissures in national security strategy. The media is accountable when public opinion is misguided by representations of exoticing women or portraying them as if naive. Some travelers may have committed crimes, but there are strong arguments that some may be victims of human trafficking or were manipulated into traveling.[280] The situation is complex, but the disparities in investigation, arrests, sentencing, repatriation and reintegration between women and men are undeniable.

A better understanding and acknowledgement of the influences of gender biases and stereotypes has real implications for national security. It facilitates an understanding of the violent extremist networks in their totality, allows the processing of potentially harmful actors, and provides restorative justice to individuals and communities worldwide. Bias regarding female offenders compromises the guarantees of equal justice and a uniform application of the law.

[279] *Americans Who Joined ISIS, supra* note 178*; see also* WILLIAMS ET AL, TRENDS IN THE DRAW OF AMERICANS TO FOREIGN TERRORIST ORGANIZATIONS FROM 9/11 TO TODAY, Santa Monica, (2018), https://www.rand.org/pubs/research_reports/RR2545.html (Extremism does not "appear to appeal solely to Muslims or Middle Eastern communities, but rather is present within changing racial and national demographics. The call to extremism is accessible to any community because of the accessibility of social media and web presences.").

[280] Ashley Binetti, *A New Frontier: Human Trafficking and ISIS's Recruitment of Women from the West*, GEORGETOWN INSTITUTE FOR WOMEN, PEACE AND SECURITY, (2015), www.homestudycredit.com/courses/contentHC/HC-ISIS-Human-Trafficking.pdf.

THE PARIS AGREEMENT, FORCED MIGRATION, AND AMERICA'S CHANGING REFUGEE POLICY

Alice R. O'Connell

I. Introduction

In October of 2016, the United Nations ("U.N.") Framework Convention on Climate Change met the threshold of ratification votes required to enact into force a set of international rules and regulations colloquially referred to as the Paris Agreement ("Agreement").[1] This Agreement sought to strengthen the global response to climate change by outlining the expectations for research, industry, and policy that each ratifying party to the convention would be expected to uphold.[2] The Agreement entered into force thirty days after the date of ratification, representing a high-water mark in international cooperation on the subject of global climate change.[3]

According to the U.N. Framework's official website, the United States ("U.S.") signed onto the Paris Agreement on April 22, 2016.[4] Their ratification was approved by the U.N. on September 3, 2016, and the accords formally went into force for the U.S. on November 4, 2016.[5]

However, there is a degree of controversy surrounding the U.S.' continued participation in the Paris Agreement. On June 1, 2017, President Donald Trump announced that the U.S. would be withdrawing from any participation in the Paris Agreement.[6] Citing "wildly unfair environmental standards" to be imposed upon American businesses and workers, the President expressed an interest in negotiating a better deal for the U.S. with regard to their role in the continuing climate change discussion.[7] As of this article's publication, however, no such deal has been established.

The U.S. sits at something of a crossroads with the international community on the matter of climate change and the nation's role in stemming its tide. This lack of legal and political clarity could well spell disaster for a demographic of individuals who stand to lose the most from the implications of global climate change. This article will seek to establish a legal definition of climate migrancy as it pertains to domestic and international standards.

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[1] U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

[2] *Id.*

[3] *Id.*

[4] PARIS AGREEMENT - STATUS OF RATIFICATION, U.N. Framework Convention on Climate Change, http://unfccc.int/paris_agreement/items/9444.phpc (last visited Nov. 27, 2018).

[5] *Id.*

[6] Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html?_r=0.

[7] *Id.*

II. History and Background

A. The United Nations Refugee Convention of 1951

Early attempts to define the boundaries of what legally constituted a refugee were spearheaded by the U.N. at the Refugee Convention of 1951 ("Refugee Convention").[8] The U.N. Refugee Agency today describes the core principle of the Refugee Convention as the "key legal document that forms the basis of [their] work."[9] The U.N. further emphasizes the core principle of non-refoulment that comprises the central message of the convention; it states that a refugee should not be returned to a country "where they face serious threats to their life or freedom."[10]

The Office of the U.N. High Commissioner for Refugees ("UNHCR") notes in its introduction to the currently available transcript of the resolution that the Refugee Convention was originally intended to deal with the fallout from World War II.[11] The resolution was originally limited in scope to events that took place prior to its passage and specifically within European nations. It was later expanded by a 1967 protocol that amended the original resolution, removing the previously established limitations and granting universal international coverage to the Refugee Convention.[12] Since then, participating regions have adopted and amended the 1967 standard to suit their individual international needs and interests. All the same, the standards established within the original document and its subsidiaries retain a significant influence upon modern understandings of refugee legal status and discourse.

Critically, Article I of the 1951 Refugee Convention endorses a single definition of the term "refugee."[13] The original text couched the language in the retrospective, defining a refugee as any person who "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" was unable or unwilling to return to their country of origin.[14] Once the temporal restrictions within this definition were lifted, the newly-broadened standard served as the watermark for international policymaking bodies for decades to come. Indeed, it remains today the functionally employed definition of the U.S.' own refugee code, as well as the definition utilized by many other member nations who subscribe to the U,N,'s principles on refugee standards.[15]

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[8] *The 1951 Refugee Convention*, UNHCR, https://www.unhcr.org/en-us/1951-refugee-convention.html (last visited Nov. 28, 2018).

[9] *Id.*

[10] *Id.*

[11] UNHRC, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, https://www.unhcr.org/en-us/3b66c2aa10 [hereinafter *UN Refugee Protocol*].

[12] *Id.* at 2.

[13] *Id.* at 3.

[14] *Id.* at 14.

[15] REFUGEE ACT OF 1980, PUB. L. NO. 96-212, 94 STAT. 102 § 1:6 (1980) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter *Refugee Act of 1980*].

The Paris Agreement

The convention and its subsequent renditions do place limits upon that straightforward definition. For example, the definition exempts individuals who may have committed war crimes, individuals who benefit "from the protection or assistance of a United Nations agency other than the UNHCR," and refugees who have "status equivalent to nationals in their country of asylum."[16] Still, these exceptions are still firmly couched in the original persecution based standard. At the time of its writing, the 1951 Refugee Convention served as a seminal advancement in the rights and interests of displaced persons. However, while that standard remains a flagship legal principle in the modern world of international law, its language has begun to show its age in significant and problematic ways.

B. The Refugee Act of 1980

Today, American legal understanding of refugees and their legal standing is derived in large part from the Refugee Act of 1980. The passage of this act marked the first time that federal law instituted a system for the processing and admission of refugees based upon the U.N. definition of persecution.[17] Prior to the institution of this Act, the U.S. tended to admit only refugees from countries in the Middle East, or Communist states.[18] This change allowed them to adapt elements of the U.N. 1951 Refugee Convention relating to the status of refugees. The Refugee Act of 1980 broadened the then-poorly-established standards and opened the door for a more generalized understanding of the sorts of individuals who qualified for refugee status in America and the ways in which they were processed and admitted to the country.[19]

However, the standards of classification established in the Refugee Act of 1980 and later elaborated upon in subsequent legislation remains narrow. Specifically, the Immigration and Nationality Act classifies a refugee as "a person who is unwilling or unable to return to his or her home country because of a 'well-founded fear of persecution' due to race, membership in a particular social group, political opinion, religion, or national origin'."[20] This definition couches its language deeply in the original 1951 Refugee Convention, which continues to serve as the modern standard.

Critically, this standard remains narrower than a mere examination of whether a person is "unwilling or unable" to return to his or her home country. The Immigration and Nationality Act specifically requires that an individual be seeking asylum due to persecution. This standard excludes individuals who might find themselves unwilling or unable to return to their home country for any myriad of reasons beyond persecution. Specifically, it fails to account for the possibility that an individual may be seeking refuge due to displacement caused by a natural disaster or other climate-related incident.

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16 *UN Refugee Protocol*, *supra* note 11.

17 *Refugee Act of 1980*, *supra* note 12.

18 *Id.*

19 *Id.*

20 8 U.S.C.A. § 1101 (West 2014).

Andrew E. Shacknove of the University of Chicago observed that the definitions of refugee status adopted by the U.N. and by extension the U.S. are predicated on an implicit four-part argument: first, that a bond of trust existed between the citizen and the state from which they are seeking refuge; second, said bond was severed or disconnected; third, persecution and alienage are "always the physical manifestations of this severed bond;" and finally, that those manifestations are "necessary and sufficient conditions for determining refugeehood."[21] In other words, Mr. Shacknove suggests that current conceptions of refugeehood necessarily require that an individual's relationship with their state of origin be harmed in a specific and observable way.

Standardization certainly makes for more straightforward legal classification; in the eyes of American courts, clear and specific standards are far more straightforward to apply across a variety of legal situations. However, said ease of use comes at the cost of equity. By presupposing an injured relationship between the alien and their state of origin as a necessary requirement for refugee status, the current refugee standard unnecessarily restricts access to the rights and interests of refugee status to other individuals who may be fleeing their homes for reasons that extend beyond persecution. Any number of scenarios may prompt an individual to flee their country of origin in search of safer horizons; limiting the applicability of the refugee standard with such a prerequisite comes with too high an equity cost to warrant retention.

In a recent publication, Mr. Shacknove identifies the most immediate and apparent example of a class of individuals who fall through the cracks of the current standard.[22] He insists that persecution is "just one manifestation" of the absence of physical security, and emphasizes for example that natural disasters are often dismissed as points of genesis for refugee status precisely because they are not political in nature.[23] Floods and hurricanes do not threaten to erode or break the connection between citizen and state in the traditional sense nor do these natural disasters inspire displacement by way of a well-founded fear of persecution.

They do, however, certainly instill a well-founded fear all their own. It is undeniable that an individual may be prompted (or indeed, may be required) to flee their country of origin due to the effects of a natural disaster. Why, then, does the current refugee standard fail to acknowledge such an individual as such under the current standards established in the U.S. and abroad? As Mr. Shacknove astutely illustrates, the legitimacy of any refugee policy is undeniably compromised where refugee status is refused to worthy claimants. The currently employed definition of what constitutes a refugee fails to meet this baseline test, and as such is insufficient.

[21] Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 274–284 (1985).

[22] *Id.* at 279.

[23] *Id.*

C. The "Well-Founded Fear" Standard and US Immigration Law

The U.S. refugee standard has been well examined in domestic courts. In *I.N.S. v. Cardoza-Fonseca*, the appellant sought an overturn of the decision of the Board of Immigration Appeals, arguing that she was eligible for consideration for asylum.[24] The Supreme Court held that in order to show a "well-founded fear of persecution," an alien seeking asylum need not prove that it was "more likely than not" that they would have been persecuted in their home country.[25] In the opinion of the Court, Justice Stevens explained that the 1980 Immigration and Nationality Act provided two separate methods through which an "otherwise deportable alien who claims that he will be persecuted if deported can seek relief."[26] Specifically, Justice Stevens mentioned Section 243(h) of the act, which requires the Attorney General to withhold deportation of an alien who demonstrates that his "life or freedom would be threatened on account of one of the listed factors if he is deported."[27] The Court urged that this standard and the "well-founded fear" standard are separate entities that are mutually exclusive of each other; the rules that govern one do not necessarily govern the other in tandem.[28]

In other words, the rules governing deportation of aliens do not necessarily affect the initial classification of individuals under the well-founded fear standard. Though there may be exceptions and legal loopholes that allow an individual to escape deportation despite their lack of legal refugee status, the fact remains that the refugee standard is overly narrow in and of itself due to its overemphasis on the historical wording and context from which the current standard is derived.

There is a clear difference between the way the U.S. Government treats formally ascribed refugees – those fleeing a well-founded fear of persecution – or non-refugee aliens that fail to meet the U.N.-inspired standard. This discrepancy stands at odds with what is increasingly being seen as the clear and present threat of climate change. An increasingly convincing body of evidence points to climate change as having an inevitable and dramatic effect on ecological and social systems the world over.[29] Scientists and researchers alike fear that the "unprecedented" challenges presented by the advent of climate change based threats may outstrip the current constraints of the international community's legal framework.[30] Climate change may well cause problems that the current international legal system is not equipped to solve.

"The vulnerability. . . of people to climate change depends on the extent to which they are dependent on natural resources and ecosystem services," writes

[24] *I.N.S. v. Cardoza-Fonseca.* 480 U.S. 421 (1987).

[25] *Cardoza-Fonseca*, 480 U.S. at 423.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 423–24.

[29] Jon Barnett, *Security and Climate Change*, 13.1 GLOBAL ENVTL. CHANGE 7 (2003).

[30] *Id.* at 8.

Jon Barnett in his examination of political security and climate change, "the extent to which the resources and services they rely on are sensitive to climate change, and their capacity to adapt to changes in these resources and services."[31] Barnett and contemporaries that share his viewpoint express concerns over the international community's collective ability to respond to the unique challenges presented by a changing climate landscape. His particular focus is in matters of security – how do states ensure that their own residents remain safe in the face of climate-fueled events?

However, the concerns of Mr. Barnett can be extended beyond the boundaries of dangers to domestic security. The standards established in the 1951 U.N. Refugee Convention that were later adopted by countless prominent members of the international community clearly emphasize the need to address concerns related to persecution-fueled migration. However, the increased likelihood of climate-related disasters across the globe is accompanied by a tangentially increasing likelihood that individuals may be displaced by such disasters. As currently construed, the international refugee standard is not equipped to handle this requisite increase.

As of 2014, there were approximately fourteen million refugees in the U.S.[32] Top countries of origin included Afghanistan, Syria, Somalia, Sudan, the Democratic Republic of the Congo, and Myanmar.[33] All of these refugees were subject to some sort of well-founded fear of persecution, as the U.N.-adopted standard dictates. Notably, the most frequent countries of origin for American refugees share certain characteristic defects with regard to domestic violence, strife, and persecution. This makes a great deal of sense; politically and socially unstable nations would naturally produce the conditions necessary for the fraying of the connection between citizen and state that Andrew Shacknove identified as the prerequisite requirement for a finding of persecution.

The U.S. Refugee Admissions Program ("USRAP") is required each year to review the refugee situation or emergency refugee situation to project the extent of possible participation of the U.S. in resettling refugees, and to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns, grave humanitarian concerns or is otherwise in the national interest.[34] "Annually," the USRAP public web page explains, "processing priorities are established to determine which of the world's refugees are of special humanitarian concern to the United States. Fulfilling a processing priority enables a refugee applicant the opportunity to interview. . . but does not guarantee acceptance."[35] As of the conclusion of 2017, the priorities currently in use included the following: "cases that are identified and referred to the program by the

[31] *Id.* at 8–9.

[32] AMERICAN IMMIGRATION COUNCIL, AN OVERVIEW OF U.S. REFUGEE LAW AND POLICY (2015).

[33] *Id.*

[34] *The United States Refugee Admissions Program*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities (last updated May 05, 2016).

[35] *Id.*

UNCHR, a United States Embassy, or a designated non-governmental organization;" "groups of special humanitarian concern identified by the U.S. refugee program"; and "family reunification cases".[36] The site further emphasizes that refugees must "generally be outside their country of origin."

Taken in a vacuum, these standards would seem to suggest some modicum of legal ground for the climate refugee to stand upon. However, the fact remains that the priorities are largely still routed through the U.N. proper or through the well-founded fear standard that the U.S. adopted from the U.N.'s own rules. Indeed, USRAP's own "refugee eligibility determination" page explains that during the admissions interview "all relevant evidence" is examined to determine if the applicant, amongst other things, meets the definition of refugee.[37] Here, still, the U.N. standard reigns; and so long as it continues to do so aliens seeking refuge from climate-related disasters will continue to encounter marked legal resistance to their attempts to relocate.

This is not to say that the U.S. and other interested parties are unaware of the threats that climate change presents. On June 1, 2017, an article was published in the Louisville Courier-Journal regarding the potential advent of domestic climate refugees. "The United States can expect massive population shifts as the weight of climate change bears down and sea levels rise perhaps six feet by the end of the century," wrote reporter James Bruggers.[38]

"As many as 13 million Americans living in coastal areas could be flooded out by 2100," Bruggers emphasizes, citing research completed by University of Georgia demographer Mathew E. Hauer.[39] Hauer's model suggested that coastal Americans may seek refuge in inland states such as Indiana, Kentucky, Ohio and Tennessee. Specifically, Bruggers reports that heavily populated areas such as Miami, New Orleans and New York could be solely responsible for over three million domestic climate refugees.[40]

Indeed, the U.S. has already begun to resettle domestic climate migrants.[41] In 2016, the Federal Government allocated a $48 million federal grant to focus on the resettlement of the former residents of Isle de Jean Charles in southeastern Louisiana.[42] This grant arrived in virtual tandem with another $1 billion dollar, thirteen-state series of grants designed to help communities adapt to climate change threats. While the majority of that money was spent on shoring up currently existing communities, at least a portion of it (the portion designated for

[36] *Id.*

[37] *Refugee Eligibility Determination,* U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/humanitarian/refugees-asylum/refugees/refugee-eligibility-determination (last updated Apr. 8, 2013).

[38] James Bruggers, *Rising Sea Levels Could Create American Climate Refugees*, USA TODAY (June 1, 2017, 2:48 PM), https://www.usatoday.com/story/news/nation-now/2017/06/01/rising-sea-levels-climate-refugees/362544001/.

[39] *Id.*

[40] *Id.*

[41] Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees'*, N.Y. TIMES (May 2, 2016), https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html.

[42] *Id.*

Isle de Jean Charles) was allocated with the specific intention of relocating an entire community struggling with the impacts of climate change.[43]

The *Times* article cites a study conducted by the U.N. University Institute for the Environment and Human Security, alongside the International Organization for Migration, which states that "between 50 million and 200 million people – mainly subsistence farmers and fishermen – could be displaced by 2050 because of climate change."[44] "The changes are underway and they are very rapid," said Interior Secretary Sally Jewell at the time of the article's publication. "We will have climate refugees."[45]

Walter Kaelin, the head of the U.N. research organization the Nansen Initiative, emphasized this reality by suggesting that it would not be enough to simply respond once the disasters inevitably arrived. "You don't want to wait until people have lost their homes," he said in an interview, "until they flee and become refugees. The idea is to plan ahead and provide people with some measure of choice."[46]

The U.S. is also considering the extension of domestic protections to U.S. nationals.[47] This further cements the reality of the situation: the U.S. Government is, to some degree, well aware of the likely increase in climate migrancy that is due to occur in the coming years. Still, U.S. nationals are afforded similar, if lesser, rights and protections as U.S. citizens. They, too, are exempt from any sort of refugee processing that might otherwise disqualify them from seeking refuge in the U.S. proper for failing to meet the U.N. standard. Domestic refugees are not constrained by international rules or regulations. They need not face any well-founded fear (of persecution or otherwise) to justify their decision to move across the country. Still, this article and others like it demonstrate a clear and undeniable acknowledgement of the imminent risk posed by the continuing effects of climate change. Further, it demonstrates specifically that researchers are concerned about the impacts that climate change may have on the residents of coastal towns, cities and states. The citizens of Miami and New York may take solace in the fact that there are inland options that they can relocate to without fear of being barred by archaic refugee standards. Residents of island or coastal nations that lack the requisite inland landmass of the U.S. and its contemporaries face a greater threat, with fewer protections available to them.

D. The Paris Agreement and Forced Migration

According to the UNCHR, an annual average of twenty-one and one half million people have been forcibly displaced by "weather-related sudden onset

[43] *Id.*

[44] Davenport & Robertson, *supra* note 41. R

[45] *Id.*

[46] *Id.*

[47] Daniel Cusick & Adam Aton, *Puerto Ricans Could be Newest U.S. Climate Refugees*, Sci. Am. (Sep. 28, 2017) https://www.scientificamerican.com/article/puerto-ricans-could-be-newest-u-s-climate-refugees/.

hazards. . . each year since 2008."[48] Climate change (and the resulting climate migrancy) is an emerging threat – and the UNCHR's statements on the subject have made their developing interest in the subject clear.[49]

The U.N. and its member states have presented remarkable initiative with regard to the implementation and ratification of the Paris Agreement.[50] The UN's last major climate initiative, commonly referred to as the Kyoto Protocol, took eight years to enter into force.[51] The Paris Agreement, by contrast, entered into force a scant year after its legal conception.[52] Legal authorities have described the Paris Agreement as a "diplomatic accomplishment of the highest order".[53] New changes in the way that international policymakers attempted to address the concerns presented by continuing climate phenomena dominate discussion, and the world looks to the United Nations to serve as something of an arbiter for the expected policies that major world powers will be expected to enact and enforce in their own territories.[54]

What motivated the rapidity behind the ratification of this cornerstone piece of international law? Reasonable minds differ as to precisely why the accords have proven so amicable where other similar attempts have failed to capture the interest of so many involved parties.[55] Some experts point to the moderate aims of the agreement's various proposals, describing the solutions suggested as a collective "Goldilocks solution" that sits somewhere in the happy medium between overly stringent and undereffective.[56]

Still, some key differences exist between the Paris Agreement and prior attempts to address climate change. Unlike previous political attempts such as the Copenhagen Accord, the Paris Agreement is a fundamentally legally binding instrument.[57] While the Paris Agreement is sparse in terms of actually addressing climate migration itself, it nevertheless represented a step forward for US foreign policy with regard to acknowledging the dangers of climate change and their impact on at-risk communities that are more likely to produce climate migrants.[58]

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48 *Frequently asked questions on climate change and disaster displacement*, UNHRC (Nov. 6, 2016), https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html.

49 *Id*.

50 Calvin Nguyen, *The Paris Agreement After 2016*, GEO. ENVTL. L. REV. ONLINE 1 (2016).

51 *Id*.

52 *Id*.

53 *Id*.

54 *See* Bonnie Smith, *Adapting the Paris Agreement* (Apr. 18, 2016), ENVTL. L. REV. SYNDICATE, https://www.nyuelj.org/2016/04/adapting-the-paris-agreement/.

55 *See* Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope*?, 110 AM. J. INT'L L. 288, 289 (2016).

56 *Id*.

57 *Id*. at 290.

58 *See* Kristen Lambert, *The Paris Agreement: Spotlight on Climate Migrants*, YALE: FORESTRY & ENVTL. BLOG (Dec. 29, 2015), https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/.

The Paris Agreement

The Paris Agreement was initially ratified in late 2015, with the assent of 195 member nations.[59] It was described as a "historic breakthrough" for acquiring the assent of member nations normally renowned for their disinterest in Climate Initiatives, such as China and India.[60] The ratification of the accords represented a nine-year ordeal that was met with universal acclaim in the international community. It also represented a watershed moment in the United States' specific interaction with the topic of climate change and climate migration – a subject that had not truly been breached since the 1980 Refugee Act, if at all. All the same, a number of barriers remained between US foreign policy and true legal and political readiness for the emergence of the climate migration issue – and the state soon proved that it was intent to take a step back before moving further forward.

III. Discussion

Previous attempts to establish forward-thinking climate change based refugee policy have often failed to address the issue of climate migration.[61] The Paris Agreement, specifically, considered but did not address the topic of forced migration.[62] As such, proposals for how, exactly, states might address the rising threat of climate migration have varied widely.

Even settling on a proper definition for the term 'climate migrant' has proven difficult for the international academic and legal communities.[63] A generally accepted baseline definition refers to individuals whose "movement is triggered" in substantial part "by the effects of climate change".[64] This definition is overly broad; it allows for the inclusion of both individuals who are displaced by single, catastrophic events such as great storms or floods or famines, as well as for the inclusion of individuals who are forced to move by the more gradual, continual effects of climate change such as the rising of sea levels to the detriment of coastal settlements.[65]

This definition would likely be sufficient to overcome the limitations of the currently utilized language of the UN charter as well as the US Refugee Act of 1980. By expanding the definition of what constitutes a refugee to include individuals fleeing the effects of climate change as well as those fleeing the effects of persecution, the law would be suitably broadened so as to not disadvantage potential asylum seekers on account of a linguistic technicality that did not consider the possible effects of climate change science that, at the time of the law's passage, was either poorly formed or not established at all.

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[59] Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html.

[60] *Id*.

[61] *See* Phillip Dane Warren, Note, *Forced Migration After Paris COP21: Evaluating the Climate Change Displacement Coordination Facility*, 116 COLUM. L. REV. 2103 (2016).

[62] *Id*. at 2106.

[63] *See* Claire DeWitte, *At Water's Edge: Legal Protections and Funding for a New Generation of Climate Change Refugees*, 16 OCEAN & COASTAL L.J. 211, 221-22 (2010).

[64] *Lambert, supra* note 58, at 2110.

[65] *Id*.

The Paris Agreement

Pundits agree that multilateral global action is required to mitigate the harm done to the climate migrants of the future.[66] "The efforts of individual states are not enough to stem the negative impact of climate change," wrote University of Denver legal scholar Jeremy M. Bellavia in the summer of 2016.[67] That being said, it is easy to see how the unilateral actions of major international powers such as the United States might serve to influence the decision-making bodies like the United Nations that hope to satisfy the requirement for multilateral action that scholars agree will be necessary.

Unfortunately, the United States of 2017 seems disinclined to acquiesce to the interests of the global community when it comes to issues of climate science – including issues of climate migration.[68] While recent reports suggest that President Trump might be more inclined to 'rejoin' the Paris Agreement, the United States government has made no formal indication that it intends to abide by the standards set forth by the Paris Agreement or any similar climate change document.[69] President Trump has in previous instances expressed a passing interest in 'renegotiating' the terms of the Paris Agreement to more appropriately suit America's supposed interests.[70] However, leaders of other relevant world powers, such as France's Emmanuel Macron, have stated that they would not be willing to renegotiate the terms of the deal (which has already been ratified and put into effect).[71]

Indeed, current US foreign and domestic policy interests seem to be geared against the relaxing or broadening of any standard of acceptance for refugees or other international parties interested in relocating to the United States.[72] The White House has remained steadfast in its focus upon border security policies, including the divisive wall promised during the current president's 2016 presidential campaign.[73] In fact, the white house is using the wall's construction as a requirement for the signing of any legislative solution that attempts to provide legal status for 800,000 immigrants currently living in the United States who were brought illegally to the country as Children (a demographic colloquially known as Dreamers, after the Obama initiative that first attempted to grant them protections).[74]

If anything, it seems more likely that the current administration would attempt to further curtail the types of individuals who qualified for refugee status, instead

66 *See* Jeremy M. Bellavia, Article, *What Does Climate Justice Look Like for the Environmentally Displaced in a Post Paris Agreement Environment? Political Questions and Court Deference to Climate Science in the Urgenda Decision*, 44 DENV. J. INT'L L. & POL'Y 453 (2016).

67 *Id.*

68 Shear, *supra* note 6.

69 *Climate Change: Trump Says US 'Could Conceivably' Rejoin Paris Deal,* BBC NEWS (Jan. 11, 2018), http://www.bbc.com/news/world-us-canada-42642331.

70 *Id.*

71 *Id.*

72 *See* Michael D. Shear, *White House Makes Hard-Line Demands for Any 'Dreamers' Deal,* N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/us/politics/white-house-daca.html.

73 *Id.*

74 *Id.*

of expanding the definition as this article proposes. It would not be the first time that the Trump administration attempted to limit refugee intake; one of the President's first major acts manifested in the form of an executive order that suspended the entire refugee resettlement program for a period of three months and further indefinitely banned the resettlement of refugees from Syria and other nations.[75] This executive order was issued despite the already stringent requirements imposed upon individuals seeking refuge in the United States.[76] The resettlement process lasted up to 36 months in length, and involved screenings from various organizations in the interest of maintaining domestic security.[77]

The President's 'travel ban', as it has become colloquially known throughout the various news media that have covered its announcement and attempted implementation, has sustained a contentious and divisive life cycle.[78] Additionally, the legality of the ban remains in question.[79] The travel ban itself has a fixed duration and it would not be likely to impact future climate migrant populations. However, it remains representative of a sea change in White House foreign policy with regard to the handling of refugees by the United States. When combined with a congressional atmosphere that some pundits are describing as divisive, it is difficult to imagine a Trump-led U.S. Government that concerns itself with the rising threat of climate migration.[80]

IV. Analysis

The United States Federal Government is currently poorly equipped to address a potential increase in global climate migration. First, it is not legally capable of differentiating between climate migrants and traditional refugees fleeing from prejudice or persecution. Second, nationalist and anti-immigration sentiment prevails in the executive and legislative branches, limiting the effectiveness of government intervention. Finally, existing disaster response protocols fail to appropriately address the main concerns likely to be amplified by climate change.

As previously stated, the current American legal understanding of what it means to be a refugee fails to take into account the possibility that individuals might be fleeing their country of origin for reasons other than persecution.[81] Critically, the original UN charter did not recognize the environment as an agent

[75] David Miliband. *Donald Trump's Un-American Refugee Policy*, N.Y. Times (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/opinion/donald-trumps-un-american-refugee-policy.html.

[76] *Id*.

[77] *Id*.

[78] Robert Barnes, *Supreme Court Allows Full Enforcement of Trump Travel Ban While Legal Challenges Continue*. Wash. Post (Dec. 4, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-full-enforcement-of-trump-travel-ban-while-legal-challenges-continue/2017/12/04/486549c0-d5fc-11e7-a986-d0a9770d9a3e_story.html?utm_term=.33260f9accd0.

[79] *Id*.

[80] Cathleen Decker, *Republicans face a divisive fight over immigrants that could define the party's future* L.A. Times (Sep. 5, 2017), http://www.latimes.com/politics/la-na-pol-gop-daca-analysis-20170905-story.html.

[81] UN Refugee Protocol, *supra* note 11, at 14.

capable of persecution.[82] This, despite the fact that the UN itself has explored the links between human mobility and climate change.[83] In 2014 alone, 19 million people from over 100 countries were forced to flee their homes for reasons linked to climate change.[84]

A change in the definition of refugees would likely require a baseline acknowledgement of the phenomena driving the possibility of climate migration in the first place. However, the current federal government remains belligerent in its opposition to the notion of climate science.[85] Immediately upon the assumption of power by the current administration, the United States Environmental Protection Agency removed any reference to climate change or global warming from its public website.[86] In Mexico alone, 700,000 citizens must relocate due to natural resource depletion.[87] Despite this, climate migrants continue to lack pathways of migration to safe havens or legal protections once they arrive there.[88] Until the definitional understanding of what it means to be a refugee changes, that is likely to remain the case.

Further, the federal government is plagued by a lack of support for and understanding of the specific topic of climate migration.[89] In keeping with the definition provided by the Refugee Act of 1980, the State Department only serves to recognize the circumstances of refugees fleeing persecution.[90] The State Department claims that the United States is responsible for two thirds of all refugees that settle in neither their country of origin or their country of initial flight.[91] However, the department emphasizes that the percentage of refugees who are permitted to do this are very small, and represent only those who face the highest risk.[92] The state department emphasizes that total resettlement is a solution for 'only a few' who are so in danger of persecution that returning to their home country is literally or logistically impossible.[93]

The United States (and other countries and entities including the UN) do have systems and safeguards currently in place intended to mitigate the potential increase of climate migrants.[94] Systems of national preparedness have been put into place with the intent of equipping the nation to confront all manner of potential

[82] *5 Facts on Climate Migrants*, INSTITUTE FOR ENV'T. AND HUMAN SEC (Nov. 26, 2015), https://ehs.unu.edu/blog/5-facts/5-facts-on-climate-migrants.html.

[83] Lambert, *supra* note 58.

[84] *Id.*

[85] The United States Environmental Protection Agency (hereinafter EPA). "This page is being renovated." EPA. January 20, 2017.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Bureau of Population, Refugees, and Migration*, STATE DEP'T, https://www.state.gov/j/prm/.

[90] *Refugee Admissions*, STATE DEP'T, https://www.state.gov/j/prm/ra/index.htm.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Presidential Policy Directive 8: National Preparedness,* DEP'T. OF HOMELAND SEC. (Mar. 30, 2011), https://www.dhs.gov/presidential-policy-directive-8-national-preparedness.

catastrophes, man-made and natural.[95] Theoretically, these frameworks as designated are meant to be "built upon scalable, flexible, and adaptable coordinating structures" in order to allow room for improvement and adaptability to the ever-changing threats that might face the United States and its citizens.[96]

However, intervening bodies such as the UN and the US are met with controversy for their focus on the areas of on-site disaster relief instead of disaster prevention.[97] Research has showed that globally only one percent of all development aid goes towards what is known as 'disaster risk reduction' or DRR.[98] Traditional means of responding to disasters – such as on-site relief efforts and reconstruction interests – are beginning to be supplemented by more innovative explorations of prevention, but progress is slow.[99] An unwillingness to bend from traditional responses to natural disasters might limit future ability to adapt to the newly increased demands of climate change and migration.

Ideally, major international relief actors such as the United States would mitigate the risks of an increase in climate migration by adapting their current policies to suit the imminent changes. Truth be told, the US never formally committed to the Paris Accords in the first place – at least not in the way that the constitution might require.[100] Article II, section 2 of the United States constitution requires that the President receive the advice and consent of the Senate before making treaties.[101] However, then-President Barack Obama adopted the Paris Agreement without engaging with this constitutionally required process.[102] This accelerated adoption of the Paris Agreement allowed President Trump to likewise unilaterally withdraw the agreement's acceptance.

That being said, clear incongruities exist between the United States' current domestic and foreign policy trends and the likely increase in climate change related political and legal concerns including climate migration. The current legal framework for refugee processing and aid simply has no answer for a world where climate migration presents a serious and prescient issue on an international stage. The United States is a major political entity that directly influences the trends in international law and policy with its legal and political decision making. As such, if the United States continues to fail to acknowledge and adapt the risks posed by climate change, remaining incongruities in the framework of international refugee law will create a host of problems for a world where climate migration has become a real and pressing reality.

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95 *Id.*

96 *Id.*

97 Mark Tran, "UN Urged to Create Global Fund for Disaster Prevention," GUARDIAN (Oct. 1, 2012), https://www.theguardian.com/global-development/2012/oct/01/call-for-global-fund-disaster-prevention.

98 *Id.*

99 *Id.*

100 Press Release, Tanya Somander, White House, The United States Formally Enters the Paris Agreement. (Sept. 3, 2016), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

101 U.S. Const. art. II, § 2, cl. 2.

102 Tran, *supra* note 97.