Volume 26 | Issue 2 | Spring 2023

HUMAN RIGHTS BRIEF

Articles

The Forgotten Sexual and Gender-Based Violence of the Vietnam-American War: Is Justice too Late for Vietnamese Victims and Survivors?
Madison P. Bingle 42

Unwinding "Law And Order": How Second Look Mechanisms Resist Mass Incarceration and Increase Justice
Destiny Fullwood & Cecilia Bruni 56

The International Criminal Court's Arbitrary Exercise of Its Duties Under the Rome Statute to the Benefit of Western Global Supremacy
Azadeh Shahshahani and Sofía Verónica Montez 65

Student Columns

A Double Standard in Refugee Response: Contrasting the Treatment of Syrian Refugees with Ukrainian Refugees
Deanna Alsbeti 72

Striking Out: How the MLB's Baseball Academies Interfere with Children's Human Rights in the Dominican Republic
Crystal Nieves Murphy 77

AECA and the United States War Crimes Connections in Yemen
Rachel Hage 81

How the Overturning of *Roe v. Wade* Disproportionately Affects the Immigrant Asian American Population in the United States
Amy P. Lyons 85

Second Chance Pell Experiment: How the United States is Starting to Recognize Education as a Right
Brittany Walker 89

American University Washington College of Law
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Volume 26 | Issue 2 | Spring 2023

HUMAN RIGHTS BRIEF

Regional Systems

One of Many: The Power of Publication in the Human Rights Regime
Amanda Lorenzo 95

ECtHR Halts Forced Deportation of Uyghur Couple Seeking Asylum in Malta: Latest in a Series of Breaches of European Convention on Human Rights
Tesa Hargis 97

Religious Discrimination and Violation of Property Rights in Turkey
Andre Taylor 99

Special Symposium Column on Movement Lawyering

Symposium Summary

Movement Lawyering: Rebuilding Community Power & Decentering Law
Sami Schramm, Naima Muminiy, Madison Sharp, Angela Altieri, Thea Cabrera Montejo 101

Articles

Lessons In Movement Lawyering from the Ferguson Uprising
Maggie Ellinger-Locke 105

Movement Lawyering for Georgia Worker Cooperatives
Julian M. Hill 113

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

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Dear Reader:

As we emerge from a global pandemic – a time when it felt like everything had changed – the realization that so much has remained the same can be both comforting and troubling. The injustices of old have given way to new, seemingly more complex issues. But if there is a lesson to be learned from the last three years, it is that there is power in individuals coming together for a shared purpose. As individuals, but also as part of a larger community of human rights advocates, we hope that our publication can be a useful tool in your work toward a more equitable and just future. That is why we are committed to providing diverse, timely, and critical analysis of ongoing and emerging human rights issues.

In this dynamic issue, we present cutting-edge and intentional legal analyses on human rights issues from the voices of a diverse group of practitioners and students. Our articles, podcasts, and programming cover an impressive breadth of local and international human rights issues ranging from gender-based violence in Vietnam, the exploitation of children in the Dominican Republic by the MLB, the differential treatment of Ukrainian and Syrian refugees in the European Union, the right to religious freedom in Turkey, and much more.

Beyond our regular coverage of human rights issues, we are excited to present a special symposium edition of the Human Rights Brief. This inclusion of a special column was inspired by the topic of our annual symposium entitled "Movement Lawyering: Rebuilding Power and Decentering Law." In this special column, we begin by summarizing and reflecting on the presentations of our distinguished symposium speakers. Next, we include a narrative piece from one of our speakers on her experience as a lawyer during the Justice for Mike Brown movement in 2014. Finally, we include a piece from one of our speakers on the worker cooperative movement and solidarity economy movement in Atlanta, Georgia.

As we transition into a new publication cycle and transition out of our time as Co-Editors-in-Chief, we are left with a bittersweet feeling. At once, we are sad to leave this incredible and talented community of human rights advocates. But we know that the Human Rights Brief's legacy of timely, diverse, and culturally competent coverage is left in capable hands. We cannot wait to see what comes next. To our readers, we are indebted to you for your unwavering support as we work toward a more just world.

With gratitude,

Angel Gardner & Leila Hamouie
Co-Editors-in-Chief

* * *

The Forgotten Sexual and Gender-Based Violence of the Vietnam-American War: Is Justice too Late for Vietnamese Victims and Survivors?

*by Madison P. Bingle**

Introduction

"The past, far from disappearing or lying down and being quiet, has an embarrassing and persistent way of returning and haunting us unless it has in fact been dealt with adequately."

—Desmond Tutu[1]

The Vietnam-American War ended nearly fifty years ago. However, the atrocities committed during the war have had a devasting impact on the lives of persons involved long after the conflicts' end.[2] A particularly marginalized group within survivors and victims of the Vietnam-American War is Vietnamese women who experienced sexual and gender-based violence.[3] And given the specific tactics of warfare employed during this war, including the use of poisonous herbicide, the sexual and gender-based violence inflicted on women spans far beyond customary forms of sexual violence during conflict—it has also led to reproductive violence that has most affected Vietnamese women.

Despite the prominence of sexual and gender-based violence during the war, Vietnamese women have yet to obtain any form of justice for these atrocities.[4] However, in recent years, international human rights advocates and Vietnamese survivors and victims of sexual-gender have begun to speak out about their enduring trauma.[5] Notably, in April 2020, Trần Thị Ngải,

* Madison P. Bingle, Assistant District Attorney, Domestic Violence Bureau, Brooklyn District Attorney's Office; Fulbright Fellow, Vietnam, 2018–2019. This Article is dedicated to victims and survivors of sexual and gender-based violence. A special thank you is owed to the entire HRB editorial team for their edits and feedback throughout the publication process. All views and errors are my own.

1 Desmond is a South African Nobel Peace Prize Laureate that lived through the South African apartheid. Desmond Tutu, Desmond Tutu, No Future Without Forgiveness 28 (1999).

2 *See generally,* Fred A. Wilcox, Scorched Earth: Legacies of Chemical Warfare in Vietnam (2011) (discussing at length the legacies of the Vietnam-American War, such as the effects of Agent Orange); Eliza Martha Hess, Then the Americans Came (1994) (providing in-depth narratives on how the Vietnam-American War has affected Vietnamese people, and how it affected Vietnamese women who were subjected to sexual and gender-based violence throughout the war).

3 I want to acknowledge that many men experienced sexual and gender-based violence during the Vietnam-American war; however, for the scope of this Article, I am choosing to focus on the experiences of women. *See* Ly Truong, *1968 – The Year that Haunts Hundreds of Women*, BBC News (Mar. 27, 2020), https://www.bbc.co.uk/news/extra/lhrjrs9z9a/vietnam-1968; Wayne David, *It's Time South Korea Recognized Allegations of Sexual Violence in Vietnam,* Independent (Feb. 28, 2021), https://www.independent.co.uk/voices/south-korea-vietnam-war-sexual-violence-women-b1806764.html.

4 *See* Choe Sang-Hun, *Vietnam War Victims Wanted Justice. They Were Given '30 Bags of Rice.*, N.Y. Times (Aug. 21, 2021), https://www.nytimes.com/2021/08/21/world/asia/vietnam-war-south-korea-massacre.html (describing how there was not justice for Vietnamese victims of atrocities committed by South Korea); Christopher J. Levesque, *The Truth Behind My Lai*, N.Y. Times (Mar. 16, 2018), https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html (noting that after the American perpetrated My Mai Massacre, several officers were brought to trial, but a U.S. court only convicted Second Lieutenant Calley, who was released on house arrest shortly after); Sharon Ungerfeld, *The Lingering Killer: Agent Orange*, 2 RSCH. J. Just. Stud. & Forensic Sci. 127, 128 (2014) (noting that "spraying a harmful chemical over a country with ample civilian populations constitutes a war crime because the individuals affected receive no justice, and groups responsible for the wartime atrocities take no responsibility.").

5 I want to acknowledge that Vietnamese on both sides of the

a woman raped by a South Korean soldier during the war, sued the South Korean government for this atrocity.[6] These efforts by advocates, survivors, and victims, now beg the question: is justice too late for Vietnamese women?

This Article argues that the time for justice for the Vietnamese people, and particularly for Vietnamese victims and survivors of sexual and gender-based violence, is now. While the Vietnamese government previously resisted reconciling with the numerous atrocities committed during the war, more recently, it has signaled its willingness to acknowledge the "barbarous" atrocities committed during the war that have led to insufferable pain by its population.[7] The Vietnamese government's shift in tone has opened the door for the offending states—namely the United States and South Korea—to grapple with their brutal military history in Vietnam. This Article further asserts that under international humanitarian law and international customary law, the United States and South Korea committed grave offenses of the Geneva Conventions and international customary law. Thus, the United States and South Korea have a residual obligation to rectify their past atrocities.

Given the breadth of atrocities committed by the United States and South Korea during the Vietnam-American War, in this Article I chose to focus on those atrocities that fit within the context of sexual and gender-based violence, in part because it provides a narrower lens for finding liability for those states, but also because these crimes have been underwhelmingly discussed in the context of accountability for atrocities committed during the war.

To begin, Part I of this Article provides a brief outline of the Vietnam-American War by delving into the perpetrators of sexual and reproductive violence during the war and briefly describing the experiences of survivor and victim groups. Part II then outlines the applicable international humanitarian law and customary international law that the United States and South Korea violated. Finally, Part III summarizes the previous and ongoing efforts for justice for and with Vietnamese women, and additionally, Part III provides recommendations on how the United States and South Korea could provide meaningful justice for Vietnamese women, such as through individual and community reparations and a truth and reconciliation commission. By finally providing Vietnamese victims justice for the sexual and gender-based violence they experienced during the war, the United States and South Korea would be fulling their international legal obligations toward those victims and survivors and would be taking an important step in helping to prevent and bring to light sexual and gender-based violence in both conflict and in its own militaries.

I. Background

A. Context of the Vietnam-American War

In 1954, the United States began officially providing military backing to the Southern Vietnamese government, with the assistance of other countries, such as South Korea who joined the war in 1964.[8] In response to the division of the country, the Northern Vietnamese government began fighting the South Vietnamese, Americans, and South Korean troops, in an effort

conflict perpetuated sexual and gender-based violence against Vietnamese women; however, for the scope of this Article, I am choosing to focus on the atrocities committed by the Americans and the South Koreans, because they are more documented than those committed by the Vietnamese, and there has been renewed movement to highlight the acts of Americans and South Koreans in the war. *See e.g.*, Lin Taylor, *Yazidi survivor demands justice for women raped in Vietnam War*, Reuters (Jan. 16, 2019, 4:56 PM), https://www.reuters.com/article/us-vietnam-war-rape/yazidi-survivor-demands-justice-for-women-raped-in-vietnam-war-idUSKCN1PA2YV (demonstrating that Vietnamese women are starting to advocate for justice for sexual-gender based violence during the Vietnam-American War).

6 *See* Travis Vincent, *K-Dramas Resurrect Long-Buried Memories in Vietnam*, Diplomat (May 10, 2022), https://thediplomat.com/2022/05/k-dramas-resurrect-long-buried-memories-in-vietnam/ (stating that "In April 2020, Tran Thi Ngai . . . became the first woman to sue the South Korean government for past crimes.").

7 *See* Adam Taylor, *Vietnamese Leader Says U.S. Committed 'Countless Barbarous Crimes' During the War*, Wash. Post (Apr. 30, 2015, 12:35 PM), https://www.washingtonpost.com/news/worldviews/wp/2015/04/30/vietnamese-leader-says-u-s-committed-countless-barbarous-crimes-during-the-war/.

8 *See generally* Daniel Oh, *The Two Koreas and the Vietnam War*, Wilson Ctr. (last visited May 3, 2021), https://digitalarchive.wilsoncenter.org/resource/modern-korean-history-portal/the-two-koreas-and-the-vietnam-war.

to reunite the country and expel foreign occupants.[9] The Northern Vietnamese military comprised of the Northern Vietnamese Army (NVA) and the Northern Liberation Front—colloquially known as the Viet Cong—which operated as a more informal militia.[10] In total, over 2.7 million U.S. troops served in the Vietnam-American War, and approximately 300,000 thousand South Korean troops assisted.[11] While other countries were involved, these two states bear a majority of the responsibility for the sexual, gender, and reproductive violence perpetrated against Vietnamese women.

A unique component of the Vietnam-American War that contributed to the widespread sexual and gender-based violence felt by Vietnamese women was their widescale involvement in near all facets of the war. During the war, an estimated 1.5 million Vietnamese women served in the regular NVA and Viet Cong.[12] Additionally, thousands of other women supported the NVA and Viet Cong by supplying food, working in administrative positions, gathering intelligence, and more.[13] Bolstered by the efforts of Vietnamese women, the NVA and Viet Cong forces possessed vast knowledge of Vietnam's topography that allowed them to evade more advanced American weaponry.[14] Meanwhile, the American and South Korean troops struggled to distinguish between Vietnamese combatants, "sympathizers," and civilians, especially amongst the thick jungle canopy. When the war escalated, the United States' military, with the assistance of the South Vietnamese military, implemented Operation Ranch Hand from 1961–1970 to clear the thick forest canopy, which led to the spraying of an estimated 19 million gallons of herbicide defoliants containing the chemical compound dioxin, such as Agent Orange, across Vietnam, Cambodia, and Laos.[15]

Exposure to Agent Orange is extremely harmful to human health.[16] In undetectable amounts dioxin exposure can alter a human's metabolism, but more significant amounts, such as experienced by those Vietnamese during the war, can cause ailments ranging from neurological disorders, skin diseases, cancers, and severe reproductive harm.[17] Vietnamese people have been chronically exposed to Agent Orange through various hotspots that remain contaminated in Vietnam, which has led to continued environmental exposure years after the war.[18] Some estimates state that between 2.1 million and 4.8 million Vietnamese were directly exposed to Agent Orange, and as many as 3 million Vietnamese are currently suffering from health conditions related to exposure.[19]

B. Atrocities Committed Against Vietnamese During the Conflict

In 1968, global news outlets reported broadly on the My Lai massacre. During this atrocity, U.S. soldiers brutally murdered over 500 hundred unarmed Vietnamese civilians.[20] However, U.S. military records demonstrate that My Lai was far from an anomaly. After My Lai, the Pentagon put together the Vietnam War Crimes Working Group (VWCWG), which found that throughout the war, U.S. soldiers committed over 320 substantiated atrocities of various magnitudes.[21]

9 *Geneva Conference to Resolve Problems in Asia Begin*, History (last visited May 3, 2021), https://www.history.com/this-day-in-history/geneva-conference-begins.

10 *See The U.S. Army in Vietnam,* Am. Mil. Hist., 627–28 (2001), https://history.army.mil/books/amh/AMH-28.htm.

11 Karen Gottschang & Phan Thanh Hao, Even the Women Must Fight: Memories of War from North Vietnam 20 (1998).

12 *See id.*

13 *Id.*

14 *See generally Viet Cong Fighters,* Pub. Broad. Rad. (last visited May 3, 2021), https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-viet-cong-fighters/.

15 There were various types of herbicides sprayed in Southeast Asia, but Agent Orange was the most used herbicide mixture used. *The U.S. Military and the Herbicide Program*, in Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam 74 (Inst. of Med. ed., 1994).

16 *See id*; *see also* Peter Sills, Toxic War: The Story of Agent Orange 45-46 (2014).

17 *See* Pamela King, The Use of Agent Orange in the Vietnam War and its Effects on the Vietnamese People 37 (Oct. 13, 2010) (Master's thesis, Georgetown University) (on file with Georgetown University Library), at 15.

18 *See id.*, at 15-16.

19 Michael F. Martin, Cong. Rsch. Serv. RL34761, Vietnamese Victims of Agent Orange and U.S.-Vietnam Relations 18 (2008).

20 *See* Christopher J. Levesque, *The Truth Behind My Lai*, N.Y. Times (Mar. 16, 2018), https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html.

21 Jon Wiener, *Beyond My Lai: Revelations of Vietnam Atrocities*, Nation (Aug. 7, 2006) https://www.thenation.com/article/archive/beyond-my-lai-new-revelations-vietnam-atrocities; Nick

South Korean soldiers also contributed to these atrocities. Post-war investigations reveal that South Korea committed an estimated eighty massacres of Vietnamese civilians, amounting to approximately 8,000 to 9,000 Vietnamese civilian deaths.[22] The most infamous atrocity committed by South Korean soldiers is the massacre of Ha My, where South Korean troops reportedly killed over 135 Vietnamese civilians.[23] What is less clear from these reports is the way in which U.S. and South Korean troops incorporated and systematically perpetuated sexual and gender-based violence, both during conflict and outside of it.[24]

1. Sexual and Gender-Based Violence Against Vietnamese Women

Narratives from Vietnamese women, testimony from organizations, such as Vietnam Veterans Against the War, and reports from internal U.S. military investigations, demonstrate that sexual and gender-based violence was commonly carried out against Vietnamese women and girls.[25] The widescale sexual violence against women ranged "from tormenting and humiliating women by tearing their clothing so as to expose their breasts or by conducting body 'searches'—barely obscured rapes—to outright raping done by either single men or groups of soldiers" as well as horrific accounts of "sexual butchery."[26]

Many U.S. troops reported that sexual violence was considered "standard procedure" and was often encouraged by peers.[27] Corroborating the widescale institutionalization of sexual and gender-based violence practices during the war was the development of coded language, which was used to describe specific sexual and gender-based acts.[28] For instance, U.S. soldiers referred to a soldier as "a double veteran" if they raped and subsequently killed a Vietnamese woman, and this title was considered a badge of honor.[29] Investigations into sexual and gender-based violence practices by the U.S. military were only initiated after the media began reporting on the infamous My Lai massacre.[30] As previously noted, the global widescale attention generated from My Lai led the U.S. military to create the VWCWG, which then found "scores of acts of rape, sexual torture and mutilation, and other sexual abuse" committed by the U.S. military.[31]

Despite Article 120 of the American Uniform Code of Military Justice criminalizing rape, the crime went widely unpunished and unprosecuted throughout the Vietnam-American War.[32] During the post-My Lai investigations, investigators found that few soldiers were prosecuted for rape, in part, because when peers reported rape, "commanders almost always failed to pursue charges."[33] For example, men from the C-Company, the platoon responsible for the killing and gang raping of children and women in My Lai, had previously participated in the mistreatment, rape, and possible murder of Vietnamese civilians, but received no punishment for it.[34] Military justice data demonstrates that between 1965–1973, only fifty-eight percent of U.S. soldiers prosecuted for rape were actually convicted, and sentences for these crimes were minimal and often reduced by half.[35]

Turse & Deborah Nelson, *Vietnam Horrors: Darker Yet*, L.A. Times (Aug. 6, 2006, 12:00 AM), https://www.latimes.com/archives/la-xpm-2006-aug-06-na-vietnam6-story.html.
22 *See* Hoang Do, *The Forgotten History of South Korean Massacres in Vietnam*, Diplomat (May 15, 2020), https://thediplomat.com/2020/05/the-forgotten-history-of-south-korean-massacres-in-vietnam/.
23 *See id.*
24 *1968 My Lai Massacre*, Center for Strat. Int'l Stud. (Mar. 16, 2018) (testimony of Professor Gary Solis) (discussing how the sexual violence that coincided with the atrocities is not discussed enough), https://www.c-span.org/video/?442602-1/1968-lai-massacre.
25 Gina Marie Weaver, *"Already Bullet" in,* Ideologies of Forgetting: Rape in the Vietnam War 47, 54 (2010).
26 *See id.*
27 Susan Brownmiller, Against Our Will: Men, Women and Rape 31 (1975).
28 Robert J. Barsocchini, *American Rape of Vietnamese Women was Considered "Standard Operating Procedure"*, CounterPunch (Oct. 3, 2017), https://www.counterpunch.org/2017/10/03/american-rape-of-vietnamese-women-was-considered-standard-operating-procedure/ (discussing the use of the term "double veteran").
29 *See id.*
30 *See* Weaver, *supra* note 25, at 54–57.
31 *See id.*
32 *See id.*; *see also* Uniform Code of Military Justice art. 120(b), 10 U.S.C. § 920 (1950).
33 *See* Brownmiller, *supra* note 27, at 101, 105.
34 U.S. Dep't of the Army, Report of the Dep't of the Army Review of the Preliminary Investigations into the My Lai Incident 8–14 (1970), https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf.
35 *See* Brownmiller, *supra* note 27, at 101.

South Korean soldiers also committed sexual and gender-based violence during the war on a widespread basis. Numerous accounts from Vietnamese women, many who were only twelve or thirteen at the time, illustrate that South Korea utilized sexual and gender-based violence against Vietnamese civilians as a tactic of war.[36] Determining exactly how systematically the South Korean troops used sexual and gender-based violence throughout the war is difficult, because unlike the My Lai massacre, there was no "whistle blower or international press coverage" over South Korean atrocities, and the killings were usually not conducted through a documented chain of command.[37] Further, the South Korean government stated that "it has no record of any civilian killings carried out by its military in Vietnam" and it has failed to answer investigation requests and requests for apologies from Vietnamese rape survivors.[38]

Beyond the systematic rape of civilian women and children by American and South Korean soldiers, women suspected of sympathizing, assisting, or serving the Northern Vietnamese were often subjected to arbitrary detention, rape and torture by both Americans and South Koreans, which often ended in brutal murder.[39] While no public records demonstrate precisely how prevalent the practice was, testimony from individuals who served in the Phoenix Program, a special Central Intelligence Agency organization, in addition to testimony from individuals from other parts of the U.S. military, corroborates the narratives of many Vietnamese women about the specific techniques used to inflict sexual violence and torture on Vietnamese women.[40] For example, testimony from formerly detained Vietnamese women indicate that American soldiers often gang raped Vietnamese women, used objects or animals, such as reptiles or bugs to sexually assault them, and reportedly used devices to electrocute women's sexual organs.[41] These women all reported being subjected to beatings and other methods of torture for their role or suspected role as combatants or for assisting the NVA and Viet Cong.[42]

Given the limited documentation available from the practice of South Korean troops, the degree to which they tortured and raped prisoners of war remains unknown. However, testimony from American soldiers on their interactions with allied South Koreans soldiers allows for the inference that sexual violence in the form of torture was regularly carried out by South Korean troops. Notably, Senator John Kerry testified in 1970 during hearings before Congress about instances where South Koreans troops raped captured female NVA nurses.[43] He stated that when the Americans handed over Northern Vietnamese nurses to the South Korean soldiers, these troops would brutally gang rape these women, mutilate their sexual organs, and murder them by placing explosives in their bodies.[44]

The legacies of this pervasive sexual- and gender-based violence has had irreversible effects on Vietnamese victims and survivors. Personal accounts of Vietnamese women establish that those who were raped, or who gave birth to children from rape, experience extreme thought isolation, harassment from family, friends, and diminished prospects within Vietnamese society.[45] Many survivors contemplated suicide, and some have discussed how their bodies, including their

36 *See* Truong, *supra* note 3.
37 *See* Do, *supra* note 22.
38 *See* Truong, *supra* note 3.
39 *See* Weaver, *supra* note 25, at 57.
40 Edward Miller, *Behind the Phoenix Program*, N.Y. Times (Dec. 29, 2017), https://www.nytimes.com/2017/12/29/opinion/behind-the-phoenix-program.html; *see* Martha Hess, Then the Americans Came: Voices from Vietnam 78 (1993); Dang Hong Nhut, *Agent Orange Has Given Me a Death Sentence*, The Guardian (Apr. 12, 2010, 4:00 EDT), https://www.theguardian.com/world/2010/apr/12/vietnam-weaponstechnology.
41 Robert J. Barsocchini, *American Rape of Vietnamese Women was Considered "Standard Operating Procedure,"* CounterPunch (Oct. 3, 2017), https://www.counterpunch.org/2017/10/03/american-rape-of-vietnamese-women-was-considered-standard-operating-procedure/.
42 *See id.*
43 *See Transcript: Kerry Testifies Before Senate Panel, 1971*, Nat'l Pub. Radio (Apr. 25, 2006), https://www.npr.org/templates/story/story.php?storyId=3875422.
44 *See* Weaver, *supra* note 25, at 58.
45 Jo Griffin, *Women Raped by Korean Soldiers During Vietnam War Still Awaiting Apology*, Guardian (Jan. 19, 2019), https://www.theguardian.com/global-development/2019/jan/19/women-raped-by-korean-soldiers-during-vietnam-war-still-awaiting-apology; *see also* Justice for Lai Dai Han, J*ustice for Lai Dai Han - Event on Wartime Sexual Violence*, YouTube (Jan. 16, 2019), https://www.youtube.com/watch?v=JooFvLVvnWc (showing the narrative a Vietnamese women discussing how sexual and gender-based violence impacted her life and the lives of her children long after the initial violence).

reproductive organs, endure chronic pain as a result of the sexual- and gender-based violence committed against them.[46] While many women became pregnant by American and South Korean soldiers through transactional sex, there were thousands of other women who were impregnated by American and South Koreans as a result of rape.[47] Mothers and children alike faced extreme discrimination and harassment from their local communities for having children with men in the military.[48] In response to this, the United States enacted legislation that allowed these children and their mothers to immigrate to the United States; however, mothers of children who were half Korean were not afforded the same privilege.[49] Beyond the direct acts of sexual- and gender-based violence, Vietnamese women experienced during the war, they also suffered from reproductive injustices as a result of exposure to dioxin-Agent Orange.

2. Agent Orange's Legacy on Vietnamese Women

Exposure to Agent Orange, whether through the environment or by the consumption of contaminated food, has had a devasting impact on the reproductive abilities of thousands of Vietnamese women.[50] As a result of Agent Orange exposure, thousands of Vietnamese women have given birth to children with congenital disabilities, and have had high rates of miscarriages and premature births.[51] Later in life, these women are at high risk of different diseases that may cause additional pain, suffering, or early death.[52]

Scientists have determined that exposure can have a detrimental impact on the ability of women to reproduce because dioxin can alter "the expression of genes relevant to ovarian follicle growth and maturation, uterine function, placental development, and fetal morphogenesis and growth."[53] Agent Orange also affects men's reproductive health, because dioxin can be stored in seminal fluid; this subsequently affects women, as dioxin can be passed on to women through sexual intercourse, which can then absorbed in the vaginal walls.[54] This process may affect a women's existing pregnancy, and may have an effect on her future reproductive health, such as heightening the risk of rare vaginal cancers.[55]

While more research is needed to fully understand the intergenerational effects of Agent Orange, the Vietnamese government's data demonstrates that exposure to Agent Orange lasts well into the third generation.[56] Moreover, despite the war ending in 1975, for the Vietnamese, and especially Vietnamese women, the risk of dioxin exposure remains an ongoing issue. While the United States cleaned up the former-air base in Danang, other hotspots in Vietnam have not been cleaned up and continue to expose people to Agent Orange.[57] Since Vietnam is an agrarian and fishing society, the opportunity for exposure increases from eating fish caught in contaminated lakes near hotspots, or when food is cultivated from areas where Agent Orange was once sprayed or stored.[58] Recently, scientists have stated that Vietnam may see six to twelve more

46 *See* Hess, *supra* note 39, at 89.
47 *See* Griffin, *supra* note 45.
48 *Id.*
49 *See e.g.,* David Lamb, *Children of the Vietnam War*, Smithsonian Mag. (June 2009), https://www.smithsonianmag.com/travel/children-of-the-vietnam-war-131207347/.
50 Le Thi Nham Tuyet, and Annika Johansson. *Impact of Chemical Warfare with Agent Orange on Women's Reproductive Lives in Vietnam: A Pilot Study*, 9 Reproductive Health Matters 18, 156 (2001).
51 Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 Colum. Hum. Rts. L. Rev. 1, 11 (2000).
52 *See e.g.*, Nhut *supra* note 41.
53 National Academics of Sciences, Engineering, and Medicine, *Reproductive Health Effects and Effects on Descendants,* 11 Veterans and Agent Orange Update 366, 365 (2018).
54 *See id.* at 388.
55 *See id.*
56 Matti Viluksela and Raimo Pohjanvirta, *Multigenerational and Transgenerational Effects of Dioxin*, Int'l J. of Molecular Sciences (June 17, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6627869/.
57 *Maps of Heavily Sprayed Areas and Dioxin Hot Spots*, Aspen Inst. (Feb. 13, 2023), https://www.aspeninstitute.org/programs/agent-orange-in-vietnam-program/maps-of-heavily-sprayed-areas-and-dioxin-hot-spots/#:~:text=Over%203.5%20million%20liters%20of,or%20150%20ppt%20in%20sediment).
58 *See Residents Keep Fishing in Contaminated Lake in Dong Nai*, Viet Nam News (Mar. 12, 2015), https://vietnamnews.vn/society/279388/residents-keep-fishing-in-contaminated-lake-in-dong-nai.html.

generations of Agent Orange victims.[59]

Agent Orange's effect on women is amplified by the cultural and social context of Vietnam. In traditional Vietnamese religious beliefs, health often correlates with fate, and fate often correlates with the actions of an individual's past life.[60] In interviews with Vietnamese women on their experiences related to having children with disabilities as a result of Agent Orange exposure, women often express sorrow for their past life's mistakes and how those have affected their children's health or their abilities.[61] A majority of the women impacted by Agent Orange exposure come from lower-socio economic statuses.[62] These conditions become heightened by the need to provide care to children with disabilities, and potentially provide care to their husbands if they have poor health caused by Agent Orange exposure.[63] In Vietnam, many women who have children with disabilities as a result of Agent Orange make a living by harvesting rice, street vending, working at the market, or by working at some other type of flexible job that allows them to return home to care for their children.[64]

Overall, the use of herbicides containing the poison dioxin has had detrimental effects upon women and their reproductive rights. In the case of Vietnam, the reproductive effects of exposure to Agent Orange, coupled with the barriers women face in society for having children with disabilities—some practical, some cultural—has left the wounds of the Vietnam-American War open well beyond the American and South Korean troops' departure from Vietnam in 1975. While the applicable international humanitarian law in 1975 does not comprehensively cover all of the atrocities committed against women in Vietnam, international humanitarian law certainly provides some protection, and international law definitely calls for remedy for Vietnamese women.

II. International Humanitarian Law Protections

Before delving into the applicable international humanitarian law, it is important to establish that the Vietnam-American War was of an international nature, rather than an internalized non-international armed conflict (NIAC).[65] This distinction sets the groundwork for the binding legal obligations of the United States and South Korea and the legal protections for women during the conflict. In the spring of 1965, the International Committee of the Red Cross (ICRC) attempted to settle any controversies about the nature of the wear by stating that "[t]he hostilities raging at the present time in Vietnam both North and South of the 17th parallel have assumed such proportions recently that there can be no doubt it constitutes an armed conflict to which the regulations of humanitarian law as a whole should be applied."[66] By doing so, the ICRC reaffirmed the legal obligations of the United States and South Korea to abide by the principles of international humanitarian law.[67]

Since the Vietnam-American War met the threshold of an internationally armed conflict, the United States and South Korea had certain obligations under international humanitarian law. The operative international humanitarian protections for internationally armed conflicts can be found under the First Geneva Convention (and apply to NIACs also), the Fourth Geneva Convention of 1949, the Third Geneva Convention of 1949, as well as the 1925 Geneva Protocol prohibiting the use of chemical weapons. The obligations

59 *See* Dewey Sim, *Vietnam War: 44 Years On, Birth Defects from America's Agent Orange Are Increasing*, South China Morning Post (Jun 8, 2019), https://www.scmp.com/week-asia/geopolitics/article/3013636/vietnam-war-44-years-birth-defects-americas-agent-orange-are.
60 Madison Bingle, *Change in Season*, WordPress Blog (Apr. 30, 2017), https://madisonbingle.wordpress.com/2017/04/30/change-in-season/ (interviewing a victim of Agent Orange).
61 *See id.*
62 *See* Tuyet, *supra* note 49.
63 *See id.*
64 *See* Bingle, *supra* note 58.
65 *See generally* George Aldrich, *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, Whiteman's Dig. § 12:25, 231-235 (Jul. 13, 1966) (noting that"[a]lthough there have been no declarations of war, the present conflict in Vietnam is indisputably an 'armed conflict' between parties to the Geneva Conventions of 1949).
66 *Letter of June 1965,* 5 Int'l Rev. of the Cross 417 (1965) (addressing the governments of the Democratic Republic of Vietnam, the Republic of Vietnam, and the United States and to the National Liberation Front of South Vietnam).
67 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 [hereinafter Fourth Geneva Convention].

stemming from these international humanitarian law treaties, in addition to observance of international customary law, serve as the basis for the legal protections available to Vietnamese women who suffered during the war.

A. Sexual and Gender Based-Violence

In the context of the Vietnam-American War, international humanitarian law prohibited sexual and gender-based violence in the form of rape, torture, and other forms of inhumane treatment against women and children who were either civilians or prisoners of war. Under Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention of 1949), grave breaches included: "willful killing, torture or inhuman treatment" and "willfully causing great suffering or serious injury to [a women's] body or health."[68] The legal obligations of the United States and South Korea are also implicated under the Common Article 3 of the First Geneva Convention. The convention mandates a duty to refrain from conduct that included "outrages upon personal dignity" against women who took no part in the hostilities, including members of the armed forces, and those who laid down their arms.[69] Under this provision, women were required to be given "basic humane treatment, including respect of life and physical moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages."[70]

The legal protections available to Vietnamese women who experienced sexual violence is overt under Article 27 of the Fourth Geneva Convention of 1949, which details that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[71] Similarly, for prisoners of war, the Third Geneva Convention enshrines the right of Vietnamese women to be "respect[ed] for their persons and their honour."[72] Under Article 17 of the same Third Geneva Convention, the United States and the South Korean troops were prohibited from causing "physical or mental torture, nor any other form of coercion" to secure information from women accused of being associated with the NVA or Viet Cong.[73]

Under these international humanitarian law provisions, the conduct of both South Korean and the U.S. troops amounted to grave violations of Common Article 3, the Fourth Geneva Convention, and Third Geneva Conventions, and hence are judicially actionable war crimes. Common Article 3 of the First Geneva Conventions does not explicitly mention rape or other sexual and gender-based crimes experienced by Vietnamese women. However, the widespread use of rape, mutilation, and torture against civilian women and prisoners of war who stopped fighting are grave violations, as the crimes violated women's personal dignity and could be characterized as torture under Common Article 3.[74] Under the Fourth Geneva Convention, both South Korean and the United States caused great bodily suffering and committed acts of torture against women, including rape, which violates Article 27 of the Fourth Geneva Convention.[75]

For Vietnamese women taken as prisoners of war, the Third Geneva Convention afforded them humane living conditions and protection from torture, including during interrogations. The use of various sexual assaults by gang rape and objects to sexually violate women were violations of these rights. Moreover, South Korea and the United States demonstrated the use of torture and mutilation of women's bodies in violation of both States' legal obligations under international humanitarian law.

68 *See id.*, art. 147.
69 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, common art. 3, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31[hereinafter First Geneva Convention].
70 *See id.*; *see also* Francoise Krill, *The Protection of Women in International Humanitarian Law*, Int'l Committee of the Red Cross (last visited May 6, 2021), https://www.icrc.org/en/doc/resources/documents/article/other/57jmfj.htm.
71 Fourth Geneva Convention, *supra* note 67, art. 27.
72 Geneva Convention relative to the Treatment of Prisoners of War, art. 14, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter the Third Geneva Convention Convention].
73 *See id.*, at art. 17.
74 *See* Krill, *supra* note 70.
75 *See* Fourth Geneva Convention, *supra* note 67, art. 27.

B. Toxic Poisoning

Unlike the international humanitarian law protecting women from sexual and gender-based violence, the legal protections available for women suffering from reproductive effects of herbicide exposure is more nuanced.[76] That is because international legal protections on the prohibition of herbicide poisoning during war, and its resulting gendered violence, were less established at the time of the Vietnam-American war. Regardless of the nuance, the then-existing customary international law on the topic validated that the U.S. military violated customary international legal principles by spraying dioxin Agent Orange, which caused reproductive harm to Vietnamese persons, and particularly women.

A tribunal finds that customary international law exists by looking at state practice, and whether there are instances where states either act, or refrain from acting in a certain way out of a sense of moral obligation.[77] In this context, there is evidence of both. For example, dating back to 1863, when the United States enacted the Lieber Code, which placed a ban "the use of poison in any way" even in the face of claims of "military necessity."[78] Again, in 1925, the United States and thirty other countries, signed the Geneva Protocol of 1925 (the Protocol), which prohibited "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" as well as "the use of bacteriological methods of warfare."[79] While the United States failed to ratify the Protocol, this treaty was indicative of the codification of customary law that had begun to emerge and had history in state practice.

This trend continued on until WWI, when the United States helped to develop of the Convention with Respect to the Laws and Customs of War on Land, which placed strict limits on the use of chemical weapons during war.[80] During post-WWI, States that used weapons containing mustard gas challenged the norm on the use of weapons containing poison.[81] In response to the use of mustard gas, there were several treaties formed to ensure that poisonous weapons were not used in war. For example, States, including the United States, drafted and ratified the Washington Treaty in 1922 which prohibited "in [t]he use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world."[82] Later, the United States signed a similar treaty with Central American nations, which confirmed that use of chemical weapons was "contrary to humanitarian principles and to international law."[83]

Based on these examples, states came together to draft the Geneva Protocol of 1925, the prohibition of weapons containing poisonous material was already codified, and it had already emerged as an international customary norm. In the history of wars that followed the codification of this principle, there have been few instances where states have used poisonous material as a weapon of war, demonstrating that most states

76 *See e.g.*, Madison P. Bingle, *Codifying Ecocide as an International Atrocity Crime: How Amending Ecocide into the Rome Statute Could Provide Vietnamese Agent Orange Victims Access to Justice*, 45 Univ. Hawai'i L. Rev. (2022) (providing analysis on the nuances of the international law that existed at the time of spraying Agent Orange).

77 To determine whether something is a concept of international customary law, a tribunal would look to determine whether there is general and consistent state practice as well as *opinion juris*, or that a state is acting out a moral sense of obligation that it should do so). *See e.g.*, Restatement (Third) of the Foreign Relations Law of the United States §102 (1987) (outlining what is necessary for finding customary international legal principles).

78 *See e.g.*, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 16 & 70 (Apr. 24, 1863) (stating that "the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare).

79 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare art. 5, Feb. 6, 1922, 25 L.N.T.S. 202.

80 Convention with Respect to the Laws and Customs of War on Land, annex, art. XXII, Jul. 29, 1899, 32 Stat. 1803.

81 *See* David Zierler, The Invention of Ecocide: Agent Orange, vietname, and the Scientists who changed the way we think about the environment (2011).

82 *See id*. (citing the Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare art. V, Feb. 6, 1922, 16 Am. J. Int'L L. 57-60 (Supp. 1922)).

83 The Problem of Chemical and Biological Warfare, A Study of the Historical Technical, Military, Legal, and Political Aspects of CBW, and Possible Disarmament Measures, Vol. III, CBW and the Law of War 24, SIPRI (1973).

refrain from using the weapons because of an understanding that there is an obligation to refrain from doing so. In instances where violations of the norm occurred, states reacted with more treaties and public outcry. For example, during WWII, there was only one instance of chemical warfare, and states reacted negatively. This demonstrates the establishment of an international customary norm.[84] Later, the Nuremberg Charter and the Nuremberg principles, which criminalized the use of chemical weapons by the German Nazis, affirmed the prohibition on the use of poisonous materials as a weapon of war.[85]

Solidifying that the United States violated international customary law is the international response to the United States using poisonous herbicide during the war, which arguably again exemplifies *opinio juris*.[86] In 1969, when the United States delegates went before the UN General Assembly to defend its use of Agent Orange in Southeast Asia, the General Assembly passed Resolution 2603. The resolution officially recognized the Geneva Protocol as "chemical agents of warfare as a 'chemical substance-whether gaseous, liquid or solid-which might be employed because of the direct toxic effects on man, animals or plants," meaning that the existing treaties included a prohibition on the use of herbicides as well.[87] On a more practical level, this move exemplified the moral sentiment of the international community, and the resolution's nearly universal passage supports the case that states believed that the use of herbicide during war violated international law, and that existing treaties should interpret herbicide as a prohibited chemical weapon.

Finally, when the prohibition emerged, the United States did not invoke its persistent objector right, which would allow a claim of immunity from following the international customary norm of not using weapons containing poisonous chemicals during war — rather, the United States claimed that the use of herbicides did not have a poisonous effect on humans.[88] Additionally, the United States took efforts to steer the development of treaties that prohibited the use of these types of weapons in war.[89]

Opponents of this interpretation of the law pointed to herbicides differing from the use of gases and other chemical weapons during war, because at least overtly, the United States targeted plants and not people. Additionally, the United States purportedly was unaware of the adverse effects of Agent Orange on persons and denied the development of the herbicide with that specific intent.[90] Yet, during war, the U.S. military could not solely target plants without affecting people, it also targeted their food and water sources. Additionally, the United States was well-informed that Vietnam was an agrarian-based society. By poisoning plants, and other sources of food, the United States effectively poisoned people. The United States also had constructive notice that Agent Orange adversely affected the reproductive health of Vietnamese based on evidence collected by

84 *See* Zierler, *supra* note 81, at 508.
85 *See* SIPRI, *supra* note 83, at 40.
86 Paulo Borba Casella, Contemporary Trends on Opinio Juris and the Material Evidence of International Customary Law, 13 https://legal.un.org/ilc/sessions/65/pdfs/2013_amado_lecture_casella.pdf (noting that *opinion juris* "ascertained through the action of institutional bodies already existing and operating for decades, the Intergovernmental organizations, especially since world wars I and II, or more than a century, considering the first initiatives adopted in that sense, during the second half of the nineteenth century . . . .").
87 *See* Zierler, *supra* note 81.
88 The persistent objector rule provides states the ability to exclude themselves from being obligated to follow a specific law that is becoming generally accepted in the international community; however, to invoke this rule, a state must clearly and consistently object to the emergence of a legal norm in order not to be bound when it's crystallized into customary law. *See generally* James Green, the Persistent Objector Rule in International law (2016).
89 *See* Zierler, *supra* note 81, at 503.
90 Some scholars argue that did not violated international customary law *see e.g.*, Anderson, Kenneth, *Declaration on Issues of the Laws of War, Corporate Liability and Other Issues of International Law in Agent Orange Ats Litigation*, (2004). *Congressional and Other Testimony*. However, these arguments are void of the reality that these herbicides intentionally included dioxin, a poisonous chemical, that that the U.S. military has constructive knowledge of this poisonous harmful effects.

the military shortly after usage.[91]

The United States' military used herbicide poison during the Vietnam-America war in contravention of international customary norms, and as a result, it impacted the lives of thousands of Vietnamese. This has caused reproductive violence that particularly effected the lives of women as a result.

III. Efforts Toward Justice and Pathways Forward

In response to the atrocities committed against the Vietnamese women have sought justice in various international and domestic forums. Despite these efforts, there has seldom been a focus of narratives highlighting the plight of Vietnamese women during the conflict. While the United States and South Korea have yet to contribute to justice in a meaningful way, both states have an obligation under international humanitarian law to take steps to rectify their wrongs. Ideally, this justice would consist of individual and community-based reparations as well as provide a truth and reconciliation commission for victims and survivors.

A. Previous and Ongoing Efforts

Before the Vietnam-American war's end in 1975, in 1967, Betrand Russel created the Stockholm International War Crimes Tribunal.[92] The Tribunal served as an "indictment of the United States" by documenting the various war crimes committed.[93] The tribunal was not a product of an international treaty and held no legally binding authority, and comprised of twenty-one various anti-war activists who served as panelists. The panelists asked questions to those testifying and made legal determinations. Despite the well-meaning intentions of the Tribunal, the Tribunal not only neglected to include descriptions of American sexual violence against Vietnamese women, but the panelists actively sidestepped revealing instances of sexual and gender-based violence against Vietnamese women.[94] For example, when a former U.S. prisoner of war interrogator testified about the American perception of Vietnam as a giant "whorehouse," the panel failed to inquire more about the specifics acts of sexual violence that the veteran alluded to. Instead, the panel moved along in their questioning of other atrocities.[95]

More recently in South Korea, the organizations Minbyun, the Korea-Vietnam Peace Foundation, and the Korean Council for the Women Drafted for Military Sexual Slavery by Japan, set up the 2018 People's Tribunal on War Crimes by South Korean Troops during the Vietnam War.[96] The purpose of the tribunal was to hear testimony from survivors of atrocities committed in Vietnam by South Korean troops, specifically pertaining to those atrocities committed in central Vietnam.[97] Like other efforts, the Tribunal did encompass testimony from sexual and gender based violence victims. However, the court found that under South Korean domestic laws, the states must compensate atrocity victims and also recommended the government facilitate investigations into other crimes such as rape.[98] The tribunal has no legal authority but managed to garner widespread attention in South Korea and in Vietnam, and has sparked some legal action in South Korean courts.[99] Notably, a South Korean District Court is currently reviewing a claim for compensation in a case brought by Nguyễn Thị Thanh, a survivor of another massacre perpetuated by the South Korean troops in 1968.[100] The organization that legally represented her

91 The Promise Institute of Human Rights, *Redefining Ecocide: Addressing Mass Damage and Destruction*, YouTube (Apr. 15, 2021), https://www.youtube.com/watch?v=huxgGXSuIzo; *see* David Burnham, *Dow Says U.S. Knew Dioxin Peril of Agent* Orange, N.Y. Times (May 5, 1983), https://www.nytimes.com/1983/05/05/us/dow-says-us-knew-dioxin-peril-of-agent-orange.html; *see also* Brief for Center for Constitutional Rights, Earth Rights and the International Human Rights Law Clinic at the University of Virginia School of Law, as Amici Curiae Supporting Petitioners, VAVA v. Dow Chemical et al, Inc., MDL No. 381, No. 04-CV-400 (E.D.N.Y. Mar. 28, 2005), https://earthrights.org/wp-content/uploads/publications/amicus-brief-agent-orange.pdf.

92 Weaver, *supra* note 25, at 49.

93 *See id.*

94 *See id*. at 50.

95 *See id*.

96 *See* Han Gil Jang, *People's Tribunal on War Crimes by South Korean Troops During the Vietnam War*, Asia Pac. J. (June 15, 2019), https://apjjf.org/-Han-Gil-Jang/5288/article.pdf.

97 *See id*.

98 Hyo Jin Kim, Evaluation of South Korea's Dealing with Its Alleged War Crimes During the Vietnam War, 29 (2019) (Master's Thesis, Grad. Sch. Int'l Studs. Seoul Nat'l Univ) (on file with Seoul National University), https://s-space.snu.ac.kr/bitstream/10371/150926/1/000000155600.pdf

99 *See id*.

100 *S. Korean Court Orders NIS to Disclose Details of Civilian*

stated "[t]he only way to ease the pain of the victims is for the South Korean government to acknowledge its responsibility for the civilian massacres."[101] A year after, Nguyen and 102 other victims of atrocities submitted a petition to the government of South Korea asking for the release of reports related to the investigation. The Supreme Court of South Korea ruled in victims favor of in March 2021, which has given hope to some victims and survivors that the truth will soon come out.[102]

While these efforts do not represent victims of sexual and gender-based violence, there is hope that these claims could be brought by victims. Trần Thị Ngải, a woman who was raped and impregnated by a South Korean solider during the war, recently gained international attention for her demand of a public apology from the South Korean government for the crimes committed against her.[103] Nadia Murad, a Yazidi activist, echoed this sentiment by demanding more justice for Vietnamese women, regardless of the time passed since the war's end.[104]

In addition to women who experienced sexual and gender-based violence during the war, women suffering from the effects of Agent Orange have yet to see justice. A majority of the prevailing efforts toward justice have been provided solely to U.S. veterans of the war. In 1984, U.S. veterans won a class action case against the chemical companies and settled out-of-court in 1984 for $180 million, and Congress has subsequently appropriated more than 13 billion dollars to Americans affected by dioxin as a result of the war.[105] For Vietnamese, U.S. federal courts have dismissed all suits.[106] Most cases were dismissed on the grounds that there was not a connection to disabilities and Agent Orange, failing to state a claim under international law, or simply being barred from suing the government based on sovereign immunity.[107] Since the litigation, the U.S. Congress has appropriated about 390 million dollars towards environmental clean-up in Vietnam, but there remains a gap in available funding available to victims already suffering from the effects of exposure.

In France, there have been additional efforts at justice for Vietnamese. In recent years, Trần Tố Nga, brought a claim in a French court against fourteen multinationals who made and sold Agent Orange.[108] She sought damages in recognition of her and her children's health problems, and also to broadly open the gate for the nearly 6,000 Vietnamese children born with congenital disabilities each year caused by Agent Orange exposure.[109] The trial court ruled that the court had no jurisdiction over the wartime actions of the U.S. military; however, Tran has appealed the case in hopes to bring justice for victims.[110] These efforts, and the lack of justice stemming from the efforts, demonstrate that both offending states have avoided recognizing the impact of sexual and gender based violence that occurred during the war.

B. Pathways Forward & Recommendations for Justice

Under international humanitarian law and international customary law, the United States and South Korea have failed to reconcile the wrongs committed by their militaries during the Vietnam-American War against Vietnamese women. State practice and international customary law mandate the right to a remedy

Massacres Korean Soldiers Perpetuated During Vietnam War, HankYoreh (Mar. 26, 2021), http://english.hani.co.kr/arti/english_edition/e_national/988399.html.

101 *See id*.

102 *See id*.

103 *See* Griffin, *supra* note 45.

104 *See* Taylor, *supra* note 5.

105 *See* Charles Dunst, *The U.S.'s Toxic Agent Orange Legacy*, Atlantic (July 20, 2019), https://www.theatlantic.com/international/archive/2019/07/agent-orange-cambodia-laos-vietnam/591412/.

106 Most suits were brought under the Alien Torts Statute on behalf of the Vietnamese Association for Victims of Agent Orange filed under the Alien Torts Statute. *See* Sim, *supra* note 59; Anthea Roberts, *Vietnam Ass'n for Victims of Agent Orange/Dixon v. Dow Chemical Co*., 99 AM. Soc'y Int'l. L. Proc. 380 (2005); *see also* Marth Graybow, *Court Upholds Dismissal of "Agent Orange" Suit*, Reuters, (Feb. 25, 2008), https://www.reuters.com/article/us-agentorange-lawsuit/court-upholds-dismissal-of-agent-orange-suit-idUSN2257383520080225.

107 *See* Roberts *supra* note 106, at 381.

108 *French Court Hears Agent Orange Case Against Chemical Firms*, Courthouse News Serv. (Jan. 25, 2021), https://www.courthousenews.com/french-court-hears-agent-orange-case-against-chemical-firms/#:~:text=A%20French%20court%20will%20on,effect%20in%20the%20Vietnam%20War.

109 Charles Pierce, *Agent Orange Won't Go Away—In Vietnam, or the Courts*, Esquire (Jan. 25, 2021), https://www.esquire.com/news-politics/politics/a35307904/agent-orange-manufacturers-lawsuit-monsanto/.

110 *See* Fourth Geneva Convention *supra* note 67, art. 14.

when gross violations of international humanitarian law have been committed. Article 146 of the Fourth Geneva Convention of 1949 implies that neither state can absolve themselves from liability that is incurred.[111] This is also supported by the Article 34 of the Draft Articles of State Responsibility, which provides Vietnam the power to vindicate their citizens' rights by seeking reparations for the harmed women.[112] Additionally, the UNGA has declared through Resolution 60/147 on the Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights and Humanitarian law, that a violation of international humanitarian law must be remedied by "adequate, effective and prompt" action, and it must seek to include an "accurate account of the violations that occurred."[113] However, given intricacies surrounding the Vietnam government's general avoidance of unearthing history and focus on bilateral relations, it is unlikely that the Vietnamese government would resort to international mechanisms of reparations for victims of these atrocities. In both the United States and South Korea, a lack of political will to criminally prosecute military personnel is likely to prevent efforts at individual criminal liability. Thus, the most effective and survivor-centered approach toward addressing these atrocities against women would be to establish a combination of a truth commission as well as subsequent individual and community reparations.

Reparations would serve as emblematic of both state's legal obligation to reconcile the wrongs of their international humanitarian law violations, and as an acknowledgement to the global community that these atrocities will not happen again.[114] Reparations coupled with a truth commission by each state would provide survivors a platform to express the systematic effects that sexual and gender-based violence and Agent Orange exposure has had on their life.

1. Reparations from South Korea

While South Korean organizations have made strides to provide a space for victims to testify about their experiences, the efforts thus far have lacked an emphasis on the Vietnamese women who experienced sexual, and gender based violence as a result of the South Korean troops. Similar to what South Korea asked from the Japanese government for the widescale sexual violence and sexual enslavement of South Korean women during WWII, South Korea must provide reparations to Vietnamese women for the atrocities its soldiers committed against Vietnamese women during the war.[115] To do so, the South Korean government must actively work with Vietnam to investigate the individuals harmed and provide reparations to those whose children endured trauma throughout their life as a result of the abuse. South Korea must also provide community reparations to areas where their troops were once stationed and committed atrocities—specifically in Central Vietnam—as this is where some of the poorest provinces in Vietnam remain today. These community reparations should pertain to ensuring that these provinces get access to reproductive health clinics, funding for children's education, the memorialization of atrocities, and have a formalized apology to Vietnamese women.

In addition to reparations, South Korea should also establish a truth and reconciliation commission. Vietnamese women would be provided a space to air their grievances and discuss their life's suffering caused by the sexual and gender-based violence. This principle ensures that South Korea is made aware of the breadth of acts that took place during the war—something the South Korean government has yet to acknowledge. Furthermore, the South Korean government would be forced to confront its military past, and the continual

111 *See* Fourth Geneva Convention, *supra* note 67, art 146.
112 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), art. 34, November 2001 (providing that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination").
113 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, UN GAOR, 60th sess, 64 plen mtg, Agenda Item 71(a), Supp No 49, UN Doc A/RES/60/147 (21 March 2006) annex paras 15-16.
114 *Reparations*, Int'l Cent. Transitional Just., https://www.ictj.org/our-work/transitional-justice-issues/reparations (last visited Nov 6, 2021).
115 *See* David, *supra* note 3.

cover up of the historical atrocities.

2. Reparations from the United States

The United States must provide reparations for both the countless victims of sexual and gender-based violence and the victims of Agent Orange. By establishing a truth and reconciliation commission for those who have experienced sexual and gender-based violence, the United States military would be presented with reconciling its own deep cycles of sexual and gender-based violence—both in wars, and for women serving in the military. Moreover, for countless Vietnamese women, a truth and reconciliation commission would be an opportunity to express decades worth of pain and suffering that they have potentially been unable to express in Vietnamese society or in diaspora communities. Like South Korea, the United States would be able to approach the systematic causes that led to the widescale violence. It could do so by providing reparations through compensation and funding to organizations. The reparations could work to combat ongoing issues with sexual and gender-based violence in Vietnamese society, as well as the current issues surrounding reproductive health services in Vietnam. The United States should provide individual reparations to victims, and also intentionally provide reparations to communities in Vietnam who suffer from the systematic gender inequality.

With respect to Agent Orange victims, the United States must take drastic steps to identify a strategic reparation plan and clean up the remaining hotspots in Vietnam, instead of focusing on just a few of the majorly contaminated areas. Additionally, reparations should be provided on an individual basis, as was provided to U.S. veterans through settlements and through U.S. Department of Veterans Affairs. Reparations should be provided to women who suffer from the reproductive health issues as a result of dioxin exposure, as well as their children. These types of reparations should compensate individuals for the hardships they have endured. The reparations would be meaningful in providing education and proper healthcare to women's children—something most children with disabilities are unable to obtain in the current Vietnamese system. There are several communities in Vietnam that notoriously have high rates of children affected. To remedy this, the United States could provide reparations through creating health clinics by providing disability resources such as wheelchairs, and proper technical equipment to these families.

IV. Conclusion

The impact of the Vietnam-American war continues to be felt by the Vietnamese people; particularly women, as the injustices committed during the war have yet to be fully addressed. The use of sexual- and gender-based violence by the United States and South Korea against Vietnamese women constitutes a grave violation of international humanitarian law. Additionally, the use of Agent Orange by the United States resulted in violations of established international customary and customary law, causing significant harm to the Vietnamese people; particularly Vietnamese women. The harm caused by these actions has not diminished and the legal responsibility to address and rectify these wrongs persists. Reparations for these injustices have the potential to bring about healing for Vietnamese women and bring closure to the ongoing legacy of the Vietnam-American war.

Unwinding "Law And Order": How Second Look Mechanisms Resist Mass Incarceration and Increase Justice

by Destiny Fullwood and Cecilia Bruni***

I. Introduction

For decades, the United States has used incarceration to achieve a particularized version of safety. Amidst the civil rights movement, presidential candidate Barry Goldwater wielded the phrase "law and order"[1] against the masses of Black men, women, and children in their fight for equitable treatment.[2] This came at a time when "[i]t was no longer socially permissible for polite White people to say they opposed equal rights for Black Americans. Instead, they began 'talking about the urban uprisings'" and "attaching [those] to street crime, to ordinary lawlessness[.]"[3] The result was a decades-long, persistent campaign to maintain order by arresting and incarcerating communities of color and people experiencing poverty.

The United States, as one of the largest incarcerators in the world, contributed to wide-spread family separation, wealth inequality, and generational trauma for many communities. Despite these traumas, oppressed communities remained resilient. The life and redemptive journey of Colie Levar Long exemplifies this struggle and resilience.

Colie Levar Long was born in Washington, D.C. after his parents, former sharecroppers, moved to the North during the last years of the Great Migration.[4] Although Colie was raised in a typical nuclear family, lengthy prison sentences had affected generations of his family, reaching back to his grandfather who was arrested and imprisoned in South Carolina for a crime he did not commit. Colie grew up witnessing the path many of the men in his family walked, cycling between the community and prison, while he lost decades with many of them. This cycle continued until, at 18, Colie was arrested and sentenced to serve life in prison without the possibility of parole.

Colie spent many years entrenched in the prison milieu — a place of extreme violence, lacking proper medical and mental health care and rehabilitative programming. As he aged, he began to take advantage of what little reading material he was afforded. While

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1 *See* Beth Schwartzapfel, *What Trump Really Means When He Tweets 'Law & Order!!!'*, The Marshall Project (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order ("Law and order" is a term that United States' politicians historically and repeatedly use to covertly call for increased criminalization and incarceration of people of color and people experiencing poverty, particularly Black Americans).

2 Schwartzapfel, *supra* note 1.

3 *Id.* (quoting Vesla Weaver, political scientist at John's Hopkins University).

4 Amanda Onion, et al., *The Great Migration*, History.com (Aug. 30, 2022), https://www.history.com/topics/black-history/great-migration ("The Great Migration was the relocation of more than 6 million Black Americans from the rural South to the cities in the North, Midwest and West from about 1916 to 1970").

reading, Colie experienced a paradigm shift; he became determined to end the cycle with him.[5]

Colie chose to live his life differently after that moment, and on July 28, 2022, Colie was released from his life sentence and allowed to return to the community. At age 45, he is now a student at Georgetown University and expects to graduate with a bachelor's degree in liberal arts in 2025. Colie is also a Program Associate at Georgetown's Prison and Justice Initiative[6] and the Justice Reform Fellow with Families Against Mandatory Minimums.[7] Colie's story epitomizes the resilience and self-determination of many incarcerated people, and his release and subsequent successes exemplify why Americans should support disenfranchised communities with systemic reforms like sentence review ("second look") mechanisms.

This Article uses the District of Columbia's Incarceration Reduction Amendment Act ("IRAA") and legislation expanding IRAA to discuss the critical need for second look mechanisms, which combat mass incarceration by providing individuals serving lengthy sentences with meaningful opportunities to return home. Part II provides background on the history of mass incarceration, the harm it and lengthy sentences cause, and the legal framework that led to the passage of IRAA and its progeny. Using these laws as a backdrop, Part III analyzes the impact of second look mechanisms, explains the importance of continuing to expand second look laws nationwide, and provides practical considerations for jurisdictions enacting these types of laws. Part IV concludes the Article.

II. Background

A. The Rise of Mass Incarceration in the United States

Between 1972 and 2009, the United States' prison population grew by an average of 5.8 percent each year, with people of color, particularly Black men, disproportionately incarcerated.8 In the 1960s and 1970s, politicians spanning the political spectrum seized on "law and order" rhetoric, advocating for and "enacting harsh, punitive, and retributively oriented policies as a solution to rising crime rates."[9] In no coincidence, this rise in incarceration of Black Americans followed closely on the heels of the civil rights movement. In the wake of the progress that Black Americans had achieved through the civil rights movement, politicians, who were historically and predominantly white, tied increased crime rates explicitly and implicitly to the Black community and urban centers where the community most frequently resided.[10] A recession in the 1970s exacerbated this issue, leaving many Black families—and Black men in particular—living in urban spaces, unemployed, and experiencing poverty.[11] Since the 1970s, legislators, executives, and judges have relied on incarceration and lengthy sentences—defined here as 10 years or more—as the premiere means to decrease crime and increase public safety, even though the continued overreliance on incarceration

5 For more on the beginning of Colie's transformation: Colie Levar Long, *I Will Not Be Broken*, More Than Our Crimes (Feb. 9, 2021), https://morethanourcrimes.medium.com/i-will-not-be-broken-27a9ea1f59.
6 *Colie 'Shaka' Long*, Geo. U.: Prisons & Just. Initiative, https://prisonsandjustice.georgetown.edu/people/colie-shaka-long/ (last visited Apr. 23, 2023).
7 Press Release, FAMM, FAMM welcomes Colie Levar Long as Justice Reform Fellow (Aug. 19, 2022), https://famm.org/famm-welcomes-colie-levar-long-as-justice-reform-fellow/.
8 Nazgol Ghandnoosh, Ph.D., *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, The Sent'g Project (Feb. 8, 2023), https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/.
9 Ruth Delaney et al., *American History, Race, and Prison*, Vera Inst. of Just. (Oct. 2018), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison.
10 *Id.* (Presidents Johnson and Nixon included wars on crime in urban settings in their policies and platforms); *see also* James Cullen, *The History of Mass Incarceration*, Brennan Ctr. For Just. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration ("But the prison population truly exploded during President Ronald Reagan's administration. When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000.").
11 Delaney et al., *supra* note 9.

and lengthy sentences has not achieved either goal.[12] Through these policies, the 200,000-person state and federal prison population in 1970 increased eight-fold to 1.6 million in 2008.[13] Today, although nearly 50 years have passed since incarceration became the priority of the American criminal legal system, the United States is still a leading incarcerator[14] with nearly two million people in prisons and jail[15] and 3.9 million people living under community supervision as of 2021.[16] This is all in the purported name of public safety.[17]

B. Mass Incarceration and Lengthy Sentences Cause Harm

Research shows that mass incarceration does not increase public safety.[18] Instead, it seriously harms the incarcerated, their families, and their communities by removing parents from their children, children from their families, and neighbors from their communities. Beyond this physical familial separation, an incarcerated person often loses income[19] and educational opportunities and experiences future barriers to employment, housing instability,[20] and impediments to or blanket exclusion from voting and civic participation.[21]

These and other collateral consequences of mass incarceration also harm the families and communities of incarcerated people. In particular, the historical rise in incarceration of Black men (and Black women and Latino people on a smaller scale) has caused generations of individuals to be removed from their communities,[22] locking financial providers, parents, partners, employees, and other valuable community members

12 In a Brennan Center study on the effect of increased incarceration on crime from 1980 to 2013, researchers determined that "[s]ince approximately 1990, the effectiveness of increased incarceration on bringing down crime has been essentially zero." Dr. Oliver Roeder, Lauren-Brooke Eisen, & Julia Bowling, *What Caused the Crime Decline?*, Brennan Ctr. For Just., 23 (2015), https://www.brennancenter.org/our-work/research-reports/. The researchers noted that some marginal decrease in property crimes in the 1990s could be attributed to increased incarceration, but that reductions in violent crime were not attributable to increased incarceration. *Id.* at 23–24. Citing empirical studies, researchers noted that "longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes." *Id.* at 26.

13 Delaney et al., *supra* note 9.

14 *Highest to Lowest – Prison Population Total*, World Prison Brief, _https://www.prisonstudies.org/highest-to-lowest/prison-populationtotal?field_region_taxonomy_tid=All (last visited Feb. 23, 2023).

15 Ashley Nellis, *Mass Incarceration Trends*, The Sent'g Project (Jan. 25, 2023), https://www.sentencingproject.org/reports/mass-incarceration-trends/.

16 Danielle Kaeble, *Probation and Parole in the United States, 2020*, Bureau of Just. Stat. (Dec. 2021), https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2020.

17 All too often, this reliance panders to the white and the wealthy, people who have incorrectly learned from politicians and media that crime is frequently on the rise and that harsher punishment corresponds with decreased crime, even where evidence of neither exists. See Martin Nelson, Samuel Feineh & Maris Mapolski, A New Paradigm for Sentencing in the United States 19 (Feb. 2023), https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf (noting that "public perception about crime [remains] out of sync with actual crime rates" and that the "purported safety" delivered by mass incarceration caters to "a select subset of U.S. communities that are predominantly white and wealthy"); see also Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

18 For a thorough discussion of why mass incarceration does not contribute to lower crime rates or increased public safety, *see* Nelson, Feineh, & Mapolski, *supra* note 17, at 23–31; *see also* Todd R. Clear, *The Impacts of Incarceration on Public Safety*, 74 Soc. Res. 613 (2007).

19 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, Prison Pol'y Initiative (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html#community ("The criminal justice system punishes poverty, beginning with the high price of money bail: The median felony bail bond amount ($10,000) is the equivalent of 8 months' income for the typical detained defendant. As a result, people with low incomes are more likely to face the harms of pretrial detention. Poverty is not only a predictor of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison destroys wealth, creates debt, and decimates job opportunities.").

20 *See* Am. Bar Ass'n, Collateral Consequences of Criminal Convictions: Judicial Bench Book 4–7 (Mar. 2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf.

21 *See* Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, The Sent'g Project (Oct. 25, 2022), https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/. For additional potential consequences of incarceration, see Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, Nat'l Inst. of Just. 25, 26 (Sept. 2013).

22 *See* Delaney, *supra* note 9 ("The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women.").

behind bars.[23] As of 2018, approximately 113 million adults in America had an immediate family member who has experienced some form of incarceration, and one in 34 adults have lost or will lose a decade or longer with an immediate family member due to incarceration.[24] The impact on Black families is particularly severe: "63 percent [of B]lack adults have had an immediate family member incarcerated and nearly one third (31 percent) have had an immediate family member incarcerated for more than one year."[25] Families of the incarcerated deal with a myriad of financial burdens: they must pay court fines and fees, they often lose a source of income or child support, and, if they want to maintain contact with their incarcerated loved one, face expenses in doing so.[26] Children of incarcerated parents frequently experience depression, anxiety, and emotional distress, and both children and parents of the incarcerated experience an increased risk of medical issues like obesity and diabetes.[27]

All this harm and more befalls those who serve lengthy sentences. The longer a person is incarcerated, the more impactful the separation from their communities, families, and society is, and the more difficult reentering their community becomes. Those who have served at least a decade in prison return to a community that has changed drastically, making it difficult to navigate social reconnections, employment opportunities, technology, and more. Long-term incarceration can also have lasting physical[28] and mental health consequences.[29]

The majority of people serving lengthy sentences in the United States are incarcerated for serious violent offenses.[30] But boiling down the identities of people who have committed violent crimes to their worst mistakes creates a culture of fear around their release, one that is often unwarranted. Data reveals that one act or a series of acts from the past does not predict the future.[31] Those arrested for violent crimes are often young,[32] and the widely-accepted age-crime curve demonstrates that young people most often age out of criminal activity.[33] Without question, victims of these violent crimes have experienced serious harm, but a 2022 survey of crime victims shows that most of these victims do not see longer sentences and harsher punishments as the best means to decrease crime and increase public safety.[34] Focusing solely on a person's crime and not their capacity for reformation also belies courts' disparate use of lengthy sentences for Black men,[35] and increasingly, women.[36] Decreasing the number of people serving lengthy sentences, therefore, is a racial justice issue, a

23 Nelson, Feineh & Mapolski, *supra* note 17, at 28; *see also* Clear, *supra* note 18, at 621 ("High imprisonment rates disturb social networks and occupy the resources that could otherwise be used to strengthen them.").
24 Brian Elderbroom et al., Every Second The Impact of the Incarceration Crisis on America's Families, 24, 26 (Dec. 2018), https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf.
25 *Id.* at 29.
26 *Id.* at 35–36, 38.
27 *Id.* at 37.
28 Ashley Nellis, *No End In Sight: America's Enduring Reliance on Life Sentences*, The Sent'g Project, 26 (Feb. 17, 2021) https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/ (discussing how living in prison accelerates aging, with accompanying medical conditions like hypertension, cancer, and dementia occurring sooner among prisoners than among the general public).
29 Katie Rose Quandt, *Research Roundup: Incarceration can cause lasting damage to mental health*, Prison Pol'y Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ ("The carceral environment can be inherently damaging to mental health by removing people from society and eliminating meaning and purpose from their lives. On top of that, the appalling conditions common in prisons and jails — such as overcrowding, solitary confinement, and routine exposure to violence — can have further negative effects.").
30 Nellis, No End In Sight, supra note 28, at 22.
31 *See id.* at 27–28 ("U.S. Bureau of Justice Statistics data reveal that 98% of persons released from prison after serving time for a homicide conviction are not arrested for another homicide. Just as encouraging, this analysis shows that people released from prison who were originally convicted of homicide are less likely than other released prisoners to be rearrested for a violent crime").
32 *See* Nelson et al., *supra* note 17, at 26.
33 Laurence Steinberg, Elizabeth Cauffman & Kathryn C. Monaham, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, Off. of Juv. Just. & Delinq. Prevention, Juv. Just. Bull. (U.S. Dep't of Just.), 1, 9 (Mar. 2015), https://ojjdp.ojp.gov/library/publications/psychosocial-maturity-and-desistance-crime-sample-serious-juvenile-offenders.
34 Alliance for Safety & Just., Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice 26, 28, 36 (Sept. 2022), https://allianceforsafetyandjustice.org/wp-content/uploads/2022/09/Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf.
35 Nazgol Ghandnoosh & Ashley Nellis, How Many People Are Spending Over a Decade in Prison 7 (Sept. 2022), https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf.
36 Nellis, *No End In Sight*, *supra* note 28, at 18.

feminist issue, and a human rights issue.

C. The History of the Incarceration Reduction Amendment Act

In the 21st century, as neuroscience advanced and public opinion on lengthy sentences and mass incarceration began to shift, so too did the law. Most impactfully, the United States Supreme Court analyzed childhood brain development with respect to juvenile incarceration. Between 2005 and 2016, the Court concluded in a series of cases that "children are constitutionally different than adults for purposes of sentencing."[37] This lineage of cases, on which IRAA is based, acknowledged that developments in neuroscience showed "fundamental differences between juvenile and adult minds."[38] This brain development accounts for the difficulty young people experience in weighing consequences and resisting peer pressure prior to reaching the stage of psychological maturity.[39] Research confirms that an adolescent's greater potential for rehabilitation is a result of this continued development and means that "[t]he vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transition to adulthood."[40]

In response to Supreme Court precedent and the supporting science, the D.C. Council[41] ("Council") passed—and has since continued to expand—a sentence review mechanism titled the "Incarceration Reduction Amendment Act" passed in 2017.[42] The Council crafted IRAA and its subsequent amendments to ensure that adolescents and young adults are treated differently in the District's criminal legal system.

The first iteration of IRAA banned life without parole and eliminated mandatory minimum sentences for juveniles,[43] while also creating a sentence reduction mechanism for juveniles serving lengthy sentences.[44] Since 2017, the Council has continued to expand eligibility for sentence reductions to its incarcerated population in accordance with developments in neuroscience. Most recently, through the Second Look Amendment Act,[45] the Council expanded eligibility to people who were under age 25 at the time of their offense and who have spent 15 years or more in prison. The Council expanded the law in recognition of the extreme racial disparities[46] and significant economic cost of mass incarceration and the fact "that as we have increased the length of prison sentences and limited the ability to obtain release, our prisons have become overwhelmed with people whose current conduct proves further incarceration is not in the public interest."[47]

IRAA focuses on rehabilitation and community safety instead of punishment for the sake of punishment. Given what we now know about psychological maturation and the concomitant ability for young people to

37 *Montgomery v. Louisiana*, 577 U.S. 190, 206–07 (2016) (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) & *Graham v. Florida*, 560 U.S. 48, 68 (2010))). In these cases, the Court has found that (1) "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking"; (2) "children 'are more vulnerable . . . to negative influences and outside pressures,' … they have limited 'control over their own environment[,]' and lack the ability to extricate themselves from horrific, crime-producing settings;" and (3) "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Miller*, 567 U.S. at 471 (quoting *Roper v. Simmons*, 543 U.S. at 569-570). As a result, the Court has held that the Eighth Amendment's ban on cruel and unusual punishment prohibits the death penalty for people who were under eighteen at the time of the offense, *Roper*, 543 U.S. at 568; prohibits life without parole for non-homicide offenses committed by children under eighteen, *Graham*, 560 U.S. at 74; and prohibits life without parole in homicide cases for "all but the rarest of children, those whose crimes reflect 'irreparable corruption,'" *Montgomery*, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479-480).

38 *Graham*, 560 U.S. at 68 (2010).

39 D.C. Council Rep. on B. 21-0683 at 3–4 (October 5, 2016) (citing Johnson et al., *supra* note 10; Steinberg, *supra* note 33).

40 Steinberg, et al., *Psychosocial Maturity and Desistance From Crime*, *supra* note 33, at 1.

41 The D.C. Council is the District of Columbia's legislative body and operates akin to a state's legislature.

42 D.C. Code § 24-403.01.

43 *Id.* § 24-403.01(c)(2).

44 *Id.* § 24-403.03.

45 *Id.*

46 D.C. Council Comm. Rep., *supra* note 39, at 11 ("Black men ages 18 to 19 were twelve times as likely to be imprisoned as white men of the same age.").

47 *Id.* at 12 (quoting Ben Miller and Daniel S. Harawa, *Why America Needs to Break Its Addiction to Long Prison Sentences*, Politico (Sept. 3, 2019)).

change and grow, IRAA tasks judges with evaluating evidence of an individual's change and rehabilitation, "despite the brutality or cold-blooded nature of any particular crime,"[48] to answer two over-arching questions: (1) is the petitioner a danger to any person or the community, and (2) do the interests of justice warrant a sentence reduction? If the answers to those questions are "yes," the judge *must* reduce the petitioner's sentence.[49] A sentence reduction in these cases most often results in immediate release, as the statute contemplates questions of current safety and rehabilitation. This recognition of the trademarks of youth and the human capacity for change provides individual motivation for the incarcerated and increases safety for all.

III. Analysis

A. Second Look Mechanisms Increase Hope, Incentivize Personal Transformation, and Increase Racial Justice

Second look mechanisms increase safety both within prisons and throughout free communities through the cultivation of hope. By creating the opportunity for release, these second look mechanisms give incarcerated people permission to dream of a future free from violence, despair, and captivity. For decades, theorists spanning several disciplines have come to similar conclusions, linking hope to resilience and recovery, and finding that hope provides people with the motivation to persevere in the face of adversity.[50] Research shows "hope's strong empirical association with other variables of well-being, such as greater life satisfaction, more self-worth, more meaning to life, and less overall dysphoria."[51]

Second look mechanisms also provide incarcerated people with a "locus of control," or the ability to perceive that a person has control over their future.[52] This locus of control is frequently linked to resilience, "as the more internal control an individual perceives over [their life], the more [they] will approach adverse situations in a determined, calm, and mentally healthy manner."[53] Hope, combined with the perception of some level of self-determination, incentivizes incarcerated people to engage in pro-social and rehabilitative activities like education and programming. These activities will allow them to pursue sustainable and fulfilling employment upon release, explore their interests, and find their passions. Fueled by feelings of hope and self-determination, incarcerated people are empowered to reconnect with their families and communities, to mentor and guide young people away from a path to prison, and to avoid violence and increase peace within their institutions, helping members of their community who are not yet free. Second look mechanisms help foster safety by igniting a light within incarcerated people that has the potential to shine far and wide into their communities both captive and free.

B. Alternative Release Mechanisms like Parole are Ineffective or Nonexistent

Second look mechanisms may seem redundant to alternative release mechanisms like parole and executive clemency, but these systems do not exist in every jurisdiction. Even where they do, they are often inconsistent in implementation and focus on an individual's original offense and the political implications of granting relief over the applicant's growth and rehabilitation.[54]

For example, although in D.C. the system of parole has been abolished, individuals who were sentenced for D.C. Code offenses under the old indeterminate sentencing scheme are still eligible for parole.[55] They now go before the United States Parole Commission ("USPC"), a federal commission whose members are not representatives of D.C. residents[56] and who are not required to have any prior background in the criminal legal system.[57] Parole examiners from the USPC operate with a great deal of discretion when determin-

48 D.C. Code § 24-403.03(c) (10).
49 *Id.* § 24-403.03.
50 Ricky T. Munoz, Shane R. Brady & Vanessa Brown, *The Psychology of Resilience: A Model of the Relationship of Locus of Control to Hope Among Survivors of Intimate Partner Violence*, 23 Traumatology 2 (2016).
51 *Id.*
52 *Id.*
53 *Id.*
54 Nellis, *supra* note 28, at 29.
55 Sophia Browning, *Three Ring Circus: How Three Iterations of D.C. Parole Policy Have Up to Tripled the Intended Sentence for D.C. Code Offenders*, 14 Geo. J. L. & Pub. Pol'y 577, 584 (2016).
56 *See id.* at 584–85.
57 *See* Eleanor Holmes Norton, *Apply for U.S. Parole Commission*, https://norton.house.gov/apply-for-us-parole-commission (last visited Feb. 17, 2023).

ing whether a D.C. parole applicant should be granted parole. Even where someone qualifies for presumptive release under the applicable parole guidelines, an individual parole examiner may choose not to follow those guidelines, oftentimes ignoring a person's rehabilitative journey and giving unnecessary weight to the nature of the underlying offense.[58] Moreover, incarcerated District residents frequently appear before the USPC without the safeguards of any representation.[59] D.C.'s parole system illustrates some of the issues with alternative release systems and the different and more just function that second look mechanisms can serve, but some practical considerations remain for jurisdictions hoping to pass a second look mechanism.

C. Practical Considerations for the Expansion of Second Look

1. Prosecutor buy-in has the potential to create increased equitable results and lower the burden on courts.

In practice, the implementation of IRAA has been successful, though some roadblocks to its robust implementation remain. Because IRAA focuses on rehabilitation, not punishment, it requires neutral arbiters (D.C. Superior Court judges), rather than members of commissions or the executive branch, to determine whether a petitioner has demonstrated readiness for release.[60] In many cases, judges have seriously weighed IRAA factors, focusing on rehabilitation and public safety, and released adults who have thoroughly demonstrated that they are non-dangerous after decades in prison. Misconceptions about the propensity of people who have committed serious offenses to commit those same offenses upon release, however, have impacted the Court's ability to efficiently decide these cases. For example, from the inception of IRAA, the United States Attorney's Office followed a practice of near universal opposition to these petitions,[61] a position that resulted in greater burdens on the court system, as petitioners clearly ready for release were required to litigate their cases fully prior to release. Prosecutor buy-in to review of extreme sentences could alleviate these burdens on courts, petitioners, and defense counsel, as it has in other jurisdictions.[62] Therefore, the creation of sentence review units in prosecutor offices, alongside the passage of second look legislation could result in the most efficient and just implementation of second look mechanisms.[63]

2. Legislators should emphasize that consideration of the underlying offense in any material way contravenes Supreme Court precedent and supporting neuroscience.

Additionally, jurisdictions enacting similar second look legislation should consider clarifying the degree to which courts are permitted to consider the nature of the underlying offense in their decisions. Although most individuals who will qualify for a second look have been convicted of serious offenses, legislators should focus on the data that demonstrates that recidivism rates for these types of crimes are lower than their non-violent counterparts,[64] and individuals frequently age out of criminal activity.[65] As such, the nature of the underlying offense is not relevant to a person's current dangerousness and ability to be safely released. Instead, the foundation of community safety is built upon psychosocial maturation and age. Without clearly drawing

58 Browning, *supra* note 55, at 591.
59 *Id.* at 580.
60 Notably, D.C. is unique compared other jurisdictions because its trial level judges are appointed, rather than elected, and therefore, these judges may have less political pressure impacting their decisions in these cases.
61 Letter from D.C. Councilmember Charles Allen to United States Attorney Jessie K. Liu (March 11, 2019).
62 Jurisdictions including Maryland and Pennsylvania have implemented these types of units. *See Sentencing Review Unit*, Off. of the State's Att'y for Baltimore City, https://www.stattorney.org/office/bureaus-units/sentencing-review (last visited Feb. 17, 2023); *Conviction Integrity Unit*, Philadelphia Dist. Attorney's Off., https://phillyda.org/safety-and-justice/investigations/conviction-integrity-unit-ciu/ (last visited Feb. 17, 2023).
63 *Id.*
64 J.J. Prescott, Benjamin Pyle & Sonia B. Starr, *Understanding Violent Crime Recidivism*, 95:4 Notre Dame L. Rev. 1643, 1668 (2020) (citing James Austin et al., Square One Project, Reconsidering the "Violent Offender" 2, 23-24 (2019) ("[P]eople who have perpetuated violence . . . have relatively low rates of recidivism . . . . The recidivism rates among those incarcerated for violent offenses are lower than those incarcerated for other offenses.").
65 Studies also show that recidivism rates for people who are now decades older than they were at the time of their offense (even for the most serious offenses), are extremely low. Ghandnoosh & Nellis, *supra* note 35, (citing United States Sentencing Commission, "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment," May 2014).

the link between maturation and recidivism, legislators leave open the potential for second look decision makers to choose not to release a person due to the violent or sexual nature of an underlying offense, despite that petitioner's rehabilitation and lack of present dangerousness. Materially considering the nature of the offense misunderstands brain science and empirical data and instead relies on biases and emotions—two things that have no place in the legal field.

3. Community-based reentry support is a critical companion to the passage and implementation of second look mechanisms.

Jurisdictions attempting to pass or implement second look mechanisms should not contemplate them in a vacuum, but rather recognize and support the diverse needs of citizens returning to their communities after a decade or more behind bars. Although jurisdictions often have some form of reentry support in place for individuals released from jails and prisons, support specifically catered to those who have served lengthy sentences is important to ensure their success in the community. As noted above, individuals coming home from lengthy sentences have exacerbated needs compared to citizens returning after shorter sentences.[66] For example, after serving a long sentence, individuals are unlikely to have identification documents, financial stability, credit history, independent housing, or immediate employment offers. They are likely to struggle reintegrating socially (particularly if they have lost contact with family and friends), navigating transportation, becoming financially independent, and using technology.[67] Reentry organizations can and should be poised to meet these needs. In the wake of IRAA's passage, D.C. reentry service providers developed programs specifically catered to IRAA grantees, created peer support groups for IRAA recipients, and dedicated certain funds directly to supporting these individuals.[68] But in D.C., the lack of transitional or supportive housing for individuals and the high cost of independent housing[69] have created a challenge for attorneys and clients in planning for their reentry. Creating, funding, and preserving transitional and supportive housing specifically for returning citizens, alongside other reentry supports, should thus be a priority of jurisdictions passing second look mechanisms. In particular, supportive housing for returning citizens with mental health challenges and disabilities is important, as these individuals are disproportionately incarcerated, but less likely to be able to fully access supportive services upon release.[70] Additionally, to best facilitate reentry, prisons should treat those petitioning for second look relief as having upcoming release dates, so that these individuals may benefit from the reentry programming offered during their incarceration and become connected to reentry organizations and job opportunities before release.[71]

66 *See infra* Section II. B.

67 *See Voices for Reform in DC: Recommendations for improving reentry following long prison terms*, Just. Pol'y Inst., 2, 3–4 (July 2021), https://justicepolicy.org/wp-content/uploads/2021/07/Voices-for-Reform-in-DC-2021.pdf.

68 For example, the Mayor's Office on Returning Citizen Affairs offers case management services specialized for IRAA grantees and Free Minds Book Club & Writing Workshop hosts a biweekly virtual support group for IRAA grantees.

69 *See* Housing for Criminal Justice Involved Individuals in the District of Columbia, Criminal Just. Coordinating Council 1, 19 (Feb. 2020), https://web.archive.org/web/20220513005605/https:/cjcc.dc.gov/sites/default/files/dc/sites/cjcc/Housing%20for%20criminal%20justice%202020.pdf ("[D]ue to an oversaturated public housing market and a lack of private housing options, there is a severe shortage of housing options for returning citizens both nationwide and in the District."). Additionally, in an issue that is perhaps unique to the District, supervision has not evolved with the continually rising housing prices which have driven many returning citizens' families into nearby Maryland or Virginia where prices are more reasonable. Those who are incarcerated for D.C. Code offenses are required to reside in D.C. immediately upon release, even if they have stable housing available with a family member just over the District border in Maryland or Virginia.

70 Approximately 43 percent of individuals in state prisons report having been diagnosed with a mental health disorder. Leah Wang, *Chronic Punishment: The unmet health needs of people in state prisons*, Prison Pol'y Initiative (June 2022), https://www.prisonpolicy.org/reports/chronicpunishment.html#mentalhealth. Additionally, according to the Bureau of Justice Statistics, based on self-report, nearly 40 percent of incarcerated people reported having some form of a disability as of 2016. *See* Laura M. Maruschak, Jennifer Bronson, & Mariel Alper, *Disabilities Reported by Prisoners*, U.S. Dep't of Just. Bureau of Just. Stat., 1 (March 2021).

71 *See* Housing for Criminal Justice Involved Individuals in the District of Columbia, *supra* note 69, at 3 ("In many state prisons, months prior to release, returning citizens are connected with social services organizations and potential employers, have opportunities to attend job fairs, and even receive assistance with building their resume.").

IV. Conclusion

For over half a century, the United States has over-incarcerated its citizens in the name of public safety, without returns. After decades of mass incarceration's harm, second look mechanisms have the power to restore some justice, hope, and control to communities of color and people experiencing poverty, especially Black communities. These mechanisms recognize that people are so much more than their worst act, and that human beings are capable of reformation and transformation. Colie's story is a prime example. Instead of relying on disenfranchised communities to lift themselves up out of trenches dug by decades of trauma linked to mass arrests and lengthy sentences, it is imperative that lawmakers acknowledge the advancements in neuroscience and the wealth of empirical data that make clear that this country can both atone for its past harms and create a safe future for all.

The International Criminal Court's Arbitrary Exercise of Its Duties Under the Rome Statute to the Benefit of Western Global Supremacy

by Azadeh Shahshahani and Sofía Verónica Montez***

I. Introduction.

A. The International Criminal Court and the Rome Statute.

The International Criminal Court (ICC) is a constituent institution of the United Nations (UN) that investigates and prosecutes perpetrators of genocide, war crimes, crimes against humanity, and the crime of aggression.[1] Established in 1998 by the Rome Statute,[2] the ICC may open an investigation through referrals by state parties to the Statute; referrals by the UN Security Council; or the prosecutor's own initiative.[3] Additionally, non-party states may extend qualified jurisdiction to the ICC to prosecute cases within their territories, setting the scope of investigations and prosecutions as well as the dates they shall encompass.[4]

The Rome Statute assigns various other duties to the ICC's Office of the Prosecutor (OTP). Article 53(1) generally mandates the OTP to conduct an investigation upon a reasonable basis to believe that a crime is, or has been, committed within the ICC's jurisdiction.[5] However, this jurisdiction may be proscribed by the Principle of Complementarity, where a state has undertaken its own domestic investigatory and prosecutorial endeavors rendering ICC action redundant.[6] Moreover, Article 42(1) mandates that the Prosecutor serve independently of "instructions from any external source."[7]

B. The ICC as a Medium for Geopolitical Power Plays.

Since the ICC's creation, the United States has sought to stay beyond its reach. In 2002, John Bolton, representing the Bush administration, declared to the UN Secretary General that the United States had "no legal obligations arising from its signature on" the Rome Statute.[8] President Bush subsequently authorized use of military force to retake any U.S. nationals taken into the ICC's custody and prohibited congressional funding of the ICC.[9] The United States further threatened to withdraw troops from UN peacekeeping operations in Bosnia unless granted immunity from ICC prosecution,[10] and the Bush administration entered into Bilateral Immunity Agreements (BIAs)[11] with over a

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1 *See* Rome Statute of the International Criminal Court, arts. 2, 5, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *see also International Criminal Court*, Encyclopedia Britannica (last updated Feb. 18, 2023), https://www.britannica.com/topic/International-Criminal-Court.
2 Rome Statute, *supra* note 1, at art. 1.
3 Rome Statute, *supra* note 1, at art. 13.
4 Rome Statute, *supra* note 1, at art. 12(3).
5 Rome Statute, *supra* note 1, at art. 53(1).
6 Rome Statute, *supra* note 1, at art. 17.
7 Rome Statute, *supra* note 1, at art. 42(1).
8 *U.S. Formally Announces its Intent Not to Ratify the Rome Statute*, Am. Bar Ass'n Int'l Crim. Ct. Project, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Feb. 25, 2023) [hereinafter ABA-ICC].
9 ABA-ICC, *supra* note 8.
10 Edith M. Lederer, *US Vetoes Peacekeeping Extension*, Global Policy Forum (June 30, 2002), https://archive.globalpolicy.org/security/veto/2002/0630icc.htm.
11 BIAs are also known as "Section 98 agreements" after Article 98(2) of the Rome Statute, which generally prohibits the ICC from requiring member States to act in ways that violate their international agreements, including BIAs. Rome Statute, *supra* note 1, at

hundred states to prohibit them from surrendering any U.S. citizens to the ICC,[12] earning it criticism from various governments and regional groups, including the European Union and The Southern Common Market (MERCOSUR).[13]

Notably, during discussions in 2010 to add a "crime of aggression" to the list of crimes in the Rome Statute, the United States actively attempted to except its own acts of aggression in Kosovo from the definition.[14] The United States has justified its continued efforts to undermine the ICC by framing any potential actions against U.S. nationals as inherently political.[15]

The United States shifted course when the ICC opened an investigation on Darfur, Sudan in 2005.[16] Since then, the United States has supported ICC investigations and prosecutions against its political opponents in Africa.[17] Within a decade, the ICC had conducted eight investigations, all exclusively on African countries, and indicted over a dozen individuals, all of African heritage.[18]

In contrast, powerful countries evade the Court's watch by leveraging economic relations and vetoing the UN Security Council's referrals.[19] Tellingly, Iraq acceded to the Rome Statute in 2005 but, facing pressure from U.S. diplomats, later withdrew its accession.[20] Similarly, investigations involving Afghanistan, which the United States attacked; Colombia, which was a U.S. ally; and Georgia, where Russia, a permanent member of the UN Security Council like the United States, was involved, have been significantly slower than investigations involving African states.[21] Though the ICC has recently diversified its caseload,[22] its disproportionate focus on the Global South, and specifically African states, is still hailed by the United States and the Western bloc.[23] Plus, in the very few instances where the OTP's attention was directed at the United States and its allies, the reaction has been markedly different.

II. International Human Rights Law Violations by Western Powers.

A. Afghanistan.

In 2017, then-ICC Prosecutor Fatou Bensouda requested an investigation for war crimes in Afghanistan.[24]

art. 98(2).

12 *See Q&A: The International Criminal Court and the United States*, Hum. Rts. Watch (Sept. 2, 2020), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states. Importantly, the United States may have relied on power imbalances to persuade other parties to join these agreements given that most of them were aimed at "developing countries dependent on nonmilitary aid, including aid for health, relief, and border security programs." *See also* Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court Over American Citizens*, 93 N.Y.U. L. Rev. 1779, 1803 (2018).

13 *Countries Opposed to Signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06*, Coal. for the Int'l Crim. Ct., https://web.archive.org/web/20181221135105/http://www.iccnow.org/documents/CountriesOpposedBIA_AidLoss_current.pdf (last visited Dec. 21, 2018).

14 *See* Special briefing by Gordon Duguid, Acting Deputy Department Spokesman, U.S. Department of State, with Harold Hongju Koh, Legal Advisor, U.S. Department of State, and Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Department of State Office of Global Criminal Justice, U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference (June 15, 2010), https://web.archive.org/web/20100625225603/http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

15 *See id.*

16 *See, e.g.,* ABA-ICC, *supra* note 8.

17 *See* ABA-ICC, *supra* note 8.

18 David Bosco, *Why is the International Criminal Court Picking Only on Africa?*, Wash. Post (Mar. 29, 2013), https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html.

19 Hum. Rts. Watch, *supra* note 12.

20 Bosco, *supra* note 18; *Iraq*, Coal. for the Int'l Crim. Ct., https://www.coalitionfortheicc.org/country/iraq (last visited Feb. 26, 2023).

21 Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, European Council on Foreign Rels. (Sept. 08, 2020), https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou.

22 *See Cases*, Int'l Crim. Ct., https://www.icc-cpi.int/cases (last visited Feb. 28, 2023).

23 For instance, in September 2022, U.S. Secretary of State Antony Blinken celebrated on Twitter "the opening of [the ICC's] trial proceedings against Mahamat Said Abdel Kani, a former Séléka commander in the Central African Republic." Antony Blinken (@SecBlinken), Twitter (Sept. 27, 2022, 1:30 PM), https://twitter.com/SecBlinken/status/1574813865216708608?s=20&t=ZYjR8H-bCsA3brkwivjwtIg.

24 Office of the Prosecutor, International Criminal Court, *Situation in the Islamic Republic of Afghanistan*, 6, PreTrial Chamber III, ICC02/17-7-Red (Nov. 20, 2017).

The ICC Appeals Chamber authorized Bensouda in 2020 to investigate crimes by "the Taliban, Afghan National Security Forces, and United States military and Central Intelligence Agency (CIA) personnel."[25] Though the United States is not a state party to the Statute, Afghanistan has been since 2003,[26] giving the OTP jurisdiction over crimes committed within its borders.[27] This authorization came after the ICC's Pre-Trial Chamber II had erroneously denied Bensouda's request by focusing on the "interests of justice" rather than whether a reasonable factual basis exists to justify the investigation.[28]

The United States' response was swift and drastic. Bolton, then-U.S. National Security Advisor, announced that the Trump administration would oppose all ICC efforts to investigate and prosecute citizens and allies of the United States.[29] Bensouda later confirmed that her U.S. visa had indeed been revoked.[30] President Trump later issued Executive Order No. 13,928, freezing the assets of ICC officials and banning their families from entering the United States.[31]

On April 2021, as Bensouda's term neared its end, President Biden lifted E.O. 13,928 and other Trump-era penalties,[32] and Silvia Fernández de Gurmendi, President of the ICC Assembly of State Parties, stated that the Court "stands ready to reengage with the US in the continuation of that tradition based on mutual respect and constructive engagement."[33] Bensouda's successor, Karim Khan, would bring a more U.S.-friendly approach to the Office.

B. Palestine.

The UN General Assembly granted Palestine "non-member observer State" status in November 2012.[34] The ICC subsequently accepted Palestine's status and its capacity to delegate jurisdiction to the Court.[35] The Palestinian government then filed a declaration recognizing the ICC's jurisdiction under Article 12(3) over its territories, including East Jerusalem, from June 13, 2014, onward.[36]

The United States has repeatedly challenged Palestine's declaration for lacking recognition as a sovereign state,[37] even though the United States leads the efforts

25 Hum. Rts. Watch, *supra* note 12.
26 *Afghanistan*, The Int'l Crim. Ct. Project, https://www.aba-icc.org/country/afghanistan/ (last updated May 10, 2021).
27 Hum. Rts. Watch, *supra* note 12 (explaining that while the ICC does have jurisdiction within a state's borders, it is a "court of last resort," and may "*only* exercise its jurisdiction when a country is either unwilling or genuinely unable to investigate these grave crimes" (emphasis added)).
28 *Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation,* Int'l Crim. Ct. (Mar. 5, 2020), https://www.icc-cpi.int/news/afghanistan-icc-appeals-chamber-authorises-opening-investigation ("Noting that the Pre-Trial Chamber's decision contained all the necessary factual findings and had confirmed that there is a reasonable basis to consider that crimes within the ICC jurisdiction . . . the Appeals Chamber decided to authorise the opening of an investigation itself, rather than to send the matter back to the Pre-Trial Chamber for a new decision.").
29 ABA-ICC, *supra* note 8 ("In September 2018, then-National Security Advisor John Bolton announced in a speech that the Trump administration would use 'any means necessary' to protect U.S. citizens and allies from ICC investigations and prosecutions»).
30 ABA-ICC, *supra* note 8 ("[Former] US Security of State Michael Pompeo announced 'a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel,' including those who 'take action to request or further such an investigation'").
31 Exec. Order No. 13,928, 31 C.F.R. App'x A to Pt. 520 (2020).
32 *See* Antony J. Blinken, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, U.S. Dept. of State, (Apr. 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/#:~:text=Today%2C%20President%20Biden%20revoked%20Executive,in%20connection%20with%20the%20Court.
33 *The ICC Welcomes the Decision by the US Government Ending Sanctions and Visa Restrictions Against ICC Personnel*, Int'l Crim. Ct., (Apr. 3, 2021), https://www.icc-cpi.int/news/icc-welcomes-decision-us-government-ending-sanctions-and-visa-restrictions-against-icc; *see also* Blinken, *supra* note 32; *USA removes sanctions on ICC officials*, Coal. for the Int'l Crim. Ct. (June 29, 2021), https://www.coalitionfortheicc.org/news/20210629/usa-removes-sanctions-icc-officials.
34 G.A. Res. 67/19, Status of Palestine in the United Nations (Nov. 29, 2012).
35 *See Hague-based ICC Accepts Palestine's Status*, Al Jazeera (Dec. 09, 2014), https://www.aljazeera.com/news/2014/12/9/hague-based-icc-accepts-palestines-status.
36 Mahmoud Abbas, President of the State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court* (Dec. 31, 2014); *See Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014*, Int'l Crim. Ct. (Jan. 5, 2015), https://www.icc-cpi.int/news/palestine-declares-acceptance-icc-jurisdiction-13-june-2014.
37 Press Release, U.S. Department of State, Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation (Feb. 5, 2021).

to block Palestinian attempts at attaining statehood.[38] Moreover, the United States contends, the ICC may only exert jurisdiction over states that have consented to it or that have otherwise been referred to the ICC by the UN Security Council, neither of which is the case for Israel.[39]

Israel has similarly contested the declaration,[40] with state officials accusing the Court of "acting without authority"[41] and emboldening "terrorist groups" through "pure anti-Semitism."[42] The Israeli government outright denied committing any war crimes in what the Public Committee Against Torture in Israel refers to as a "culture of falsehood and cover-up that still exists in the [Israeli] security system."[43]

Other states have joined in by threatening to withhold subsidies to the ICC and the Palestinian Occupied Territories.[44] Stephen Harper, then-Prime Minister of Canada, echoed the position that Palestine is not a state and is therefore incapable of extending jurisdiction to the Court.[45] When Justin Trudeau succeeded Harper, Israeli Prime Minister Benjamin Netanyahu requested he continue opposing any ICC investigations in Palestine.[46] Trudeau thereafter issued a letter to the ICC affirming such continuation, emphasizing Canada's anticipated contribution of $10.6 million to the Court that year.[47] Other key financial contributors to the ICC, including the United Kingdom and France, have used similar tactics to prevent this probe.[48]

C. Reversal of Investigations on Western Powers at the Direction of Current ICC Prosecutor Karim Khan.

Both the Afghanistan and the Palestine investigations have slowed down significantly since Khan took office. Khan requested the deprioritization of investigations into U.S. actions in Afghanistan probe in September 2021 on the basis of "the limited resources available to" the OTP.[49] Though Khan has since stated that de-prioritization need not suggest a lack of investigation, and though the judges at the ICC's Pre-Trial Chamber II acknowledge the OTP may define the scope of its operations, they urged that this decision would signal that the OTP is "overlooking crimes allegedly committed by" the United States.[50] Khan has likewise dedicat-

38 *See, e,g.*, Louis Charbonneau, *Palestinian Statehood Resolution Fails at U.N Council, U.S. Votes Against*, Reuters (Dec. 30, 2014, 07:18 PM), https://www.reuters.com/article/us-mideast-palestinians-un/palestinian-statehood-resolution-fails-at-u-n-council-u-s-votes-against-idUSKBN0K81CR20141231.

39 Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation, *supra* note 37.

40 Peter Beaumont, *ICC to Investigate Alleged Israeli and Palestinian War Crimes*, The Guardian (Dec. 20, 2019, 11:07 AM), https://www.theguardian.com/law/2019/dec/20/icc-to-investigate-alleged-israeli-and-palestinian-war-crimes.

41 *Israel 'Will Not Co-operate' with ICC War Crimes Investigation*, BBC News (Apr. 09, 2021), https://www.bbc.com/news/world-middle-east-56687437.

42 Mark Kersten, *This Time, the International Criminal Court is Watching*, Al Jazeera (May 27, 2021), https://www.aljazeera.com/opinions/2021/5/27/this-time-the-international-criminal-court-is-watching.

43 BBC News, *supra* note 41; Lubna Masarwa, *Israeli Anti-torture Body Refers Israel to International Criminal Court*, Middle E. Eye (June 10, 2022, 09:00 AM), https://www.middleeasteye.net/news/israel-anti-torture-body-refers-international-criminal-court.

44 Julian Borger, *Hague Court Under Western Pressure Not to Open Gaza War Crimes Inquiry*, The Guardian (Aug. 18, 2014, 03:00 AM), https://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry.

45 Paul Heinbecker, *Canada's Bluster Over Palestine's ICC Bid Betrays its Principles*, The Globe and Mail (Jan. 28, 2015), https://www.theglobeandmail.com/opinion/canadas-bluster-over-palestines-icc-bid-betrays-its-principles/article22672289/.

46 Steve Sweeney, *Canada Says Palestine Not a State, ICC Can't Investigate Israeli War Crimes*, People's World (Feb. 27, 2020, 01:31 PM), https://www.peoplesworld.org/article/canada-says-palestine-not-a-state-icc-cant-investigate-israeli-war-crimes/.

47 *Id.*

48 Borger, *supra* note 44 (noting that these two states have attempted to persuade Palestine to withdraw its request for an investigation).

49 Statement, ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan (Sept. 27, 2021).

50 Ehsan Qaane, *ICC Afghanistan Investigation Re-Authorized: But Will It Cover the CIA, ISKP and the Forces of the Islamic Republic, as Well as the Taleban?*, Afg. Analysts Network (Nov. 11, 2022), https://www.afghanistan-analysts.org/en/reports/rights-freedom/icc-afghanistan-investigation-re-authorised-but-will-it-cover-the-cia-iskp-and-the-forces-of-the-islamic-republic-as-well-as-the-taleban/. Amnesty International noted that "the Prosecutor [taking] a decision which aligns with the objectives of those who had sought to infringe his Office's hard-fought independence, is almost unfathomable." *Afghanistan: ICC Prosecutors Statement on Afghanistan Jeopardizes His Office's Legitimacy and Future*, Amnesty Int'l (Oct. 05, 2021), https://www.amnesty.org/en/documents/ior53/4842/2021/en/?utm_source=annual_report&utm_medium=epub&utm_campaign=2021&utm_ter-

ed minimal attention to the Palestine probe, even as various Israeli officials have expressed certainty that Bensouda would have already taken action had she remained in the OTP.[51]

Khan's approach may best be understood as working within the global hegemonic political order.[52] Great-power politics are useful in examining the ICC's failure to reach states that the United States, Russia, and China—three of the greatest economic powers of today—have a vested interest in exempting.[53] However, Khan's encouragement to expedite an investigation against Russia for its crimes in Ukraine in 2022,[54] after having deprioritized his investigation on the U.S. only five months prior on the basis of "limited resources," indicates a suspect unwillingness to antagonize Western powers.

The "limited resources" argument echoes the rationale of the ICC's Pre-Trial Chamber II when it originally declined Bensouda's request for an investigation in Afghanistan.[55] Particularly, the Chamber referenced the United States' uncooperativeness and the need to focus on operations with the highest likelihood of success.[56] For the OTP to suspend an inquiry on the United States' alleged crimes on this basis, then, while seeking an expedited investigation against Russia, another state that is just as likely to spurn the ICC's authority,[57] is nothing short of chimeric.

As for the Israel investigation, Khan has expressed his intention to visit Palestine in 2023, but former ICC defense attorney Nick Kaufman noted that an expression of intent is not a binding commitment.[58] And, the Netanyahu administration recently declared that "the Jewish people have an exclusive and unquestionable right over all areas of the land of Israel,"[59] indicating that it deems its apartheid regime justified. This reading is corroborated by Israeli Minister of National Security Itamar Ben-Gvir's support for new legislation immunizing Israeli soldiers and police from accountability under the guise of "security."[60]

III. Weaponization of the Court by Western Powers Through the War in Ukraine.

Though Ukraine is not a party to the Rome Statute, it, like Palestine, has invoked Article 12(3) to allow the ICC to investigate crimes committed within its boundaries since early 2014.[61] With this framework in place, President Biden has called for a trial against Russian President Vladimir Putin for the latter's war crimes in Ukraine.[62]

The Biden administration is undertaking an internal review to reconcile its self-contradictory positions concerning the Afghanistan and the Ukraine investigations.[63] On Afghanistan, the United States has consis-

m=english.

51 Yonah Jeremy Bob, *One Year of Khan: How Does the Probe Against Israel Look? - Analysis*, The Jerusalem Post (last updated June 18, 2022, 07:09 PM), https://www.jpost.com/israel-news/article-709714.

52 *See* Photeine Lambridis, *The International Criminal Court and Afghanistan: Leveraging Politics to Bolster Accountability and Enhance Legitimacy*, 54 N.Y.U.J. Int'l L. Pol. 1007, 1019–20 (concluding that the ICC may only assert its legitimacy by declining to yield to political pressures).

53 Bosco, *supra* note 18.

54 Statement, ICC Office of the Prosecutor, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation" (Feb. 28, 2022).

55 Office of the Prosecutor, International Criminal Court, *Situation in the Islamic Republic of Afghanistan*, 16, PreTrial Chamber II, ICC 02/17-33 (Apr. 12, 2019).

56 *Id.* at 29.

57 *See, e.g.*, Shaun Walker & Owen Bowcott, *Russia withdraws signature from international criminal court statute*, The Guardian (Nov. 16, 2016, 09:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute (chronicling Russia's withdrawal of its signature on the Rome Statute following its annexation of Crimea in 2016).

58 *International Criminal Court Prosecutor Says He Aims to 'Visit Palestine' in 2023*, The Times of Isr. (Dec. 7, 2022, 12:38 PM), https://www.timesofisrael.com/international-criminal-court-prosecutor-says-he-aims-to-visit-palestine-in-2023/ (however, note that one of his goals is to visit).

59 Maureen Clare Murphy, *How Will ICC Respond to Netanyahu's Threats?*, The Elec. Intifada (Dec. 29, 2022), https://electronicintifada.net/blogs/maureen-clare-murphy/how-will-icc-respond-netanyahus-threats.

60 *Id.*

61 Pavlo Klimkin, Minister of Foreign Affairs of the State of Ukraine, *Declaration by Ukraine Lodged Under Article 12(3) of the Rome Statute, 8 September 2015*, 1 (Sept. 08, 2015).

62 *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NPR (Apr. 16, 2022, 04:54 PM), https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court.

63 Colum Lynch, *America's ICC Animus Gets Tested by Putin's*

tently asserted its officials retain functional immunity for their actions abroad under customary international law.[64] Such a claim "may implicitly concede the functional immunity of Russian . . . agents who commit crimes" in Ukraine.[65] This conclusion would undermine the United States' global policy of unipolarity by extending its longstanding protections from accountability to a rising imperialist competitor.[66]

Alternatively, the United States may argue that the principle of complementarity shields it, but not Russia, from the ICC's jurisdiction because it has investigated some of its actions in Afghanistan whereas Russia has failed to investigate its own actions in Ukraine.[67] But, the Afghan government used a similar argument in trying to delay the ICC's investigation,[68] and its failure suggests the United States will not succeed on such grounds. Afghanistan's domestic investigations were deemed not genuine given "[t]he limited number of cases and individuals prosecuted by [the state]."[69] The United States has likewise conducted dozens of investigations, often with arbitrary limitations, leading to no charges.[70] Furthermore, though the CIA is on the record for misrepresenting the nature and extent of its torture and other illicit acts in Afghanistan,[71] the federal government has neglected its obligation to meaningfully investigate and prosecute the responsible figures.[72]

And, though the U.S. Department of Defense has allegedly disciplined hundreds of servicemembers—including over 70 investigations "result[ing] in trial by courts-martial," almost 200 investigations "result[ing] in either nonjudicial punishment or adverse administrative action," and other investigations "result[ing] in action at a lower level"—[73] the leniency of these penalties, the glaring lack of verifiable prosecutions, and the disproportionate focus on low-level officers over higher-ranking decision makers, indicates that the United States, like Afghanistan, is not preempted from an ICC investigation under the principle of complementarity.[74] Truly, the United States' reticence to hold itself accountable was what drove Bensouda to open this investigation in 2017.[75]

IV. The Court's Violation of the Rome Statute Via Preferential Treatment for Western Powers.

Given these facts, the OTP likely abused its discretion by de-prioritizing inquiries into the United States' crimes in contravention of Article 53(1) of the Rome Statute. To be clear, while the OTP has the power to define the scope of its investigations, the ICC Pre-Trial Chamber II only conceded this point relative to Khan's assertion of limited resources, an assertion farcical on its face given the expediency the OTP has dedicated to investigating Russia despite a failure to demonstrate doing so will be less resource-intensive than an equivalent probe on the United States. Therefore, this de-prioritization disregards the OTP's obligation to duly investigate the U.S. upon a reasonable basis to believe that it committed crimes in Afghanistan.

Furthermore, the OTP has neglected its duties under Article 42(1). Even if the OTP has not received direct

Alleged War Crimes, Foreign Pol'y (Mar. 15, 2022, 03:13 PM), https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion/.

64 Adil Ahmad Haque, *At a Crossroad: The Int'l Criminal Court's Afghanistan Probe and the International Law Commission*, Just Sec. (Apr. 19, 2018), https://www.justsecurity.org/55111/intl-criminal-courts-afghanistan-probe-international-law-commission/ (noting that this argument contravenes both Article 27(2) of the Rome Statuteas well as the United Nation's 2017 International Law Commission).

65 *Id.*

66 M. Ali Hamza, *'Wolfowitz Doctrine' and Ukraine*, Daily Islamabad Post (Mar. 02, 2022), https://islamabadpost.com.pk/wolfowitz-doctrine-and-ukraine/ (connecting the mandate of the Wolfowitz Doctrine for "a policy of 'Unilateralism'" to the U.S.'s position on the War in Ukraine).

67 NPR, *supra* note 62; Rome Statute, *supra* note 1, art. 17.

68 M. Homayoon Azizi, Ambassador of the Islamic Republic of Afghanistan in The Netherlands, *The Situation in the Islamic Republic of Afghanistan - Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute*, 5 (Mar. 26, 2020).

69 Office of the Prosecutor, International Criminal Court, Situation in the Islamic Republic of Afghanistan, 24, PreTrial Chamber II, ICC 02/17-196 (Oct. 31, 2022).

70 Hum. Rts. Watch, *supra* note 12.

71 *See generally* S. Rep. No. 113-288 (2014).

72 Hum. Rts. Watch, *supra* note 12.

73 *One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports*, U.S. State Dep't (Nov. 27, 2015), https://2009-2017.state.gov/j/drl/rls/250342.htm.

74 Jonathan Marcus Harrison, War Crimes and Complementarity at the ICC: How the United States of America and the United Kingdom Have Responded to War Crimes Allegations (Sept. 2021) (Ph.D. dissertation, University of Leeds).

75 ICC02/17-7-Red, *supra* note 24, at 163–64.

instructions from the United States or other external sources, the unwarranted de-prioritization of the investigation on the United States and the inactivity regarding the Israel probe indicates a submission of the Office to extraneous political pressures at the expense of its legitimacy as an independent entity.

V. Conclusion.

The Rome Statute imposes clear responsibilities upon the OTP to guarantee that justice is administered impartially, free from political abuse. And yet, the ICC has demonstrated a consistent pattern of targeting the foes of the Western bloc to a virtually exclusive degree, which has in turn gained it the conditional support of the United States. Though the Court had an opportunity to defend its legitimacy as an impartial arbiter by holding the United States and Israel accountable to the same standards it maintains for their opponents, it ultimately shelved any meaningful action that would antagonize them and focused its ostensibly limited resources against their imperialist rival. Though this probe against Russia may be as merited as the probes on the Western powers, the OTP's expectation that it be prioritized for having a greater likelihood of success is unsound and illustrates a regression of the ICC's jurisprudence to the undisturbed benefit of Western hegemony. This preferential treatment evidences the blatant politization of the ICC in contravention of its duties under the Rome Statute and serves only to subordinate it to the whims of a political order of unilateral Western supremacy over the world stage.

A Double Standard in Refugee Response: Contrasting the Treatment of Syrian Refugees with Ukrainian Refugees

*by Deanna Alsbeti**

I. Introduction

The unrelenting proliferation of international crises marks the twenty-first century with mass global displacement. In 2011, the world witnessed the Arab Spring, a series of anti-government protests that led to the Syrian Civil War and injected more than 13.5 million displaced Syrians into the global system.[1] Today, twelve years later, the international system still struggles to accommodate and protect Syrians who cannot return to their homeland. In addition to the dire Syrian refugee crisis, and other refugee crises throughout the globe, the recent Russian invasion of Ukraine added approximately 7.5 million Ukrainian refugees to the world's already stressed humanitarian system.[2]

This rise of displaced persons necessitates an adherence to international law, specifically Article 14 of the 1948 Declaration of Human Rights (the 1948 Declaration) and the 1951 Convention Relating to the Statute of Refugees (the 1951 Convention), to ensure a just, equitable, and uniform standard for all persons seeking asylum from oppression, war, and violence.[3] Additionally, Article 18 of the European Union (EU) Charter of Fundamental Rights guarantees the right to asylum, which means that individuals who are fleeing persecution or other forms of serious harm in their home countries have the right to seek refuge and protection in another country.[4] This right is enshrined in international law, including the Geneva Convention on the Status of Refugees and the EU Qualification Directive.[5] Further, Article 18[6] of the EU Charter reaffirms the EU's commitment to protecting and assisting refugees, by guaranteeing the right to asylum with due respect for the rules of the 1951 Convention[7] and the 1967 Protocol Related to the Status of refugees (1967 Protocol).[8] After the Ukrainian exodus, the EU adhered to this international law to protect millions fleeing Ukrainian refugees, however, this same legal protection was not provided to Syrian refugees. The EU's solidarity with displaced Ukrainians illustrates the deeply politicized, and often discriminatory, nature of providing refugee protection compared to Syrian refugees, which violates the 1951 Convention and the subsequent 1967 Protocol that broadened it.[9]

II. Background

In March 2011, the Syrian government violently extinguished public demonstrations that arose after a group of teenagers were arrested for spraying graffiti that reflected the Arab Spring's anti-government

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1 Mark Tessler, *The Arab Spring and the Syrian Civil War: The Implications of the Arab Spring for Syria and the Broader Middle East*, 41 J. Palestine Stud. 21 (2012); *Refugee Statistics*, USA for UNHCR, https://www.unrefugees.org/refugee-facts/statistics/.
2 *Ukraine Refugee Situation*, UNHCR Data (Oct. 26, 2022), https://data.unhcr.org/en/situations/ukraine.

3 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71; *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 137 (July 28, 1951) [hereinafter 1951 Convention].
4 Art. 18. Right to Asylum, European Union Charter of Fundamental Rights, 2000 O.J. (C 364) 1.
5 *Id.*
6 Charter of Fundamental Rights of the European Union art. 18, 2012 O.J. (C 326) 391.
7 1951 Convention, *supra* note 3.
8 Convention Relating to the Status of Refugees, Protocol, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].
9 *See id.*; 1951 Convention *supra* note 3.

sentiments.[10] This triggered a nationwide outburst of demonstrations in Syria, causing government security forces to aggressively and violently suppress them.[11] The outburst quickly escalated the Syrian Civil War and the ensuing refugee crisis forced millions of Syrian families out of their homes.[12] Now, Syrian asylum seekers reside in more than 130 countries, with seventy percent of Syrian refugees living in poverty, unable to access education, job opportunities, and basic services to improve their situations.[13]

Comparably, in February 2022, Russia launched a military offensive against Ukraine, destroying public infrastructure; cutting access to adequate water, heat, and electricity, which mass displaced Ukrainian refugees into Europe.[14] Over seven million people in Ukraine require humanitarian aid, and nearly two million people have been forced to flee their homes due to the conflict.[15] Ukrainian refugees face similar challenges to their Syrian counterparts, with limited access to education and job opportunities, as well as language barriers and discrimination.[16] However, unlike Syrian refugees, Ukrainian refugees have received more favorable treatment from European nations, in part due to their geographic proximity and cultural similarities. Despite these differences, both refugee groups face uncertain futures as they continue to seek safety and stability in new countries.[17]

In attempt to follow these legal obligations for the millions of Ukrainians fleeing the Russian invasion, the European bloc activated the 2001 Temporary Protection Directive (TPD) three days after the invasion began, granting residence, healthcare, and the right to work or study to Ukrainian refugees and their families fleeing the country for up to three years.[18] This was the first time the Council of Ministers for Justice and Home Affairs triggered the TPD since it was initially adopted after the Yugoslav Wars.[19] However, Syrian refugees never benefited from such a law in the eleven years of the crisis.[20] European nations justified this lack of action, claiming that implementing TPD would create a "pull factor" for refugees seeking entry to the EU.[21] In 2015, Elisabetta Gardini, a European Parliament member, posited to the Commission whether the Syrian refugee crisis met the legal conditions necessary to establish TPD, but this inquiry was rejected.[22] The selective implementation of TPD highlights the special standard applied to Ukrainians and the subsequent legal neglect of Syrians.

The inequitable treatment of Syrian and Ukrainian refugees stems from the different diplomatic relations between the EU and countries that these refugees are coming from as well as an internalized othering of people from the Middle East.[23] Discrimination and prejudice, such as Islamophobia, influences the differential treatment of Syrian refugees compared to Ukrainian refugees in the EU.[24] Ukrainian refugees hold similar racial, religious, and cultural traits with

10 *Syria Refugee Crisis Explained*, UN Refugee (July 8, 2022), https://www.unrefugees.org/news/syria-refugee-crisis-explained/.
11 *Id.*
12 *Id.*
13 *Id.*
14 *The Ukraine-Russia Crisis: What is Happening?*, Int'l Rescue Comm. (Sept. 21, 2022), https://www.rescue.org/article/ukraine-russia-crisis-what-happening.
15 *Ukraine,* UNHCR, https://data.unhcr.org/en/situations/ukraine (last visited Mar. 24, 2023).
16 Omer Karasapan, Ukrainian Refugees: Challenges in a Welcoming Europe, Brookings (Oct. 14, 2022), https://www.brookings.edu/blog/future-development/2022/10/14/ukrainian-refugees-challenges-in-a-welcoming-europe/.
17 *Id.*
18 22 O.J. (L 71) 11, 21; Temporary Protection, European Comm'n Migration & Home Affs., https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en (last visited May 15, 2023) [hereinafter Temporary Protection Guidance].
19 Temporary Protection Guidance, *supra* note 18.
20 Zachary Laub, *Syria's War and the Descent into Horror*, Council on Foreign Rels. (Jan. 31, 2022), https://www.cfr.org/article/syrias-civil-war.
21 Meltem Ineli Ciger, *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, *in* Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System 225, 233(2015) ("Pull factors can be defined as factors that attract migrants . . . to a certain host country").
22 Gupta, Mihika*, Trapped and Deterred: The European Response to Asylum Seekers*, YaleGlobal Online (Apr. 7 2016), www.yaleglobal.yale.edu/content/trapped-and-deterred-european-response-asylum-seekers.
23 Addie Esposito, *The Limitations of Humanity: Differential Refugee Treatment in the EU*, 39 Harv. Int'l Rev. (Sept. 14, 2022, 9:00 AM), https://hir.harvard.edu/the-limitations-of-humanity-differential-refugee-treatment-in-the-eu/.
24 *Id.*

European host nations, while Syrians represent a prejudiced threat to power dynamics and socio-political nativism.[25] Although the EU is obligated to provide protection and assistance to refugees, and to respect the rights and dignity of all people, regardless of their origin, the reality often falls short of these obligations, with many Syrian refugees facing discrimination, exclusion, and other forms of marginalization.[26] Despite these factors, the EU and its Member States have a responsibility under international law to ensure that refugees are treated fairly and humanely, thus a privileged treatment towards Ukrainian refugees not only violates legal structures, but unjustly disadvantages Syrian refugees.

III. Legal Analysis

During international crises, there is an international legal obligation for states to shelter and assist those fleeing wars and oppression. The European Convention on Human Rights outlines several requirements that are pertinent to the treatment of refugees. Member States are bound to Article 14 of the 1948 Declaration, which grants any person the "right to seek and enjoy asylum from persecution."[27] Member States are also bound by the 1954 Convention, which defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[28] Article 3 of the 1967 Protocol specifically prohibits the discrimination of refugees based on race, religion, or country of origin.[29] There is also an obligation to uphold the principle of non-refoulment, which prevents states from expelling or returning any refugee to the borders where their freedoms and safety were threatened.[30]

Despite these requirements, European nations have failed to provide equal protection to refugees from different countries.[31] Syrian refugees have experienced discrimination and a more restrictive approach than their Ukrainian counterparts.[32] Polish authorities violated the 1948 Declaration by unjustly subjecting Middle Eastern refugees to discriminatory and inhumane treatment.[33] In *M.K. and Others v. Poland*,[34] immigrants from the Middle East were placed in a detention center that stripped their right to be free from ill-treatment and their right to respect for their private and family life.[35] The European Court of Human Rights later declared it illegal to return persons seeking asylum in Polish territory back to Belarus.[36] The Deputy Interior Minister of Poland, Mariusz Kaminski, later blocked the provision of aid and protection for refugees from Afghanistan due to the fear that hosting them would "play into the hands of Belarusian propaganda."[37] The Polish failure to provide Afghan asylum seekers humanitarian assistance coupled with the border zone restrictions for organizations seeking to provide humanitarian and legal aid staunchly violates Article 2 and Article 3 of the Refugee Convention.[38] This blatant discrimination of refugees made up the official narrative of European states in response to the Syrian refugee crisis.

25 *Id.*
26 *Id.*
27 G.A. Res. 217A, Universal Declaration of Human Rights (Dec. 12, 1948).
28 Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137 [hereinafter 1954 Convention]. Notably, the 1967 Protocol allows for the universal application of the Convention by removing the temporal and geographical restrictions. The 1967 Protocol notoriously broadened the 1951 Convention, which initially limited the Refugee Convention to apply solely to refugees of European crises prior to January 1, 1951.
29 1967 Protocol, *supra* note 8 at art. 3.
30 1951 Convention, *supra* note 3 at art. 33.1.
31 James C. Hathaway, *The Refugee Convention at Fifty: A View from Forced Migration Studies*, 29 Refugee Survey Q. 3, 12 (2010).
32 *See infra* Background.
33 Monika Płatek, *Violations of the European Convention on Human Rights with Regard to Treatment of Refugees in Poland*, 39 Refugee Surv. Q. 322 (2019).
34 *M.K. and Others v. Poland*, App. No. 40503/17, 42902/17, 43643/17 (July 23, 2020). https://hudoc.echr.coe.int/fre?i=002-12916.
35 *Id.*
36 *Id.*
37 Magdalena Gwozdz-Pallokat, *Afghan Refugees Remain in Limbo at EU Border*, Deutsche Welle (Sept. 3, 2021), https://www.dw.com/en/polands-state-of-emergency-worsens-afghan-refugees-eu-border-plight/a-59078380.
38 *M.K. and Others*, App. No. 40503/17, 42902/17, 43643/1710, at 10.

Furthermore, in the case of *D.A. and Others v. Poland*,[39] Syrian nationals suffered pushback at the Polish-Belarusian border and were repeatedly denied their right to protection under Articles 3 and 4 of the 1951 Convention, relating to the Status of Refugees and its 1967 Protocol,[40] when Polish authorities unlawfully aimed to reduce the number of asylum applications registered in Poland.[41] The Court held that Article 3 of the Convention was violated due to the illegally denied access to the asylum process and "exposed . . . risk of inhuman and degrading treatment and torture in Syria."[42] The mistreatment of Syrian nationals in this case highlights the serious consequences of the Polish government's efforts to restrict the number of asylum applications, which disregards their obligations under international law.

Since 2011, EU nations have illegally tightened migration and asylum policies, denying Syrian refugees their right to asylum under Article 14.[43] Greece notoriously violated Article 18 of the EU Charter by its systematic expulsions and violence against Syrian asylum seekers at its borders.[44] Syrian refugees are routinely intercepted by Greek border guards who illegally employ excessive use of force in the detainment, stripping, and expulsion of migrants.[45] In March 2020, the Greek government decided to halt asylum applications for individuals who "irregularly" crossed their borders and returned asylum seekers who arrived without formal registration.[46] This violates both the non-refoulment principle[47] as well as Article 3 due to the blatant discrimination based on Syrian nationality.[48]

Further, Eastern European States "illegal pushback policies" further demonstrate a discriminatory and polarized political climate toward Syrian refugees.[49] In 2020, a *Guardian* report revealed the illegal tactics conducted by the European Border and Coast Guard Agency, including the use of intimidation, violence, and physical abuse of women and children.[50] The EU's illegal mass expulsions has caused the forcible return of at least 40,000 asylum seekers and the death of more than 2,000 people during the pandemic alone.[51] These pushbacks are violations of international and EU law due to the disproportionate and excessive use of force, along with the infringement of a just, equitable, and uniform standard for asylum seekers that is guaranteed under the 1951 Convention.[52] The EU's blatant and unlawful operations to stop Syrian asylum seekers from reaching safer EU shores unjustly excludes Syrians from their right to seek asylum, which is guaranteed under Article 18 of the EU Charter.[53] These actions not only violate the fundamental human rights of Syrian refugees, but also undermine the EU's commitment to the principles of human dignity and equality, and threaten the stability and security of the region as a whole.[54]

39 *D.A. and Others v. Poland*, App. No. 51246/17 (July 8, 2021), https://hudoc.echr.coe.int/fre?i=001-210855.
40 *D.A. and Others v. Poland*, App. No. 51246/17 at ¶ 109; 1951 Convention, supra note 3 at art. 3-4.
41 *D.A. and Others v. Poland*, App. No. 51246/17 at ¶ 109; *see also* James C. Hathaway, *supra* note 31 (discussing how some countries have engaged in pushback tactics and other measures to avoid their obligations under the Convention, despite the fact that such actions are prohibited under international law).
42 *D.A. and Others v. Poland*, App. No. 51246/17 at ¶ 109.
43 Christina B. Katsourides, *EU Migration Policies and the Syrian Refugee Crisis: The Case of Greece*, 27 Mediterranean Q. 111, 122 (2016) (explaining that Article 14 of the Universal Declaration of Human Rights guarantees the right to seek and enjoy asylum from persecution).
44 *Greece: Rights Violations Against Asylum Seekers at Turkey-Greece Border Must Stop – UN Special Rapporteur*, UNHCR Off. of the High Commissioner (Mar. 23, 2020), https://www.ohchr.org/en/press-releases/2020/03/greece-rights-violations-against-asylum-seekers-turkey-greece-border-must?LangID=E&NewsID=25736.
45 *Id.*
46 *Id.*
47 1951 Convention, *supra* note 3 at art. 33.1 (explaining how discriminatory treatment of refugees based on their country of origin violates the principle of non-refoulment).
48 *Id.* at art. 3.
49 Adnan Nasser & Alexander Langlois, *World Leaders are Forgetting About Syrian Refugees*, Carnegie Endowment for Int'l Peace (May 5, 2022), https://carnegieendowment.org/sada/87079 (identifying Poland, Hungary, and Romania as a few states that have enacted these policies).
50 Lorenzo Tondo, *Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks*, The Guardian (May 5, 2021, 1:00 PM), https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks.
51 *Id.*
52 Idil Atak, *The EU-Turkey Deal and the Contemporary Refugee Regime Complex*, 38 Refugee Survey Q. 207, 221 (2019).
53 2000 O.J. (C 364) 1.
54 Sarah Deardorff Miller, *Syrian Refugees, State Sovereignty, and the Future of the International Refugee Regime*, 16 Georgetown J. Int'l Affs. 85, 93 (2015).

The aforementioned circumstances demonstrate the uneven nature of the EU's response to refugee flows, and the ways in which certain groups may be favored over others based on political, cultural, and other factors. Favorable treatment of Ukrainian refugees as opposed to Syrian refugees is driven by a negative perception of Syrians due to oversimplified and prejudiced fears about terrorism, security, and cultural differences, as well as broader anti-immigrant sentiment for refugees from the Middle East.[55] For example, Poland displayed a warm welcome for Ukrainian refugees, taking immediate actions to integrate, protect, and assist Ukrainians.[56] The State even enacted legislation to grant Ukrainian citizens and their families equal access to the Polish labor markets and afforded them social benefits such as the right to education and healthcare.[57] The Polish Border Guard and other public services have expedited quick border crossings, arranged for free transportation, and facilitated humanitarian assistance and medical aid for Ukrainian refugees.[58] Although the promptness and efficiency of aid for Ukrainians should be applauded, the apparent and unlawful bigotry toward Syrian refugees that it revealed cannot be ignored.

IV. Conclusion

The international community is displaying a disappointing double standard by showing openness and generosity towards Ukrainians while failing to extend the same treatment to Syrians who were forced to flee their homeland due to the Syrian Civil War.[59] While each refugee crisis is distinct, there is a necessary uniformity with international law that must be upheld. Selectively applying international law to only certain refugees is unlawful and unjust. Thus, the more welcoming regional response to Ukrainian refugees violates the 1954 Convention and the 1948 Declaration when it discriminates against other Syrian refugees who seek similar and equally deserving protection. The injustice of Syria's experience with seeking asylum and the unequal treatment of Ukrainian refugees should be a lesson in global humanitarian responses toward creating leveled legal responses to displacement.

The EU must take immediate steps to address this issue, by providing safe and legal pathways for Syrian refugees to reach Europe and access asylum, and by ensuring that all refugees are treated fairly and with dignity and respect, regardless of their nationality, religion, or other characteristics. International cooperation is crucial to provide resettlement, family reunification, and humanitarian visas. Those unfairly turned away must be allowed to reapply for asylum with support. Ultimately, member states must be held accountable for violations of international and EU law so that the EU can prioritize protecting vulnerable refugees, such as minors and survivors of torture and violence. Only by taking concrete steps, can the EU uphold its commitments to human rights and provide a safe haven for those in need.

55 Carolyn Gallaher, *The Specter of the Syrian Refugee Crisis and the Fear of the "Other": Challenges for U.S. Leadership in a Time of Global Crisis*, 11 J. Global Initiatives 59, 65-67 (2016).
56 *UN Expert Praises Generosity Towards Ukrainian Refugees by Poland and Urges Belarus and Poland to End Pushbacks*, OHCHR (July 28, 2022), https://www.ohchr.org/en/press-releases/2022/07/un-expert-praises-generosity-towards-ukrainian-refugees-poland-and-urges
57 *Id.*
58 *Id.*
59 Tondo, *supra* note 50..

Striking Out: How the MLB's Baseball Academies Interfere with Children's Human Rights in the Dominican Republic

*by Crystal Nieves Murphy**

I. Introduction

Major League Baseball (MLB) has recently included a large number of foreign-born players in the league.[1] Specifically, many of these players are from the Dominican Republic, with Dominican players making up more than ten percent of active players on MLB Team rosters across the league.[2] This large number of Dominican baseball players in the MLB comes from a culture of scouting talent at a young age and the creation of baseball academies[3] in Latin America as a whole. Currently, all thirty MLB teams have a baseball academy in the Dominican Republic where each team develops young teenagers talented at baseball.[4]

While the MLB, through its intent to develop Dominican talent, has entrenched itself as a juggernaut in the Dominican economy by spending more than half a billion dollars on Dominican baseball academies, staff, and players, it has also led to Dominican boys dropping out of school.[5] Players between ages twelve and fourteen regularly drop out of school to concentrate on baseball with the hope of entering an academy.[6] Many of them believe they will be able to make a living from the sport, when in reality only two percent of them will be able to do so.[7] Dropping out of schools also has a direct correlation with higher HIV rates, teen paternity, criminal convictions, and future unemployment in the Dominican Republic.[8]

The MLB consistently makes "unofficial" agreements with children as young as twelve, which can cause them to drop out of school as they have no incentive to continue traditional schooling.[9] Furthermore, the MLB repealed regulations that previously would not allow boys to enter a team baseball academy facility until the

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1 Stuart Anderson, *27% of Major League Baseball Players are Foreign-Born*, Forbes (Apr. 27, 2018), https://www.forbes.com/sites/stuartanderson/2018/04/27/27-of-major-league-baseball-players-are-foreign-born/?sh=76955f447712 (stating that international players are not drafted).

2 J.J Cooper, *Which Countries Produce the Most MLB Players*, Baseball Am. (Apr. 7, 2021), https://www.baseballamerica.com/stories/which-countries-produce-the-most-mlb-players/.

3 Enrique Rojas, *Baseball Academies Thrive in the Dominican Republic,* ESPN (July 1, 2015), https://www.espn.com/blog/onenacion/post/_/id/710/baseball-academies-thrive-in-the-dominican-republic (explaining that baseball academies develop talented players to increase the number of Dominican players in the MLB).

4 Jackeline Pou, *Dominican Teens Keep Baseball Hopes Alive, But Not Without Risks,* NBC News (Oct. 9, 2019), https://www.nbcnews.com/news/latino/dominican-teens-keep-baseball-hopes-alive-not-without-risks-n1062061.

5 David Lagesse, *Baseball is a Field of Dreams–and Dashed Hopes–For Dominicans*, NPR (Apr. 3, 2016), https://www.npr.org/sections/goatsandsoda/2016/04/03/472699693/baseball-is-a-field-of-dreams-and-dashed-hopes-for-dominicans.

6 Thomas McKenna, *The Path to the Sugar Mill or the Path to Millions: MLB Baseball Academies' Effect on the Dominican Republic*, Soc'y for Am. Baseball Rsch. (2017), https://sabr.org/journal/article/the-path-to-the-sugar-mill-or-the-path-to-millions-mlb-baseball-academies-effect-on-the-dominican-republic/.

7 *See* Lagesse, *supra* note 5.

8 Michael Lisman, *Walk-off or Trade-off? Baseball and education in the Dominican Republic*, The Dialogue (March 25, 2019), https://www.thedialogue.org/blogs/2019/03/baseball-education-dominican-republic/

9 Christian Red & Teri Thompson, *In Latin America, Big League Clubs Are Exploiting Prospects as Young as 12, Whistleblower Told Feds*, USA Today (June 16, 2020), https://www.usatoday.com/story/sports/mlb/2020/06/16/mlb-international-free-agents-deals-underage-prospects/5334172002/.

age of sixteen.[10] While a Dominican player still cannot officially sign a deal before they turn sixteen, regulations now allow for players to enter a team facility for a limited amount of time from as early as fourteen.[11] After this time, a player can spend up to fifteen days in a baseball team's facility every ninety days once a player is six and twelve months away from eligibility.[12] At the age fifteen-and-a-half, players can then spend fifteen total days every forty-five days at a facility.[13]

This practice of scouting at such a young age is a direct violation of the requirements of the United Nations, the Inter-American Commission on Human Rights, and the Dominican Republic, which all state that a child has a right to an education and economic safety.[14] This article will explore how the MLB uses its Dominican Baseball Academies to exploit children for their labor, interfere with childrens' right to education, and create a physically unhealthy and unsafe financial environment for young Dominican boys.[15]

II. Legal Background

A. The Dominican Republic's Deference to A Child's Right to Education

The Dominican Republic has more safeguards for a child's right to education than the United States. This is important as despite the MLB being United States corporation, it must also follow the Dominican Republic's rules. Both the Dominican Republic and the United States have adopted and ratified the United Nation's Declaration on the Rights of the Child (the Declaration).[16] The Declaration states that children must receive a free and compulsory education; a child shall have protection against exploitation; a child shall not have employment before an appropriate age; and a child cannot enter an occupation which could affect their health.[17] The MLB, by allowing teams to host baseball academies, is indirectly influencing boys to drop out of traditional schools; these baseball academies are not proper substitutions for a traditional education as the only provide English classes and American Culture courses.[18] This is in direct contention with the Declaration, which pertain to a child's right to education.[19] The Dominican Republic has also ratified the United Nations Convention on the Rights of the Child ("the Convention") stipulating that a state must act with the best interest of a child in mind and take action to promote regular attendance at school, this Convention gives further protections to children than the Declaration.[20]

B. Dominican Republic's Domestic Obligation to Protect a Child's Right to Education

In *Yean & Bosico v. Dominican Republic*,[21] the Inter-American Court of Human Rights (the Court) held that the Dominican Republic must uphold its promise of guaranteed access to free primary education.[22] As part of the Court, the Dominican Republic must follow its decisions.[23] The Court states that the Dominican Republic must follow Article 19 of the American Convention on the Right of the Child. It also must follow the protocol within the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights by ensuring conditions that will allow its children "full intellectual development."[24] Additionally, legislation in the Dominican Republic also protects

10 Ben Badler, *MLB Changes Rules for International Signings*, Baseball Am. (Aug. 15, 2018) https://www.baseballamerica.com/stories/mlb-changes-rules-for-international-signings/
11 *Id.*
12 *Id.*
13 *Id.*
14 Ryan S. Hanlon, *School's Out Forever: The Applicability of International Human Rights Law to Major League Baseball Academies in The Dominican Republic*, 26 Glob. Bus. & Dev. L.J. 236, 243–44 (2013).
15 Michael S. Schmidt, *Dominicans Try Shots to Boost Rising Players*, N.Y. Times (Oct. 24, 2009), https://www.nytimes.com/2009/10/25/sports/baseball/25dominican.html#:~:text=SANTO%20DOMINGO%2C%20Dominican%20Republic%20%E2%80%94%20The,profit%20from%20their%20players'%20prowess.
16 G.A. Res. 1386 (XIV), UN Declaration on the Rights of the Child (Nov. 20, 1959).
17 *Id.* at prins. 2. 7, 9.
18 *See* Lagesse, *supra* note 5.
19 *See* UN Declaration on the Rights of the Child, *supra* note 16.
20 Convention on the Rights of the Child, 1577 U.N.T.S. 3.
21 Yean & Bosico v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 260 (Sept. 8, 2005).
22 *Id.* at ¶¶ 185, 244.
23 Inter-American Commission on Human Rights, The Rights of the Child in the Inter-American Human Rights System ¶¶ 58-118 (2d ed. 2008), http://www.cidh.org/countryrep/infancia2eng/Infancia2Cap2.eng.htm.
24 *Id.*

a child's right to education.[25] Specifically, Law 136-03 protects the right to basic education, adopts methods to prevent students from dropping out of schools, and mandates orientations regarding professional careers.[26]

II. Legal Analysis

A. The Ramifications of a Lack of Regulations

A player can sign a deal with a team per MLB bylaws once they turn sixteen.[27] While that age does not currently contradict Law 136-03's prohibition of children working under the age of fourteen, that may soon change. There is pending litigation from two baseball players who at 14, below the signing age of 16, entered into verbal contracts with the Los Angeles Angels, who are now allegedly in breach of those verbal contracts.[28] The two players are asking the Dominican Republic to recognize these verbal agreements as valid contracts.[29] If these two players prevail, the MLB may be in violation of Law 136-03, and may face consequences in the Dominican Republic. MLB's "unofficial" agreements with children are in direct opposition to the Dominican Republic's Law 136-03 because it interferes with the schooling of the child.[30] This case demonstrates the level of exploitation young players face as they receive promises of millions of dollars only for teams to renege and leave them without an education.[31]

Even if a team does stand by its original contract, many families become indebted to scouts or trainers who prey upon boys' dreams of being a baseball player and then take a hefty amount of the player's signing amount.[32] As a result, scouts begin to look for talented kids aged eleven to fourteen.[33] The MLB does not verify these scouts' credentials. Moreover, the scouting system is incredibly unregulated, allowing scouts to charge exploitative fees up to 50 percent of a player's bonus.[34] These scouts appear to prioritize profit, even influencing players to take steroids and painkillers to get a competitive advantage.[35] Often when a player tests positive for a banned substance, the player states that they only took it because their trainer provided it.[36] This is in direct violation of the UN Declaration on the Rights of the Child as it bans children from working jobs that might adversely affect a child's health.[37] This system as it stands violates the children's international and domestic legal rights.[38]

III. Recommendations

One possible remedy to this issue is the implementation of an international draft. This is something that the MLB has repeatedly investigated, but the MLB Players Association has been reluctant to implement.[39] The international draft would end the early agreements for preteen players and would create a similar system to the domestic draft.[40] Instead of Dominican players being evaluated in high school or college games, evaluations could be done through combines and showcases where a player's skills would be adjudicated in drills and simulated games by MLB-hired scouts.[41] The international draft would allow children to stay in school while incentivizing the MLB to build resources

25 Ley 136-03 Código para el Sistema de Protección y los Derechos Fundamentales de Niños, Niñas y Adolescentes [Law 136-03 Code for the Protection System and Fundamental Rights of Boys, Girls, and Adolescents] (2013) (Dom. Rep.) [hereinafter Law 136-03].
26 *Id.* at art. 46.
27 *International Amateur Free Agency & Bonus Pool Money*, The MLB (2022), https://www.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money
28 Martín José Adames, *Dominican Teens Sue LA Angels, Alleging Team Broke Deal*, Seattle Times (Sept. 9, 2022), https://www.seattletimes.com/sports/mlb/dominican-teens-sue-la-angels-alleging-team-broke-deal/.
29 *Id.*
30 *See* Law 136-03, *supra* note 25.
31 *See* Red & Thompson, *supra* note 9.
32 *Id.*
33 James Wagner, *As a Deadline Looms, the Dominican Republic Ponders a Draft*, N.Y. Times (July 24, 2022), https://www.sanjuandailystar.com/post/as-a-deadline-looms-the-dominican-republic-ponders-a-draft.
34 *Id.*
35 Michael S. Schmidt, *Dominicans Try Shots to Boost Rising Players*, N.Y. Times (Oct. 24, 2009), https://www.nytimes.com/2009/10/25/sports/baseball/25dominican.html.
36 *Id.*
37 *See* UN Declaration on the Rights of the Child, *supra* note 16.
38 *See* Law 136-03, *supra* note 25.
39 Maria Torres & Ken Rosenthal, *'A Failed System': A Corrupt Process Exploits Dominican Baseball Prospects. Is an International Draft Really the Answer?*, The Athletic (Jan. 20, 2022), https://theathletic.com/3080470/2022/01/20/a-failed-system-a-corrupt-process-exploits-dominican-baseball-prospects-is-an-international-draft-really-the-answer/.
40 *Id.*
41 *Id.*

and jobs in the Dominican Republic and other Latin American countries to scale up combines and showcases for players around the globe.[42] An international draft that mimics the MLB's draft in the United States would allow for Latin American players to receive bonuses similar to those received by domestic players, which has not been seen before.[43]

Another option is to change the MLB's current scouting rules. The MLB would institute a rule saying teams cannot have any contact with a player before the age of fifteen.[44] For example, after the age of fifteen, the players can attend baseball academies, but the academies must also provide a traditional education. This would be an education on par with what a player would receive if they went to a traditional school, meaning teams would need to teach more than just English and American culture classes. There must also be systems in place to combat unqualified individuals from becoming trainers or scouts, like the implementation of a scout registration system that includes a background check.

IV. Conclusion

Players from the Dominican Republic will always be a part of the MLB. There needs to be safeguards put in place to stop these human rights violations and allow for players to continue their schooling and pursue a career in baseball without being exploited. Both the Dominican Republic and the MLB are failing to protect Dominican boys by not abiding by the laws they are subject to. Without change, the exploitation of young boys will continue, leading those boys to lose out on an education in favor of following a dream that many will not achieve.

42 *See* Red & Thompson, *supra* note 9.
43 *Id.*
44 *Id.*

AECA and the United States War Crimes Connections in Yemen

*by Rachel Hage**

I. Introduction

The conflict in Yemen wages on, and many states, including Saudi Arabia and the United States, have been complicit in human rights violations.[1] The United States' current and past administrations have continued to sell arms to Saudi Arabia despite multiple international organizations' documenting the state's human rights violations.[2] This Article argues that, despite the lack of transparency regarding how much support the United States is lending to Saudi Arabia arms being used in Yemen, the United States may be held responsible for human rights violations in Yemen. The Arms Export Control Act (AECA) provides the U.S. President with the authority and responsibility for the exportation of defense articles and services.[3] Under the AECA, specifically 22 U.S.C. § 2785, the United States fails to comply with arms sales requirements by not sufficiently performing end-use monitoring, failing to ensure arms sold to Saudi Arabia are used for their intended purpose, and breaking international law as cited under the Foreign Assistance Act of 1961.

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1 *See generally* Annual Rep. of the U.N. High Commissioner for Hum. Rts. & Reps. of the Off. of the High Commissioner and the Secretary-General, Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014, U.N. Doc. A/HRC/42/CRP.7 (2020) [hereinafter UNHCR Report].
2 *See id*. at 73, 106.
3 22 U.S.C. § 2778.

II. Background

After decades of growing tensions, the war in Yemen began in 2014 when Houthi rebels attempted to overthrow the then-Yemeni government.[4] The Houthi rebels, a Zaydi Shiite movement backed by Iran, formed in northern Yemen in the 1980s, and opposed the growing Saudi influence within Yemen.[5] The Houthis currently maintain control of the region.[6]

The Yemeni government, backed by Saudi Arabia, remains a majority Sunni coalition.[7] While the UN has attempted to broker many peace negotiations, they continue to fall through.[8] Saudi Arabia plays a significant role in the conflict by conducting a military campaign to reduce Houthi control while simultaneously blocking humanitarian aid and committing war crimes through violence against civilians.[9] The United States, along with France, Germany, and the United Kingdom, continue to fund the Yemeni government indirectly through Saudi Arabia.[10] While Congress has attempted to enforce stricter oversight of the American-made weapons deployed in Yemen, each bill has failed, and Former President Trump and President Biden have vetoed attempts at reform.[11]

4 Kali Robinson, *Yemen's Tragedy: War, Stalemate, and Suffering*, Council on Foreign Rels. (May 1, 2023, 1:44 PM), https://www.cfr.org/backgrounder/yemen-crisis.
5 Bruce Riedel, *Who are the Houthis, and Why are We at War with Them?*, Brookings Inst. (Dec. 18, 2017), https://www.brookings.edu/blog/markaz/2017/12/18/who-are-the-houthis-and-why-are-we-at-war-with-them/.
6 *War in Yemen*, Council on Foreign Rels. (Apr. 25, 2023), https://www.cfr.org/global-conflict-tracker/conflict/war-yemen.
7 *Id.*
8 *See* Robinson, *supra* note 5.
9 Joyce Sohyun Lee, Meg Kelly and Atthar Mirza, *Saudi-Led Airstrikes in Yemen have been Called War Crimes. Many Relied on US Support*, Wash. Post (June 4, 2022), https://www.washingtonpost.com/investigations/interactive/2022/saudi-war-crimes-yemen/.
10 *See* Robinson, *supra* note 5.
11 Cameron Glenn, *Who are Yemen's Houthis?*, Wilson Ctr., (July 7, 2022), https://www.wilsoncenter.org/article/who-are-yemens-houthis; *see also* Joyce Sohyun Lee, Meg Kelly & Atthar Mirza, *Saudi-Led Airstrikes in Yemen Have Been Called War Crimes. Many Relied on US Support*, Wash. Post (June 2022), https://www.washingtonpost.com/investigations/interactive/2022/saudi-war-crimes-yemen/; Oona A. Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 Harv. Nat'l Sec. J. 1, 8 (2018).

Hundreds of thousands of people have died in the armed conflict in Yemen, including civilians.[12] Millions more are suffering or have perished from hunger, and the Saudi-led coalition has placed massive restrictions on aid delivery—a situation that COVID-19 exacerbated.[13] Moreover, the Saudi coalition carried out at least 200 air raids, and 716 individual airstrikes in February 2022.[14] In February 2022, out of fifty-nine air raids where the target was identified: nine hit residential areas, killing two civilians and injuring ten.[15] This was just one month in an eight-year war, where recording abuses has been difficult due to ongoing violence and lack of sufficient human rights monitoring.[16]

Congress passed the AECA in response to amending the Foreign Military Sales Act of 1968 ("the Act").[17] The Act governs military and commercial sales of defense articles, services, and training to guide conduct for all actors in the international arms market.[18]

III. Analysis

Under 22 U.S.C. § 2785, which governs end-use monitoring of defense articles and services, the United States is required to "provide reasonable assurance that" the recipient of U.S. munitions complies with and uses such articles for their intended purposes.[19] However, the Saudi-led coalition continues to commit human rights abuses, and the United States arms play a key role in these violations.[20]

A. Blue Lantern, 22 U.S.C. § 2785(2)(A)

The United States is violating 22 U.S.C. § 2785(2)(A) ("Blue Lantern program") due to its failure to perform end-use monitoring of the munitions sold to Saudi Arabia.[21] This statute aligns with § 38(g)(7) of the AECA, which requires a strict standard "for identifying high-risk exports for regular end-use verification.[22]" The goal of Blue Lantern programs is to establish expectations of due diligence for exporters and importers.[23]

The first objective of the Blue Lantern program is to build confidence in trade relationships, but the program emphasizes that Blue Lantern is not a law enforcement agency nor does it open "investigations" in order to further research issues.[24] The current system of checking compliance involves base-level observations through open-source research or consulting host government officials.[25] However, the lack of investigation and *prima facie* research does not allow anything more than shallow conclusions about the use of weapons sold.[26]

Not all of Congress has turned a blind eye to these human rights violations; several bills have been introduced to monitor Saudi Arabia's actions.[27] For instance, Representative Tom Malinowski introduced H.R. 6601, "Saudi Arabia Legitimate Self Defense Act," to impose restrictions on defense services of U.S.-provided aircraft belonging to Saudi Arabian military units conducting offensive airstrikes in Yemen, but like many of its predecessors, the proposition ended there.[28]

12 Andrea Prasow, *U.S. War Crimes in Yemen: Stop Looking the Other Way*, Hum. Rts. Watch (Sept. 21, 2020, 5:37 PM), https://www.hrw.org/news/2020/09/21/us-war-crimes-yemen-stop-looking-other-way.
13 *Id*.
14 *Id.*
15 *Yemen: Latest Round of Saudi-UAE-Led Attacks Targets Civilians,* Hum. Rts. Watch (Apr. 18, 2022, 12:00 AM), https://www.hrw.org/news/2022/04/18/yemen-latest-round-saudi-uae-led-attacks-targets-civilians.
16 *Id.*
17 *See* 22 U.S.C. § 2778 (The Arms Export Control Act (AECA) came into existence with the passage of the Foreign Military Sales Act (FMSA) of 1968. An amendment in the International Security Assistance and AECA of 1976 changed the name of FMSA to the AECA).
18 *See* 22 U.S.C. § 2751.
19 22 U.S.C. § 2785.
20 *See generally*, *Yemen: State and DOD Need Better Information on Civilian Impacts of U.S. Military Support to Saudi Arabia and the United Arab Emirates*, U.S. Gov't Accountability Off. (June 15, 2022), https://www.gao.gov/products/gao-22-105988.
21 *Id.* at 39.
22 22 U.S.C. § 2785(a)(2).
23 Tammy Rutledge, U.S. Defense Trade Controls and the Blue Lantern End-Use Monitoring Program 6, https://www.bis.doc.gov/index.php/documents/update-2015-presentations/1375-civil-military-ddtc/file.
24 *Id.* at 4.
25 Off. of Def. Trade Controls Pol'y, Blue Lantern End-Use Monitoring Program 4 (2016), https://www.bis.doc.gov/index.php/documents/pdfs/1588-end-user-verification-blue-lantern/file.
26 *Id.* at 8.
27 Hathaway et al., *supra* note 12.
28 H.R. (IH) 6601, 117th 2d Cong. (2022), https://www.govinfo.gov/content/pkg/BILLS-117hr6601ih/html/BILLS-117hr6601ih.htm.

Additionally, Senator Elizabeth Warren inquired with The United States Central Command ("CENTCOM") regarding the quality of arms use tracking the use of U.S. arms by Saudi Arabia, and CENTCOM responded that there is a database detailing every airstrike by the Saudi-led coalition.[29] The Senator and Congress do not have open access to CENTCOM's database, and the Department of Defense ("DoD") has denied knowledge of U.S.-made weapons being used for the inhumane treatment in Yemen, so Congress is forced to rely on external organizations' reports.[30]

B. Intended Purposes, 22 U.S.C. § 2785(2)(B)

Under 22 U.S.C. § 2785(2)(B), the President could be held liable for failing to impose requirements on Saudi Arabia to use the arms purchased from the United States only for their intended purposes.[31] Multiple reports have outlined law-of-war violations, but the DoD and the Department of State have denied any illegal transfers of weapons sold to Saudi Arabia in Yemen.[32] Nevertheless, CNN investigations found multiple Saudi coalition attacks where enlistees used U.S.-made weapons to strike and kill civilians, including children, in Yemen.[33] Additionally, many guns, grenades, and other U.S.-made weapons are sold in markets across Yemen.[34] The AECA requires the United States government to terminate sales if the President or Congress finds that the recipient is using defense articles in an unintended manner.[35] If a country is using U.S. military assistance for any purpose other than those listed in the AECA, then it is considered an unintended manner.[36] U.S. defense articles may only be used for the specific purposes for which they were intended, as specified in the export license. They may not be used for any other purpose, such as for re-export, retransfer, or diversion to a third party.[37] If there is a violation, the transaction must cease until the violation stops or there is satisfactory assurance that the violation will not take place again.[38] Although the AECA permits the use of munitions for "legitimate self-defense" purposes, the Saudi-led coalition's actions may constitute war crimes, thus extending beyond the scope of self-defense purposes.[39]

C. Foreign Assistance Act of 1961 Under 22 U.S.C. § 2785

The Foreign Assistance Act of 1961 invokes international law to hold the United States accountable for articles sold.[40] Nonetheless, the arms sales continue to violate § 2785.[41] Since as early as 2015, the Saudi-led coalition has used U.S. arms in unlawful airstrikes and to kill civilians.[42] Section 502B of the Foreign Assistance Act of 1961 lays out the United States' goal of observing international human rights laws by denying security assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[43] Therefore, the arms sales are contributing to these human rights violations and violating § 2785. [44]

IV. Recommendations

Several possible solutions exist to end the United States' connection to war crimes in Yemen and the coinciding domestic law violations. First, previous unenacted proposals, such as H.R. 6601, should serve as a base for recommendations that would require the State Department to further investigate U.S.-origin defense articles in Yemen.[45] Other options include adopting

29 *Id.*
30 *See* UNHCR Report, *supra* note 2. *See also* Hathaway et al., *supra* note 12.
31 22 U.S.C. § 2785(2)(B).
32 Akshaya Kumar, *US Government Watchdog Finds Flawed Weapons Monitoring in Yemen - Oversight Needed to Protect Yemeni Civilians, Hold Saudi Arabia and UAE Accountable*, HUM. RTS. WATCH (June 13, 2022, 1:10 PM), https://www.hrw.org/news/2022/06/13/us-government-watchdog-finds-flawed-weapons-monitoring-yemen.
33 Nima Elbagir, Salma Abdelaziz & Laura Smith-Spark, *Made in America,* CNN, https://edition.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/ (last visited February 23, 2023).
34 Nima Elbagir Salma Abdelaziz, Mohamed Abo El Gheit & Laura Smith-Spark, *Sold to an Ally, Lost to an Enemy*, CNN, https://www.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms/ (last visited February 23, 2023).
35 *See* Hathaway et al., *supra* note 12, at 21.
36 *Id.*
37 22 USCS § 2753.
38 *Id.*
39 Prasow, *supra* note 13.
40 *See* 22 U.S.C. § 2785; Hathaway et al., *supra* note 12, at 4.
41 *See generally* Hathaway et al., *supra* note 12.
42 *See* Prasow, *supra* note 13.
43 22 U.S.C § 2304(a)(1)-(2).
44 *See* Prasow, *supra* note 13.
45 § 1337 of H.R. 7900 (as recommended by the GAO, requires

FY23 National Defense Authorization Act (NDAA) Subtitle F, 16 § 1271, which is a bill that outlines policy priorities for national security, and §1271 includes specific provisions requiring stricter weapons monitoring. For example, former President Trump cut Section 1290 of the 2019 NDAA, which required certification that the Saudi-led coalition showed intent to end the war.[46] Adopting additional measures requiring transparency would allow better insight into where U.S. arms are used and how to prevent future human rights violations.

V. Conclusion

The United States' lack of accountability continues to risk its complicity in international and domestic crimes.[47] The United States is in direct violation of domestic law under 22 U.S.C. § 2785 of the AECA. The Executive continues selling arms to Saudi Arabia despite Saudi Arabia's inability or refusal to fully report the results of end-use monitoring, failing to ensure arms sold to Saudi Arabia are used for their intended purpose, and breaking international law under the Foreign Assistance Act of 1961. These illegal actions gravely threaten the integrity of the United States' government, and they continue to harm and kill Yemeni civilians.

the State Department to develop guidance to investigate whether U.S.-origin defense articles have been used in Yemen by the Kingdom of Saudi Arabia or the United Arab Emirates in violation of relevant agreements).

46 *See* Hathaway et al., *supra* note 12, at 8.

47 *See* Kumar, *supra* note 33.

How the Overturning of *Roe v. Wade* Disproportionately Affects the Immigrant Asian American Population in the United States

*by Amy P. Lyons**

I. Introduction

On June 24, 2022, the Supreme Court overturned the historic case *Roe v. Wade*[1], ending the right to abortion across the United States.[2] The overturning of *Roe v. Wade* and the responsive state statutes that criminalize abortion[3] are yet further barriers to health access for Asian Americans, especially those who experience domestic violence, and are a violation of the universal Right to Health.[4]

II. Background

Asian Pacific Islander women in the United States are uniquely impacted by the *Dobbs* decision.[5] Almost a quarter of Asian Pacific Islander women in the United States have reported sexual violence at home; another survey found that 60 percent of immigrant Korean women had been battered by their husbands.[6] These experiences may lead to unwanted pregnancies and the need for abortions.[7] With the overturning of *Roe v. Wade*, safe abortions have become increasingly inaccessible across the United States.[8] Survivors within this community face further challenges, such as limited English proficiency, and other cultural stigmas and norms within their groups.[9] While addressing these

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1 Roe v. Wade, 410 U.S. 113 (1973).
2 Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, Nat'l Public Radio (June 24, 2022, 10:43 AM), https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn; *see also Roe*, 410 U.S. 113; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
3 *Tracking the States Where Abortion is Now Banned*, N.Y. Times, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last visited Feb. 17, 2023) [hereinafter Tracking Where Abortion is Banned]; *see also After* Roe *Fell: Abortion Laws by State*, Ctr. For Reproductive Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited Feb. 17, 2023) [hereinafter After Roe Fell]; *Roe*, 410 U.S. 113 at 733 (1973); *Dobbs*, 142 S. Ct. at 2284 (2022).
4 U.N. Hum. Rts. Off. High Comm'r, The Right to Health (June 2008), https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf [hereinafter Right to Health]; *see also*, U.N. Hum. Rts. Off. High Comm'r, Sexual and Reproductive Health and Rights, https://www.ohchr.org/en/node/3447/sexual-and-reproductive-health-and-rights (last visited Sept. 25, 2022) [hereinafter Sexual and Reproductive Health and Rights].
5 *Dobbs*, 142 S. Ct. 2228 (2022).
6 *Statistics on Violence Against API Women*, Asian Pac. Inst. on Gender-Based Violence, https://www.api-gbv.org/about-gbv/statistics-violence-against-api-women/ (last visited Oct. 25, 2022) [hereinafter Statistics on Violence]; *see also The Facts on Immigrant Women and Domestic Violence*, Tarrant Cares, https://tarrant.tx.networkofcare.org/dv/library/article.aspx?id=1042 (last visited Feb. 17, 2023).
7 Statistics on Violence, *supra* note 6.
8 Tracking Where Abortion is Banned, *supra* note 3; After Roe Fell, *supra* note 3 (this interactive map allows users to see how many states have made abortion inaccessible. If users click on "Abortion Bans in Effect" on the left-hand side of the screen, and click on all of the boxes, the map shows that every state has some form of abortion ban).
9 *State of Asian Americans, Native Hawaiians, and Pacific Islanders in the United States*, AAPI Data (June 2022), https://aapidata.com/wp-content/uploads/2022/06/State-AANHPIs-National-June2022.pdf [hereinafter State of Asian Americans]; *see also* Frances Kai-Hwa Wang, *Despite State Efforts to Protect Abortion Access, Asian Americans in Michigan Still See Obstacles*, PBS News Hour (Aug. 12, 2022), https://www.pbs.org/newshour/nation/despite-state-efforts-to-protect-abortion-access-asian-americans-in-

challenges, survivors are facing not only unwanted pregnancies, but also the fear of homicide during those pregnancies by their partner.[10]

A. What Right to Health Standards the United States Should be Following

Currently, there are two international declarations that encompass the Right to Health. The United States has signed, but has never been ratified, the International Covenant on Economic, Social, and Cultural Rights.[11] The United States has also signed the Universal Declaration of Human Rights, but it is not considered legally binding, and many provisions are considered part of customary international law, and therefore universally obligatory.[12] To make something legally binding, the United States must sign and ratify an agreement. Ratification occurs when, after consideration by the Committee on Foreign Relations, the Senate approves or rejects a resolution of ratification.[13] Even though the United States has not ratified these declarations, they should still be legally bound to them because of their status as not only a Member State of the United Nations, but as one of the five permanent members of the United Nations Security Council.[14]

III. Legal Analysis of the Right to Health

The overturning of *Roe v. Wade* and the subsequent state statutes prohibiting abortion both fail to acknowledge and provide exceptions for women who experience domestic violence, including rape. Very few states have a rape exception for abortion, and if they do, even fewer comply with these exceptions.[15] The United States must comply with the United Nations' Right to Health standards, as included in the International Covenant on Civil & Political Rights (ICCPR), because the United States ratified it in 1992, and, upon ratification, the ICCPR became the "supreme law of the land," under the Supremacy Clause of the United States Constitution. [16] Complying with these standards will help to better support these more vulnerable populations, such as the Asian American community, and provide for safeguards against further harm.

A. Right to Health

The overturning of *Roe v. Wade* and subsequent state statutes violate many key aspects of the United Nations' Right to Health standards.[17] Under these health standards, the Right to Health: (1) is inclusive, (2) contains entitlements, (3) is provided without any discrimination, and (4) is available, accessible, acceptable and

michigan-still-see-obstacles; Katherine Gallagher Robbins & Vanisha Kudumuri, *State Abortion Bans Could Harm More than 1.3 Million Asian American and Pacific Islander Women*, Nat'l P'ship for Women & Fams. (Aug. 30, 2022), https://www.nationalpartnership.org/our-impact/blog/general/aapi-women-state-abortion-bans.html; Sakshi Venkatraman, *Nearly One-Third of Low-Income Asian Women Now Live in States with Limited Abortion Access*, NBC News (Aug. 30, 2022), https://www.nbcnews.com/news/asian-america/nearly-one-third-low-income-asian-women-now-live-states-limited-aborti-rcna43194.

10 Tiffany Diane Tso, *Pregnant Asians at Unique Risk in a Post-'Roe' World*, Rewire News Grp. (Sept. 21, 2022), https://rewirenewsgroup.com/2022/09/21/abortion-bans-and-anti-asian-violence-how-aapi-women-like-me-are-in-the-crosshairs/; *see also* Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018-2019*, Nat'l Libr. of Med. (Nov. 1, 2021), https://pubmed.ncbi.nlm.nih.gov/34619735/; Anita Raj & Jay Silverman, *Immigrant South Asian Women at Greater Risk for Injury from Intimate Partner Violence*, Nat'l Libr. of Med. (Mar. 2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447758/.

11 *Six US-Signed Treaties and Declarations Recognizing a Right to Health Care*, ProCon (Sept. 17, 2014), https://healthcare.procon.org/six-us-signed-treaties-and-declarations-recognizing-a-right-to-health-care/#un-decleration-of-human-rights.

12 *Id.*; *see also* Ionel Zamfir, *The Universal Declaration of Human Rights and its Relevance for the European Union*, European Parliamentary Rsch. Serv. (Nov. 2018), https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf.

13 *About Treaties*, U.S. Senate, https://www.senate.gov/about/powers-procedures/treaties.htm (last accessed Nov. 6, 2022).

14 *Current Members*, U.N. Sec. Council, https://www.un.org/securitycouncil/content/current-members (last accessed Nov. 6, 2022).

15 Tracking Where Abortion Is Banned, *supra* note 3; After Roe Fell, *supra* note 3; *see also*, Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. Times (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html.

16 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, arts. 18, 21; *see also FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr#:~:text=The%20U.S.%20must%20comply%20with,when%20it%20ratified%20the%20treaty (last visited Feb. 17, 2023).

17 Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

of good quality.[18]

First, the Right to Health as an inclusive right means access to health care and other tools that support healthy lifestyles, and also encompasses gender equality.[19] As evidenced in the United States, there is a disproportionate effect of abortion access and discrimination on the female-identifying population.[20] For example, studies have found that immigrant women tend to suffer higher rates of battering than United States citizens because their cultures accept domestic violence or because they have less access to legal and social services than U.S. citizens.[21] The Right to Health is also inclusive because it includes "health-related education and information."[22] It is clear that the states that have shut down access to abortion rights do not provide accurate information for those seeking that form of assistance.[23] Many women receive misleading information in state-issued brochures when seeking abortions, including misinformation about embryonic development; thirty-one states require that health care providers give women informational packets before an abortion and in twenty-three of those thirty-one states, researchers found that nearly a third of the information was medically inaccurate.[24] Further, the Right to Health includes entitlements, which include "maternal, child and reproductive health" as well as "participation of the population in health-related decisionmaking at the national and community levels."[25] The overturning of *Roe v. Wade* and state statutes that prohibit abortions do not account for maternal and reproductive health and do not allow for participation of all women in this health-related decisionmaking at both the national and community levels. State statutes have taken away a woman's right to choose an abortion by making it illegal, meaning that a woman who chooses to have an abortion may be punished with life imprisonment, felony titles, and/or hefty fines as high as $10,000.[26] Asian American communities, who are particularly hard hit, have spoken out, but to no avail.[27]

Perhaps most importantly for this topic, the Right to Health is "provided to all without any discrimination."[28] It is abundantly clear that the ban on abortions not only affects more than half of the United States population, but also places an undue health barrier on the Asian American community.[29] This is especially

18 Right to Health, *supra* note 4, at 3–4; Sexual and Reproductive Health and Rights, *supra* note 4.
19 Right to Health, *supra* note 4, at 3.
20 Roe vs. Wade *and its impact on the AAPI Community*, Clean Circle (May 4, 2022), https://clean-circle.com/blogs/our-blogs/roe-vs-wade-and-its-impact-on-the-aapi-community; Statistics on Violence, *supra* note 6; *see also* State of Asian Americans, *supra* note 9; Samantha Artiga et al., *What are the Implications of the Overturning of* Roe v. Wade *for Racial Disparities?*, Kaiser Fam. Found. (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/.
21 Statistics on Violence, *supra* note 6; *see also*, *The Facts on Immigrant Women and Domestic Violence*, Tarrant Cares, https://tarrant.tx.networkofcare.org/dv/library/article.aspx?id=1042 (last visited Feb. 17, 2023).
22 Right to Health, *supra* note 4, at 3–4; Sexual and Reproductive Health and Rights, *supra* note 4.
23 Julia Rollison, *Combating Abortion Misinformation in the Post-Roe Environment*, Rand Corp. (July 6, 2022), https://www.rand.org/blog/2022/07/combating-abortion-misinformation-in-the-post-roe-environment.html.
24 Sebastian Malo, *One-third of U.S. Women Seeking Abortions Get Misleading Information: Study*, Reuters (Jan. 21, 2023), https://www.reuters.com/article/us-usa-abortion-study/one-third-of-u-s-women-seeking-abortions-get-misleading-information-study-idUSKCN0W22T6.
25 Right to Health, *supra* note 4 at 3–4; Sexual and Reproductive Health and Rights, *supra* note 4.
26 Oriana Gonzalez, *How States Enforce Anti-abortion Laws* Axios (June 24, 2022), axios.com/2022/06/08/abortion-bans-penalty-fines-prison-us-states.
27 *As SCOTUS Overturns* Roe v. Wade*, Asian Americans Demand Action*, Nat'l Council of Asian Pacific Ams. (June 24, 2022), https://www.ncapaonline.org/as-scotus-overturns-roe-v-wade-asian-americans-demand-action/; *see also Asian Americans Sound Off on Overturning of* Roe v. Wade, NW Asian Wkly. (June 30, 2022), https://nwasianweekly.com/2022/06/asian-americans-sound-of-f-on-overturning-of-roe-v-wade/; *Asian American and Pacific Islander Groups File Amicus Brief In U.S. Supreme Court in Support of* Roe v. Wade, Asian Ams. Advancing Just. (Sept. 20, 2021), https://www.advancingjustice-aajc.org/press-release/asian-american-and-pacific-islander-groups-file-amicus-brief-us-supreme-court-support; Kavya Srikanth*, Why South Asian Americans Overwhelmingly Support Abortion*, The Juggernaut (July 1, 2022), https://www.thejuggernaut.com/south-asian-americans-abortion-rights-roe-v-wade-overturn.
28 Right to Health, *supra* note 4 at 3–4; Sexual and Reproductive Health and Rights, *supra* note 4
29 Liza Fuentes, *Inequality in US Abortion Rights and Access: The End of Roe is Deepening Existing Divides* Guttmacher Inst. (Jan.

true for those who experience domestic violence, as they have nowhere safe to turn when seeking an abortion for health reasons or otherwise.[30]

Finally, the Right to Health demands that "all services, goods and facilities must be available, accessible, acceptable, and of good quality."[31] As of February 2023, at least thirteen states have outright banned abortions, and ten states have abortion "legal for now," but that status could change at any moment.[32] Combined, these abortion-banning statutes account for thirty-three states, equating to more than fifty percent of states placing a restriction on abortion access. With more than fifty percent of states placing some form of restriction on abortion, this precludes a significant portion of the United States population from seeking an abortion, and an even greater weight on Asian American women who are more likely to seek that right to health. These statistics demonstrate how the United States is not meeting the requirement to provide available, accessible, and acceptable abortion facilities under the Right to Health.

IV. Recommendations & Conclusion

The United States must adjust its abortion policies so that it meets the United Nations' standards of the Right to Health. Specifically, the United States must codify abortion rights and create legislation that should address these areas of concern. The Asian American immigrant community already faces many obstacles, such as English proficiency and unsafe home environments; their ability to accessible abortion care should not be another barrier to their health and well-being. The United States must create legislation that protects more vulnerable populations so that they can receive the healthcare they deserve and need. Furthermore, the United States must sign and ratify the United Nation's Right to Health and Universal Declaration of Human Rights so that it will be legally bound to follow those standards and would therefore be more accountable for its actions.

17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides.
30 Sakshi Venkatraman, *Asian Domestic Violence Survivors are in More Danger After Roe Ruling, Experts Fear*, NBC News (July 7, 2022), https://www.nbcnews.com/news/asian-america/asian-domestic-violence-survivors-are-danger-roe-ruling-experts-fear-rcna35992; *see also* Sakshi Venkatraman, *Asians born in U.S. Have Higher Rate of Abortions than Asian Immigrants. What that Means*, NBC News (May 11, 2022), https://www.nbcnews.com/news/asian-america/asians-born-us-higher-rate-abortions-asian-immigrants-means-rcna27930.
31 Right to Health, *supra* note 4 at 3–4; Sexual and Reproductive Health and Rights, *supra* note 4.
32 Tracking the States Where Abortion is Now Banned, *supra* note 3; *see also*, After Roe Fell, *supra* note 3.

Second Chance Pell Experiment: How the United States is Starting to Recognize Education as a Right

*by Brittany Walker**

I. Introduction

For decades, education as a right has been an issue between U.S. citizens and U.S. courts.[1] U.S. courts maintain that education is not a right, as it was not explicitly stated in the U.S. Constitution.[2] Since the U.S. Constitution is silent about education, U.S. courts have applied the 14th Amendment to defer educational matters, such as compulsory school requirements, to each state.[3] Currently, education in the United States is generally a right until middle school.[4] After middle school, the American government allows parents and students to determine whether additional education is necessary in their situation.[5] This view causes disparities for students desiring to further their education at colleges and universities, between those that can and cannot afford post-secondary education tuition.[6] One segment of the American population that has been excluded from obtaining higher or post-secondary education are incarcerated individuals.[7] Until recently, the American government prohibited incarcerated individuals from having access to post-secondary educational programs within prisons.[8] Offering post-secondary educational programs in state and federal prisons could be as effective as substance abuse programs or vocational trainings currently offered, to provide them with the tools to be productive citizens once released.[9] If the United States permits incarcerated individuals to receive post-secondary education, they will in essence, acknowledge education as more than a right for all of their citizens and live up to the international human rights standards.

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1 *See generally* David Dorsey, *Education is Still (For Now) Not a Fundamental Right Under the U.S. Constitution*, Kan. Pol'y. Inst. (Sept. 17, 2020), https://kansaspolicy.org/education-is-still-for-now-not-a-fundamental-right-under-the-u-s-constitution/ (explaining the lineage of cases brought to the U.S. Supreme Court regarding education as a constitutional right).

2 Janine Bowen, *Ask the Expert: What Does the Constitution Say About Education? Nothing Explicitly, but That Doesn't Mean It Can't Help Provide Students with Equal Educational Access*, Coll. Educ. News (Sept. 18, 2020), https://ced.ncsu.edu/news/2020/09/18/ask-the-expert-what-does-the-constitution-say-about-education-nothing-explicitly-but-that-doesnt-mean-it-cant-help-provide-students-with-equal-educational-access-says-assistant-p/; San Antonio Independent School District v. Rodriguez, No. 71-1332, 1973 U.S. LEXIS 91 (Mar. 21, 1973); Wisconsin v. Yoder, Nos. State 92, 93, 94, 1971 Wisc. LEXIS 1129 (Jan. 8, 1971).

3 Bowen, *supra* note 2.

4 *Compulsory School Age Requirements*, Educ. Commission States (2010), https://www.ecs.org/clearinghouse/86/62/8662.pdf (the reasons for compulsory school age requirements have changed throughout American history but some reasons include the need to protect children's safety and welfare, as well as prepare them to be productive citizens).

5 Cynthia A. Cave, *Compulsory School Attendance*, State Univ. (last visited Feb. 24, 2023), https://education.stateuniversity.com/pages/1878/Compulsory-School-Attendance.html.

6 *A History of Privilege in American Higher Education*, Best Colls., https://www.bestcolleges.com/news/analysis/2020/07/17/history-privilege-higher-education/.

7 Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, Prison Pol'y Initiative (Oct. 2018), https://www.prisonpolicy.org/reports/education.html#table3.

8 Press Release, U.S. Dep't of Educ. Announces Expansion of Second Chance Pell Experiment & Actions to Help Incarcerated Individuals Resume Educ. Journeys & Reduce Recidivism (Apr. 26, 2022).

9 *Education Programs*, Federal Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/education.jsp (last visited October 23, 2022).

II. Background

A. The Pell Grant

In 1965, the United States Congress passed the Higher Education Act, which established the Pell Grant.[10] Pell Grants are federally funded grants that are awarded to students who meet certain need-based qualifications to assist with post-secondary education tuition costs.[11] When Congress passed the Higher Education Act, individuals who were incarcerated, applied for the Free Application for Federal Student Aid (FAFSA), and met the financial eligibility requirement, were also awarded Pell Grants.[12] The Pell Grants allowed incarcerated individuals to obtain a post-secondary education within the prison.[13] In 1982, there were approximately 350 post-secondary educational programs in U.S. prisons.[14] The number of post-secondary educational programs increased to nearly 800 within 1,300 prisons by the early 1990s.[15] However, when Congress passed the Violent Crime Control and Law Enforcement Act in 1994, a provision within the Act, revoked the eligibility of incarcerated individuals to receive a Pell Grant.[16] By 2005, there were only twelve post-secondary educational programs still operating within U.S. prisons.[17] In 2015, the Obama administration established the Second Chance Pell Experiment, which provided Pell Grants to incarcerated individuals to participate in post-secondary educational programs.[18] The Biden administration expanded the Second Chance Pell Experiment in 2022, enabling 200 schools to participate in the experiment.[19]

B. The Universal Declaration of Human Rights

The United Nations General Assembly drafted the Universal Declaration of Human Rights (UDHR) in 1948, as a common standard of fundamental rights for all nations to strive to protect.[20] Article 26 of the UDHR declares that everyone has the right to education, that it be free in the elementary and fundamental stages, and that higher education be equally accessible to all on the basis of merit.[21] Higher education includes technical and professional education beyond high school.[22] The United States, a Member State of the United Nations, currently abides by some of Article 26 by providing free education to students from elementary to high school.[23] While the Universal Declaration of Human Rights is merely persuasive, the United States, as one of the world's most influential countries, should always strive to set the best humanitarian standards. Education can be used as a vehicle to promote human welfare by reducing poverty and crime, and by promoting equality and civic involvement.[24] However, the United States stops short of providing equal access to higher (or post-secondary) education on the basis of merit.[25] The reason for the partial implementation of Article

10 Higher Education Act of 1965, Pub. L. No. 89-329, § 401, 79 Stat. 183, 184-204 (1965).
11 Federal Student Aid, https://studentaid.gov/help-center/answers/article/federal-pell-grant-program (last visited Nov. 20, 2022).
12 Wendy Sawyer, *Since You Asked: How Did the 1994 Crime Bill Affect Prison College Programs?*, Prison Pol'y Initiative (Aug. 22, 2019), https://www.prisonpolicy.org/blog/2019/08/22/college-in-prison/; Higher Education Act of 1965, Pub. L. No. 89-329, § 484, 79 Stat. 637, 637-38 (1965).
13 Bennett G. Boggs, *Correction by Degrees: Postsecondary Programs in Prisons,* Nat'l Conf. of State Legis. (June 2019), https://www.ncsl.org/Portals/1/Documents/educ/Postsecondary-Programs-in-Prisons_v02.pdf.
14 *Id.* at 2.
15 *Id.*
16 Higher Education Act of 1965, Pub. L. No. 89-329, § 401(b)(6), 79 Stat. 183, 185 (1965).
17 Boggs, *supra* note 13 at 3.
18 *See* Press Release, U.S. Dep't Educ., *supra* note 8.
19 *Id.*
20 Universal Declaration of Human Rights, A/RES/3/217 A (Dec. 10, 1948).
21 *Id.*
22 *Structure of U.S.* Education, U.S. Dep't. Educ., https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-structure-us.html. (last visited May 15, 2023) (The U.S. Department of Education classifies education after high school as postsecondary or tertiary education. This includes non-degree programs that lead to certificates and diplomas plus six-degree levels: associate, bachelor, first professional, master, advanced intermediate, and research doctorate).
23 Cassidy Francies & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, Educ. Comm'n States (2020); *Member States*, United Nations, https://www.un.org/en/about-us/member-states#gotoU (last visited Nov. 20, 2022).
24 Vinay Prajapati, *Top 25 Benefits of Education that Can Shape Our Future*, TechPrevue (Mar. 8, 2022), https://www.techprevue.com/benefits-of-education/.
25 *Why Meritocracy is a Myth in College Admissions*, The Conversation, (Mar. 15, 2019, 6:42 AM), https://theconversation.com/why-meritocracy-is-a-myth-in-college-admissions-113620 (mentioning that there are few spots remaining in highly selective colleges after legacy students, student-athletes, and students with highly desirable qualities are admitted).

26 by the United States is the government's sentiment that post-secondary education is a privilege and not a right.[26] This sentiment was expressed by the Supreme Court of the United States in 1972, when it concluded that education was "not among the rights afforded explicit protection under [the] Federal Constitution" nor implicitly protected by the Constitution.[27] Students benefit from "free" public education through high school, mostly due to state's desire to have literate citizens.[28] However, without the proper funding (either federal or private) accessing education for incarcerated individuals will be nearly impossible, even to those with merit to attend.[29]

III. Legal Analysis

Not providing post-secondary educational programs in U.S. prisons causes consequences on many levels. On the individual level, released inmates face discrimination in the job market due to their criminal convictions.[30] Further, individuals who are uneducated or lack higher education face more hurdles to obtain legal employment and have a higher chance of reoffending.[31] Studies show that current and formerly incarcerated individuals have less education than the general population and are less competitive in the job market.[32] A longitudinal study by the U.S. Sentencing Commission found that individuals who were incarcerated with less than a high school diploma had the highest recidivism rates compared to individuals who obtained a college degree prior to being incarcerated.[33] Formerly incarcerated individuals who had access to educational programs within prisons have higher employment rates and better wages than those who were not offered those programs.[34] Additionally, at the state and federal levels, not providing post-secondary education in prisons has been costly.[35] The U.S. Department of Education compared the state and local spending of prisons versus pre-K-12 public education from 1979 – 2013.[36] They found that the spending on prisons was three times the rate of funding for pre-K-12 public education, and that the bulk of the funds went toward housing incarcerated individuals.[37]

Although funding post-secondary educational programs within prisons could temporarily increase state and local spending on prisons, the goal is to give inmates the necessary tools to reduce recidivism rates and reduce inmate populations.[38] The implementation of post-secondary educational programs within U.S. prisons produced positive results for released inmates and their communities.[39] For instance, a report found that individuals who participated in any type of educational program while in prison were forty-three percent less likely to return to prison.[40] With results like these, the United States should desire to provide post-secondary educational programs to incarcerated individuals.

Perhaps more importantly, the United States has an

26 Bowen, *supra* note 2.
27 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1972).
28 Cave, *supra* note 5.
29 Press Release, NORC, Survey: Americans See Cost as the Biggest Barrier to Higher Education (May 3, 2022), https://www.norc.org/NewsEventsPublications/PressReleases/Pages/survey-americans-see-cost-as-the-biggest-barrier-to-higher-education.aspx.
30 *Employment after Prison: A Longitudinal Study of Releasees in Three States*, URBAN INST. (2008), https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF.
31 Alexandra Gibbons & Rashawn Ray, *The Societal Benefits of Postsecondary Prison Educ.,* BROOKINGS (Aug. 20, 2021), https://www.brookings.edu/blog/how-we-rise/2021/08/20/the-societal-benefits-of-postsecondary-prison-education/.
32 Couloute, *supra* note 7.
33 United States Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (indicating that those with less than a high school diploma have a 60.4% rate of recidivism compared to 19.1% of individuals who obtained a college degree).
34 Christopher Zoukis, *Educated Inmates Have Higher Employment Rates and Wages*, ZOUKIS CONSULTING GRP. (May 10, 2022, 12:16 AM), https://federalcriminaldefenseattorney.com/correctional-education-boosts-employment-and-wages/.
35 *Id.* (noting the U.S. economy loses around $60 billion each year from loss labor from the high rates of incarcerated individuals).
36 *Id.*
37 *Id.*
38 *See generally* Kathleen Bender, *Education Opportunities in Prison are Key to Reducing Crime,* CTR. FOR AM. PROGRESS (Mar. 2, 2018), https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/.
39 *Id.*
40 *Id.*

obligation to provide education in general to all their citizens, as a matter of promoting human rights.[41] As previously mentioned, education can be used to reduce poverty.[42] Post-secondary education, in particular, can create more informed individuals and create better health in those individuals.[43] The United States must acknowledge that the times have changed between now and when the Constitution was created in 1776. While the United States Constitution may not have listed education as a fundamental right, education should still be made available to all those with merit and the desire to learn.[44] In doing so, the United States would acknowledge and strengthen the human rights of its citizens.

IV. Recommendations

The American government is currently attempting to expand educational rights to all, mainly through the enactment and expansion of the Second Chance Pell Experiment. However, these efforts are not enough. The United States needs to recognize education (specifically post-secondary education) as a right for all and not a privilege to only those who can afford it. This would remove barriers that prevent incarcerated individuals from receiving funding for education, which would also decrease recidivism rates.[45] However, this change will not materialize until the American government sees and understands the benefits of providing post-secondary educational programs to incarcerated individuals. For example, for every dollar invested in post-secondary educational programs within prisons, taxpayers save four to five dollars that would have been spent on solely housing individuals.[46] The money saved on investing in these programs within prisons can be used for other societal programs such as public education, housing, and Medicare. Generational cycles of imprisonment can also be broken by continuing to expand access to post-secondary educational programs within prisons.[47]

V. Conclusion

In all, Article 26 of the UDHR recognizes the importance of education on all parts of an individual's life.[48] The drafters of the UDHR recognized that when an individual is afforded the opportunity of education, their standard of life could improve.[49] Mainly, education is not just about education. Education is about affording individuals the opportunity to receive a good paying job that will provide them with sufficient income to provide for themselves and their families. Denying access to education unjustly obstructs formerly incarcerated individuals' attempts to better themselves and their situation.[50] Article 26 establishes foundational education rights for its Member States to utilize regarding educational rights. The United States has incorporated part of the Article by providing free education until (generally) high school.[51] But, since the United States does not recognize education as a fundamental right for its citizens, those with merit (incarcerated or free) are not provided with equal access to post-secondary education.[52] When Congress revoked incarcerated individuals' ability to receive Pell Grants, they created larger, unintended consequences. They may have believed that incarcerated individuals should not receive the privilege of an education, but denying incarcerated individuals access to post-secondary education made it more likely for them to recidivate once released.[53] While the United States has recently tried

41 *See* Universal Declaration of Human Rights, *supra* note 20 (Article 26 also states education should be purposeful in developing human personality and respecting human rights and fundamental freedoms).
42 Prajapati, *supra* note 24.
43 Isabel V. Sawhill, *Higher Education and the Opportunity Gap*, Brookings (Oct. 8, 2013), https://www.brookings.edu/research/higher-education-and-the-opportunity-gap/.
44 Bowen, *supra* note 2.
45 Kelsie Chestnut et al., *Second Chancel Pell: Five Years of Expanding Higher Education Programs in Prisons, 2016*-2021, Vera Inst. Just. (May 2022) https://www.vera.org/downloads/publications/second-chance-pell-five-years-of-expanding-access-to-education-in-prison-2016-2021.pdf.
46 *Id.*
47 Bender, *supra* note 38.
48 Press Release, Off. of the High Comm'r for Hum. Rts., *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 26* (Dec. 5, 2018) https://www.ohchr.org/en/press-releases/2018/12/universal-declaration-human-rights-70-30-articles-30-articles-article-26#:~:text=Article%2026%20of%20the%20Universal,benefit%20from%20education%20and%20literacy.
49 *Id.*
50 Couloute, *supra* note 7.
51 *See generally Compulsory School Age Requirements*, *supra* note 4.
52 Bowen, *supra* note 2; *A History of Privilege in American Higher Education*, *supra* note 6.
53 Patrick Oakford et al., *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, Vera Inst.

to correct this human rights issue by implementing and expanding the Second Chance Pell Experiment, more needs to be done. The American government and its citizens need to recognize the positive impact that post-secondary educational programs in prisons can provide on many levels. When they do, recidivism rates will decrease, funding for prisons in general will decrease, and communities will thrive.

Just. 20 (2019), https://www.vera.org/downloads/publications/investing-in-futures.pdf (a study by RAND found that the odds of recidivating are 48 percent less for those incarcerated individuals who participate in a post-secondary education program within prison than incarcerated individuals who do not participate in the program).

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The Regional Systems Team seeks to provide up-to-date coverage of the regional human rights bodies' handling of some of our time's most pressing human rights issues. In this issue, the Regional Systems focuses on cases brought before African Court on Human and People's Rights and the European Court of Human Rights (ECtHR). Each of these articles highlights the critical role of regional courts in shaping the human rights landscape of the future and putting an end to the past abuses.

* * *

One of Many: The Power of Publication in the Human Rights Regime

*by Amanda Lorenzo**

On September 19, 2011, the High Court of Tanzania found Ghati Mwita guilty of murder for a February 4, 2008 homicide, sentencing her to hang pursuant to Tanzania's mandatory death sentence.[1] The domestic Court of Appeal sitting at Mwanza dismissed Mwita's appeal on March 11, 2013 and rejected her application for review on that decision on March 19, 2015.[2] Mwita then brought the case to the African Court of Human Rights (the Court) alleging that the conviction and sentencing procedures violated her fundamental rights under the Banjul Charter (the Charter).[3]

The Charter imposes an affirmative duty on member states to uphold fundamental rights based in its text and other internationally recognized principles of human rights.[4] As of December 2019, Tanzania has become only the second state to withdraw completely from the African Court, removing the Court's jurisdiction to receive cases from individuals and non-governmental organizations.[5] The Court has held that this does not destroy its jurisdiction over cases filed before November 22, 2020 — consequently, the withdrawal has resulted in a near monopolization of Tanzanian cases on the Court's published decisions, inherently drawing the focus away from the merits of individual cases to the state of the law in Tanzania through the deliberate publicization of judicial opinions.[6]

The Court routinely disregarded questions of the factual merits of the sentencing and conviction orders of the lower domestic courts, instead criticizing the law being applied, particularly the lack of an opportunity within the regime to mitigate the conviction and

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1 Mwita v. Tanzania, No. 012/2019, Decision, African Court on Human and People's Rights [Afr. Ct. H.P.R.], 2-3; 15, (Dec. 1, 2022), https://www.african-court.org/cpmt/storage/app/uploads/public/639/0ab/573/6390ab5730346379766550.pdf.

2 *Id.* at 3-4 (specifically, Mwita argued a violation of her right to a fair trial under Article 7 through unduly lengthy pretrial detention and trial proceeding, not affording her the presumption of innocence, convicting without sufficient evidence, not providing effective counsel, and imposing the death penalty without a fair trial; her right to life under Article 4 in imposing the mandatory death sentence outside the "narrow category of 'most serious offences,'" and not taking the personal situation into account in sentencing; and her right to dignity under Article 5 through the imposition of "cruel, inhuman or degrading punishment" by the death sentence and related detention).

3 *Id.* at 2-3.

4 African Charter on Human and People's Rights, art. 1, Dec. 28, 1988, 1520 U.N.T.S. 217 (Article 1 provides: "The Member States . . . shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative *or other measures* to give effect to them." A bright line interpretation of "other means" has not been enunciated, but it has been interpreted broadly to impose on states affirmative duties under the Charter.); *Basic Information*, African Ct. Hum. & People's Rts., https://www.african-court.org/wpafc/basic-information/ (last visited Mar. 23, 2023).

5 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Maputo Protocol"), art. 34(6), July 11, 2003, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf (requiring state parties to the protocol to make a separate declaration in order to allow direct access to individuals and non-governmental organizations to bring cases against them before the Court); *Mwita*, Afr. Ct. H.P.R., at 2; *see* @UNHumanRights, Twitter (Dec. 3, 2019, 11:12 AM), https://twitter.com/UNHumanRights/status/1201896893380530176, ("We regret decision by Tanzania Govt to block individuals and NGOs from taking cases to African Court on Human & Peoples' Rights. We urge Govt to reconsider. The Court is crucial for justice & accountability in Tanzania.").

6 *Mwita*, Afr. Ct. H.P.R., at 49. *See, generally,* African Court of Human Rights, African Court Cases | Latest Decisions, https://www.african-court.org/cpmt/latest-decisions/judgments (last visited March 14, 2023) (showing the prevalence of cases involving Tanzanian parties).

the inherently degrading nature of the sentencing.[7] Of the pecuniary relief prayed for, the Court only upheld a modest sum of seven million Tanzanian shillings (about $3,000 USD) for "reparations for the moral prejudice."[8] The Court remanded the case "through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer."[9]

Mwita's case is one of many handed down concerning alleged violations pointing to a systematic problem in the Tanzanian justice system.[10] The Court, otherwise lacking traditional enforcement power, appeals outside of itself through deliberate publication practices: "There is no indication whether measures are being taken for the law to be amended to align with [Tanzania's] international human rights obligations . . . The Court thus finds it appropriate to order publication of this judgment."[11]

The network of voluntarily joined regional human rights courts are the result of and are illustrative of a tumultuous history of compromise and uneasy acknowledgement of international governing bodies. The newest, the African Court of Human and Peoples' Rights, is no different.[12] With no inherent enforcement power, courts in their infancy appeal to other international organizations and the public conscience to supplement a quasi-enforcement power through "soft power" as a means to effectuate the pillars of the fundamental rights of the so-called human rights regime.[13] Following Tanzania's explicit withdrawal from an already controversial court, the explicit denouncing of systematic violations of due process rights by the Court in the words and themes of a burgeoning international human rights regime calls upon those instruments to prove their sustainability — if it so exists in its current formulation — on both a continental and global stage.

7 *Mwita*, Afr. Ct. H.P.R., at 30 (finding that State did not violate the Charter by reason of the time it took to conclude the trial at the High Court); *id.* at 31-32 (finding Mwita had a properly impartial tribunal); *id.* at 34 (holding state did not violate Mwita's right to a fair trial); *id.* at p. 37, ¶129 (did not violate the right to effective representation); *id.* at 20, 23; *id.* at 25 (quoting *Ally Rajabu and Others v. Tanzania*); *id.* at 26-27 (holding that death via hanging and prolonged detention "encroaches upon dignity in respect of the prohibition of [. . .] cruel, inhumane and degrading treatment.").

8 *Mwita*, Afr. Ct. H.P.R., at 52.

9 *Id.* at 48.

10 *As African Court Releases New Judgments, Tanzania Withdraws Individual Access,* Int'l Just. Res. Ctr., (Dec. 5, 2019), https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access/; *see also*, *Tanzania: Withdrawal from individual rights to African Court will deepen repression*, Amnesty Int'l (Dec. 2, 2019), https://www.amnesty.org/en/latest/press-release/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/ (noting that Tanzania is the state with the most African Court of Human Rights judgments entered against it: "Of the 76 finalized AfCHPR cases published on the Court's website, 33 (or 40 percent) are against Tanzania"). *See generally 2020 Country Reports on Human Rights Practices: Tanzania*, U.S. Dept. of State, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/tanzania/ (last visited March 14, 2020) (indicating alleged systemic problems in the Tanzanian justice system).

11 *Basic Information*, African Ct. Hum. & People's Rts., https://www.african-court.org/wpafc/basic-information/ (last visited Mar. 23, 2023) (explaining that the enforcement power imbued to the Court is "delivery of judgments"); *see Mwita*, Afr. Ct. H.P.R., at p. 50; ¶ 180, p. 49; ¶ 176 (noting that Tanzania has not implemented the orders in "any of the earlier referred to cases where it was ordered to repeal the mandatory death penalty").

12 *See, generally,* Andreas Zimmerman & Jelena Bäumler, *Current Challenges Facing the African Court on Human and People's Rights,* KAS Int'l Reports (Jan. 1, 2010), at 39. http://www.jstor.org/stable/resrep09939. ("The African Charter on Human and People's Rights . . . was not signed until the [Organization of African Unity] summit in 1981. This did not, however, establish a court with jurisdiction in respect to any of the contraventions of the Charter. *On the contrary, the contracting parties were able to agree only on the creation of a Commission on Human rights . . . ..*" (emphasis added)).

13 *Cf. Msuguri v. Tanzania, Mwita v. Tanzania*, *Iguna v. Tanzania,* ¶ 7 (1 December 2022) (Separate Opinion of Tchikaya, J.) ("[The Court in this judgment] invalidates Tanzania's mandatory death penalty provisions but allows the death penalty to persist in the Respondent state's system. It should have taken the opportunity to strengthen international law on this issue . . . The Court, a human rights court, should keep pace with the evolution of international law."), https://www.african-court.org/cpmt/storage/app/uploads/public/63e/360/3a0/63e3603a0fce1864412002.pdf. *See generally* Elizabeth Schéré, *Critical Intersections in Foreign Policy: Theoretical (Re)Applications: Soft Power -- The Underestimated Strategy for Global Influence*, 45 Fletcher F. World Aff. 41, 44 (2021).

ECtHR Halts Forced Deportation of Uyghur Couple Seeking Asylum in Malta: Latest in a Series of Breaches of European Convention on Human Rights

*by Tesa Hargis**

On January 16, 2023, the European Court of Human Rights (ECtHR) ordered Malta to halt the process of forcibly removing a Uyghur couple, A.B. and Y.M., seeking asylum.[1] The couple, who are Chinese nationals of Uyghur ethnicity and Muslim faith, arrived in Malta in 2016; the rejection of their initial application in 2017 forced them to live in hiding for years.[2] Prior to bringing their case to the ECtHR, the Uyghur couple had been detained at the Safi Barracks and were facing immediate deportation to China.[3]

The couple's application for asylum consisted of evidence that forced return to Xinjiang would threaten their right to life under Article 2 of the European Convention of Human Rights ("the Convention") and protection against torture under Article 3.[4] The application also contended that Malta further violated Article 13 by not providing the couple with access to a mechanism by which they could receive effective remedy for their complaint.[5]

The Maltese Immigration Appeals Board rejected the refugee couple's final appeal for humanitarian protection on January 12, 2023.[6] The board's rejection was based on the argument that the couple "failed to produce further evidence to substantiate the principle of non-refoulement."[7] The Maltese Appeals Court's decision was made despite a "hard-fought" report released by the United Nations Office of the High Commissioner for Human Rights (UNCHR) in August of last year.[8] The report expressed concerns regarding the prohibited actions of member states utilizing forced deportation and violating international law regarding non-refoulement and implored those States to refrain from taking such actions.[9]

After the Maltese Court's last rejection, Aditus Foundation and Safeguard Defenders, along with Maltese and Spanish NGOs, filed an application for urgent interim measures under Rule 39 of the Rules of Court with the ECtHR.[10] The ECtHR acted upon the NGOs' application and ordered that A.B. and Y.M. not be deported until the Court issues a decision regarding Malta's

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1 Letter from K. Ryngielewicz, Head of the Filtering Section, European Court of Human Rights, to Alexis Galand, Aditus Foundation (Jan. 16, 2023) (on file with the Aditus Foundation) [hereinafter Letter from K. Ryngielewicz] (conveying the ECtHR's decision to grant the request for interim measures).
2 *European Court of Human Rights Forces Malta to Halt Uyghur Deportation*, Safeguard Defenders (Jan. 17, 2023), https://safeguarddefenders.com/en/blog/european-court-human-rights-forces-malta-halt-uyghur-deportation.
3 *Id.*
4 European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1, 3, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights] (emphasis added).
5 *Id*. at art. 13.
6 Safeguard Defenders, supra note 2.
7 *Id*.; Eur. Ct. H.R., Rules of Court 1 (2023), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
8 U.N. Hum. Rts. Off. of the High Commissioner, OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China ¶¶ 139, 142 (2022), https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf.
9 *Id*.
10 Letter from K. Ryngielewicz, *supra* note 1.

actions and the couple's status.[11]

This is not the first instance in recent years where the ECtHR has intervened in Malta following the government's breach of the Convention and its corrupt asylum procedures. In September 2019, S.H., a Bangladeshi journalist, arrived in Malta and applied for asylum by November of the same year. S.H. sought asylum because he was a prominent reporter who spoke out against the corruption and fraud of the governing party, and as a result the governing party attacked him, vandalized his house, and threatened to kill him.[12] The ECtHR's December 20, 2022 judgment in *S.H. v. Malta* determined that Malta had breached Article 13, in conjunction with Article 3 of the Convention.[13] The Court found that Malta had failed to conduct a satisfactory evaluation of the applicant's claim and had made a decision to remove S.H. by force without a renewed assessment, exposing them to the risk of treatment in violation of Article 3.[14] The court further held that Malta must conduct a new review of S.H.'s claim and pay damages. [15]

In *S.H. v. Malta*, the ECtHR identified numerous issues in the asylum procedure of Malta, including "a complete lack of access to relevant information and legal services, . . . lengthy delays in receiving a decision [,] . . . [lack of contact] and lack of interpretation," all of which effectively deprives asylum seekers of effective remedies.[16] It is essential that the ECtHR promote and facilitate a complete overhaul of the Maltese asylum system in conjunction with its numerous judgments which show the ineptitude of the current system.

11 *Id.*
12 S.H. v. Malta, App. No. 37241/21, ¶ 5 (Dec. 20, 2022), https://hudoc.echr.coe.int/eng?i=001-221838.
13 *Id.* at ¶¶ 1, 55.
14 *Id* at ¶ 67.
15 *Id.* at ¶ 102.
16 *Id.* at ¶ 61.

Religious Discrimination and Violation of Property Rights in Turkey

*by Andre Taylor**

In 2022, the European Court of Human Rights (ECtHR) provided a ruling in an application against Turkey by the Foundation of the Taksiarhis Greek Orthodox Church.[1] The Turkish government was held to have committed religious discrimination against its Greek Orthodox community by rejecting an application to register a historic church without a valid explanation.[2] The Turkish High Court decided to register the disputed property in the name of the Public Treasury rather than grant ownership of the property outright to the Church.[3] The Istanbul Administrative Court had repeatedly dismissed the Church's appeals on the basis that the conditions listed in their property code were not satisfied.[4]

The European Court of Human Rights held that even though the Church's ownership of the disputed property had not been formally recognized for generations, it had effective control due to the length of time the Church held de facto possession of the property.[5] The property had been mentioned in the Church's declaration of founding as far back as 1936. The ECtHR recognized that the under Article 1 of Protocol 1 concerning protection of property, the Turkish government had failed to uphold its responsibility to maintain citizens' peaceful enjoyment of their own possessions. In recognition of the unfounded nature of the Turkish government's refusal, the ECHR ruled that there was a violation of Article 14 of the European Convention on Human Rights, which protects against discrimination.[6] As a result, the ECtHR declared that Turkey needed to pay 5,000 euros in compensation to the church.[7]

This ruling reflects the ongoing struggle for religious freedom in Turkey, which has lost a substantial portion of its citizens of Greek descent since the fall of the Ottoman Empire due to genocide and political strife within its borders.[8] Longstanding ethnic and religious cleavages in Turkish society remain political hot button issues, with many experts positing that Turkey is attempting to marginalize over 160 foundations operating in the country for the benefit of minorities.[9] The historical relationship between property rights and cultural heritage is intertwined because ethnic minorities such as Greeks have relied on houses of worship and other private forums to maintain their cultural solvency in the face of repression. The ruling reveals the challenges faced by Turkey's government as it attempts to integrate itself into the wider European community both politically and economically.

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1 *Takisiarhis Greek Orthodox Church Foundation of Arnavutkoy v. Turkey*, App. No. 27269/09, ¶ 45 (Nov. 15, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-220865%22]} (available only in French).
2 Stella Mazonakis, *European Human Rights Court Fines Turkey for Violating Greek Church Rights*, Greek City Times (Nov. 17. 2022), https://greekcitytimes.com/2022/11/17/european-human-rights-court-turkey/.
3 *Takisiarhis Greek Orthodox Church Foundation of Arnavutkoy v. Turkey*, App. No. 27269/09, ¶ 11 (Nov. 15, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-220865%22]} (available only in French).
4 *Id*. (citing Property Code, Law No. 5737, art. 7 (Turk. 2008)).
5 *Id*.
6 European Convention on Human Rights, Protocol 1, November 4, 1950, ETS 5, https://www.echr.coe.int/documents/convention_eng.pdf.
7 Press Release, Registrar of the Court, Judgments of 15.11.2022 (Nov. 15, 2022), https://hudoc.echr.coe.int/eng-press#{%22sort%22:[%22kpdate%20Descending%22]}:~:text=Judgments%20of-,15.11.2022,-Press%20Release%20%2D%20Chamber.
8 Hamdi First Buyuk & Eleni Stamatoukou, *European Court Fines Turkey for Breach of Greek Church's Rights*, Balkan Insight (Nov. 15, 2022), https://balkaninsight.com/2022/11/15/eu-human-rights-court-fines-turkey-for-beaching-greek-orthodox-churchs-possessions-rights/.
9 Stella Mazonakis, *European Human Rights Court Fines Turkey for Violating Greek Church Rights*, Greek City Times (Nov. 17. 2022), https://greekcitytimes.com/2022/11/17/european-human-rights-court-turkey/.

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We are excited to present a special column devoted to covering movement lawyering. The inclusion of this special column was inspired by the topic of the annual *Human Rights Brief* Spring symposium entitled "Movement Lawyering: Rebuilding Community Power and Decentering Law."

In this special column, we begin by summarizing the presentations of our renowned symposium speakers. The speakers defined movement lawyering, conducted a power mapping workshop, and called young lawyers to action. The devotion of our symposium speakers to a wide variety of issues serves as inspiration and we encourage all young lawyers to continue in their footsteps.

* * *

Movement Lawyering: Rebuilding Community Power & Decentering Law

by Sami Schramm, Naima Muminiy, Madison Sharp, Angela Altieri, Thea Cabrera Montejo

On Thursday, February 16, 2023, the Human Rights Brief held its annual symposium entitled *Movement Lawyering: Rebuilding Community Power and Decentering Law*. It was organized by Angela Altieri, Madison Sharp, Naima Muminiy, Sami Schramm, Destiny Staten, Angel Gardner, Leila Hamouie, Fabian Kopp, Marnie Leonard, and Thea Cabrera Montejo. Together, the team curated a day full of empowering keynotes, inspiring panels, and an insightful workshop. The team also created a resource to document the event.[1]

To kick off the event, Thea Cabrera Montejo, the Symposium Editor, recited the introduction for the event's "resilient, inspiring, and compassionate" keynote speaker, Professor Iman Freeman. Destiny Staten, a fellow editorial board member with the *Human Rights Brief*, wrote the introduction. Professor Freeman is the Baltimore Action Legal Team's ("BALT") co-founder and Executive Director. She has seven years' experience as an attorney and serves on the advisory board for Law for Black Lives, a national network of over 3,500 radical lawyers committed to building a responsive legal infrastructure for movement organizations and cultivating a community of legal advocates trained in movement lawyering. During her speech, Professor Freeman began with gratitude as well as an acknowledgement that "everything about my story says I'm not supposed to be standing here before you today." She then eloquently described her untraditional path to law school, how her life experiences equipped her on how to be a movement lawyer, and her intentional and strategic work with BALT — all while weaving in how America's war on drugs has impacted marginalized and particularly Black communities in Baltimore. She ended her speech by addressing the future attorneys in the room. She displayed a slide with Charles Hamilton Houston's words: "a lawyer's either a social engineer or he's a parasite on society." She urged us all to check our power, our privilege, and ourselves as we move forward in our careers. She called on both law students and legal institutions to be more critical of the law, to contextualize the fight for justice within and beyond the classroom, and to examine how to work in marginalized communities to balance how the law should work versus how it actually is implemented.

I. Panel 1: Power to the People: What is Movement Lawyering?

In panel 1 we asked the question: What is Movement Lawyering? First, we grounded this conversation and discuss movement lawyering as a theory — in contrast to other more popular theories of change. This panel featured Professor Carlton Williams from Cornell Law School, Professor Charles Ross from Washington College of Law's Community Economic and Equity Clinic, and Director Paromita Shah from Just Futures Law.

Professor Carlton Williams has practiced criminal and civil rights law in Massachusetts for many years. Mr. Williams is an advocate on issues of war, immigrant rights, LGBTQ rights, and Black and Palestinian liberation. He is a member of the National Lawyers Guild and has served as the chair of its Massachusetts board of directors. In 2015, he served on the working group that organized the inaugural Law for Black Lives convening and was a featured speaker in its RadTalks event.

1 Movement Lawyering: Rebuilding Community Power & Decentering Law, Hum. Rts. Brief (Feb. 16, 2023), https://www.canva.com/design/DAFVnpeWE7Y/cRr58Qe_nzXJkDscz7a_8g/view?utm_content=DAFVnpeWE7Y&utm_campaign=designshare&utm_medium=link&utm_source=viewer.

Charles Ross is the Practitioner-in-Residence in the Community Economic and Equity Development Clinic, a clinic representing businesses, workers' cooperatives, housing cooperatives, and nonprofit organizations in the District of Columbia and Maryland. Professor Ross' areas of expertise and scholarly interests include housing law, child welfare law, and small business law. Prior to joining WCL, Professor Ross practiced in Los Angeles, California as a Public Counsel and in the District of Columbia at Children's Law Center.

Paromita Shah is the founding Executive Director of Just Futures Law, a movement lawyering organization that has provided cutting-edge legal support to the grassroots groups and organizers fighting for a future beyond deportation and criminalization since 2019. She previously served as the Associate Director of the National Immigration Project of the National Lawyers Guild, as the Detention Project Director at Capital Area Immigrants' Rights Coalition in Washington DC, and as a staff attorney at Greater Boston Legal Services.

Through the expertise and personal experience of our distinguished panelists, we fleshed out the contours of what movement lawyering means to practitioners who actively partner with grassroots movements and communities. An overarching theme of this panel was attorneys using the law as a tool to affect social change and to serve alongside the communities they care about. The panelists emphasized to serve first, to understand the needs of the community, before advocating for legal recourse. One example of service that resonated with symposium attendees was Professor Williams' story about how he attended town hall meetings and stacked chairs at the back of the church or mosque the community was meeting in while observing the community-led movements.

Each panelist elaborated on how movement lawyering can be intersectional between their areas of practice and the community they chose to partner with. Director Shah, Professor Williams, and Professor Ross' work is inherently more movement lawyering focused because it specifically partners with certain communities seeking social change. However, the panelists said that for example a tax attorney can engage in additional pro bono work with a community and/or partner with grassroots groups who may want their tax law expertise. Essentially, movement lawyering is not restricted to any one field of law.

During the audience Q&A, there was a particularly moving moment where the panelists encouraged a student who was disheartened when she observed people being unfairly evicted from their homes during a protest the student was monitoring with the National Lawyers Guild. The panelists chimed in to suggest that even if change does not happen today there is still hope that your actions will propel change for tomorrow. They advised her to keep partnering with and supporting the communities she cared about because social change does not happen immediately, but it does gain traction over time.

A. Power Mapping Workshop

After the first panel, the symposium conducted a power mapping workshop led by Elyssa Feder, the Executive Director of Rising Organizers. Elyssa has spent over a decade working as an organizer and a trainer with organizations like EMILY's List and Priorities USA. Since co-founding Rising Organizers in 2016, the organization trained over 3,000 individuals and held ten intensive community organizing fellowships. Elyssa herself has trained over 10,000 activists, political operatives, and candidates in the pursuit of social justice and civic engagement. Her expertise was evident through the success of the power mapping workshop.

Elyssa provided essential background so everyone was able to work with the same knowledge before launching into an engaging activity. Elyssa defined key terms that are often used in the organizing space like "mobilizing," "activism," "lobbying," and "direct service." In doing so, she also explained how people choose to organize and use tools like mobilizing and lobbying. Most importantly, Elyssa discussed how power plays a significant role in the success and downfall of movements.

In explaining what power mapping is and how she has used it successfully Elyssa broke down the steps of the process and explained what strategies were useful. She started by distinguishing who can be the targets

of an organizing campaign and split these targets into primary and secondary targets. Elyssa then separated the key players into four sectors: "powerful opposed," "powerful supportive," "less powerful opposed," and "less powerful supportive." Each player can be placed on the sliding scale based on their ability to effect change and how supportive they are of the campaign. She offered an example where she was recently successful in using power mapping to enact tangible change which made the tool more accessible.

Each table then created their own power maps on campaigns varying from housing justice to diversity in the Bachelor franchise. Attendees walked away with a tangible skill that can be used in any organizing space. Furthermore, learning this skill from an organizer rather than a lawyer embodied the notion of decentering the law in community spaces which gave a realistic example of how working with organizers may look.

Panel 2: Reimagining Our Role

Panel two, the final panel of this year's symposium, focused on "Reimagining Our Role." This panel served as a call to action for the next generation of lawyers by reflecting on what we have learned about movement lawyering throughout the course of the symposium. Additionally, the panel discussed how we, as future lawyers, can further mobilize by taking direction from organizers and impacted communities. These distinguished panelists who guided us in reimagining our role were Tamar Dekanosidze, Professor Julian Hill, and Maggie Ellinger-Locke.

Tamar is a human rights lawyer from Georgia and the Eurasia Regional Representative at Equality Now. She leads the efforts addressing violence and discrimination against women and girls in Georgia and other countries of the former Soviet Union. With over ten years of experience in human rights litigation, she has also litigated cases at the national level, the European Court of Human Rights, and the UN Convention on the Elimination of All Forms of Discrimination Against Women Committee. Tamar's extensive work within local and international human rights provided incredible insight on how to mobilize movement lawyering in the international legal arena.

Julian Hill is an assistant professor and the founding director of the forthcoming Community Development and Entrepreneurship Law Clinic at Georgia State University College of Law. The Clinic has supervised the Capacity Building practice at Takeroot Justice, a New York City-based non-profit, where it regularly advised worker cooperatives and partnered with community-based organizations to co-facilitate political education and co-develop policies and campaigns in English and Spanish. Professor Hill also has done extensive work regarding solidarity economy.

Maggie Ellinger-Locke is a movement lawyer and longtime activist and organizer. She has lent support to several movement moments, including Occupy, Ferguson, Trump's Inauguration, Unite the Right in Charlottesville, and Justice for George Floyd. Her work has supported activists at every level of organizing, including criminal representation, civil appeals, pre-action briefings, coordinating legal observers, policy advocacy, and more. Currently, Maggie works as an environmental justice staff attorney at Howard Law School's Thurgood Marshall Civil Rights Center.

The questions asked during panel two can be broken down into two categories: movement lawyering within the law school community and movement lawyering as a practicing attorney. The first category of questions revolved around how, as current law students, can we create the space for movement lawyering within the law school community and the importance of it. Our panelists emphasized the importance of carving out time to work with local communities to hear their voices and put marginalized voices at the forefront of advocacy. Additionally, the panelists encouraged students to recognize our privilege as law students and to not fall into the mindset of a "savior complex" when partnering with communities and supporting other movement lawyers.

The second category questions focused on what movement lawyering looks like as a practicing attorney. Our panelists noted that an attorney can be a movement lawyer without being explicitly labeled as a movement lawyer. Panelist Tamar Dekanosidze emphasized how she was only introduced to the concept of movement lawyering recently, but her work in the intersectional

sector would be considered movement lawyering.

Panelists also emphasized self-care. The panel engaged in holistic discussion on the importance of self-care when practicing movement lawyering, especially when working in a field that is client facing and which could be heavy in subject matter. Afterward there was a profound reflection from the lawyers of panel two by sharing moments of pride that they felt throughout the course of their careers. By ending this panel with an inspirational note, law students could envision what reimagining their roles as potential future movement lawyers could look like and learn the importance of community and people power.

Lessons In Movement Lawyering from the Ferguson Uprising

*by Maggie Ellinger-Locke**

I. Introduction

Michael Brown was killed by Officer Darren Wilson on August 9, 2014.[1] That day, I was on vacation in Michigan with my family, hanging on the beach and playing in the water. My father passed away from liver cancer exactly four months before, and I made the decision to close down his law practice in the St. Louis, Missouri area, and move to Washington, DC, where my long-term partner had taken a job. The trip to Michigan was supposed to be a stopover on my way to DC; my car was packed to the brim.

Over the next few days I sat glued to Twitter, watching community members assemble around Canfield Drive, the place where Mike Brown's body laid baking for hours in the hot August sun. I watched the community turn from shock to anger, saw that anger boil over and take action. A QuickTrip gas station was set ablaze, businesses up and down West Florissant Avenue had their windows broken. People were chanting and marching, and their numbers were growing.

I sent emails to the listserv of the St. Louis Chapter of the National Lawyers Guild (NLG):[2] "What is going on? Is anyone there to offer to help?" It was summer, others too were on vacation, and there was a clear need for legal support to the budding resistance on the ground. After several days of pulling out my hair and hemming about what to do, I decided to put my DC move on hold, and drove back to St. Louis.

This is the story of one person's experience supporting a significant movement moment. This is not the story of that movement, nor even of the legal-support infrastructure that supported that movement. This is just the work I did on the ground for a year in the St. Louis area, defending Ferguson frontliners and helping to organize all aspects of legal support. My hope is that other movement lawyers will find my experiences helpful in their own journeys.[3]

II. Finding Beauty through Community

When I arrived in St. Louis, I reached out to the national office of the National Lawyers Guild (NLG) for help. Several longtime legal-support organizers answered the call. My mother opened her home to the dozens of people heading to town to help out; some stayed for months.

We started training people to be NLG legal observers (LOs). LOs observe law enforcement conduct directed at protesters during First Amendment-protected activities. Guildies came from all over, helping to set up legal-support infrastructure and train people to serve the movement as LOs.[4]

Among others, this included Blair Anderson of Detroit. Anderson is an original member of the Black Panther Party.[5] He was at the apartment the night Chi-

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1 *Michael Brown is Killed by a Police Officer in Ferguson, Missouri*, Hist. (Aug. 6, 2020), https://www.history.com/this-day-in-history/michael-brown-killed-by-police-ferguson-mo.

2 *About*, Nat'l Laws. Guild, https://www.nlg.org/about/ (last visited Apr. 22, 2023). The National Lawyers Guild (NLG) is the country's oldest progressive bar association. Founded in 1937 because the American Bar Association refused to allow in Black and Jewish lawyers, NLG has worked on the frontlines of movements ever since, providing support to the Freedom Riders, the Attica Brothers, the Global Justice Movement, and more.

3 *See generally* Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5 How. Hum. & Civ. Rts. L. Rev. 101 (2021) (informing the author's definition of movement lawyering).

4 "Guildies" is a nickname for members of the National Lawyers Guild.

5 The Black Panthers were a revolutionary Marxist political organization dedicated community self-determination and the end of

cago police assassinated Fred Hampton.[6] Police shot Anderson three times, and he would end up spending decades in prison. Only recently released, Anderson told me he believes legal observing is a powerful way to support racial justice movements. We became comrades and he stayed for weeks, training and inspiring mostly young Black activists.

Legal observers deployed nightly to the protests, suffering from the effects of chemical weapons and subjecting ourselves to being targets for police violence.[7] For weeks, every night we hit the streets, donning neon-green LO hats and writing notes about what we saw. In the mornings I attended bond hearings for people arrested the night before. Sometimes the tear gas would still be clinging to my hair in court. I had more than one judge comment on this, despite the frigid showers I would take when I got home from the actions.[8] After a month or so of this, my hair temporarily turned white. I was only 31 years old.

Our days were filled with organizing, visiting jails and courthouses, attending meetings, answering phone calls, and trying to catch up on sleep. At night we attended the protests, which were a fifteen-minute drive away from my home. After experiencing and witnessing violence every night, it was difficult for us to fall asleep when we got back to my mother's home in University City, often around three or four in the morning. We would stay up until sunrise and process the violence and trade stories from other resistance movements we had been part of. NLG's interim executive director jokingly called my mother's home "anarchist summer camp." And in a lot of ways, that is exactly what it was.

As time went on, the Uprising became more organized. People who had never met formed deep bonds after supporting each other in the streets every night. And the police continued to meet the movement with violence.[9]

While much of the experience in the streets was brutal, there were also moments of beauty. The most beautiful action I have experienced—before or after Ferguson—happened around the mass mobilization, "Ferguson October." A couple of artists organized a group of us to attend the St. Louis Symphony, buying tickets that were dispersed around Powell Symphony Hall. After intermission and just as the conductor was set to begin the next piece, at the back of the hall Derek Laney, a local artist and activist, sang loudly "Which side are you on? Which side are you on? Justice for Mike Brown means justice for us all," set to the tune of the old labor ballad.[10]

One-by-one those of us in on the action stood up and joined in the singing. Activists seated in the balcony dropped a series of banners with messaging asking the crowd to pick a side, and rained down leaflets talking about the protest. Eventually we left the hall, tears streaming down our faces. The action was mostly well-received by the crowd, and the symphony continued with its program after we left.

This experience offered a crucial lesson in movement legal organizing—you cannot just support activists with representation and organizing. To sustain the stamina that this work demands, you must connect with your heart as well.11 After the symphony action I was rejuvenated, finding joy in the work and building community with artists, not just those holding down traditional infrastructure. And I was able to move forward with a deeper vision, embraced by an even more dynamic community.

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white supremacy. See *A Brief History of Civil Rights in the United States: The Black Panther Party*, How. Univ. Sch. of L. (Jan. 6, 2023, 12:25 PM), https://library.law.howard.edu/civilrightshistory/bpp.

6 Alicia Maynard, *The Assassination of Fred Hampton*, Digital Chicago, https://digitalchicagohistory.org/exhibits/show/fred-hampton-50th/the-assassination (last visited Mar. 23, 2023).

7 *See National Lawyers Guild Condemns Ongoing Arrests of Legal Observers in Ferguson*, Nat'l Laws. Guild (Aug. 26, 2014), https://www.nlg.org/national-lawyers-guild-condemns-ongoing-arrests-of-legal-observers-in-ferguson/.

8 Taking warm or hot showers will open your pores and reactivate tear gas long after its effects have otherwise worn off.

9 *2 Officers Injured in Ferguson; 5 Arrested*, KSDK-TV (Sept. 24, 2014), https://www.ksdk.com/article/news/local/2-officers-injured-in-ferguson-5-arrested/63-278820562.

10 *See* St. Louis American, *Demonstrators 'Disrupt' STL Symphony Singing a 'Requiem for Mike Brown,'*, YouTube (Oct. 5, 2014), https://www.youtube.com/watch?v=T_7ErkQFduQ.

11 Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. Rev. 173 (2021).

III. Supporting Protest: Accountability, Collaboration, and Infrastructure-Building

Ferguson, Missouri, is an inner-ring suburb of St. Louis. I had represented people in its municipal court. When I arrived from Michigan, I found a party atmosphere—people were dancing on top of cars and in the street, openly consuming cannabis, and playing music. It was a true liberation zone. I also saw the vigil of flowers and teddy bears erected where Mike Brown's body laid, the pavement still stained with his blood.

That night police violence descended. Tear gas filled city blocks, the police beat and arrested dozens of protesters. Police arrested two reporters who were charging their phones at a McDonald's.[12] Reporters from all over the world assembled to video and broadcast the events.

I will never forget having a member of the National Guard perched atop an armored truck train his rifle on me. Law enforcement went out of their way to terrorize the protesters. Many wore "I am Darren Wilson" wristbands. They jeered and spat on us. They beat people indiscriminately, and nightly. When shooting rubber bullets into the crowd they targeted well-known organizers, street medics, and legal observers.[13] It would be years before I could handle being around fireworks again—the sound and the shower of sparks from the volleys of tear gas reminded me too much of these events.

News reports generally focused on the City of Ferguson, but many missed the unique context that led in significant part to the conditions that created rebellion—the St. Louis County municipal court system. Had Michael Brown been killed a few blocks to the north he would have been in Delwood; a few blocks to the south the hashtag might have been Jennings. Each municipality fits into a larger network of policing and control, creating a structure uniting the whole region.[14]

The framework for St. Louis County's municipal courts dates back to 1861, when the City of St. Louis split from the County. Locals call it "The Great Divorce." Balkanization of the County followed, frequently through the creation of new, racially restricted residential areas. The U.S. Supreme Court deemed the racial covenants that supported these communities unenforceable in *Shelly v. Kramer*, a case not-so-incidentally from St. Louis's Central West End neighborhood.[15] Years later, in that same gated neighborhood, images of a white couple haphazardly training weapons on mostly Black activists would go viral.[16]

By 2014, St. Louis County had ninety municipalities.[17] Some were large, upwards of 50,000 people.[18] Others were small; one municipality had just twelve people.[19] Each one had its own municipal code—ninety different sets of laws, governing 523 square miles between them, where about one million people live.[20] That number is small though; most people who live in the St. Louis area (approximately 2.8 million people), whether in the City or in adjoining counties, have reason to go to St. Louis County and its labyrinth of municipalities at some point. Most of those municipalities had their own police force, and eighty-one had their own court system.[21]

By statute, public defenders cannot represent clients outside of the state court system, so defendants in municipal court often go unrepresented.[22] Judges

12 Ravi Somaiya & Ashley Southall, *Arrested in Ferguson Last Year, 2 Reporters Are Charged*, N.Y. Times (Aug. 10, 2015), https://www.nytimes.com/2015/08/11/us/arrested-in-ferguson-2014-washington-post-reporter-wesley-lowery-is-charged.html.

13 *See, e.g.*, *Rubber Bullets, Tear Gas and Jail: Ferguson Police Crack Down on Journalists Covering Protests*, Democracy NOW (Aug. 20, 2014), https://www.democracynow.org/2014/8/20/rubber_bullets_tear_gas_and_jail.

14 Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 Harv. L. Rev. F. 213 (2021).

15 *Shelly v. Kramer*, 334 U.S. 1, 20 (1948) (holding that racially restricting covenants violate equal protection).

16 Rachel Lippmann, *Central West End Couple Who Pointed Guns at Protesters Plead Guilty*, St. Louis Pub. Radio (June 17, 2021, 3:24 PM), https://news.stlpublicradio.org/law-order/2021-06-17/central-west-end-couple-who-pointed-guns-at-protesters-pleads-guilty.

17 Thomas Harvey, et al., ArchCity Defenders: Municipal Court White Paper 6 (2014), https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Mo. Rev. Stat. § 600.42.4(6) (2019).

and prosecutors are usually moonlighting, working elsewhere as private attorneys or even full-time state prosecutors. For example, until his resignation in the aftermath of a U.S. Department of Justice report, Ronald Brockmeyer was Ferguson's judge (its *only* judge), the prosecuting attorney in the nearby City of Florissant, and a private defense attorney in the next county over (St. Charles County).[23]

Municipal courts are designed to deal with civil cases. But many of the cases before them are really "quasi-criminal" in nature.[24] Courts treat cases as if they were criminal without providing defendants with the constitutional protections *theoretically* provided to people facing criminal charges in state court. Because all of this is dependent on a system of policing, or control, warrants and arrests are the most serviceable tool available to the system, and people regularly end up with warrants in multiple municipalities. Thus, after arrest, defendants may be transferred from jail to jail, often spending weeks or longer incarcerated until they can appear in front of a judge. Lawyers refer to this situation as the "muni-shuffle," shuffling from one tiny jail to another.[25]

This is what our initial legal support team faced when the Uprising started. Activists were being arrested and then immediately lost in the system—so many had multiple municipal warrants. The first thing we needed was a way to locate activists and pay the sums to get them out of jail.

In stepped Missourians Organizing for Reform and Empowerment (MORE). MORE used its own landline number to serve as jail support so arrestees could place a call and talk to someone at the MORE office.[26]

Within a few months, over one hundred volunteers would end up staffing the hotline. Along with MORE's leadership a group of us launched a Ferguson Legal Collective (the Collective), initially comprising of defendant-activists facing felony charges and their supporters. This group worked to ensure everyone knew their next court date, had a ride to court, knew how to reach their lawyer, and had other holistic support.[27]

A separate part of the Collective took on organizing criminal-defense counsel, with a mission to secure individual representation and bond reductions for people with serious state-court charges. We were in a rapid-response moment and not focused on internal political alignment, counsel's range of experience working with activists, or ensuring strong communication between defendants and lawyers. Looking back, this was a serious mistake, and an important lesson learned. Movement cases require attorneys who understand movement cases—their political element creates important nuances for fulsome representation and client interaction.[28] And not everyone who volunteers shows up for the right reasons. Newsworthy events bring out attorneys looking to turn a buck, or to gain notoriety. Even experienced criminal attorneys can put themselves at a disadvantage by ignoring the political nature of cases like these. Now I know, having movement-aligned counsel is a top concern for building out criminal-defense capacity during movement moments.[29]

Another lesson we learned was the importance of making sure the people we represented were movement-aligned, or at least sympathetic. On occasion far-right groups would attend protests to counter-demonstrate. I was inadvertently assigned to represent one such counter-demonstrator. Upon meeting this client in the attorney interview room at the jail, I was sur-

23 Nicolás Medina Mora, *7 Curious Facts About the Ferguson Municipal Judge*, BuzzFeed News (Mar. 6, 2015, 7:58 PM), https://www.buzzfeednews.com/article/nicolasmedinamora/7-curious-facts-about-the-ferguson-municipal-judge.

24 Mae Quinn & Eirik Cheverud, *Civil Arrest? (Another) St. Louis Case Study in Unconstitutionality*, 52 Wash. Univ. J. L. & Pol'y (2016).

25 Samuel Lev Rubinstein, *Dismantling Policing for Profit: How to Build on Missouri's Post-Ferguson Court Reforms*, 54 Univ. Mich. J.L. Reform 953 (2021).

26 MORE no longer exists, but for more on their role during the movement see *Ferguson Legal Defense Committee Circa 2015*, Ferguson Legal Def., https://www.fergusonlegaldefense.com/ (last visited Apr. 22, 2023).

27 *See* Irina Ceric, Lawyering from Below: Activist Legal Support in Contemporary Canada and the US (Oct. 2020) (PhD Dissertation, Osgoode Hall Law School of York University), https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/38157/Ceric_Irina_2020_PhD.pdf?sequence=2&isAllowed=y (discussing legal collectives and the role they can play in social justice movements).

28 Justin Hansford, *Demosprudence on Trial: Ethics for Lawyers in Ferguson and Beyond*, 85 Fordham L. Rev. 2057, 2076 (2017).

29 William Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 How. Hum. & Civ. Rts. L. Rev. 23 (2020).

prised to learn he was openly hostile to the movement. He also did not realize a movement-aligned lawyer was set to handle his case. We both quickly ensured he secured representation elsewhere. While of course everyone should benefit from representation, there was no reason I, or any other movement lawyer, needed to be the one to provide it. Contrary to, say, the philosophy of John Adams, it is okay for lawyers to have a politic, and to consider that politic carefully when taking clients. Far-right activists can find their own lawyers.

Moving forward, we were much more discerning in connecting lawyers and clients. Running a large-scale jail support effort is challenging. Coordinating dozens of volunteers every night was how I spent much of my time; it was basically a crash course in management and systems administration. Much of my work was spent organizing or coordinating legal observers.

The legal team—including our LOs—were mostly white. Necessarily much of our work focused on antiracism. Nearly a year after the fact, I learned of a Black lawyer who came to town to help out. When she arrived for an LO training, a white LO turned her away. The volunteer at the check-in table told her, "[T]his training is for lawyers, the know your rights training is later today." Translated out of a white gaze, what the LO did was assume this volunteer was not a lawyer because of her Black skin. Putting aside that the LO incorrectly believed only lawyers could serve as LOs, the microaggression perpetuated on this out-of-town lawyer was unacceptable.

When I heard this happened, I was horrified. I immediately reached out to the lawyer and apologized on behalf of the St. Louis NLG Chapter. This was a lesson in institutional accountability and antiracism for me; of course, I took responsibility for what took place. As an LO coordinator and chapter leader, I had a duty to account for the actions of those I helped train. This was not only an individual error on the part of the white LO, it was an institutional failure on the part of the NLG. We need to attack the ways whiteness shows up and causes harm in movement spaces.

IV. Proactive Civil Litigation–Victories in the Streets

A. Fighting for Community Demands, with a Dose of Creativity

Shortly after Darren Wilson killed Mike Brown, St. Louis County Prosecuting Attorney Robert (Bob) McCulloch opened a grand jury investigation into it.[30] The grand jury is an incredibly powerful tool for the prosecutor. They control entirely what information the grand jury receives—from evidence to witnesses to legal arguments. Hence the adage that a prosecutor can get a grand jury to indict a ham sandwich.[31]

McCulloch could have charged Wilson with murder himself by criminal information, as many demanded; he chose the grand jury route instead. So, when he held a press conference on November 24, 2014, and announced that the grand jury had returned a "no true bill," i.e., declined to indict Officer Wilson on *any* charge, people were outraged.[32] The decision against indictment aside, McCulloch made it all the more insulting by blaming a grand jury for it, one he controlled.[33]

We worked with activists on a plan to call out McCulloch in court. Missouri has a peculiar *writ of quo warranto*[34] statute. It permits prosecutors to file ouster suits against elected officials accused of failing to fulfill their office's duties. It also creates a complaint system. If someone files an affidavit in court about an elected official's failure, it gets referred to the local prosecutor's office. But if the affidavit is about the local prosecutor, then a court can appoint a special prosecutor to inves-

30 Frances Robels and Michael Schmidt, *Shooting Accounts Differ as Holder Schedules Visit to Ferguson*, N.Y. Times (Aug. 19, 2014), https://www.nytimes.com/2014/08/20/us/shooting-accounts-differ-as-holder-schedules-visit.html

31 Josh Levin, *The Judge Who Coined "Indict a Ham Sandwich" Was Himself Indicted*, Slate (Nov. 25, 2014, 1:20 PM), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html.

32 CNN, *(Full Video) Ferguson Grand Jury Announcement*, YouTube (Nov. 25, 2014), https://www.youtube.com/watch?v=dd5sQEI_chs.

33 David Feige, *The Independent Grand Jury That Wasn't*, Slate (Nov. 25, 2014, 11:17 AM), https://slate.com/news-and-politics/2014/11/ferguson-grand-jury-announcement-prosecutor-robert-mcculloch-influenced-the-proceedings.html.

34 Quo warranto, Latin for "by what authority."

tigate it. That is what we wanted.

Specifically, we wanted the special prosecutor to show how McCulloch had gamed the grand jury into a no true bill. And we were not just speculating. McCulloch had released the grand jury transcripts to the press. They showed that his office designed the proceedings to vindicate Darren Wilson's version of events. And perhaps, we hoped, that breach of public trust would be enough for the special prosecutor to bring an ouster suit.

Over many hours we argued the facts and case law and even brought in an expert witness at the judge's request to testify.[35] Still, it was a toss-up, because the statute left the appointment of the special prosecutor to the trial judge's discretion. Ultimately, we lost—well, we lost in court anyway. But the exercise shows that even when you lose in court, you can advance movement goals. The press and the public understood our gripe. Some of the organizers involved with the suit would organize the "Bye Bob" campaign,[36] leading to McCullouch's defeat to a primary challenger in the next election.[37] Our ouster goal was met, even if the mechanism we used was not successful. Winning can take many forms, and movement victories do not always lie in a courtroom.

As an abolitionist, I had mixed feelings about our legal theory.[38] Some might argue that we were pushing for the indictment, conviction, and imprisoning of Darren Wilson. I do not believe human beings should be locked into cages. But the suit was not actually pushing for this result. We merely sought the appointment of a special prosecutor to examine the way the prosecutor's office conducted the Darren Wilson grand jury. It is also worth naming that the Justice for Mike Brown movement was not explicitly abolitionist. Years later, during the uprising sparked by George Floyd's murder, the movement would be much more abolitionist in scope, rallying around "defund the police."[39] But that time had not yet come. The rallying cry of this movement was, as we chanted in the streets: "Indict, convict, send that killer cop to jail, the whole damn system, is guilty as hell."[40] This powerful chant confused me: how can one simultaneously argue the whole system is flawed, while in the same breath seek to use its measures of accountability? Was that not the point, that the system's accountability measures *do not work*? Even better, that those measures are designed to *uphold* racial capitalism? This internal confusion on messaging illustrates the complexity we faced. White supremacy is a complex system, and there are not easy solutions to defeat it.

This provided another powerful lesson: how can we stay true to our values while uplifting the demands of those on the street? Organizing and movement work can be messy, and things are not always cut and dry. I had an opportunity to pursue movement goals through creative lawyering, but the strategy did not feel revolutionary, at least not fully revolutionary—we were using the system and its contradictions, exploiting those contradictions, but we were not advancing an abolitionist world.

B. Arrested in the Street, then Back to Court

For the one-year anniversary of Mike Brown's death, activists planned actions throughout the city. Activists who had visited early on were coming back to show support, and we expected large numbers in the streets. One action took place on Interstate 70, at the bridge over the Missouri River, the dividing line between St. Louis and St. Charles Counties. Over sixty people took part; activists used barriers to bring traffic to a halt going both directions across the bridge.[41]

35 J. Dismissing Req. for Appointment of Special Prosecutor with Prejudice to Refiling Same, *Simmons v. McCulloch* 15SL-CC000177, St. Louis Cnty. Cir. Ct. (July 2, 2015), https://www.documentcloud.org/documents/2158912-mcculloch-order.html.
36 Matt Ferner, *How Activists Ousted St. Louis County's Notorious Top Prosecutor Bob McCulloch*, Huffington Post (Aug. 11, 2018), https://www.huffpost.com/entry/st-louis-county-missouri-prosecutor-bob-mcculloch-defeat_n_5b6e0c96e4b0530743c9f032.
37 Note: McCulloch had won the Democratic Party primary in 2014 a few days before Wilson killed Mike Brown, so electioneering was not an immediate solution then.
38 *See generally* Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom (2021).
39 Sonali Kolhatkar, *An Abolitionist Makes a Case for "No More Police"*, Yes Mag. (Oct. 3, 2022), https://www.yesmagazine.org/social-justice/2022/10/03/police-safety-abolition.
40 Rachel Colyer, *Indict. Convict. Send that Killer Cop to Jail. The Whole Damn System Is Guilty As Hell.*, Daily Kos (Oct. 13, 2014), https://www.dailykos.com/stories/2014/10/13/1336250/-Indict-Convict-Send-that-killer-cop-to-jail-The-whole-damn-system-is-guilty-as-hell.
41 Joe Millitzer, *Car Breaks Through Protesters Shutting Down I-70*

I attended as a legal observer. After the action ended, the group left the highway, and we made our way down the embankment to where our cars were parked. There, we were met by police, who quickly moved in and arrested all of us. They placed our hands behind our backs and secured them with plastic cuffs.

Police moved us onto school buses where we waited, the hot August sun bearing down like it had a year before. We were eventually transported to a processing facility in Wellston, not far from my mother's home. After each one of us was processed we were put back onto the bus and taken to the St. Louis County jail.

I visited this jail dozens of times over the years, but this was the first time I did not use the visitor entrance. Once inside we were divided into groups for additional processing. My group was jovial but defiant, and we used the time to get to know one another. While we were originally supposed to be processed early, we were bumped to the back of the line because we were laughing so loudly. That meant we had to remain cuffed until we reached the main room of the jail. In my case that was not until nearly 5:00 a.m. I spent over twelve hours in the plastic cuffs.

Once we were finally in the main room, I made my way to the phone and called jail support. I was assured they were working furiously on the outside to support us, as I knew they would be. One of my comrades kindly offered me her lap, and I laid down and tried to rest for a bit while waiting to be released.

Finally, my name was called. I went outside to find my partner had taken the red eye from Washington D.C. and was there to embrace me. A street medic rubbed oils into my swollen wrists; it would take days for feeling to fully return to my fingers. Our cars were all impounded, and the movement provided funds to help us get them out. Soon thereafter I was finally able to get some sleep.

When I woke, we headed to a meeting of advocates at Mokabe's Coffee Shop to talk about the legal needs of the movement. There we discussed the charge we had all been arrested under, St. Louis County Ordinance Section 701.110, "Interfering with an Officer Unlawful." The ordinance reads makes it "unlawful for any person to interfere in any manner with a police officer or other employee of the County in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty."[42]

We thought that language violated the federal and state constitutions—namely, that it was so vague as to violate due process, and so broad as to criminalize a substantial amount of protected speech. It lacked a mens rea, and it allowed for violations in "any" manner, which would include constitutionally-protected activity. Case law was on our side. Police had used it to arrest hundreds, if not thousands, of protesters, merely a pretext for arrests—including the two journalists I noted earlier. Surely once examined, the courts would strike it down.

Unfortunately, that did not happen, but we found more legal success than the first case. At the trial court level, we survived a motion to dismiss but then lost on the merits. We appealed and received a limiting instruction from the appellate court—now police can apply the ordinance only to physical interference.43 Verbal interference, or just auditory interference, was not enough We had hoped for more, but this limited instruction has stopped prosecutions of verbal conduct under the ordinance, and we believe the case prevented the prosecutions of myself and everyone else arrested at the highway action. The case outlasted the statute of limitations for the highway action, and the County stopped charging demonstrators under the Ordinance once we filed our challenge. So again, victory can come in many ways.

V. Conclusion

Nearly ten years since these events unfolded, the lessons I learned stay with me today. I still find beauty in community, seek to build protest infrastructure that is accountable to movements, and believe that most victories unfold in the streets, not in the courtrooms. It was a difficult time, where the paths of so many social justice advocates were launched or reborn. Many of us

on "Moral Monday", Fox 2 Now (Aug. 10, 2015, 5:26 PM), https://fox2now.com/news/protesters-shut-down-i-70-near-blanchette-bridge/.

42 St. Louis, MO, Ordinance No. 16845 § 701.110 (2022).
43 *Bennett v. St. Louis Cnty.*, 542 S.W.3d 392 (Mo. App. E.D. 2017).

put our lives on hold to contribute to the movement. I am grateful to have played the small role I did. I hope other movement legal workers will benefit from this story, and lean into nuance and complexity in their own paths. And together we will help lay the groundwork for future revolutionary activity.

"It is our duty to fight for our freedom.

It is our duty to win.

We must love each other and support each other.

We have nothing to lose but our chains."[44]

44 Assata Shakur, Assata: an Autobiography 52 (Lawrence Hill Books 1988).

Movement Lawyering for Georgia Worker Cooperatives

*by Julian M. Hill**

I. Introduction

Capitalism's Contradictions in Atlanta. The Park Place and Auburn Avenue intersection in downtown Atlanta juxtaposes capitalism's shiny veneer and putrid underbelly.[1] Among Georgia State University's multi-story buildings, Woodruff Park's lush trees, and the vibrant Sweet Auburn neighborhood once home to Martin Luther King, Jr., diverse youth vying for class ascension and minority-owned businesses exemplifying Atlanta's claim as an entrepreneurship hub populate the sidewalks. A deeper look, however, reveals cracks within the "Real Wakanda" facade.[2] Wooden boards cover commercial space doors along Auburn Avenue, houseless folks support each other and request help from others around Woodruff Park, and students born into poverty face the reality of being less likely than anywhere in the country to escape it.[3] Moreover, significant numbers of Atlantans suffer despite pockets of wealth among Black entertainers and entrepreneurs who generally live in the suburbs.[4] When capitalist markets fail, communities worldwide have turned to cooperation, and Atlanta is no different.

Solidarity Economy Alternative in Atlanta. The solidarity economy, rooted historically in indigenous, pre-capitalist traditions in places like Africa and contemporarily in anti-neoliberalism resistance in Latin America during the 1990s, is an international movement and framework that critiques and offers an equitable alternative to capitalism.[5] There are solidarity economy alternatives related to various economic domains or activities, including land stewardship (e.g., community land trusts and collective ownership of land), exchange (e.g., bartering or sliding scale pricing), consumption (e.g., consumer and housing cooperatives), surplus allocation (e.g., credit unions and public banks) and production (e.g., farm cooperatives and worker cooperatives).[6] The solidarity economy prioritizes people and the planet over profits by centering collective care, participatory democracy, education, liberation, and other values.[7] Critics of racial capitalism, including the Atlantan Martin Luther King, Jr., have long understood the connection between fighting for human rights and economic rights necessary for Black liberation.[8] The

* Julian M. Hill (they/them/he/him) is a teacher, solidarity economy lawyer, community organizer, and artist who knows that the world we deserve, though possible and necessary, is not inevitable without a mass movement empowering the most vulnerable among us.

1 Cedric J. Robinson, Black Marxism 2 (noting that racial capitalism is the "development, organization, and expansion of capitalist society [] in essentially racial directions…" such that "racialism [] inevitably permeate[s] the social structures emergent from capitalism").

2 Michael Harriot, *Atlanta Is the Real Wakanda*, The Root (Feb. 19, 2021), https://www.theroot.com/atlanta-is-the-real-wakanda-1832715696 (describing Atlanta as a real-life version of the City of Wakanda from the motion picture, Black Panther, given the high levels of Black wealth, Black-owned businesses, and Black self-employment).

3 Dylan Jackson, *Atlanta's Income Inequality Is the Highest in the Nation*, The Atlanta Journal-Constitution (Nov. 28, 2022), https://www.governing.com/community/atlantas-income-inequality-is-the-highest-in-the-nation.

4 *Quick Facts: Atlanta City, Georgia*, U.S. Census Bureau, https://www.census.gov/quickfacts/atlantacitygeorgia (last visited Apr. 21, 2023) (noting that nearly one-fifth of Atlantans live in poverty).

5 Aborampah Amoah-Mensah, *Nnoboa and Rotated Susu as Agents of Savings Mobilization: Developing a Theoretical Model Using Grounded Theory*, 26 The Qualitative Rep. 140, 141 (2021) (describing the nnoboa as a pre-colonial "form of cooperative society whereby two or more people help each other or themselves in weeding" and other farm-related processes on a rotational basis); Emily Kawano & Julie Matthaei, *System Change: A Basic Primer to the Solidarity Economy*, Nonprofit Q. (Jul. 8, 2020).

6 Ethan Miller, Solidarity Economy: Key Concepts and Issues 5 http://www.communityeconomies.org/sites/default/files/paper_attachment/Miller_Solidarity_Economy_Key_Issues_2010.pdf (last visited Apr. 21, 2023).

7 *What is the Solidarity Economy?*, Solidarity Econ. Principles, https://solidarityeconomyprinciples.org/what-is-solidarity-economy-2/ (last visited Apr. 21, 2023).

8 Obery M. Hendricks, Jr., *The Uncompromising Anti-Capitalism of Martin Luther King Jr.*, Huff Post (Jan. 20. 2014), https://www.huffpost.com/entry/the-uncompromising-anti-capitalism-of-mar-

2007 U.S. Social Forum, hosted in Atlanta, was vital for integrating the energy toward building solidarity economies domestically after the World Social Forum of 2001 in Brazil.[9] When the COVID-19 pandemic began in 2020, Atlantans engaged in solidarity and mutual aid to care for each other amidst the state's failure to do so.[10]

Worker Cooperatives in Atlanta. Several Black, Atlanta-based organizers, activists, and community members believe worker cooperatives rooted in the solidarity economy can partially alleviate capitalism's dehumanizing impacts on laborers.[11] Worker cooperatives—businesses owned and managed by their workers—distribute their profits to, and foster democratic decision-making among, their workers instead of passive investors. They beg the question of why people who happen to have money, even if they do not live in a given country, should have corporate voting power and reap all of the surplus of laborers. By infusing solidarity economy principles, worker cooperatives offer an alternative to corporate structures and our capitalist economy. To this end, various groups have formed worker cooperatives in Atlanta using traditional corporate or limited liability company (LLC) structures because no Georgia law recognizes worker cooperatives as legal entities.[12]

Georgia Enabling Statute & Movement Lawyering. This Article analyzes a proposed law to recognize worker cooperative formation in Georgia and proposes how movement lawyers can support organizers' efforts to build a solidarity economy through and beyond this bill.[13] First, it provides background on cooperative laws nationally and in Georgia. Then, within this context, it analyzes the proposed Georgia Limited Worker Cooperative Associations Act (the "GLWCAA"), noting its strengths and offering key questions, the answers to which may suggest changes to the draft bill. Finally, it discusses how policy is only one type of support movement lawyers have provided, and could provide, in expanding the solidarity economy in Atlanta.

II. Historical Context and Significance of Cooperatives in America

Origin Story. Indigenous communities worldwide, including West Africans enslaved in the United States, had engaged in solidarity economies or cooperative economics for centuries before the American cooperative movement began in the 18th century.[14] Three common types of cooperatives are those owned by: (1) their workers (i.e., worker cooperatives), (2) the consumers of their services or products (i.e., consumer cooperatives like food cooperatives), and (3) the producers of their products (i.e., producer cooperatives like farmer cooperatives), though there are also hybrid, purchasing, agricultural, and other subcategories of cooperatives (e.g., housing).[15] In 1752, Benjamin Franklin founded the first American cooperative, a mutual fire insurance company owned by consumers of insurance policies that covered home fire damage.[16] Free Africans practiced solidarity economics through mutual

tin-luther-king-jr_b_4629609.

9 Rose Brewer, walda katz-fishman, & Jerome Scott, *USSF 3 Evaluation and Documentation*, U.S. Soc. F. (Apr. 10, 2016), https://www.ussocialforum.net/ussf3-eval-and-documentation.pdf.

10 *See* Ella Fassler, *Mutual Aid Groups That Arose During COVID Gather to Build Power Regionally*, Truthout.org (Jul. 10, 2022), https://truthout.org/articles/mutual-aid-groups-that-arose-during-covid-gather-to-build-power-regionally/; Steve Dubb, et. al, *Remaking the Economy: 3 City Case Studies in Mutual Aid*, Nonprofit Q. (Oct. 29, 2020), https://nonprofitquarterly.org/remaking-the-economy-mutual-aid-3-city-case-studies/.

11 Julian Rose, *For Black Atlanta, the Path to Collective Liberation Lies in Economic Solidarity*, Shareable (Feb. 23, 2023), https://www.shareable.net/for-black-atlanta-the-path-to-collective-liberation-lies-in-economic-solidarity/.

12 *See* Roland Hall, *Legal Corner: In What State Should We Organize Our Co-op?*, Ga. Cooperative Dev. Ctr., https://www.georgiacoopdc.org/legal-corner-state-organize-co-op-roland-hall-autry-hall-cook-llp/198/ (last visited Apr. 21, 2023).

13 *What We Can Do*, Law 4 Black Lives, http://www.law4blacklives.org/respond (last visited Apr. 21, 2023) (defining movement lawyering as "taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates").

14 *See* Greg Patmore & Nikola Balnave, A Global History of Co-operative Business 26-27 (2018) (describing how indigenous Ghanaians developed the *nnoboa* system that allowed farmers to share labor with each other as part of a larger collective and indigenous Burknabe farmers used *naams* to support both themselves and each other prior to colonization); Lynn Pitman, History of Cooperatives in the United States: An Overview 2 (Dec. 2018), https://resources.uwcc.wisc.edu/History_of_Cooperatives.pdf.

15 *See What is a Co-op?*, Nat'l Cooperative Bus. Ass'n CLUSA Int'l, https://ncbaclusa.coop/resources/what-is-a-co-op/_(last visited Apr. 21, 2023).

16 Pitman, *supra* note 14 at 2.

aid societies like the Free African Society in the early 1800s.[17] Agricultural cooperatives, owned by farmers aiming to strengthen their marketing power while lowering individual costs, started in the early 1800s.[18] Labor unions, including the National Labour Union and Knights of Labour, were instrumental in leveraging their organizing skills to facilitate the formation of some of the country's first worker cooperatives in the 1800s.[19] During this time, labor unions viewed worker cooperatives as a form of mutual aid and a method for building worker power.[20]

Cooperative Legal Structures. Before the passage of specialized cooperative statutes, "a cooperative was [typically] organized as a corporation for state law purposes."[21] Traditional corporations allocate profits and voting rights based on how much capitalists invest, prioritize profits over people, and infuse other values antithetical to cooperatives. As a result, cooperative founders using the corporate form tend to face financial, corporate governance, taxation, and other legal hurdles to conform to cooperative principles. Two of the first states to pass a law enabling the creation of cooperatives were Michigan in 1865 and Massachusetts in 1866.[22] Several other states passed statutes before the turn of the century, followed by others between 1910 and 1925.[23] Among these was the first credit union statute, which Massachusetts passed in 1909.[24]

Existing Cooperative Forms in Georgia. Several types of cooperatives operate in Georgia. Farmers organized agricultural cooperatives in the 1800s and credit unions in the 1900s.[25] Georgia joined the second wave of states creating cooperatives statutes by passing the Georgia Cooperative Marketing Act (the "GCMA") in 1921 and an enabling law for credit unions in 1925.[26] While the GCMA enabled the creation of agricultural cooperatives, the Georgia Electric Membership Corporation Act of 1937 (the "GEMCA") and the Georgia Rural Telephone Cooperative Act of 1950 (the "GRTCA") recognized electricity and rural telephone cooperatives.[27] These laws reflected the economic dynamics of Georgia and some other southern states. With World War I in the distant past, rural farmers struggled to meet their material needs independently. However, they continued to see cooperation as a more economical way to structure their enterprises. Addressing this need, Aaron Shapiro drafted and championed uniform marketing cooperative legislation in 1919 that served as the model for the GCMA and the marketing cooperative acts passed in other states over the next ten years.[28] Since the passage of the GCMA, the Georgia state legislature has made several amendments to the GCMA, the GEMCA, and the GRTCA to expand the scope of cooperative enterprises.

Georgia Cooperatives: Reality & Impact. Georgia has benefited in several ways from the cooperative movement. A recent study of Georgia's ecosystem showed around 320 known cooperatives in the state.[29] They have combined assets of $29 billion, a revenue stream of $6 million, over 3.5 million members, and 10,900 jobs created.[30] Research done by National Cooperative Business Association CLUSA International ("NCBA CLUSA") reveals that over half of the state's cooperatives are credit unions (179).[31] In contrast, over 40 electric cooperatives are formed under the GEMCA, which comprise just over ten percent of all cooperatives.[32] At publication, there were twenty-four housing

17 Jessica Gordon Nembhard, Collective Courage: a History of African American Cooperative Economic Thought and Practice 42 (2014).
18 *Id.*
19 John Curl, *The Cooperative Movement in Century 21*, 4 Affinities: J. Radical Theory, Culture, & Action, 12, 15-16 (2010).
20 *Id.*
21 Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DePaul L. Rev. 1013, 1028 (2017).
22 *Id.* at 1031.
23 *Id.*
24 Patmore & Balnave, *supra* note 14 at 4.
25 Paul G. Brower, *Farm Cooperatives*, New Georgia Encyclopedia (Sep. 30, 2005); *Our Story*, Atlanta Post Credit Union, https://www.apcu.com/home/about-us/our-story (last visited Apr. 21, 2023).
26 Ga. Code Ann. §§ 2-10-80 - 111 (West 1921); Ga. Code Ann. §§ 46-3-170 - 541 (West 1937); Ga. Code Ann. §§ 46-5-60 - 105 (West 1950).
27 2 James S. Rankin, Jr., *Kaplan's Nadler Georgia Corporations, Limited Partnerships and Limited Liability Companies with Forms* § 16:12 (ed. 2022-2023).
28 Pitman, *supra* note 14 at 4-5.
29 *Co-op State Snapshot: Georgia*, Nat'l Cooperative Bus. Ass'n CLUSA Int.'l, https://ncbaclusa.coop/content/uploads/2018/09/georgia-FINAL.pdf (last visited Apr. 21, 2023).
30 *Id.*
31 *Id.*
32 *Id.*

cooperatives, fifteen insurance cooperatives, fourteen farm supply cooperatives, and ten utility cooperatives in Georgia.[33]

What's Missing in Georgia? Worker Cooperatives. Unfortunately, NCBA CLUSA research does not capture the existing worker cooperatives in Georgia, presumably because of their small size and because the state has not adopted a worker cooperative statute to identify them quickly. However, there is growing interest in cities like Atlanta to create worker cooperatives, not merely as a means to institutions that empower workers but as tools that are key to the transition to an economy beyond capitalism. Informal research suggests over a dozen worker cooperatives operating in the Atlanta metropolitan area alone.[34] Absent a statute for worker cooperative formation, people interested in starting worker cooperatives utilize the state's existing Business Corporations Code, Limited Liability Company Act, or Nonprofit Corporation Code.[35] As discussed above, these alternatives have significant drawbacks (e.g., corporate governance, double taxation, labor law) compared to laws specifically designed for worker cooperatives.

III. Legal Developments

Cooperative Statutes in the United States. Around half of the country has left Georgia behind and has already adopted a worker cooperative statute. These state-level developments have unfolded in one of four waves spanning several decades. The statutes these states adopted incorporate cooperative principles, such as worker ownership and democratic voting, that are missing from the conventional corporation or limited liability company statutes.

The first wave started with Massachusetts, which passed the nation's first worker cooperative law, the Employee Cooperative Corporations Act, in 1982.[36] Over the next dozen years, Connecticut, New York, Oregon, and Washington passed substantively similar statutes dubbed the Massachusetts Model.[37] These statutes created cooperatives as corporations, allowed only for worker members, and incorporated important cooperative principles. During the same period, a second group of states, Alaska, California, Illinois, and Texas (now expired), passed laws that more closely mirrored the traditional corporate form.[38]

The second wave of worker cooperative laws, or "new state cooperative" or "new generation cooperative" laws, started in the early 2000s with Wyoming's Processing Cooperative Law and was followed by laws in Iowa, Minnesota, Tennessee, and Wisconsin.[39] They differed from the first wave by combining elements of traditional cooperatives with those of limited liability companies and enabling cooperatives to obtain capital from non-members. In addition, they permitted but were not limited to worker cooperatives.

Over the next ten years, a third wave of states, including Nebraska, Utah, Oklahoma, Washington D.C., Kentucky, Colorado, Missouri, Vermont, and Washington, approved laws based on the Uniform Limited Cooperative Association Act drafted by the National Conference of Commissioners on Uniform State Laws.[40]

33 *Id.*

34 *See Connect*, Ga. Cooperative Dev. Ctr.,https://www.georgiacoopdc.org/connect/ (last visited Apr. 21, 2023); Rose, *supra* note 11.

35 Ga. Code Ann. §§ 14-2-101 - 1807 (West 1988); Ga. Code Ann. §§ 14-11-100 - 1109 (West 1993); Ga. Code Ann. §§ 14-3-101 - 1703 (West 1991).

36 Mass. Gen. Laws Ann. ch. 157A, §§ 1 - 11 (1982); Lewis D. Solomon & Melissa B. Kirgis, *Business Cooperatives: A Primer*, 6 DePaul Bus. L.J. 233, 289 (1994) (stating "[t]his act was enacted in 1982, and became the first cooperative statute designed exclusively for worker cooperatives").

37 Solomon & Kirgis, *supra* note 36, at 238; Conn. Gen. Stat. Ann. §§ 33-418(f) - (o) (West 1987); N.Y. Coop. Corp. Law §§ 80 - 94 (West 1993); Or. Rev. Stat. Ann. §§ 62.765 - 792 (West 1993); Wash. Rev. Code Ann. §§ 23.78.010 - .900 (West 1994).

38 Solomon & Kirgis, *supra* note 36, at 238; Alaska Stat. Ann. §§ 10.15.005 - 600 (West 1992); Cal. Corp. Code §§ 12200 - 12704 (West 1991); 805 Ill. Comp. Stat. Ann. 310/1 to 27 (West 1992); Tex. Rev. Civ. Stat. Ann. art. 1396-50.01 §§1 - 45 (West 1994).

39 James B. Dean & Thomas Earl Geu, *The Uniform Limited Cooperative Association Act: An Introduction*, 13 Drake J. Agric. L. 63, 74-75 (2008); Wyo. Stat. Ann. §§17-10-201 - 253 (West 2008); Iowa Code Ann. § 501A.101 - 1216 (West 2005); Minn. Stat. Ann. § 308B.001 - 975 (West 2003); Tenn. Code Ann. § 43-38-101 - 1109 (West 2005); Wis. Stat. Ann. § 193.001 - .971 (West 2006).

40 Neb. Rev. Stat. Ann. §§ 21-2901-21 - 29,134 (West 2007); Utah Code Ann. §§ 16-16-101 - 120 (West 2008); Okla. Stat. Ann. tit. 18, §§ 441-101 - 1704 (West 2009), D.C. Code Ann. §§ 29-1001.01 - 1015.08 (West 2011), Ky. Rev. Stat. Ann. § 272A.1-010 - 17-040 (West 2012), Colo. Rev. Stat. Ann. §§ 7-58-101 - 1704 (West 2011), Mo. Ann. Stat. §§ 351.1000 - 1228 (West 2011), Vt. Stat. Ann. tit. 11C, §§ 101 - 1703 (West 2011); Wash. Rev. Code Ann.

The limited cooperative association (the "LCA") also allows for other types of cooperatives and more explicitly integrates non-worker, investor members.

Finally, California, in 2016, and Illinois, in 2020, tweaked the limited cooperative association to create new limited worker cooperative associations specific to worker cooperatives.[41] Notwithstanding these four periods of legislative support, several other states passed or amended statutes that either explicitly or indirectly recognized worker cooperatives over the years, including Alabama, Montana, New Mexico, Rhode Island, Virginia, and South Dakota.[42]

Benefits of Georgia Worker Cooperative Bill. Between 2021 and 2022, the Georgia Cooperative Development Center (the "Center") drafted the Georgia Limited Worker Cooperative Association Act (the "GLWCAA"), which would recognize worker cooperatives as a distinct legal entity in Georgia.[43] In addition, the GLWCAA aims to benefit potential worker-owners in several ways, incorporating lessons from the first four waves of statutes.

First, as with the first wave statutes, the GLWCAA would enable worker-owners to use "cooperative" in their legal name, a point of pride and a signal of their unique values to customers and partners.[44] Further, the bill integrates cooperative values, including "one member, one vote" and the payment of surplus based on worker labor (i.e., patronage), ensuring worker control and direct financial benefit.[45] Third, following second-wave worker cooperative laws, the GLWCAA provides another avenue for raising capital by permitting cooperatives to have an investor class with no or minimal voting rights.[46] Fourth, the bill would allow worker-owners to bring in investors as another avenue for finance, which, as discussed later, could have negative consequences if not limited appropriately.

The GLWCA provides substantial tax and regulatory benefits consistent with the LCA laws. For example, it integrates limited liability company-like flexibility for the cooperative to opt for: (i) corporate taxation and avoid double taxation through the Internal Revenue Code or (ii) partnership taxation and potentially have flexibility concerning the migration status of future worker-owners.[47] The GLWCAA also ensures that member investments do not require the costly and lengthy registration process demanded by local and federal securities agencies.[48]

GCDC also introduced a few unique elements into the GLWCAA. Unlike any other statutes and responsive to growing concerns around conflict in worker cooperatives, the GLWCAA includes an expulsion provision for members that requires a fair and reasonable process done in good faith.[49] The emphasis on process protects a member from arbitrary removal from the cooperative.

Open Questions regarding the GLWCAA. Even with these features, the GLWCAA raises several potential questions that a community-led process could resolve. The list of questions includes the following:

1. To what extent did the Center engage directly with existing and future worker-owners, mainly Black, brown, and indigenous worker-owners? Engaging marginalized worker-owners ensures that the bill addresses diverse needs in its initial form before negotiations and amendments

§§ 23.100.0101 - 1573 (West 2019); *Limited Cooperative Association Act (2007)(Last Amended 2013)*, Unif. L. Comm., https://www.uniformlaws.org/viewdocument/final-act-82?CommunityKey=22f0235d-9d23-4fe0-ba9e-10f02ae0bfd0&tab=librarydocuments (last visited Apr. 21, 2023).

41 Cal. Corp. Code §§ 12200 - 1207 (West 2016); 805 Ill. Comp. Stat. Ann. 317/1 to /99 (West 2020).

42 Ala. Code §§ 10A-11-1.01 - 11.15 (West 1975); Mont. Code Ann. §§ 35-15-101 - 507 (West 1895); N.M. Stat. Ann. §§ 53-4-1 - 45 (West 1939); 7 R.I. Gen. Laws Ann. §§ 7-6.2-1 - 12 (West 2017); Va. Code Ann. §§ 13.1-346 - 355 (West 2020); and S.D. Codified Laws §§ 47-15-1 - 47-18-28 (West 2018).

43 *Advocate: Our Proposed Legislation*, Ga. Cooperative Dev. Ctr., https://www.georgiacoopdc.org/advocate/ (last visited Apr. 21, 2023).

44 Georgia Cooperative Development Center, *Georgia Limited Worker Cooperative Association Act ("GLWCAA")*, §14-12-204, https://www.georgiacoopdc.org/wp-content/uploads/2022/12/Text-of-Georgia-LWCA-Act.pdf (last visited Apr. 21, 2023).

45 *Id*. at §14-12-101(10).

46 *Id*. at §14-12-101(4) (defining investor members).

47 *Other Tax Status Options for a Worker Cooperative*, Co-opLaw.org, https://www.co-oplaw.org/knowledge-base/other-tax-status-options-for-a-worker-cooperative/ (last visited Apr. 21, 2023).

48 GLWCAA, *supra* note 44 at §14-12-706.

49 *Id*. at §14-12-405.

during the legislative process.

2. Are there any concerns about investor member co-optation of worker cooperative voting if worker-owners maintain only a majority of the voting power?[50] LCA critics worry that savvy investors could indirectly control a worker cooperative unless there is: (i) a higher threshold for worker-owner voting power (e.g., 80% instead of 51%), (ii) a cap on investor member voting power (e.g., 20%), or (iii) no voting power for investor members (i.e., equity-only, non-voting shares).

3. Should there be language rooted in a solidarity economy framework (e.g., equity in all forms, regeneration) that more accurately speaks to this bill's goals instead of neoliberal, capitalist language such as "intergenerational wealth building" and "freedom of contract"? Including solidarity economy language could signal that this bill is also concerned with lifting those currently on the margins and advancing the planet's sustainability.

4. Does the bill provide enough flexibility to allow multiple stakeholders aside from workers and investors, such as consumers or producers? For people interested in a multi-stakeholder cooperative, clear avenues to bring in different classes of members would make the GWLCAA more accessible and avoid a need for a second bill.

5. Should the bill include any incentives (e.g., procurement, built-in funding) or other exemptions (e.g., taxes)? Given that several cities, including New York City and Chicago, have initiatives to support the worker cooperative ecosystem through different policies, the GLWCAA could be an avenue to include some of those types of incentives on the front end.

A. Movement Lawyering For and Beyond the Bill

Background on Movement Lawyering. A movement lawyering framework could help initiate the process of transforming labor relationships through worker cooperatives. Movement lawyering is an approach whereby the lawyer partners with and empowers community-based leaders and organizers who identify the needs and the strategies for supporting their communities.[51] It pushes back against the lawyering model that centers the law and the lawyer as the primary avenue for needed change by recognizing how the law is a conservative tool that upholds the status quo power arrangements rooted in exploitation and oppression. Alexi and Jim Freeman posit four loci of influence lawyers can interrogate with communities to go beyond policy: (i) political; (ii) communications and media; (iii) grassroots support; and (iv) legal support.[52] Further, Renee Hatcher offers solidarity economy lawyering as a framework that integrates a movement lawyering approach to building this alternative economy.[53]

Examples of Movement Lawyering for Worker Cooperatives. When supporting the solidarity economy movements in California and Illinois, local lawyers supported in each of the four areas, including campaign strategy (i.e., political), educational materials development (i.e., communications), event hosting (i.e., grassroots support), sample governance document drafting (i.e., legal), and so much more.[54] The result of this work has arguably gone beyond securing the passage of these statutes to include ecosystem building, fundraising, ongoing political education, and power building among community members.

50 *Id*. at §14-12-402(e).

51 *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. Rev. 1645, 1656–57 (2017); Azadeh Shahshahani, *Movement Lawyering: A Case Study in the U.S. South*, 5 How. Hum. & C.R.L. Rev. 45, 47–49 (2020).

52 Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 Clinical L. Rev. 147, 156 (2016).

53 *See* Renee Hatcher, *Solidarity Economy Lawyering*, 8 Tenn. J. Race Gender & Soc. Just. 23 (2019).

54 *See, e.g., CA Worker Cooperative Act*, Sustainable Economies L. Ctr., https://www.theselc.org/ca-worker-cooperative-act (last visited Apr. 21, 2023) (describing the proposed worker cooperative act and strategies for supporting the movement to pass the act); Illinois Worker Cooperative Alliance & The John Marshall Law School-Chicago Business Enterprise Law Clinic, Cooperation Chicago: Building Chicago's Worker Cooperative Ecosystem 15-17 (Aug. 2018), https://geo.coop/sites/default/files/cooperation_chicago_-_rev_082418.pdf (describing policy recommendations for the passage of a worker cooperarive law *and* other policies).

Lawyering for the GLWCAA. Georgia lawyers have already shown up in several ways to support worker cooperatives. First, lawyers have provided direct legal services for people forming worker cooperatives using the current legal tools (i.e., corporations and limited liability companies). Second, leveraging this experience, local lawyers researched existing laws and drafted the GLWCAA to adequately shift local policy to meet prospective worker owners' needs. This effort directly responds to the need for a legal form for worker cooperatives as articulated by Georgia worker-owners and worker cooperative developers. However, to engage in movement lawyering, lawyers must transcend policy supporting the empowerment of local communities and push for economic relationships rooted in solidarity.

Movement Lawyering beyond the GLWCAA. In addition to what lawyers have done, I will offer here other potential interventions. From a political standpoint, movement lawyers could continue identifying and collaborating with local organizers, community members, worker-owners, developers, and others interested in this work. Such lawyers could support infrastructure development for a larger formation or coalition where helpful. In a previous job, I often helped coalitions think through governance issues such as membership, voting, committee structures, and related processes.

Once lawyers identify the people to whom they can be accountable, if this has not already taken place, they can support with co-developing campaign strategy (e.g., determining who has the power to make the changes our people want and avenues, including law-related, for realizing such changes). These efforts could include drafting a proposal or white paper outlining demands, sharing knowledge and skills to support organizers' leadership, and connecting organizers with advocacy opportunities, resources, and critical networks. Further, such efforts could include meeting with state legislators to promote the GLWCAA and other initiatives the coalition prioritizes.

From a communications and media standpoint, lawyers could help craft public messaging supporting worker cooperatives and the larger solidarity economy. Lawyers can translate the legalese from policies or court decisions and distill the information in ways that best fit the story that local organizers are trying to tell about a new world that is possible. Further, lawyers can help elevate the critical work organizers are doing by connecting organizers with media opportunities. Thirdly, lawyers can also advance organizers' work with their pens and keyboard by drafting or editing public-facing materials to ensure they accurately cover legal issues.

Movement lawyers could also support grassroots organizing by participating in political education about the solidarity economy. One concern is that movement lawyers preach to the choir instead of engaging the uninitiated. To advance the cause of the solidarity economy, movement lawyers must prioritize meeting the community where it is: local community centers, libraries, elementary schools, basketball courts, and churches. Lawyers could also co-lead workshops with local organizers and co-develop curricula around legal issues impacting worker cooperatives. Finally, lawyers can continue to do legal research on topics that come up and provide direct client services to worker-owners.

IV. Conclusion

To end the suffering that so many Atlantans and people beyond are experiencing, we must create new ways — and reclaim old ways — of structuring our economy rooted in solidarity. Recognizing this, Atlanta organizers have supported the formation of worker cooperatives for years. However, despite the proliferation of worker cooperative statutes throughout the country, Georgia does not have one. The GWLCAA aims to fix that problem.

This Article argued for using a movement lawyering framework to get the short-term win of passing the GWLCAA and long-term successes in alignment with the aspirations of local organizing to transform the local economy. The GWLCAA is just one part of the multi-layered work that movement lawyers can do to support building such an economy in Georgia — a meaningful first step. However, given the law's limitations and whether for-profit or for-the-people, a worker cooperative statute can only lower an intermediate barrier to worker cooperative formation. It cannot, on its own, shift the power needed to bring about a soli-

darity economy in Georgia. Despite the noted advantages of this bill, movement lawyers can help support organizers through political, communications, grassroots organizing, and legal strategies.

* * *