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HUMAN RIGHTS BRIEF

Articles

Student Columns

American University Washington College of Law
Center for Human Rights & Humanitarian Law

Faculty Director | Macarena Sáez

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HUMAN RIGHTS BRIEF

VOLUME 24

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Dear Reader:

Around the world, people are calling on states to better protect human rights. Most states are a party to at least one of the major human rights treaties; however, all states also have serious human rights violations occurring within their borders. Meanwhile, a global pandemic continues to expose inequalities in our systems, and a reckoning of racial tensions has reverberated with communities around the world. As we reflect on 2020, we also look forward — how do we use existing legal mechanisms to effectively protect human rights? What new mechanisms need to be created?

The answer, at least partially, lies in the technical details of implementation and interpretation. Removing statutes of limitations for human rights claims; acknowledging gender when interpreting non-gendered laws; updating excessive force laws and regulations to address current technology; and providing specific laws for citizenship are some ways to ensure individual rights are protected. More broadly, defining rights explicitly in domestic law and integrating a human rights approach in other areas of law, such as arbitration and corporate law, is also necessary to protecting human rights. As we look towards a post-2020 world, we encourage our readers to continue watching the technical implementation of human rights protections with a close eye.

This year has been one of transformation. At *The Human Rights Brief*, we have taken this opportunity to reflect upon our own processes and goals in order to better support our student staff and be a resource to the human rights community. We could not have gone through this process without our incredibly visionary and talented Editorial Board, and all of our student editors and staff have been instrumental in making this change.

We hope you find the ideas in this issue as encouraging and thought-provoking as we have. We will continue to advocate for a world where states protect every individual's human rights, and we thank you for your continued support.

Sincerely,
Samira & Kate

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

* * *

Is Human Trafficking a Crime That Should Not Be Subject to Any Statute of Limitations?

*by María Barraco**

This paper has two aims: 1) to analyze if the prohibition of human trafficking and slavery are jus cogens norms, and if they consequently constitute crimes that shall not be subject to any statute of limitations; 2) to analyze if the criminal provisions on slavery and human trafficking of the States Parties to the American Convention on Human Rights (ACHR) establish statutes of limitations for these crimes. This paper concludes that human trafficking is in fact a crime that shall not be subject to any statute of limitations when the purpose of exploitation is slavery and when the latter has been achieved. In addition, this paper finds that States Parties to the ACHR that do not contemplate this particularity should improve their criminal law.

I. Introduction & General Concepts

Despite the various conventions prohibiting human trafficking,[1] this crime was not defined by international law until December 2000 in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).[2]

According to Article 3(a) of the Palermo Protocol, human trafficking consists of three cumulative elements:[3] an action ("recruitment, transportation, transfer, harboring or receipt of persons"); the means used to secure that action ("threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of a person having control over another person"); and the purpose of the action for which the means were used ("[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs").[4] It is important to highlight that for a situation of trafficking to arise, it is not necessary for the exploitation to be achieved.[5]

The aforementioned definition was accepted by the European Court of Human Rights (ECtHR),[6] the Inter-American Court of Human Rights (IACtHR)[7] and the Inter-American Commission of Human

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[1] International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278; International Convention for the Suppression of Traffic in Women and Children, Sep. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271; Organization of American States, Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, O.A.S.T.S. No. 79.

[2] Anne T. Gallagher, The International Law of Human Trafficking 12 (2010); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the U.N. Convention against Transnational Organized Crime*, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

[3] Gallagher, *supra* note 2, at 29.

[4] *See* Palermo Protocol, *supra* note 1, art. 3(c) (regarding trafficking in children, the "means" requirement is waived).

[5] U.N. Office on Drugs and Crime, Legislative Guides For The Implementation Of The United Nations Convention Against Transnational Organized Crime And The Protocols Thereto, Part II, para. 33.

[6] Rantsev v. Cyprus & Russia, 25965/04 Eur. Ct. H.R. 65 (2010).

[7] Caso Trabajadores de la Hacienda Brasil Verde v. Brazil, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 284, 290 (Oct. 20, 2016).

Rights (IACHR).[8] Both the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights (ACHR), prohibit human trafficking in Article 4[9] and Article 6[10] respectively. In this sense, trafficking in persons often involves violations of other human rights recognized in human rights treaties, such as the right to life, the right to personal integrity, and the right to personal liberty and security.[11]

II. States' General Obligations Towards Human Trafficking

States' main obligation regarding the crime of human trafficking is to respect and ensure that no one is subjected to it.[12] Moreover, states are obliged to:

- Prevent trafficking cases,[13] adopt an integral preventive policy, and carry out inspections to detect any situation of human trafficking or slavery;[14]
- Eliminate the legislation that tolerates slavery, servitude, and human trafficking[15] and criminalize those crimes;[16]
- Initiate *ex officio* an immediate effective investigation to identify, judge and sanction those responsible when there is a complaint or a well-founded reason to believe that individuals under their jurisdiction are being victims of human trafficking or slavery;[17]
- Investigate and prosecute the offenses;[18]
- Protect and assist human trafficking victims,[19] which specifically includes: the non-criminalization of the victims,[20] provision of legal assistance,[21] and voluntary and safe return;[22]
- Compensate and provide restitution to human trafficking victims;[23]
- Confiscate assets: proceeds of the crime of human trafficking or elements used in or destined for use in committing the crime;[24]
- Cooperate with other States Parties of the Convention against Transnational Organized Crime (UNTOC), which includes joint investigations,[25] information exchange, and training.[26]

III. Human Trafficking as a Crime that Shall Not be Subject to Any Statute of limitations

A. Jus Cogens *Norms, Grave Violations of Human Rights and Statutes of Limitations: The Case of the Prohibition of Slavery*

A *jus cogens* norm is defined by Article 53 of the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international com-

[8] Inter-Am. Comm'n H.R., *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/II, ¶ 136 & ¶ 220 (2015) [hereinafter Human Rights of Migrants]; Inter-Am. Comm'n H.R., *Human Rights of Migrants and Other Persons in the Context of Human Mobility In Mexico*, OEA/Ser.L/V/II., doc. 48/13 ¶ 348 (2013) [hereinafter Human Rights of Migrants in Mexico].

[9] Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 221 (even though "human trafficking" is not recognized as such in Article 4, the E.Ct.H.R. has understood that such crime is included in the Article); *Rantsev v. Cyprus & Russia*, at 60-61.

[10] American Convention on Human Rights art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123.

[11] *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, No. 318 at ¶ 273; *Human Rights of Migrants*, supra note 8, at ¶ 223; *Human Rights of Migrants in Mexico*, supra note 8, at ¶ 350.

[12] *Velasquez Rodriguez v. Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 04, ¶ 165-166 (Jul. 29, 1988); *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, No. 318 at ¶ 317.

[13] Palermo Protocol art. 9, *supra* note 2; Gallagher, *supra* note 2, at 414.

[14] *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, at ¶ 319-320.

[15] *Id.*

[16] *Id.*; Palermo Protocol, *supra* note 2, at art. 5; Gallagher, *supra* note 2, at 371.

[17] *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, No. 318 at ¶¶ 319-20.

[18] Palermo Protocol, *supra* note 2, at art. 4; Gallagher, *supra* note 2, at 382.

[19] *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, No. 318 at ¶¶ 319-20; Palermo Protocol, *supra* note 2, at art. 6; Off. of the High Comm'r for Hum. Rts., Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N. Doc E/2002/68/Add.1 (May 20, 2002), at Guideline 6 [hereinafter "UN Principles"].

[20] UN Principles, *supra* note 19, at Guideline 2.5; Gallagher, *supra* note 2, at 276.

[21] Palermo Protocol, *supra* note 2, at art. 6.3.b; UN Principles, *supra* note 19, at Guideline 6.5; Gallagher, *supra* note 2, at 315.

[22] Palermo Protocol, *supra* note 2, at art. 8; UN Principles, *supra* note 19, at Guideline 6.7; Gallagher, *supra* note 2, at 339.

[23] Convention against Transnational Organized Crime (Nov. 15, 2000), at art. 25.2 [hereinafter "UNTOC"]; Gallagher, *supra* note 2, at 354-360.

[24] UNTOC, *supra* note 23, art. 12-13; Gallagher, *supra* note 2, at 400.

[25] UNTOC, *supra* note 23, art. 19.

[26] Palermo Protocol, *supra* note 2, art. 10.

munity of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[27] The prohibition of slavery has been considered by the IACtHR as a *jus cogens* norm.[28] Likewise, the prohibition of slavery has been recognized as a *jus cogens* norm by the IACHR[29] and the International Law Commission (ILC).[30]

In the case *Hacienda Brazil Verde vs. Brazil*, the first decision rendered by the IACtHR regarding Article 6 of the ACHR (which prohibits human trafficking and slavery),[31] the Court understood that, *since slavery and its analogous forms are a* jus cogens *norm, statutes of limitations do not apply to the investigation and prosecution of such crimes*.[32] In addition, to support this conclusion, it argued that *crimes that involve grave violations of human rights, such as slavery, cannot be subject to any statute of limitations*.[33] In this vein, the IACtHR ruled in a subsequent decision that "sexual slavery"[34] is a *jus cogens* norm subjected to all the corresponding obligations.[35] Accordingly, cases of sexual slavery cannot be subject to any statute of limitations either.

Similarly, in its previous case *Barrios Altos v. Peru*, the Court understood that provisions on prescriptions are not applicable to "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[36] This same conclusion was affirmed regarding crimes against humanity.[37] Accordingly, the Court considered that statutes of limitations were not applicable to the crimes of enforced disappearance[38] and torture[39] since they constituted grave violations of human rights.

These conclusions reached by the IACtHR are in accordance with international law. Professor Theo Van Boven, former Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, understood that "claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations."[40] In that report, he considered to be gross violations of human rights the crimes of "genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on

[27] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 83 (Jul. 8, 1996); Jochen A. Frowein, *Ius Cogens*, Oxford Pub. Int'l Law (Mar. 2013).

[28] Caso Trabajadores de la Hacienda Brasil Verde v. Brazil, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 249 (Oct. 20, 2016); Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57 (Sep. 10, 1993).

[29] Human Rights of Migrants, *supra* note 8 at ¶ 219; Captive Communities: Situation of the Guaraní Indigenous People and the Contemporary Forms of Slavery in the Bolivian Chaco, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 58 ¶ 54 (2009).

[30] Int. Law Comm'n, *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto*, ¶ 5, U.N. Doc. A/56/10 (2001).

[31] The case concerned the situation suffered by eighty-four workers in a private-owned Brazilian ranch, who had been subjected to trafficking in persons and slavery. The Court analyzed the "modern" definitions of slavery, servitude, human trafficking and forced labor, as well as the state's obligations regarding them.

[32] *Caso Trabajadores de la Hacienda Brasil Verde v. Brazil*, at ¶ 412-13.

[33] *Id.* at ¶ 454 (emphasis added).

[34] *See* Gay J. McDougall, *Contemporary Forms of Slavery*, ¶ 8, U.N. Doc. E/CN.4/Sub.2/2000/21 (Jun. 6, 2000) (defining sexual slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual abuse").

[35] Lopez Soto v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 362, ¶ 176 (Sep. 26, 2018).

[36] Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 294 (May 11, 2007).

[37] Almonacid Arellano et al. v. Chile, Preliminary Exceptions, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 153 (Sep. 26, 2006).

[38] Tenorio Roca et al. v. Peru, Preliminary Exceptions, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 315, ¶ 268 (Jun. 22, 2016).

[39] Ibsen Cardenas v. Bolivia, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 217, ¶ 208 (Sep. 1, 2010).

[40] Theo Van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶ 135, U.N. Doc. E/CN.4/Sub.2/1993/8 (Jul. 2, 1993).

race or gender."[41] For its part, the ILC considered that slavery, genocide, and apartheid are serious breaches of human rights.[42]

It is clear that the prohibition of slavery and its analogous forms, such as sexual slavery or servitude, are *jus cogens* norms that involve grave violations of human rights that, at least in the American Region, cannot be subject to any statute of limitations. That said, *can the same conclusion be affirmed regarding the crime of human trafficking?*

B. The Crime of Human Trafficking and the Statutes of Limitations

The Palermo Protocol contains no prescription of statutes of limitations. Due to the absence of a provision, Art. 11.5 of the United Nations Convention against Transnational Organized Crime applies.[43] This article establishes that "[e]ach State Party shall, where appropriate, establish under its domestic law a long statute of limitations period." That is to say, there is no prohibition to apply statutes of limitations to human trafficking. Nevertheless, the United Nations Office on Drugs and Crime (UNODC) has considered that states should not establish a statute of limitations on the crime of human trafficking considering the gravity of the crime because "such a provision may serve to send a strong message of deterrence."[44]

In the Commentary to the ACHR, Professor Federico Andreu considered that human trafficking can be regarded as a "grave violation of human rights."[45] Similarly, Professor Pellet understood that the prohibition of human trafficking is a *jus cogens* norm, amongst others such as the right of peoples to self-determination, the prohibition of slavery, racial discrimination, torture, genocide, and crimes against humanity.[46] Furthermore, the Council of Europe enacted the guidelines on "Eradicating Impunity for Serious Human Rights Violations," including human trafficking as a serious violation. In accordance with what has been so far discussed above, it could be understood that no statute of limitations should be applied to the crime of human trafficking.[47]

However, no other international organ or tribunal has affirmed that this crime is a *jus cogens* norm. Not even the Special Rapporteurs on trafficking in persons, especially women and children made that conclusion. Nevertheless, I do consider there to be a specific situation of human trafficking in which the prohibition to establish statutes of limitations to the investigation and prosecution of the crime applies: *when the purpose of the action (the third element in the human trafficking's definition) is slavery or any of its analogous forms, and when that purpose has been achieved.*

As it was stated in Part 1, one of the possible forms of exploitation is slavery or its analogous forms. This purpose of enslavement may not be achieved, and the attempt will still be considered human trafficking if the other elements are present (that is to say, the purpose and the means to secure that purpose). But, if the human trafficking victim has indeed been exploited in the form of slavery or its analogous forms, such crime shall not be subject to any statute of limitations. And that is because even though the crime is catalogued as human trafficking, it has involved slavery, a *jus cogens* norm, which cannot be subject to any statute of limitations.

To conclude, the prohibition of slavery is a *jus cogens* norm, however that cannot be similarly affirmed regarding the prohibition of human trafficking. The IACtHR has understood that the investigation and prosecution of slavery and its analogous forms cannot be subject to any statute of limitations. Even though nothing has been said regarding human

[41] *Id.* at ¶ 13.
[42] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* 85 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
[43] Gallagher, *supra* note 2, at 80.
[44] U.N. Office on Drugs and Crime, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (2009), at 36, https://www.unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf.
[45] F. Andreu, *Articulo 6. Prohibición de la Esclavitud y Servidumbre*, in: C. Steiner et al. (Eds), Convención Americana de Derechos Humanos: Comentario 118 (2014).
[46] A. Pellet, *Responsibility of States in Cases of Human-Rights or Humanitarian-Law Violations*, in: J. Crawford et al., The International Legal Order: Current Needs and Possible Responses 236 (2014).
[47] Directorate General of Human Rights and Rule of Law, *Eradicating Impunity For Serious Human Rights Violations* 23 (2011), https://rm.coe.int/1680695d6e%20.

trafficking, there is a specific circumstance where this prohibition also applies: when the purpose of the trafficking was slavery or its analogous forms, and when such purpose was achieved in the facts of the case.

IV. The 'Control of Conventionality' Doctrine & Compliance in the Subject-Matter by the States Parties to the ACHR

A. The Definition of the "Control of Conventionality" and the Case Hacienda Brazil Verde vs. Brazil

The "Control of Conventionality" doctrine imposes on States Parties to the ACHR the obligation to interpret their legal instruments taking into consideration the ACHR and the Inter-American *corpus juris*.[48] Accordingly, the Conventionality Control requires all state authorities, and specifically judges, to apply the ACHR as interpreted by the Court in its jurisprudence.[49] Furthermore, this would imply that States Parties to the ACHR are obliged to adjust their national legislation with the provisions contained on the ACHR and with the Court's rulings.

It is worthwhile to note that in the case *Hacienda Brazil Verde*, the Court reiterates the state's obligation to exercise *ex officio* the Conventionality Control by every state organ.[50] This obligation, in conjunction with the conclusions in Part 3 of this article, would entail that States Parties should modify their national legislation if they apply statutes of limitations on the crime of slavery and its analogous forms and/or human trafficking when the purpose of slavery has been achieved. Precisely, in the *Hacienda Brazil Verde* case, the Court establishes as reparation that Brazil must take the appropriate legislative steps to guarantee that slavery and its analogous forms are not subjected to any statute of limitations.[51] This was determined because, in the particular case, victims were unable to access justice to obtain redress, since the crimes punished in Article 149 of Brazil's Criminal Code had been subject to the statute of limitations established in the Criminal Code. Consequently, this situation led to impunity for the crimes committed.

B. Analysis of the States Parties to the ACHR's Criminal Provisions on Slavery and Human Trafficking and the Establishment of Statutes of Limitations

In order to analyze the situation in the American region, the following chart summarizes the criminal law of each State Party to the ACHR regarding the crimes of slavery and human trafficking, and their corresponding term of statute of limitations.[52] Furthermore, it will establish if the legislative situation complies with the decision rendered in the case *Hacienda Brazil Verde*.

[48] E. Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 Am. J Int'l L. 93, 93 (2015).

[49] A. E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Texas Int'l L. J. 45, 52 (2015).

[50] Caso Trabajadores de la Hacienda Brasil Verde v. Brazil, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 408 (Oct. 20, 2016).

[51] *Id.* at ¶ 455.

[52] The Chart does not contain information regarding Granada, Jamaica and Suriname, since there was no official information available. The main source used for the chart were the criminal codes uploaded at the official page of the OAS. Red Hemisférica de Cooperación Jurídica en Materia Penal, Org. of Am. States, http://web.oas.org/mla/es/Paginas/default.aspx (last visited Nov. 17, 2020).

State	Criminal Law regarding slavery	Criminal Law regarding human trafficking	Term of the statute of limitations	Compliance
Argentina	Criminal Code, Article 140: punishes slavery or servitude, under any modality, forced labor or services and servile marriage.	Criminal Code, Article 145 bis: Punishes Human Trafficking, with the purpose of: slavery or servitude, under any modality; forced labor or services; servile marriage; the exploitation of the prostitution of others or other forms of sexual exploitation; the removal of organs, or human fluids or tissues; child pornography.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 65: **between 4 and 15 years.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 65: **between 4 and 15 years.**	No.

Barbados	Offences against the person Act, Art. 33: punishes slavery.	Transnational Organized Crime, Prevention and Control, Act 2000, Article 8: punishes human trafficking for the purpose of exploitation. Exploitation includes: exploitation of the prostitution of others or any other form of sexual exploitation; forced labor, slavery, servitude or similar practices; and the removal of human organs or human tissue without the consent of the victim or the legal guardian of the victim in circumstances where there is no medical or therapeutic need on the part of the victim for the removal.	Slavery No Information Human Trafficking No information	-

Bolivia	Criminal Code, Article 291: punishes slavery or analogous situation.	Criminal Code, Article 281 bis: Punishes human trafficking, for the purpose of: Commerce of the Human Being or other acts of dispositions; the removal, commerce or illicit disposition of human fluids or corporal liquids, cells, organs or human tissues; slavery or analogous situation; Labor exploitation, forced labor or any situation of servitude; "consumerist servitude"; Commercial sexual exploitation; Forced pregnancy; Sexual tourism; adoption; forced begging; servile marriage or union; recruitment for arm conflict or religious sects; criminal activities; illicit biomedical investigations;	Slavery General Statute of limitations prescribed in Criminal Code, Art. 101: **8 years.** Human Trafficking Law 263/2012, Article 44: **Human trafficking shall not be subjected to any statute of limitations.**	Partial Compliance

Brazil	Criminal Code, Article 149: Punishes slavery or analogous situations, forced labor or any form of degrading treatment at work.	Criminal Code, Article 149-A (added by Law 13.344): Punishes Human Trafficking, for the purpose of remove organs, tissues or parts of the body; slavery or any type of servitude; illegal adoption; or sexual exploitation.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 109: **between 12 and 20 years.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 109: **between 12 and 20 years.**	No.
Chile	No provisions regarding slavery or any analogous situation.	Criminal Code, Article 411 ter., quáter and quinquies: punishes human trafficking, for the purpose of sexual exploitation, pornography, forced labor or services, servitude, slavery or analogous situation, organs removal.	Slavery - General Statute of limitations prescribed in Criminal Code, Art. 94: **between 5 and 10 years**.	No.
Colombia	No provisions regarding slavery or any analogous situation.	Criminal Code, Article 188 A: Punishes Human Trafficking, for the purpose of sexual exploitation, forced labor or services, slavery or analogous situations, servitude, forced begging, forced marriage, removal of organs, sexual tourism, or other forms of exploitation.	Slavery - General Statute of limitations prescribed in Criminal Code, Art. 83: **20 years.**	No.

Costa Rica	Criminal Code, Article 189: Punishes Servitude or any analogous situations.	Criminal Code, Article 172: Punishes Human Trafficking, for the purpose of exploitation, sexual or labor servitude, slavery or any analogous situation, forced labor or services, begging, forced marriage, illicit removal of organs and illicit adoption.	Slavery General Statute of limitations prescribed in Criminal Code, Art.84: **between 5 years - 4 months and 16 years.** General Statute of limitations prescribed in Criminal Code, Art.84: **between 8 and 21 years – 4 months.**	No.
Dominica	No provisions regarding slavery or any analogous situation.	Transnational Organized Crime (Prevention and Control Act) 13/2013. Art. 8: punishes Human Trafficking for the purpose of : the exploitation of the prostitution of others or any other form of sexual exploitation; forced labor, slavery, servitude or similar practices; or the removal of human organs or human tissue without the consent of the victim or the legal guardian of the victim in circumstances where there is no medical or therapeutic need on the part of the victim for the removal;	Slavery - Human Trafficking No information.	No.

Dominican Repbulic	No provisions regarding slavery or any analogous situation.	Law 137-03, Art.3: Punishes Human Trafficking, for the purpose of any form of sexual exploitation, pornography, forced labor or services, debt servitude, forced marriage, irregular adoption, slavery or any analogous situation, servitude or removal of organs.	Slavery - Human Trafficking General Statute of limitations prescribed in Criminal Procedural Code, Art. 45: **10 years**.	No.
Ecuador	Criminal Code, Article 82: Punishes slavery.	Criminal Code, Article 91 and 92: Punish Human Trafficking, for the purpose of: removal or commercialization of organs, human tissues or fluids, genetic material of alive individuals; sexual exploitation (including forced prostitution, sexual tourism and child pornography); labor exploitation (including forced labor, debt servitude, and child labor); forced marriage or union; illegal adoption; begging; recruitment for armed conflicts; any other form of exploitation.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 75: **39 years.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 75: **24 to 39 years.**	Partial Compliance.

El Salvador	Criminal Code, Article 150: Punishes servitude (among other crimes against personal freedom).	Criminal Code, Article 367-B: Punishes Human Trafficking, for the purpose of: sexual exploitation, forced labor or services, analogous situations to slavery; removal of organs, illegal adoptions or forced marriage Criminal Code, Article 367-C: aggravating circumstances.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 99: **between 3 years and 32 years and 4 months.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 99: **between 3 years and 8 months and 13 years and 4 months**.	No.
Guatemala	Criminal Code, Article 202: Punishes Servitude and any other analogous situation.	Criminal Code, Article 202 ter: Punishes Human Trafficking, for the purpose of: prostitution of others or any other form of sexual exploitation; forced labor or services, or any other form of labor exploitation; begging; any form of slavery; servitude; commerce of human beings; removal and commerce of human organs or human tissue; the recruitment of minors for organized crime groups; illegal adoption; pornography; forced pregnancy; and forced marriage or union.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 107: **between 13 years and 4 months and 18 years and 1 month.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 107: **20 years**.	No.

Haiti	No provisions regarding slavery or any analogous situation.	Law CL 2014-0010, Article 11: Punishes Human Trafficking for sexual and labor exploitation, removal of organs or tissues, and illegal adoption. Law CL 2014-0010, Article 21: Aggravating circumstances (for example, the victim is a minor).	Slavery - Human Trafficking Law CL 2014-0010, Article 30: **30 years** for human trafficking, **human trafficking with aggravating circumstances does not prescribe**.	Partial Compliance.
Honduras	No provisions regarding slavery or any analogous situation.	Decree 59-2012, Article 52: Punishes Human Trafficking, for the purpose of: servitude, slavery or any other analogous situation; forced labor or services; begging; forced pregnancy; forced marriage; illicit traffic of organs, human tissues or fluids; commerce of human beings; sexual exploitation; illegal adoption; recruitment of minors for criminal activities.	Slavery - Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 97: **22 years and 6 months** for Human Trafficking and **33 years and 9 months** for Human Trafficking with aggravating circumstances.	Partial Compliance.

México	General law on the prevention, punishment and eradication of offenses in the field of trafficking in persons and for the protection and assistance of the victims of these offenses, Art. 11: punishes slavery.	General law on the prevention, punishment and eradication of offenses in the field of trafficking in persons and for the protection and assistance of the victims of these offenses, Art. 10: punishes human trafficking.	Slavery Statute of limitations prescribed in Criminal Code, Art. 105: **between 7 years and 6 months and 15 years.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 105: **between 3 years and 7 years and 6 months.**	No.
Nicaragua	Criminal Code, Article 315: Punishes slavery and or analogous situations, forced or mandatory labor, servitude, any other form of labor exploitation.	Criminal Code, Article 182: Punishes Human Trafficking, for the purpose of slavery and or analogous situations, forced or mandatory labor; servitude; sexual exploitation or illegal adoption; child pornography; forced marriage; illicit traffic of organs, human tissues or fluids; commerce of human beings; irregular adoption; begging.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 131: **between 10 and 15 years.** Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 131: **between 10 and 15 years.**	No.

Panamá	Law 79/2011, Article 456-D: Punishes forced labor or services. No provisions regarding slavery or any analogous situation.	Law 79/2011, Article 456-A: Punishes Human Trafficking, for the purpose of prostitution, sexual or labor servitude, slavery or analogous situations, forced labor or services, forced marriage, begging, illicit removal of organs or illegal adoption.	Slavery - Forced Labor or Services General Statute of limitations prescribed in Criminal Code, Art. 119: **between 6 and 15 years**. Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 119: **between 15 and 30 years**.	No.
Paraguay	No provisions regarding slavery or any analogous situation.	Law 4788/2012: Punishes Human Trafficking, for the purpose of sexual exploitation, labor exploitation (slavery, servitude, forced labor, forced marriage or any analogous situation), or illicit removal of organs.	Slavery - Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 102: **between 8 and 15 years.**	No.

Perú	Legislative Decree No. 1323, Article 153-C: punishes slavery and servitude.	Criminal Code, Article 153: Punishes human trafficking, for the purpose of: the commerce of children and teenagers, prostitution and any form of sexual exploitation, slavery or any other analogous situation, any form of labor exploitation, begging, forced labor or services, removal or traffic of organs, somatic tissues or its human components, and any other analogous form of exploitation. Criminal Code, Article 153 A: Aggravating circumstances.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 80: **between 15 and 30 years**. Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 80: **between 15 and 20 years**.	No.

Uruguay	Criminal Code, Article 280: Punishes slavery, servitude under any modality, and forced labor or analogous situation. Criminal Code, Article 280 bis: Punishes sexual slavery.	Law 18.250, Article 78: Punishes human trafficking in the context of migration. Law 19.643, Article 4: Punishes human trafficking, for the purpose of sexual exploitation, forced marriage, forced pregnancy, forced labor or services, slavery or analogous situations, servitude, labor exploitation, forced begging, the removal or illicit transfer of organs, or human fluids or tissues, and the commerce of human beings, especially children and teenagers.	Slavery General Statute of limitations prescribed in Criminal Code, Art. 117: **between 15 and 20 years**. Human Trafficking General Statute of limitations prescribed in Criminal Code, Art. 117: **between 15 and 20 years**.	No.

First, it must be noted that states with no provision at all regarding slavery and/or human trafficking are violating the obligation to criminalize those crimes,[53] as stated in Part 2. Further, considering that the IACtHR obliged Brazil to modify its legislation in order to eliminate the statute of limitations regarding the investigation and punishment of the crime of slavery and its analogous forms, and due to the "Control of Conventionality" Doctrine, every State Party to the ACHR should also adjust its legislation.

However, after analyzing the legislations of every State Party to the ACHR, it can be concluded that none is currently complying with this obligation. Brazil, directly bounded by the decision of the Court, in accordance with Article 68.1 of the ACHR, has not fixed its criminal law. In fact, the majority of states establish short statutes of limitations (fifteen years or less). Only Ecuador has a long statute of limitations for the crime of slavery (thirty-nine years).

Regarding human trafficking, only Bolivia has eliminated a statute of limitations to the crime of human trafficking; Haiti has done so when human trafficking is committed with aggravating circumstances. Further, only Honduras has established a long statute of limitations (thirty-three years if the crime is committed with aggravating circumstances), together with Ecuador (thirty-nine years if the victim of human trafficking dies).

Specifically, States Parties to the ACHR that subject the crime of slavery to a statute of limitations are indeed violating their international obligations. Conversely, States Parties that do not contemplate this particularity on the crime of human trafficking would not contravene, at first, any international law. However, states should be aware that, when a human trafficking case involves slavery or its analogous forms, and slavery and/or any of its analogous forms have been achieved, that specific crime must not be subject to any statute of limitations.

[53] Caso Trabajadores de la Hacienda Brasil Verde v. Brazil, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 319-320 (Oct. 20, 2016); Palermo Protocol, *supra* note 2, art. 5.

V. Conclusion

Various sources of international law affirm that the crime of slavery is a *jus cogens* norm. Accordingly, the obligation to prevent and prohibit slavery or its analogous forms is not subject to any statute of limitations. The case *Hacienda Brazil Verde* develops this obligation and obliges Brazil (by virtue of art. 68.1 of the ACHR) and the rest of the States Parties to it (by virtue of the "Control of Conventionality" Doctrine) to adjust their legislation.

This case also opens the possibility that human trafficking is a crime not subject to any statute of limitations when the purpose of human trafficking is slavery or its analogous forms, such as sexual slavery, and this purpose has been achieved. States should modify their criminal codes in order to address this situation. States should not only comply with their international obligations, but also effectively guarantee the victims' rights. Human trafficking cases imply grave violations of human rights, even more when its victims are subjected to slavery or sexual slavery. Moreover, human trafficking victims are usually in a vulnerable situation that prevents them from seeking the adequate redress to their sufferings. States should guarantee that these crimes will not remain unpunished, but rather investigated, prosecuted, and adequately remedied. Furthermore, there would be a "deterrent effect," as UNODC suggested, which is absolutely necessary regarding all of these serious crimes.

The final question that may arise would be: why have states not yet complied with the obligation to eliminate the statutes of limitations regarding these crimes? I believe the main reason is that, after all, these crimes are dealt with within national criminal systems, were the human rights of the defendant must also be taken into consideration. In this vein, the institute of the statutes of limitations is an exception, and should be used cautiously. Nevertheless, I believe it is absolutely necessary that states adjust their legislation soon, not only in order to comply with their international obligations, but mainly to ensure that any victim of these grave crimes will always find an appropriate response from the judiciary system and will obtain an adequate redress for their suffering.

Rubber Bullets and the Black Lives Matter Protests

by Tala Doumani[*] and Jamil Dakwar[**]

Linda Tirado, a freelance photographer and activist, drove to Minneapolis from Nashville to photograph the protests that had erupted on May 26, 2020. She had just taken a photo and lowered her camera when she felt her face explode. Screaming "I'm press! I'm press!" Linda had been shot in the left eye by a rubber bullet. After being rushed into surgery, doctors told her she was not likely to regain the vision in her eye.[1]

Stories like Linda's have become common during the recent Black Lives Matter protests. Sparked by the horrific murder of George Floyd on May 25, 2020 and the killings of other Black people, protests erupted in more than 140 cities across the United States[2] and 40 countries around the world.[3] Since May 26, 2020, there have been more than 400 instances of police detaining, assaulting, or otherwise preventing journalists from performing their duties.[4] Protestors have experienced injuries, and sometimes death, from tear gas, pepper spray, rubber bullets, and other crowd-control tactics used by police.[5]

This Article argues that instances of peaceful Black Lives Matter protestors and journalists being targeted by rubber bullets are not only incompatible with international human rights law but often contradict, when available, police forces' own internal policies. Comparing recent incidents of protestors targeted with rubber bullets with internal police department manuals on the use of force shows a clear disconnect between policy and practice. Drawing on international standards on the use of force, this Article further argues that, to protect First Amendment rights to peaceful assembly and association, the use of rubber bullets as a crowd-control weapon should be banned in the context of mass assembly.

I. Black Lives Matter Protests

Rubber bullets have been used widely by law enforcement and in the majority of states where Black Lives Matter protests have been held. While there has been a lot of media coverage on the misuse and dangerous overuse of tear gas and pepper spray against protestors, far less attention has been paid to another weapon that is equally as harmful. The use of rubber bullets has often been indiscriminate, targeting protestors, journalists, and minors, and has resulted in serious and sometimes life-threatening injuries, including blindness, head fractures, and even loss of fertility. Journalist Scott Reynhout documented more than sixty-three instances of neck or head injuries from rubber bullets, of which thirty-two were eye injuries and thirteen led to a permanent loss of vision.[6] Many of

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[1] Frances Robles, *A Reporter's Cry on Live TV: 'I'm Getting Shot! I'm Getting Shot!'*, N.Y. Times (May 30, 2020), https://www.nytimes.com/2020/05/30/us/minneapolis-protests-press.html.

[2] Weiyi Cai et al., *Photos From the George Floyd Protests, City By City*, N.Y. Times (June 1, 2020), https://www.nytimes.com/interactive/2020/05/30/us/george-floyd-protest-photos.html.

[3] Savannah Smith et al., *Map: George Floyd Protests Around the World*, NBC News (June 9, 2020), https://www.nbcnews.com/news/world/map-george-floyd-protests-countries-worldwide-n1228391.

[4] Laurin-Whitney Gottbrath and Patrick Strickland, *Blinded, Arrested: Police Attack Journalists Covering U.S. Protests*, Al Jazeera (June 16, 2020), https://www.aljazeera.com/indepth/features/blinded-arrested-police-attack-journalists-covering-protests-200616023545157.html.

[5] ACLU Statement, *Interactive Dialogue with the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Statement by the American Civil Liberties Union at the 43rd Session of the UN Human Rights Council* (July 10, 2020).

[6] Scott Reynhout, *Head Injuries From Less-Than-Lethal Rounds in the United States Since May 26*, https://tinyurl.com/ShotInFace (last updated June 23, 2020) (used with permission).

the victims are young, such as sixteen-year-old Brad Levi Ayala who was struck in the head with a rubber bullet fired by an Austin Police Department sniper, causing traumatic brain injury,[7] and twenty-two-year-old Megan Matthews who suffered a broken nose and fractured facial bones after being hit while protesting in Denver, Colorado.[8]

Congress has typically played a minimal role in regulating the use of rubber bullets, and national law enforcement groups have repeatedly refused to address a set of policing standards. However, instances like these have led federal, state, and local governments, as well as civil society, to call for investigations into and limitations on police use of rubber bullets and other less-lethal weapons. In June 2020, thirteen U.S. Senate Democrats issued an unprecedented call for an immediate review of the safety of crowd-control weapons (CCWs), including rubber bullets, used during racial justice protests, as well as the use of force against peaceful protestors. Following the deployment of federal agents in Portland, Oregon and Washington, D.C., in July 2020, the Justice Department's Office of the Inspector General opened an investigation into allegations that DOJ personnel "improperly used force" in their role in responding to mass protests. The news of serious injuries resulting from the use of rubber bullets even led to a push in the United Kingdom to halt the export of tear gas and rubber bullets to the United States amid the Black Lives Matter protests.[9]

II. History of Rubber Bullets as It Relates to Contemporary Use

The use of rubber bullets against protestors is not unique to the present Black Lives Matter protests. Kinetic impact projectiles (KIPs), which includes rubber bullets, are regularly used in response to popular protests around the world. Initially developed by the British military to ensure distance between law enforcement personnel and the individual or group they were trying to control, KIPs are now marketed to police and private security forces in nearly every country with "little or no regulatory oversight or accountability."[10] Over the past thirty years, production of KIPs has spread from a few manufacturers in the United States and the United Kingdom to dozens of producers throughout the world.[11] In the United States, the lethal ammunition market will be worth $1,106 million by 2023.[12]

Rubber bullets were introduced in the United States to suppress the civil rights and anti-Vietnam War protests in the 1960s.[13] However, it was not until the 1990s that police departments began using rubber bullets en masse. In the following decades, rubber bullets were often deployed in the context of civil unrest such as the 1992 Los Angeles Rodney King uprising.[14] Protestors of color are more often met with disproportionate force, especially when protestors are expressing grievances about racial injustice, as evidenced by the use of rubber bullets against protestors in Ferguson, Missouri in 2014 and similarly against

[7] Rhea Mahbubani, *'My Face Exploded': Police Firing Rubber Bullets Have Wounded and Permanently Disabled Protestors and Journalists*, Insider (June 2, 2020), https://www.insider.com/black-lives-matter-protesters-journalists-hurt-disabled-police-rubber-bullets-2020-6.

[8] Liz Szabo et al., *Fractured Skulls, Lost Eyes: Police Break Their Own Rules When Shooting Protestors with 'Rubber Bullets'*, USA Today (Sep. 11, 2020), https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001/.

[9] Callum Keown, *Boris Johnson Urged to Halt U.K. Exports of Tear Gas and Rubber Bullets to the U.S. Amid George Floyd Protests*, MarketWatch (June 3, 2020), https://www.marketwatch.com/story/boris-johnson-urged-to-condemn-us-police-and-halt-uk-exports-of-tear-gas-and-rubber-bullets-heres-his-response-2020-06-03.

[10] Rohini J. Haar et al., *Lethal in Disguise*, Int'l Network Civ. Liberties Orgs., https://www.inclo.net/pdf/lethal-in-disguise.pdf (last visited Nov. 10, 2020).

[11] *Id.*

[12] *Less Lethal Ammunition Market Worth $1,106 Million by 2023*, PR Newswire (Feb. 11, 2019), https://www.prnewswire.com/news-releases/less-lethal-ammunition-market-worth-1-106-million-by-2023---exclusive-report-by-marketsandmarkets-300792976.html.

[13] *What Are Rubber Bullets?*, Slate (Oct. 4, 2000), https://slate.com/news-and-politics/2000/10/what-are-rubber-bullets.html.

[14] *Health Impacts of Crowd-Control Weapons: Kinetic Impact Projectiles (Rubber Bullets)*, Physicians Hum. Rts. (Jan. 1, 2017), https://phr.org/our-work/resources/health-impacts-of-crowd-control-weapons-kinetic-impact-projectiles-rubber-bullets/.

Indigenous peoples and other demonstrators at Standing Rock, North Dakota in 2016.[15]

As a result of the proliferation of law enforcement use and abuse of CCWs against popular protests around the world, the International Network of Civil Liberties Organizations (INCLO) and Physicians for Human Rights (PHR) partnered in 2014 to document the health consequences of CCWs and their use in protest contexts. The report titled, Lethal in Disguise, details case studies of misuse of CCWs, including KIPs in Egypt, South Africa, Israel, and Argentina. In assessing the health effects of KIPs, the report found during a systematic review of medical literature that KIPs cause serious injury, disability, and death. Therefore, despite their status as "less lethal weapons" the prevalence of morbidity and mortality associated with KIPs indicate they are significantly dangerous.[16] Other CCWs such as tear gas, which has also been widely used against BLM protestors in the last several months, were also condemned due to its indiscriminate nature and potentially life-threatening effects on respiratory function.

III. Lack of Compliance with International Legal Standards

While guidelines on the use of rubber bullets by police, military, or manufacturers are limited, according to international law use of force guidelines, instances like those described above fall short of international standards. First, international norms dictate that the use of less lethal weapons by law enforcement is subject to strict requirements of *non-discrimination*, *necessity* and *proportionality*.[17] For example, the European Court of Human Rights (ECtHR) has repeatedly held that unnecessary or excessive use of force in the context of demonstration constitutes inhumane and degrading treatment or even torture in the most severe circumstances.[18] As a result, regional courts like the ECtHR have traditionally applied a "strict proportionality" test when evaluating law enforcement officers' use of force.[19] Second, international legal frameworks call for heightened precaution in the particular context of policing assemblies. The use of less lethal weapons in the context of assemblies should take into account freedoms of assembly and of expression and, therefore, "law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary."[20] In particular, the International Covenant on Civil and Political Rights provides that "no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society" with limited exceptions and specific grounds.[21] Third, international norms have strictly delineated protections for the methods in which less lethal weapons are deployed. According to recent guidelines on the use of less lethal weapons, which have been adopted by the Office of High Commissioner on Human Rights, KIPs "should generally be used only in direct fire with the aim of striking the lower abdomen or legs of a violent individual and only with a view to addressing an imminent threat of injury to either a law enforcement official or a member of the public."[22]

These international norms have been largely disregarded by domestic law enforcement departments, which has led to international condemnation for the use of excessive force by United Nation human rights experts and the Inter-American Commission

[15] ACLU Statement, *supra* note 5.
[16] Rohini J. Haar et al., *supra* note 10.
[17] G.A. Res. 34/169, Code of Conduct for Law Enforcement Officials (Dec. 17, 1979).
[18] Abdullah Yaşa and Others v. Turkey, App. No. 44827/08, ¶¶ 48, 50 (July 16, 2013), http://hudoc.echr.coe.int/eng?i=001-122874.
[19] Anzhelo Georgiev and Others v. Bulgaria, App. No. 512 84/09, ¶ 66 (Sept. 30, 2014), http://hudoc.echr.coe.int/eng?i=001-146567.
[20] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *adopted by* G.A. Res. 45/121 (Dec. 14, 1990), https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx [hereinafter Basic Principles on the Use of Force]; *see also* Human Rights Council Res. 25/38, U.N. Doc. A/HRC/RES/25/38, ¶ 9 (Apr. 11, 2014).
[21] International Covenant on Civil and Political Rights art. 21, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.
[22] Off. of the United Nations High Comm'r for Hum. Rts., Guidance on Less-Lethal Weapons in Law Enforcement, 35 (2020), https://www.adh-geneve.ch/joomlatools-files/docman-files/LLW_Guidance.pdf.

on Human Rights (IACHR).[23] According to a report published by the International Human Rights Clinic at the University of Chicago Law School, "none of the police use of lethal force policies from the 20 largest U.S. cities during 2017-2018 complied with basic international human rights law and standards."[24] The report found that every city fell short of the international standard for legality and most failed to fully satisfy basic accountability measures for officers who fired KIPs. Additionally, the report found that "[n]one of the policies are constrained by a state law that complies with human rights law and standards. And too many police departments allow the use of lethal force in response to a non-lethal threat, thereby sanctioning unnecessary and disproportionate use of force."[25]

IV. Lack of Compliance Within Internal Police Department Policies

Over 18,000 law enforcement agencies "establish their own rules for when [rubber bullets] should be used, who is allowed to fire them, and how to hold their officers accountable."[26] The fact that policies regarding the use of force are largely piecemeal, differing from department to department, reflects the lack of a cohesive federal policy. In reviewing police manuals and general policies of various police departments that have been using less lethal weapons it is apparent that the police are often violating their own rules and regulations surrounding the use of force and the use of rubber bullets more specifically.

- In Dallas, Texas, Brandon Saenz was shot in the face with a projectile. According to his lawyer, Brandon was peacefully protesting. Dallas Police Department (DPD) rules state that police can only use less-lethal projectiles when someone shows "active aggression" or to control someone "physically resisting" with a weapon.[27] Additionally, according to the Dallas police manual, officers are required to immediately report when a plastic or rubber bullet is fired and they are not to aim at a person's head.[28] In the aftermath of the incident, a local newspaper reported that "No one from DPD has made a public statement about this."[29] However, as a result of the complaint filed by Brandon's lawyer, a U.S. district judge signed a 90-day injunction barring the Dallas Police Department from using "less-than lethal weapons" to disperse protesters.[30]
- In Denver, Colorado, Megan Matthews was peacefully demonstrating before being shot in the eye. Denver police policy forbids officers from targeting the "head, eyes, throat, neck, breasts of a female, genitalia or spinal column."[31] Additionally, officers are generally not allowed

[23] Press Release, Inter-Am. Comm'n H.R., *The IACHR Expresses Strong Condemnation for George Floyd's Murder, Repudiates Structural Racism, Systemic Violence Against Afro-Americans, Impunity and the Disproportionate Use of Police Force, and Urges Measures to Guarantee Equality and NonDiscrimination in the United States* (June 8, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/129.asp; *Human Rights Office Decries Disproportionate Use of Force in US Protests*, United Nations News, (July 24, 2020), https://news.un.org/en/story/2020/07/1068971.

[24] Univ. Chi. L. Sch. Glob. Hum. Rts. Clinic, *Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards* 19 (2020), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihrc.

[25] *Id.*, at 37.

[26] Liz Sazbo et al., *Fractured Skulls, Lost Eyes: Police Often Break Own Rules Using 'Rubber Bullets'*, Kaiser Health News (June 19, 2020), https://khn.org/news/rubber-bullets-protesters-police-often-violate-own-policies-crowd-control-less-lethal-weapons/ [hereinafter *Fractured Skulls*].

[27] *Id.*

[28] Nic Garcia, *Texas Police Deployed Less-Lethal Ammunition to Control Protests. Now Policymakers Want to Ban the Weapons*, The Dallas Morning News (June 9, 2020, 11:31 AM), https://www.dallasnews.com/news/2020/06/09/texas-police-deployed-less-lethal-ammunition-to-control-protests-now-policymakers-want-to-ban-the-weapons/.

[29] Tyler Hicks, *Brandon Saenz, Who Lost Eye in Peaceful Protest, Wants to Know Who Shot Him*, Dallas Observer (July 1, 2020, 4:00 AM), https://www.dallasobserver.com/news/brandon-saenz-dallas-police-protests-foam-bullets-11922860.

[30] Paige Phelps, *Dallas Police Prohibited For 90 Days From Using Tear Gas During Protests, Judge Rules*, KERA News (June 12, 2020, 12:56 PM), https://www.keranews.org/news/2020-06-12/dallas-police-prohibited-for-90-days-from-using-tear-gas-during-protests-judge-rules; *Meet Brandon Saenz: Dallas Protester Who Lost Eye After Police Shot Him with "Less Lethal" Projectile*, Democracy Now (June 23, 2020), https://www.democracynow.org/2020/6/23/brandon_saenz_dallas_police.

[31] *Fractured Skulls, supra* note 26.

to deploy projectiles indiscriminately into a crowd.[32]

- In Los Angeles, California, C.J. Montano was shot in the face as he was left standing in a "no man's land" between retreating protestors and an advancing police line.[33] The Los Angeles Police Department (LAPD) explicitly prohibits police from using projectiles against people who are passively resisting or disobeying. Projectiles can only be fired if "an officer reasonably believes that a suspect or subject is violently resisting arrest or poses an immediate threat of violence or physical harm."[34] Additionally, projectiles "shall not be used to target the head, neck, face, eyes, or spine unless lethal force is authorized."[35]

In general, most police department policy guidelines on the use of rubber bullets follow the concept that officers should deploy the minimum amount of force necessary in any given situation. And while often the guidelines for the use of lethal force (e.g. firing a gun) are clear — although often at odds with international norms on use of force — the guidelines for the use of less-lethal weapons, which can have just as devastating an effect, are less straightforward.

V. Recommendations

Police response to protests and other mass assemblies should not involve violent displays of force. According to international legal standards, the use of force by law enforcement agents should be proportional in response and only when absolutely necessary and use of firearms or deadly force is only justified against imminent threat of serious bodily injury or death.[36] In addition to posing serious risks to people's health and safety, according to the ACLU, the indiscriminate use of crowd control weapons almost by definition "violate[s] [protestor rights] to due process and will seldom, if ever, constitute the least restrictive means available to regulate unlawful conduct in the context of a protest or mass assembly."[37] This goes to the very heart of protecting First Amendment rights to freedom of peaceful assembly and of association. Police in a democratic society should not use violence to control the crowd or silence those they disagree with. Because of this, the use of rubber bullets as a crowd-control weapon should be banned in the context of mass assembly.[38] Instead, the most successful law enforcement approach to unlawful conduct at a mass assembly focuses on de-escalation, effective communication, and crowd management, not crowd control. Additionally, increased accountability measures and transparency within police departments are crucial to protecting public safety.

As people across the United States and the world have been protesting policing practices and are reimagining the role of police in society, now is the time to shed a critical spotlight on these issues and demand change on both the domestic and international levels. Last June, the UN Human Rights Council adopted resolution 43/1 after an historic urgent debate on racist police violence.[39] The resolution mandated the Office of the High Commissioner for Human Rights to examine police violence and structural racism as well as "government responses to anti-racism peaceful protests, including the alleged use of excessive force against protesters, bystanders and journalists."[40] The

[32] Denver, Colo., Police Dep't Operations Manual, Use of Force Policy § 105.00 (2020).
[33] *Fractured Skulls, supra* note 26.
[34] Los Angeles, Cal., Police Dep't Use of Force-Tactics Directive, Directive No. 6.3, 1 (July 2018).
[35] *Fractured Skulls, supra* note 26.
[36] Geneva Acad., *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Academy In-Brief No. 6, 6-9 (November 2016), https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf; Basic Principles on the Use of Force, *supra* note 20, at principle 9, 13-14.
[37] Am. Civ. Liberties Union, *Interactive Dialogue with the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Statement, 44th Session of the UN Human Rights Council (July 10, 2020), https://www.aclu.org/hearing-statement/aclu-statement-interactive-dialogue-un-special-rapporteur-rights-freedom-peaceful?redirect=hearing-statement/aclu-statement-interactive-dialogue-unsr-rights-freedom-peaceful-assembly-and.
[38] A categorical ban on the use of rubber bullets, rather than just in mass assembly contexts, would potentially lead to worse health outcomes since a categorical ban may lead law enforcement to resort to even more lethal style of weapons, such as live rounds.
[39] Human Rights Council Res. 43/1, U.N. Doc. A/HRC/RES/43/1 (June 30, 2020). *See also* Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, EJIL: Talk! (June 26, 2020), https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/.
[40] *Id.*

High Commissioner's report will be an opportunity to push UN Member States to adopt measures to ban the use of rubber bullets and other life-threatening crowd control weapons especially in the context of assemblies. The UN just published a call for input to inform the report which will be presented to the Council in June 2021.[41]

As this topic continues to gain momentum, activist groups such as the Irish group Relative For Justice have been reaching out to civil society groups in the United States like the ACLU to find new allies in the struggle against the use of rubber bullets. No one should have to risk their life to protest injustice. By continuing to allow the use of rubber bullets and other CCWs in mass assembly contexts, the United States is flagrantly violating fundamental freedoms in a democratic society. It is time to find meaningful accountability measures, regulate the use of CCWs, and protect protestor rights in the United States and around the world.

[41] Implementation of Human Rights Council Resolution 43/1, Off. High Comm'r for Hum. Rts., https://www.ohchr.org/EN/Issues/Racism/Pages/Implementation-HRC-Resolution-43-1.aspx.

The Tortured Woman: Defying the Gendered Conventions of the Convention Against Torture

by Linda Kelly[*]

In the last few years, asylum advocacy for women has made some great strides — and has had some significant setbacks. Terrific attention has been paid to the ongoing, twenty-year struggle of domestic violence survivors to win asylum.[1] The hard-won victory of female genital mutilation (FGM) claims for asylees has also been widely celebrated.[2] However, little attention is paid to women's claims pursuant to the Convention against Torture (CAT).[3]

There are both practical and legal reasons for the difference in interest between asylum and CAT claims. As a practical matter, asylum has more benefits. Asylum puts the recipient on the road to residency and allows her to petition for family members. By contrast, CAT relief is a strictly limited benefit for the recipient, who can be subject to detention for the duration of status.[4] As a legal matter, asylum is also easier to win.[5] Asylum's "reasonable fear of

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[1] *See* Matter of AB, 27 I. & N. Dec. 316, 317, 320, 340, 346 (2s018), https://www.justice.gov/eoir/page/file/1070866/download (vacating the matter of A-B-); *see also* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388, 395-96 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf (serving as the first published BIA decision acknowledging a viable asylum claim for domestic violence survivors, subsequently overruled by Matter of AB, 27 I. & N. Dec. 316 (2018)). To date, the First, Sixth and Ninth Circuits have severely rebuked or overruled *Matter of A-B-*. De Pena-Paniagua v. Barr, 957 F.3d 88, 93-94 (1st Cir. 2020) (concluding that *A-B-* should not be read as categorical); Juan Antonio v. Barr, 959 F.3d 778, 799 (6th Cir. 2020) (noting that *A-B-* has been ruled arbitrary and capricious by another court); Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074, 1080 (9th Cir. 2020) (asserting *Matter of A-B-* did not announce a bright line rule for applications based on domestic violence but rather underscored the need for a case-by-case analysis). For the history and ongoing challenges of domestic violence asylum claims, *see generally*, Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 Geo. J. Gender & L. 541, 571-72 (2019) (discussing *A-B-* in the context of gender-based asylum claims); Linda Kelly, *The Ejusdem Generis of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 Nat'l L. Guild Rev. 65, 65, 74 (2018) (advocating for domestic violence asylum claims in the aftermath of *A-B-*).

[2] *See In re* Kasinga, 27 I. & N. Dec. 357, 368 (1996); *see also* Fauziya Kassindia & Layli Miller Bashir, Do They Hear You when You Cry (1998) (discussing Kasinga's story of flight and securing asylum); Karen Musalo, *In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 Interp. Rel. 853 (1996) (discussing *In re* Kasinga from the perspective of her lead attorney); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 Hastings L.J. 557, 588-92 (2000) (discussing *In re* Kasinga in the context of other treatment of "good female victims" in immigration law).

[3] *See generally* Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy 1133-1374 (7th ed. 2018) (examining the history, elements, and process of refugee and asylum claims in the United States). By comparison, the text addresses the Convention against Torture in less than thirty pages. *Id.* at 1374-91.

[4] Aruna Sury, *Qualifying for Protection Under the Convention Against Torture*, Immigrant Legal Resource Center (April 2020), https://www.ilrc.org/sites/default/files/resources/cat_advisory-04.2020.pdf (explaining that asylees can apply for lawful permanent residency, petition for family members to become refugees or residents, and work, travel, and live in the United States without being detained, whereas CAT beneficiaries cannot apply for lawful permanent residency or confer benefits on other family members, and may be subject to detention).

[5] To qualify for asylum, one must meet the definition of a refugee pursuant to the Immigration and Nationality Act. 8 U.S.C. § 1158; 8 U.S.C. § 1101(a)(42) (defining a refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

persecution" is much lower than CAT's "would be tortured" analysis.[6]

The fights, wins, and losses of female asylees deserve all the support they get — and more. Nevertheless, CAT remains an important tool for women. There are many women who are not eligible for asylum due to prior criminal[7] or immigration[8] records. Ongoing challenges to what qualifies as a valid particular social group for gender violence asylum claims[9] and possible new, severe restrictions on all asylum claims[10] further contribute to the need to fully appreciate and litigate CAT claims.

CAT requires that a claimant prove she "will more likely than not be tortured with the consent or acquiescence of a public official if removed to her native country."[11] This standard breaks down in four significant criteria for the success of a CAT claim: torture, government action or acquiescence, relocation, and future harm.[12] This Article systematically evaluates the CAT standards from a gendered perspective. When they are put in context with the overarching historical struggle of women to fight gender violence, Professor Catherine MacKinnon's blunt question arises: "Are Women Human?"[13]

While gender challenges persist, existing CAT regulations can be tools to defy them. Uncovering CAT's gender conventions, this Article proposes a new perspective on CAT standards of torture, state acquiescence, and relocation. Such proposals rely on key, positive 2020 U.S. Circuit Court CAT decisions while remaining rooted in feminist norms.[14]

Part I of this Article introduces the basic definition of torture. Addressing the "what" and "why," it considers what acts of domestic violence, rape, and sexual assault qualify as torture and whether why they occur is being fully considered. Part II follows by critiquing whether "who" perpetrates such acts of torture can fit the standard of government actor or acquiescence. Part III then moves to relocation, proposing that the standard can readily encompass safety issues unique to gender violence. Finally, Part IV brings the variables together to properly calculate the risk a torture victim will face upon return and asks how gender violence changes the calculus.

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[6] *See* 8 U.S.C. § 1231(b)(3); *see also* Sury, *supra* note 4 at 12 (comparing asylum with CAT). *Compare* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449-50 (1987) (setting asylum's reasonable possibility standard) *with* Perez v. Sessions, 889 F.3d 331, 331-32, 336 (7th Cir. 2018) (discussing CAT's "would be tortured" standard).

[7] 8 U.S.C. § 1158(b)(2)(A)(ii)-(iii) (stating that among other bars, an individual is prima facie ineligible for asylum if she has been convicted of a "particularly serious crime [and] constitutes a danger" or "there are serious reasons for believing" she has "committed serious nonpolitical crime outside the United States").

[8] 8 U.S.C. § 1231(a)(5) (providing that an individual who was previously subject to a removal order returns illegally and is subject to the reinstated removal order is unable to apply for any relief pursuant to the Immigration and Nationality Act, including asylum). Additionally, asylum's one-year filing requirement aggravates many would-be applications. *See* 8 U.S.C. § 1158(a)(2)(B). Individuals with "reinstatement orders" may seek CAT relief. Andrade-Garcia v. Lynch, 820 F.3d 1076, 1078-79 (9th Cir. 2016); *see* Sury *supra* note 4, at 9 (discussing the contexts in which an Immigration Judge may consider a CAT application).

[9] *See, e.g.*, Linda Kelly, *On Account of Private Violence: The Personal/Political Dichotomy of Asylum's Nexus*, 21 UCLA J. Int'l L. Foreign Aff. 98, 108-118 (2017) (discussing asylum's "on account of" criterion and the common reliance on the "particular social group" factor for gender violence claims).

[10] *See, e.g.*, Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (proposed June 15, 2020) (proposing greater limits on asylum for individuals who pass through third countries, live in the United States "illegally" and fail to pay taxes); *see also* Amanda Robert, *Trump Administration Attempts to Further Restrict Asylum Seekers Through New Rule*, ABA J. (June 12, 2020, 10:42 AM), https://www.abajournal.com/news/article/trump-administration-attempts-to-further-restrict-asylum-seekers-through-new-rule (criticizing the proposed regulations).

[11] Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1183 (9th Cir. 2020).

[12] *Id.* at 1183-88 (discussing at length what is necessary to meet three of the criteria).

[13] Catharine A. Mackinnon, Are Women Human? And Other International Dialogues (2007).

[14] For a discussion of the most noteworthy cases, *see* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1178 (9th Cir. 2020), *infra* text accompanying notes 107-117; Inestroza-Antonelli v. Barr, 954 F.3d 813 (5th Cir. 2020), *infra* text accompanying notes 57-60; De Artiga v. Barr, 961, F.3d 586 (2d Cir. 2020), *infra* text accompanying notes 129-130; and Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019), *infra* text accompanying notes 61-62. Numerous other published and nonpublished cases are cited. The Author notes that all non-published cases are cited for purposes of illustration, not authority.

I. CAT: The Definition

According to the Convention, "[n]o State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[15] To make this determination, the adjudicator "shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights."[16]

The Convention against Torture is not self-executing. However, in 1998, the U.S. Congress codified the treaty,[17] thereby allowing implementation through regulation.[18] CAT starts by defining torture:

> [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[19]

This lengthy "torture" definition is multi-dimensional: (1) what is a qualifying "act" of torture?; (2) why is such harm being inflicted?; and (3) who is inflicting it? CAT's prospective "would be tortured"[20] requirement further implies showing (4) how likely are such acts to occur.

A. The Act: Severity of Harm

Contemplating that both "physical" and "mental" acts can qualify as torture, the regulations further explain that "[t]orture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment."[21] "Mental" acts cause "prolonged mental harm" due to subjecting the applicant or another to the infliction or threatened infliction of physical pain or threat of imminent death.[22] However, neither the Convention nor regulations provide a laundry list of qualifying acts. Case precedent provides further direction.

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[15] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

[16] *Id.* at art. 3(2).

[17] CAT was enacted into U.S. law on October 21, 1998 by Fiscal Year 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, PL 105-277, Div. G, Sub. B, Tit. XXI § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, 112 Stat. 2681-822, 105th Cong. 2d Sess. (1998) [hereinafter FARRA]; 144 Cong. Rec. H11044-03; 136 Cong. Rec. S17,486, 36,198 (1990); Committee on Foreign Relations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Ex. Rept. 101-30, 101st Cong. 2d Sess. (Aug. 30, 1990); *see also* 136 Cong. Rec. S17,486, S17,491-92 (daily ed. 1990) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[18] 8 C.F.R. § 208.16-.18 (1999). For individuals in removal proceedings, the Department of Justice (DOJ) regulations provide the critical CAT standards. *Id.*; 64 Fed. Reg. 9,435-37 (Feb. 26, 1999) (to be codified at 22 C.F.R. pt. 95, 64). For individuals claiming CAT relief in extradition proceedings, the Department of State (DOS) regulations prevail, however they are not discussed herein. *See generally* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool 880-81 (discussing the DOS regulations' "more likely than not" standard).

[19] 8 C.F.R. § 1208.18(1); *see also* Convention against Torture *supra* note 15, art. 1(1) (stating same without including the "or she", "or her" references).

[20] *See* Convention against Torture, *supra* note 15.

[21] 8 C.F.R. § 1208.18(a)(2).

[22] *Id.* § 1208.18(a)(4)(i)-(iv) (explicitly referencing the administration or application of mind-altering substances or threat of same to oneself of another is explicitly referenced).

While the courts may recognize certain acts (or threats) of rape,[23] sexual assault,[24] FGM,[25] and domestic violence[26] as torture — this recognition is not unconditional. The CAT standards examine the degree of harm for each act while also requiring that the victim prove the perpetrator's motives. This what (degree of harm) and why (motive) pairing prevents many gender-based claims from going forward. It also evidences a naïve understanding of gender violence. Unpacking the what/why criteria is an important step towards advancing gender violence CAT claims.

1. Domestic violence

CAT's conventional severity of harm analysis is reminiscent of early understandings of gender violence. On the domestic violence front, there is an exclusive reliance on severe, physical acts. Acts of torture are credited in cases of "shocking domestic violence" — with years-long patterns of being choked, thrown, hit, and threatened with death at gunpoint.[27] Certainly, such horrific acts of domestic violence must be viewed as torture. However, these starkly physical illustrations return understandings of domestic violence to its rudimentary beginnings and do not realize the potential of the torture definition.

2. The developing domestic violence definition

Like CAT's current standards of domestic violence, the earliest definitions of domestic violence began with a simple recognition of the use of physical power by men against women.[28] However, as the early domestic violence definition evolved, physical violence came to be understood as only a part of a "cycle of violence" — which repeatedly moved through a pattern of tension building, acute battering, and batterer contrition.[29] The physical violence component was eventually viewed as secondary to the need to focus on the patriarchal dynamics surrounding the use of violence.[30] Gradually, the

[23] *See, e.g.*, Xochihua-Jaimes v. Barr, 962 F.3d 1175 (9th Cir. 2020) (rape and sexual assault); Zubeda v. Ashcroft, 333 F.3d 463, 472-73 (3d Cir. 2003) (rape); Lopez-Galarza v. I.N.S., 99 F.3d 954, 959 (9th Cir. 1996) (rape and sexual assault).

[24] *See e.g.*, Lopez-Galarza, 99 F.3d 954, 959 (rape and sexual assault); Xochihua-Jaimes, 962 F.3d 1175 (rape and sexual assault).

[25] Kone v. Holder, 620 F.3d 760, 765-66 (7th Cir. 2010) (threat of FGM to child); Tunis v. Gonzales, 447 F.3d 547, 550 (7th Cir. 2006) (FGM); Mohammed v. Gonzales, 400 F.3d 785, 802 (9th Cir. 2005) (FGM); Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019) (genital mutilation threatened by Honduran gang).

[26] Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2018) (domestic violence accepted as tortured, but CAT denied for lack of acquiescence); De Ayala v. Barr, 819 F. App'x 487 (9th Cir. 2020) (domestic violence).

[27] Orellana v. Barr, 925 F.3d 145 (4th Cir. 2019) (remanded on acquiescence); *see also* Bautista Lopez v. U.S. Att'y Gen., 813 F. App'x 430 (11th Cir. 2020) (acts of torture based on record of numerous death threats, drowning, bone fracturing and punching); Aguilar-Gonzalez v. Barr, 779 F. Appx. 354 (6th Cir. 2019) (acts of torture based on record of years of mistreatment, insults and beatings); Juarez-Coronado v. Barr, 919 F.3d 1085 (8th Cir. 2019) (domestic violence on five year relationship with record of fourteen beatings (including while pregnant) and strangulation (to the point of not breathing); Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2018) (fifteen years of domestic abuse); De Ayala v. Barr, 819 F. App'x 487 (9th Cir. 2020) (strangled and repeatedly raped, hit, kicked, pushed spouse as well as physical and emotional abuse of children).

[28] R. Emerson Dobash & Russell Dobash, Violence Against Wives 1-3 (1979); Ellen Pence & Michael Paymar, Education Groups For Men Who Batter: The Duluth Model 173 (1993).

[29] Lenore E. A. Walker, The Battered Woman Syndrome xv (1979) ("A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.").

[30] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 28-34 (1991) (criticizing the physical definition of domestic violence espoused by Lenore Walker and others); *id.* at 53-55 (criticizing legal literature's failure to focus on the "power and control, domination and subordination" dimensions of domestic violence); Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295, 1317-22 (1993) (acknowledging the patriarchal dynamics of domestic violence); G. Chezia Carraway, *Violence Against Women of Color*, 43 Stan. L. Rev. 1301, 1305-06 (1991) (using the patriarchal element of domestic violence as part of an overall definition of violence against women of color which includes "economic violence, cultural violence, legislative violence, medical violence, spiritual violence, emotional violence and educational violence").

"power and control"[31] wheel replaced the "cycle of violence." Through the power and control wheel, physical and sexual violence is seen only as a part, albeit an important one, of the overall effort to control women. Power and control are further solidified through such additional forces as using children, minimizing, denying, blaming, isolating, relying upon male privilege, coercing, threatening, intimidating, and emotionally abusing.[32] Today, domestic violence is largely understood as the male way of "'doing power' in a relationship; battering is power and control marked by violence and coercion. . . . A battered woman is a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself."[33]

To truly acknowledge domestic violence as torture, CAT's analysis must align with contemporary understandings of domestic violence. CAT's regulations already encourage consideration of both "physical" and "mental" acts.[34] Consequently, CAT can easily encompass the myriad of ways domestic violence is perpetrated. When torture is properly perceived as "doing power," CAT claims of domestic violence can be fully heard.

B. The Motive: A "Particularized Threat" of Torture

Regardless of the severity of the physical or mental act, it must also be perpetrated due to certain prescribed motives. As the CAT definition dictates, the act must be "intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing . . . intimidating or coercing . . . or for any reason based on discrimination."[35]

1. Domestic violence and motive

In domestic violence cases, the victim's burden to prove the torturer's motive also disregards the CAT's potential and evidences another traditional misconception regarding domestic violence. In *De Ayala v. Barr*, the Ninth Circuit recognized a domestic violence history of strangulation, rape, hitting, kicking, and child abuse as torture but only "because at least some of it was meted out as punishment."[36]

Domestic violence does not need to be proven or, for that matter, deemed "punishment" to qualify as torture. Domestic violence is more broadly about "power and control" and the CAT regulations allow for such a broader understanding of intent.[37] While CAT does recognize that torture can be inflicted to "punish," it also recognizes that torture can be inflicted for such other purposes as "intimidating or coercing" or "for any reason based on discrimination of any kind."[38] Domestic violence easily meets either criterion. Simply stated, domestic violence is torture because it is directed at "the spouse." Or it is directed at the "partner." This "discrimination" on account of the personal, patriarchal relation gets to the very root of domestic violence.[39] Domestic violence "is not gender neutral any more than the economic division of labor or the institution of marriage is gender neutral."[40] Contemporary understandings of domestic violence clearly recognize that domestic violence is intended to intimidate and coerce. The violence is

[31] Ellen Pence, *supra* note 28, at 3. From a central hub of power and control, the wheel's outer rim is formed by a circle of physical and sexual violence. The wheel's spokes are identified by the other means of exacting power. *Id.*
[32] *Id.*
[33] Mahoney, *supra* note 30, at 93.
[34] 8 C.F.R. § 1208.18.
[35] See CAT definition, supra note 15.
[36] De Ayala v. Barr, 819 F. App'x 487, 490 (9th Cir. 2020).
[37] *See supra* note 30 and accompanying text. (power and control dynamics of domestic violence).
[38] 8 C.F.R. § 1208.18(1); *see also* Convention against Torture, *supra* note 16 art. 1(1) (stating same without including the "or she" or "or her" references); *see also* Tun v. I.N.S., 445 F.3d 554, 571-72 (2d Cir. 2006) (reason for torture need not be political, basis of government torture not relevant).
[39] For a sampling of works devoted to the patriarchal or male use of domestic violence *see e.g.*, Dobash, *supra* note 28, at 1-13; Donald G. Dutton, The Domestic Assault Of Women: Psychological And Criminal Justice Perspectives (1995); Feminist Perspectives On Wife Abuse (Kersti Yllö & Michele Bograd eds., 1988); Catharine A. Mackinnon, Feminism Unmodified: Discourses On Life And Law 85-92 (1987); Pence, *supra* note 28; Walker, *supra* note 29; Mahoney, *supra* note 30; Elizabeth M. Schneider, *Making Reconceptualization of Violence Against Women Real*, 58 Alb. L. Rev. 1245 (1995); Malinda L. Seymore, *Isn't It A Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 N.W.U. L. REV. 1032 (1996); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996).
[40] Kersti A. Yllö, *Through a Feminist Lens: Gender, Power and Violence*, *in* Current Controversies On Family Violence 54 (Richard Gelles & Donileen R. Loseke eds., 1993).

simply a byproduct of the patriarchal dynamics of the relationship. The "battering is power and control marked by violence and coercion."[41]

2. Rape, sexual assault, and motive

In cases of rape and sexual assault, some motives can be easily established. *Avendano-Hernandez v. Lynch* relayed the tragic account of a Mexican transgender woman's years of being raped and sexually assaulted by family, teachers, and government officials.[42] Insults of "faggot," "queer," or "gay" were regularly associated with the abuse.[43] The Ninth Circuit (as well as the Board of Immigration Appeals (BIA) and the Immigration Judge (IJ)) were easily able to recognize that she had been tortured.[44] "Rape and sexual abuse due to person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes."[45] Indeed, the failure to acknowledge the motivation evident in such insults is reversible error. The Ninth Circuit had earlier reversed in *Godoy-Ramirez v. Lynch*, when the rapist "repeatedly used homophobic, derogatory language while raping [a Mexican transgender woman]. . . . Words used by a persecutor during an attack are highly indicative of a persecutor's motive, and such 'motivation should not be questioned when the persecutors specifically articulate their reason for attacking a victim.'"[46]

However, this need to prove both act and motive under the CAT often prevents even severe acts of rape and sexual assault from being recognized as torture. Victims of gender-based violence are often unable to satisfy the motivation standard. Words or other affirmative showings are either lacking or insufficient. For example, a Guatemalan woman and speaker of the indigenous Mam language could not establish her rape as torture because covering her mouth during the rape did not provide sufficient evidence that she was raped because of her "status as a native Mam speaker."[47]

Failure to prove motive is labeled as the lack of a "particularized threat" or no "individualized risk." The violence is simply deemed "general." As another example, a young girl in El Salvador was routinely harassed by gang members for two years on her way back and forth to school.[48] During the same time frame, a female classmate was threatened, raped, and killed by the gang.[49] Nevertheless, there was no "particularized threat of torture."[50] The petitioner did not establish "more than general allegations of a threat against a group that the applicant belongs to."[51] Likewise, there was no "individualized risk" for a Guatemalan female and native speaker of the Akateko dialect who was sexually assaulted at the age of twelve by a group of ten men outside her church.[52] "[The BIA] acknowledge[s] the general country conditions, including violence against women, in Guatemala, but this evidence does not indicate that the respondent faces an individualized risk of harm if she returns to the country."[53]

As such failed cases illustrate, violence perceived as general is never enough. But that is the misconception. How is the sexual violation of women "general"? Such neutral treatment of sexual violence willfully ignores the "male pursuit of control over women's sexuality."[54] As Catherine MacKinnon explained, sexuality is the "primary social sphere of male power."[55] Gender neutral laws, like the laws of torture, are simply the "consequence" of such power.[56]

These conventions can be defied. Recently, the Fifth Circuit, in *Inestroza-Antonelli v. Barr*, explicitly

[41] Mahoney, *supra* note 30, at 93.
[42] Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015).
[43] *Id.*
[44] *Id.* at 1078-1079 (reversing Board of Immigration Appeals' failure to find government acquiescence).
[45] *Id.*
[46] Godoy-Ramirez v. Lynch, 625 F. App'x 791 (9th Cir. 2015) (quoting Li v. Holder, 559 F.3d 1096, 1111-12 (9th Cir. 2009).
[47] Perez-Agustin v. U.S. Att'y Gen., 798 F. App'x. 608 (11th Cir. 2020).
[48] Villanueva-Leon v. Barr, No. 19-3741, 2020 U.S. App. LEXIS 24012 at 1 (6th Cir., Jul. 29, 2020).
[49] *Id.* at 2.
[50] *Id.* at 12.
[51] *Id.*
[52] Jose-Tomas v. Barr, No. 19-4157, 2020 U.S. App. LEXIS 24260 at 13 (6th Cir., July 31, 2020).
[53] *Id.*
[54] Catherine A. MacKinnon, Toward a Feminist Theory of the State 112 (1989).
[55] *Id.* at 109.
[56] *Id.*

recognized the potential of a gender-based torture claim.[57] Relying on changed country conditions in Honduras, *Inestroza-Antonelli v. Barr* rescinded an *in absentia* order, allowing a woman's CAT petition to go forward.[58] The Fifth Circuit in *Inestroza-Antonelli* saw the potential motive created in Honduras by the "dismantling of institutional protections for women against gender-based violence following a 2009 military coup."[59] The subsequent, dramatic increase in violence and murder of women in Honduras was deemed "because of their gender."[60]

Likewise, in the Fourth Circuit, when a Honduran woman reported threats of genital mutilation, gang rape, and death of herself and her child for not paying the extortion demands of the Barrio 18 gang, *Lagos v. Barr* made the link.[61] The Barrio 18 "would exact revenge, punishing her in an especially 'graphic' and visible manner for disobeying their demands."[62]

Inestroza-Antonelli's and *Lagos*' recognition of gender-based violence as potential torture is a critical turning point. Certainly, the recognition of gender violence in asylum and withholding of removal is also important.[63] In recent years, there have been some positive lower immigration court decisions.[64] However, the need in asylum and withholding of removal cases to prove persecution "on account of . . . particular social group" subjects such gender claims to the more exacting "particular social group" demands.[65] Moreover, for women who are statutorily barred from bringing asylum and withholding of removal claims, the Convention against Torture is their only recourse.[66]

II. Acquiescence

Per CAT, an act of torture must be "inflicted or instigated" by a foreign government public official or with an official's "consent or acquiescence."[67] Such person must also be "acting in their official capacity." Differences regarding the meaning of "acting in an official capacity" were recently resolved. In July 2020, Attorney General Barr ended the agency's use of "rogue official" exceptions — which had excluded torturous acts by public individuals for "personal reasons."[68] However, a government official must still be acting under "color of law."[69]

[57] Inestroza-Antonelli v. Barr, 954 F.3d 813 (5th Cir. 2020).
[58] *Id.* at 814 (granting a motion to reopen for the purpose of applying for asylum, withholding of removal or protection under the Convention against Torture based on evidence of a substantial change in country conditions).
[59] *Id.*
[60] *Id.* at 816.
[61] Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019).
[62] *Id.*
[63] *See* Linda Kelly, *The Ejusdem Generis of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 N.L.G. Rev. 65 (2018) (gender violence in asylum claims); Kelly, *supra* note 9, at 98.
[64] *See e.g.,* Matter of L–C–Y–G–, EOIR, Philadelphia (June 2019) (recognizing "Honduran females" as a cognizable social group for asylum) (on file with author); *Matter of Artiga de Arias*, EOIR, Chicago (March 2017) (recognizing as a particular social group "single women who have no familiar protection and who report gang crimes to the police in El Salvador") (on file with author).
[65] For domestic violence survivors, the "on account of membership in a particular social group" continues to be a long and twisted legal journey. In 2018, Attorney General Jeff Sessions issued *Matter of A–B–*, attempting to undo the ability of domestic violence survivors to claim asylum "on account of a particular social group." Matter of A–B–, 27 I. & N. Dec. 316 (2018). Several circuits have already explicitly criticized *Matter of A–B–*'s reasoning thereby effectively overlooking or overruling it. To date, the First, Sixth and Ninth Circuits have severely rebuked or overruled *Matter of A–B–*; *see* De Pena-Paniagua v. Barr, 957 F.3d 88, 93 (1st Cir. 2020); Antonio v. Barr, 959 F.3d 778 (6th Cir. 2020), Diaz-Reynoso v. Barr, 968 F.3d 1070 (9th Cir. 2020). However, in other circuits *Matter of A–B–*, continues to raise additional challenges in proving asylum's "on account of" criteria. For a review of the twenty-year struggle to bring domestic violence asylum claims and ongoing efforts *see e.g.*, Kelly, *supra* note 63, at 95.
[66] *See* 8 U.S.C. § 1231(a)(5) (outlining the statutory ineligibility standards of asylum and withholding of removal).
[67] 8 C.F.R. § 1208.18(1) ("Torture is defined as any act by which severe pain or suffering is inflicted . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").
[68] Matter of O-F-A-S-, 28 I. & N. Dec. (2020). For prior use of the "rogue official exception" *see* Matter of Y-L-, 23 I. & N. Dec. 270 (2002) (rejecting contention that government acquiescence could be shown "by evidence of isolated rogue agents engaging in extrajudicial acts of brutality"); *see, e.g.*, Garcia v. Holder, 756 F.3d 885, 891 (5th Cir. 2014) (rejecting, in certain circuits, the "rogue official" exception even prior to the Attorney General Barr's 2020 decision); United States v. Belfast, 611 F.3d 783, 808-09 (11th Cir. 2010); Ramirez-Peyro v. Holder, 574 F.3d 893, 900 (8th Cir. 2009); Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1139 (7th Cir. 2015).
[69] Matter of O-F-A-S-, 28 I. & N. Dec. (2020).

When the government directly inflicts or instigates torture, a victim does not also have to show acquiescence.[70] "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and therefore breach his or her legal responsibility to intervene to prevent such activity."[71] Acquiescence is interpreted as the government's "awareness and willful blindness."[72] "Willful blindness" does not require a showing that the "entire government" would acquiesce to the torture.[73] At the other extreme, "willful blindness" also does not encompass a government's "general ineffectiveness to investigate or stop a crime."[74]

A. Gender Violence and Acquiescence

For victims of gender violence, virtually any efforts by the government, regardless of degree of success, will defeat an acquiescence claim. A government which is "actively, albeit not entirely successfully" investigating claims of domestic violence and rape is not acquiescing.[75] Nor is there acquiescence if a government is issuing, despite not successfully enforcing, protective orders.[76] Reporting an act of gender violence and being told by the government that "we can't help you" still amounts to non-acquiescence on the part of the government.[77] And certainly, an individual who fails to report rape, despite threat of reprisal for doing so, is traditionally barred from showing acquiescence.[78] Simply put, a government seen as "doing something" defeats acquiescence.[79]

Unlike government ineptitude or indifference, government corruption can support an acquiescence argument. "[W]idespread corruption of public officials . . . can be highly probative," allowing

70 Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (remanding CAT when both Board of Immigration Appeals and Immigration Judge required that CAT applicant must prove acquiescence in addition to credible evidence of multiple rapes by Mexican officials).

[71] 8 C.F.R. § 1208.18(7).

[72] Aguilar Ramos v. Holder, 594 F.3d 701, 705-06 (9th Cir. 2010) ("Acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice."); *see also* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (discussing the legislative history and development in the "willfully blind" aspect of acquiescence) ("In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.").

[73] Xochihua-Jaimes v. Barr, 962 F.3d 1175 (9th Cir. 2020) (quoting Madrigal v. Holder, 716 F.3d 499, 509-510 (9th Cir. 2013)).

[74] Andrade Garcia v. Lynch, 820 F.3d 1076, 1082 (9th Cir. 2016); *see also* Garcia Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014); Scarlett v. Barr, 957 F.3d 316, 335 (2d Cir. 2020) (quoting Quinteros v. Att'y Gen., 945 F.3d 772, 788 (3d Cir. 2019). However, if an applicant satisfies the asylum and withholding of removal standard that a foreign government be shown "unable or willing" to protect, it may still be shown that the government has acquiesced to torture "[a]lthough not dispositive of whether a government acquiesced in torture through willful blindness, [a CAT] applicant may be able to establish government acquiescence in some circumstances, even where the government is unable to protect its citizens from persecution." Scarlett v. Barr, 957 F.3d at 335.

[75] Bautista-Lopez v. United States Att'y Gen., 813 F. App'x 430, 436 (11th Cir. 2020) (citing Salvadoran government efforts to criminalize domestic violence, sponsor public awareness campaigns and provide shelters for domestic violence victims); Cano v. Sessions, 2018 U.S. App. LEXIS 56 3, 6 (6th Cir. 2018) (Guatemalan woman's failure to report rape and multiple threats prevented showing acquiescence).

[76] Juarez-Corado v. Barr, 919 F.3d 1085, 1089 (8th Cir. 2019) (no acquiescence when Guatemalan woman gets a temporary restraining order against her husband; police are unable to enforce and the husband continues to threaten); Aguilar-Gonzalez v. Barr, 779 F. App'x 354, 358-359 (6th Cir. 2019) (no acquiescence when abuse against a Guatemalan woman continues after her husband is summoned to court and a restraining order is issued).

[77] Gonzalez-Veliz v. Barr, 938 F.3d 219, 225 (5th Cir. 2019) (Honduran woman unable to get protection against her violent boyfriend shows "lack of resources and funding" is "not consent or acquiescence, on the part of the police force").

78 Cano v. Sessions, No. 17-3123, 2018 U.S. App. LEXIS 56, at *7 (6th Cir., Jan. 2, 2018) (finding no showing of acquiescence for Guatemalan woman raped and sexual assaulted and threatened with further violence if reported).

[79] Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2019) (finding no acquiescence despite "troubling data regarding gender-based violence" in the Dominican Republic and applicant's testimony of a fifteen-year abusive relationship and multiple reports to the police proving "ineffective," citing country reports detailing government agencies established to protect women); *see also* Villanueva-Leon v. Barr, No. 19-3741, 2020 U.S. App. LEXIS 24012 at 1 (6th Cir., July 29, 2020) (finfing no acquiescence due to El Salvadoran government "efforts to combat [gang violence] and police corruption and applicant's failure to report gang assaults"); Munoz v. U.S. Att'y Gen., 786 F. App'x. 988 (11th Cir. 2019) (finding no acquiescence when Honduran government showing efforts at "making improvements").

acquiescence to be shown through corruption at "any level — even if not at the federal level."[80]

Yet for gender violence victims, the focus on corruption is superficial. Why is government indifference and the failure to prioritize the needs of half of its populace never seen as an active decision?[81] An active decision to do nothing is acquiescence.[82] The false line between indifference and corruption exists only because of the manner in which the issue is framed. The false line prevents asking the deeper questions of why a country has chosen not to act and what are the real implications of its patriarchal norms. CAT's fictional dichotomy is legal complicity.

CAT's "all evidence"[83] standard allows for the recognition of the broader implications of inaction as acquiescence. Adhering to CAT's demand that "all evidence" be evaluated, personal evidence and/or country conditions may prove corruption.[84] Courts cannot selectively choose from nor ignore evidence.[85] Consequently, *Lagos v. Barr* was remanded when a Honduran woman sought protection under CAT after being threatened with gang rape, genital mutilation, and murder for failure to pay the extortion fee.[86] Importantly, the Fourth Circuit excused the applicant's failure to report such threats to the police, relying upon expert testimony which "explained multiple connections between Barrio 18 and 'local police power,' including the sharing of information about neighborhood residents."[87]

III. Relocation

The consideration of whether internal relocation is possible exists in both asylum and CAT. In both, it serves to treat refuge in the United States as a last resort. However, the relocation standard for CAT is less than asylum's relocation standard. Asylum places the burden on the applicant to show that internal relocation is not possible.[88] By contrast, CAT regulations direct an "affirmative" consideration of "all evidence" relating to whether "the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured."[89] Stated in the negative, CAT applicants are not required to prove

[80] Parada v. Sessions, 902 F.3d 901, 916 (9th Cir. 2018) ("[C]ountry reports and exhibits evidence the acquiescence of the Salvadoran government (or at least parts of the Salvadoran government) in the rampant violence and murder perpetrated by the MS gang.") (internal quotations omitted); *see also* Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019) (finding that the Immigration Judge ignored the "extensive evidence of the specific conditions in her neighborhood" and omitting any mention of the substantial evidence marshalled to show that local government police officials acquiesce and indeed actively collude with Barrio 18 in her neighborhood).

[81] *See* MacKinnon, *supra* note 39, at 3-4 (stating that the rationale of state inaction is a device for perpetuating hierarchies based on gender, class and race); *see e.g.*, Mary Ann Glendon, Rights Talk: The Impoverishment Of Political Discourse (1991); Anita L. Allen, Uneasy Access: Privacy For Women In Free Society (1988). Feminism's "positive rights" approach has long demanded accountability for inaction. *Id.*

[82] Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 Pace Int'l L. Rev. 1, 65, 332 (1996) (arguing inaction as "acquiescence of a public official" under the Convention on the Elimination of all Forms of Discrimination against Women).

[83] 8 C.F.R. § 1208.16(c)(3).

[84] 8 C.F.R. § 1208.16(c)(3); *see also* Rivas-Pena v. Sessions, 900 F.3d 947 (7th Cir. 2018).

85 *See, e.g.*, Lagos v. Barr, 927 F.3d 236, 255-56 (4th Cir. 2019) (finding the Immigration Judge ignored the "extensive evidence of the specific conditions in her neighborhood . . . omitt[ing] any mention of the substantial evidence marshalled . . . to show that local government police officials acquiesce and indeed actively collude with Barrio 18 in her neighborhood).

[86] *Id.* at 256.

[87] *Id.*

[88] 8 C.F.R. § 1208.13(b)(3)(i).

[89] 8 CFR § 1208.16(c)(1); *see also* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1186 (9th Cir. 2020).

that internal relocation is "impossible."[90] They are also not actively required to evade future harm. CAT applicants are not required to hide their "fundamental identity,"[91] abandon their sexual orientation,"[92] or "live incommunicado and isolated from loved ones."[93] However, asylum applicants enjoy a presumption that internal relocation is not possible when government persecution or past persecution is established.[94] CAT applicants never enjoy a burden shift.[95] The CAT applicant always retains the "overall burden of proof."[96]

A. Consideration of "All Evidence"

Despite CAT's broad "all evidence . . . not likely to be tortured" relocation standard, CAT applicants fleeing gender violence are still being judged with a narrow view of the dangers they face. In *Garcia-Arce v. Barr*, a Mexican woman sold by her brother to a gang member who sexually assaulted her could not meet CAT's relocation burden.[97] Upholding the CAT denial, the Seventh Circuit agreed that she could safely relocate since she had avoided contact with her abuser and other gang members by living in another part of Mexico for four years. Sadly, such affirmation effectively endorses the agency's "cherry-picked"[98] assurances from U.S. State Department reports that Mexican women could be safe because "Mexican law imposes an 'absolute prohibition' on torture and that a new law 'adds higher penalties for conviction of torturing vulnerable classes of victims,[ ] including women."[99] It also ignores CAT's "all evidence" instruction. Why had the submitted reports regarding the prevalence of gang violence in Mexico — clearly contradicting the false assurances of protection for women — not been given greater weight?[100] While the opinion briefly notes she had been living with the father of her son,[101] why was there not a fuller discussion of the means by which Garcia-Barr lived? Did she effectively live in hiding? Had ties to other loved ones been severed?[102] Why did she ultimately leave Mexico? And, most importantly, given CAT's overarching "would be tortured" analysis, would she fear reprisal upon return?[103]

CAT applicants (and their attorneys) must raise such questions. The "all evidence . . . not likely to be tortured"[104] relocation standard demands any potential harm be evaluated. Domestic violence victims must educate courts on "separation assault" — the heightened risk of violence associated with

[90] For CAT applicants, "neither [§ 1208.16(c)(2)] nor § 1208.16(c)(3) requires the petitioner to prove anything as to internal relocation" (quoting Maldonado v. Lynch, 786 F.3d 1155, 1163 (9th Cir. 2015)). Recognizing such difference, the Ninth Circuit overruled three of its own precedential decisions for misinterpreting the CAT regulations and improperly equating the relocation burden of proof for asylum and CAT. Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (overruling Hasan v. Ashcroft, 380 F.3d 1114, 1123 (9th Cir. 2004); Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1084 (9th Cir. 2008); Singh v. Gonzales, 439 F.3d 1100 (9th Cir. 2006) ("[T]o the extent that [they] conflict with the plain text of the regulations."); *see also* Manning v. Barr, 954 F.3d 477, 488 (2d Cir. 2020) ("The governing regulations to be sure, do not require an applicant to prove that it is not possible to relocate to a different area of the country in order to evade torture."); Perez v. Sessions, 889 F.3d. 331, 336 (7th Cir. 2018) (remanding where "the Board did not comply with 8 CFR § 1208.16(c)(3)(ii)'s requirement that it consider all evidence relating to whether a CAT applicant can relocate safely within the proposed country of removal").

[91] Xochihua-Jaimes v. Barr, 962 F3d 1175, 1187 (9th Cir. 2020) (relying on Edu v. Holder, 624 F.3d 1137, 1146 (9th Cir. 2010).

[92] Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000).

[93] Manning v. Barr, 954 F.3d 477, 488 (2d Cir. 2020).

[94] As the asylum regulations state: "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service established by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii)).

[95] Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (overruling Perez-Ramirez v. Holder, 684 F.3d 953 (9th Cir. 2011)).

[96] Maldonado v. Lynch, 786 F.3d at 1164.

[97] Garcia-Arce v. Barr, 946 F.3d 371, 377 (7th Cir. 2019).

[98] *See infra* note 135 and accompanying text for further discussion of the impropriety of "cherry-picking" evidence.

[99] Garcia-Arce v. Barr, 946 F.3d 371, 375 (7th Cir. 2019).

[100] *Id.* (giving more weight to the State Department reports than general reports submitted by Garcia-Arce describing gang violence).

[101] *Id.*

[102] For CAT's acknowledgement that relocation does not require that one hide in order to evade torture, *see supra* note 90 and accompanying text.

103 For discussion of the prospective "would be tortured" criteria, *see infra* Part IV and accompanying text.

[104] 8 C.F.R. § 1208.16(c) (2020).

leaving an abusive partner.[105] And all victims of gender violence must consistently document the heightened risks associated with gender — emphasizing the real lack of protection for women.[106]

Following this regimen, *Xochihua-Jaimes v. Barr* reversed the agency finding that a Mexican lesbian woman could relocate.[107] After suffering years of rape by her family to "learn to be a woman," Xochihua-Jaimes fled to the United States.[108] To gain her family's approval, she resorted to living with Luna, an abusive member of the Los Zetas drug cartel.[109] She endured years of rape and abuse by Luna and his Zeta cartel family members in the United States and Mexico.[110] When Luna was imprisoned for the rape of Xochihua-Jaimes' eldest child in the United States, his family's attacks on Xochihua-Jaimes intensified in order to avenge.[111] Nevertheless, the IJ found the abuse connection to the Zetas "speculative" and accorded "little weight" to the "unsubstantiated opinion" that the Zetas were throughout Mexico.[112] Upholding the IJ, the BIA agreed that there was "an absence of evidence indicating that the applicant could not relocate."[113] Reversing, the Ninth Circuit corrected both the agency's misapplication of the relocation standard and its incomplete evaluation of evidence. The Ninth Circuit returned to the explicit, affirmative language of the regulations. "Neither the IJ nor the BIA cited any affirmative "[e]vidence that [Petitioner] could relocate to a part of [Mexico] where . . . she is not likely to be tortured."[114] And the Ninth Circuit considered "all evidence," relying upon "extensive record evidence" of the Zetas' operations throughout "many parts of Mexico."[115] Perhaps even more importantly, it saw the independent claim on account of sexual orientation. "Even if Los Zetas did not find her, Petitioner is at heightened risk throughout Mexico on account of her sexual orientation. Extensive record evidence demonstrated that LGBTQ individuals are at risk throughout Mexico."[116]

Xochihua-Jaimes v. Barr sets the bar for evaluating the true possibility of relocation within the CAT — particularly for gender based claims. When adjudicators affirmatively consider "all evidence," women can be heard.

IV. Would Be Tortured

"The ultimate inquiry" in qualifying for CAT relief is whether the applicant has shown she "would be tortured" upon being removed to her country.[117] Concededly, this prediction about what will happen is "speculation."[118] But, given the high stakes, numerous standards are built in. To make a CAT prediction, adjudicators must evaluate the probability, consider all the possible forms of torture, and weigh all the evidence.[119]

A. The Probability

Pursuant to CAT regulations, a CAT applicant must show "it is more likely than not that he or she would be tortured" upon removal.[120] While typically understood as a "more than 50%" likelihood,[121] adjudicators are expected to aggregate the risk of torture from all possible sources. For some circuits, the need to aggregate risks is taken literally. In those

[105] Mahoney, *supra* note 30, at 65-66 ("Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.").

[106] *See e.g.*, Inestroza-Antonelli v. Barr, 954 F.3d 813, 816, 818 (5th Cir. 2020) (reversing BIA denial of motion to reopen for asylum, withholding of removal and CAT relief for Honduran woman based on "voluminous and uncontroverted evidence that regime established after the 2009 coup made changes that substantially reduced legal protections for women and dramatically impaired institutions within the government and civil society that protect women from gender-based violence. And the coup was accompanied by the rate of homicides of women doubling within a single year, which can hardly be described as incremental.").

[107] Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1178 (9th Cir. 2020) (deferring removal).

[108] *Id.* at 1179.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1180.

[112] *Id.* at 1181.

[113] *Id.* at 1186.

[114] *Id.* (citing 8 C.F.R. § 1208.16(c)(3)(ii)).

[115] *Id.* at 1186-87.

[116] *Id.*

[117] *Id.* at 1188; Convention against Torture, *supra* note 15.

[118] Perez v. Sessions, 889 F.3d 331, 336 (7th Cir. 2018).

[119] 8 C.F.R. § 1208.16(c)(3)-(4), 1208.17(a) (2020).

[120] *Id.* § 1208.16(c)(2), 1208.17(a).

[121] Perez v. Sessions, 889 F.3d at 336.

courts, if an applicant, for example, fears being tortured by the police, gangs and anti-gang vigilante groups, the determined percentage possibilities are to be added together in order to see if the final number is greater than 50%.[122] Other courts forewarn against engaging in such "mathematical precision,"[123] calling instead to consider "a substantial risk that a given alien will be tortured if removed from the United States."[124]

Regardless of a circuit's aptitude or aversion to statistical probability, the common understanding is that there must be an "aggregate risk of torture from all sources, and not as separate divisible CAT claims." Reaching this cumulative determination requires considering "the evidence of record, when considered in the aggregate."[125] Regulations further direct that such a thorough evidentiary evaluation includes consideration of (1) past torture; (2) the possibility of relocation; (3) the country of removal's "flagrant or mass violations of human rights"; and (4) any other "relevant information."[126]

B. Past Torture

Of all the "would be tortured" considerations, past torture is "ordinarily the principal factor."[127] As the reasoning goes, "[i]f an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering."[128]

The bias toward past torture does not, however, require individuals to "wait until they suffer physical harm or recurring threats" before leaving their countries.[129] Recently, CAT claims in both the Second and Seventh Circuits were remanded to reconsider whether applicants who fled after only isolated death threats "would be tortured" upon return.[130] Such "near misses" were not deemed past torture, despite torture's definition including "prolonged mental harm," caused by factors including the "imminent threat of death."[131] Nevertheless, it was found an "error of law" to "hold categorically that an applicant for CAT relief must be threatened more than once and that such a person must suffer physical harm before fleeing."[132]

Past instances of torture are to be evaluated with all other relevant evidence, including other personal events and country conditions.[133] Inasmuch as CAT adjudicators may not "arbitrarily ignore relevant

[122] Rodriguez Arias v. Whitaker, 915 F.3d 968 (4th Cir. 2019) (former gang member facing removal to El Salvador claimed likelihood of torture by police, opposition gangs and anti-gang vigilante groups); *see* Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020) (directing explicitly the percentages to be added, adding likelihood of harm from Mexican police combined with likelihood of torture by mental health facility workers); Kamara v. Att'y Gen., 420 F.3d 202, 213-14 (3d Cir. 2005) (finding the necessary greater than 50% by adding 27% likelihood from one entity with 28% likelihood of torture by another).

[123] Perez v Sessions, 889 F.3d 331, 334 (7th Cir. 2018).

[124] *Id.* (quoting Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1135-36 (7th Cir. 2015).

[125] *In re* G-A-, 23 I. & N. Dec. 366, 368 (2002) (emphasis added).

[126] 8 C.F.R. § 1208.16(c)(3)(i)-(iv) (2020).

[127] Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 (9th Cir. 2015) (quoting Nuru v. Gonzales, 404 F.3d 1207 (9th Cir. 2005).

[128] *Id.*

[129] De Artiga v. Barr, 961 F.3d 586, (2d Cir. 2020).

[130] *Id.* (Salvadoran mother flees with son after threatened once by MS-13 gang with death if son does not join them and brandishing a knife); Perez v. Sessions, 889 F.3d 331, 333 (7th Cir. 2018) (Honduran applicant with "narrow escape from torture" by gang whose multiple forcible recruitment efforts included being beaten and shot at on two separate occasions).

[131] Perez v. Sessions, 889 F.3d 331, 336 (7th Cir. 2018) (citing 8 C.F.R. § 1208.18(a)(4)(iii)) (holding that it did not "need to and [does] not literally equate a narrow escape from torture with actual torture . . . . The fact that Perez was the target to some near-misses, however, shows that MS-13 had Perez himself in his sights and was willing to take violence action against him. The threat of imminent death is one way in which torture by means of mental pain or suffering can be inflicted.").

[132] De Artiga v. Barr, 961 F.3d 586, 591 (2d Cir. 2020).

[133] "[A]n escape from torture at the hands of the state or someone who the state cannot or will not control is strong evidence supporting a prediction of torture should the target be returned to that country. Such evidence is particular to the petitioner; it indicates the methods likely to be used; it identifies who the perpetrator(s) will be; and it sheds light on the state of mind of the potential torturer." Perez v. Sessions, 889 F.3d 331, 335 (7th Cir. 2018); *see also* De Artiga, 961 F.3d 586 (2d Cir. 2020) (recognizing the need to evaluate the death threat directed at Petitioner with harms directed at other family and country conditions); Rodriguez-Arias v. Whitaker, 915 F.3d 968, 974-75 (4th Cir. 2019) (remanding CAT claim for failure to "meaningfully" address live testimony and country conditions).

evidence,"[134] they are also prevented from "cherry-picking"[135] evidence which suits their findings. "Catchall phrases" that the agency has considered all the evidence are also not sufficient.[136] To withstand judicial review, CAT decisions must be ground in "substantial evidence."[137] Such a standard necessitates that "the judge build a 'logical bridge from evidence to conclusion.'"[138] "Those who flee persecution and seek refuge under our laws have the right to know that the evidence they present of mistreatment in their home country will be fairly considered and weighed by those who decide their fate."[139]

Female CAT claims are especially vulnerable to judicial disconnect between evidence and conclusion. Complete failure to consider personal evidence and country reports in CAT claims involving female violence and government consent or acquiescence are commonplace.[140] In *Lagos v. Barr*, an Immigration Judge found a Honduran woman's claim of future torture to be an "unsupported assumption" despite having found her testimony credible.[141] She and her daughter were threatened with rape, genital mutilation, and murder if she did not pay the Barrio 18 gang's extortion tax.[142] Expert testimony and evidence regarding the acquiescence and collusion of local police with the gang is simply "omitted" from the IJ's decision, which relies instead on general country conditions and concludes that "generalized reporting" does not support her claim.[143]

V. Conclusion

At every turn, CAT presents significant hurdles for gender violence claims. Fortunately, in recent years, there is more sensitivity to the contours of women's torture claims. Amongst the many courageous published and unpublished opinions, a few lead the way. *De Artiga v. Barr* preserves the possibility of future torture in an isolated past threat.[144]

[134] *See* Rodriguez-Arias v. Whitaker, 915 F.3d at 974; *see also* Inestroza-Antonelli v. Barr, 954 F.3d 813, 816-18 (5th Cir. 2020) (holding the BIA's "complete failure" to address "uncontroverted evidence" of changes in the treatment of women since the 2009 coup amounted to abuse of discretion); Scarlett v. Barr, 957 F.3d 316, 226 (2d Cir. 2019) (remanding when BIA failed to give "reasoned consideration to all the relevant evidence of Jamaican authorities' inability to protect Scarlett from gang violence").

[135] *See* Inestroza-Antonelli, 954 F.3d at 816-17 (5th Cir. 2020) (describing Government (and dissents) as "cherry-picking" excerpts from the Respondent's evidence in order to argue Honduran government protecting women rather than acknowledging the documents' contrary conclusions).

[136] *See* Cole v. Holder, 659 F.3d 762, 771-72 (9th Cir. 2011) (holding that although the BIA need not discuss every piece of evidence, it cannot misstate or ignore highly probative or potentially dispositive evidence).

[137] *See e.g.*, Bernard v. Sessions, 881 F.3d 1042, 1047 (7th Cir. 2018) (holding that the "IJ exhaustively reviewed all of the evidence and explained why it did not establish a substantial likelihood Bernard would be tortured").

[138] *See* Riva-Pena v. Sessions, 900 F.3d 947, 950 (7th Cir. 2018) (quoting Cojocari v. Sessions, 863 F.3d 616, 626 (7th Cir. 2017)); *see also* Parada v. Sessions, 902 F.3d 901, 915 (9th Cir. 2018) (remanding CAT claim in part because the "significant and material disconnect between the IJ's quoted observations and his conclusions . . . indicate that the IJ did not properly consider all of the relevant evidence before him").

[139] Baharon v. Holder, 588 F.3d 228, 233 (4th Cir. 2009).

[140] *See e.g.*, Varela-Lopez v. Sessions, 695 F. App'x 1, 3-4 (2d Cir. 2017) (remanding CAT claim for complete failure to consider "testimony that gang members killed her father, uncle, and brother for failing to pay extortion, the death certificates supporting that testimony; her testimony that gang members assaulted her and her two living brothers; threatening letters from gang members; country reports reflecting increased murder rates of women between 2005 and 2012 (a large number of which were likely related to gangs); and reports that Honduran police are willfully blind to violence against women"); Jacobo-Melendres v. Sessions, 706 F. App'x 724, 727 (2d Cir. 2017) (remanding CAT claim as agency failed to analyze any of the material evidence including "Jacobo-Melendres's testimony that a gang member in Guatemala stalked and harassed her almost daily for four months and attempted to kidnap her on one occasion in 2012, her testimony that the gang member continues to call her cell phone (which she left with her mother in Guatemala); her testimony that she did not trust the police to help her; letters from her mother, sister, and sister's father-in-law corroborating her claim; and country reports reflecting that rape, sexual offenses, and femicide are serious problems in Guatemala and that impunity for the perpetrators of such crimes remains extremely high because police are not equipped to investigate or assist the victims"); Maldonado-Andrade v. Barr, 801 F. App'x 516, 517 (9th Cir. 2020) (remanding CAT claim for ignoring Honduran country reports regarding ties of cartel with corrupt government officials).

[141] *See* Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019).

[142] *Id.*

[143] *Id.*

[144] *See* De Artiga v. Barr, 961 F.3d 586, 591 (2d Cir. 2020).

Lagos v. Barr recognizes the many forms in which women can be tortured.[145] *Xochihua-Jaimes v. Barr* thoughtfully addresses more localized limits to relocation.[146] Finally, *Inestroza-Antonelli v. Barr* sees a threat of female torture in a country's changing political regime.[147]

With such appellate successes, one could dismiss systemic, administrative problems in immigration courts as easily addressed through the appellate process.[148] Circuit studies have shown "staggering" reversals of immigration agency decisions.[149] However, there is no right to free counsel in immigration proceedings.[150] Many refugees, who may be able to afford representation in the lower administrative proceedings, often do not have the wherewithal to continue the appellate process into the federal circuits.[151] Federal court appeals to the circuits may also not be treated fairly. The courts feel "overrun"[152] and hand-tied. "Our Nation's immigration policy is determined by the political branches, not the courts."[153]

Yet irrespective of the immigration courts' fundamental problems, for gender violence victims, a pattern emerges — from the refusal to unequivocally name every act of rape, sexual assault, and domestic violence as torture; to the failure to find government action or acquiescence in indifference; to the unreasonable expectation of relocation on poor women and children; and, most importantly, to the overall, superficial evaluation of claims. As Professor Catherine MacKinnon rhetorically responds:

> If women were human, would we have so little voice in public deliberations and in government in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we are close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our

[145] *See* Lagos, 927 F.3d at 256.
[146] *See* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1182, 1186-87 (9th Cir. 2020).
[147] *See* Inestroza-Antonelli v. Barr, 954 F.3d 813, 816-17 (5th Cir. 2020).
[148] *See also* Linda Kelly, *The Poetic Justice of Immigration Law*, 42 Ind. L. Rev. 1, 1-8 (2009) (discussing the Circuits' recognition of the intemperance and incompetence of the immigration courts).
[149] Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (disclosing that the 7th Circuit had reversed 40% of administrative immigration decisions in the preceding year); *see also* John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 Seventh Cir. Rev. 216, 217-218 (2006) (reporting the Seventh Circuit granting two-thirds of the petitions for review filed by individuals seeking asylum in preceding five month period).
[150] 8 U.S.C. § 1362 ("In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose.").
[151] *See* Irving A. Appleman, *Right to Counsel in Deportation Proceedings*, 14 San Diego L. Rev. 130 (1976) (demonstrating the need to have appointed counsel in immigration proceedings); Robert N. Black, *Due Process and Deportation — Is There a Right to Assigned Counsel?*, 8 U.C. Davis L. Rev. 289 (1975); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immig. L.J. 739 (2002) (reporting the vast statistical differences in success of represented versus non-represented individuals in immigration proceedings); Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 Univ. Mich. J.L. Reform 639 (1994) (highlighting the additional need for particularly vulnerable groups to have legal counsel); Linda Kelly, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. Third World L.J. 41 (2011) (proposing constitutional right to counsel for unaccompanied minors); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647 (1997) (promoting need for counsel for detained individuals).
[152] Inestroza-Antonelli v. Barr, 954 F.3d 813, 819 (5th Cir. 2020) (Jones, dissenting).
[153] Gjetani v. Barr, 968 F.3d 393 (5th Cir. 2020).

> ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women were human, would our violation be enjoyed by our violators? And, if we were human when these things happened, would virtually nothing be done about it?[154]

The Tortured Woman calls out to defy conventions.

[154] Mackinnon, *supra* note 13, at 41-42.

The Statelessness of the Children of North Korean Women Defectors in China

by Chae Mims[*]

I. Introduction

Of the ten million estimated stateless people in the world, one-third are children.[1] An estimated 30,000 are children born to North Korean women defectors.[2] Stateless persons lack a formal identity, without which they lack access to the right to education, employment, housing, medical care, political engagement, marriage, and more.[3] This Article does not discuss the implications of these considerable rights violated as a result of statelessness. Instead, it is limited to the North Korean women defectors' children's right to nationality and China's refoulement policy that hinders the children from enjoying this right.

North Koreans began defecting to China in the 1990s due to a famine, also known as The Arduous March.[4] Among North Koreans surveyed in China, twenty-three percent of men and thirty-seven percent of women had family members starve to death.[5] By the early 2000s, North Koreans began fleeing for reasons other than food, such as fear of political persecution and lack of economic opportunities.[6]

North Koreans defect primarily along the China-North Korea border through the Tumen River.[7] Due to the shortage of women in rural northeastern China, human traffickers target North Korean girls and sell them into prostitution or forced marriages with Chinese nationals.[8] Most trafficked North Korean refugee women remain in hiding due to fear of forced refoulement to North Korea where they will likely face torture.[9] In North Korean Criminal Law, Article Sixty-Two states, "[c]itizens that commit treason against the fatherland, including those who flee to other countries . . . shall be subject to five years or more of correctional labor . . . and in serious cases, to unlimited-term correctional labor punishment or the death penalty." The North Korean women's fear of refoulement also keep them from reporting their children at birth, causing their children to grow up in China as stateless persons.[10]

Existing international laws provide several key rights to North Korean women defectors and their children born in China. The Universal Declaration of Human Rights (UDHR) is the first UN instrument to address statelessness.[11] The Convention on the Rights of the Child (CRC) condemns forced separation of families, and the 1954 Refugees Convention and the Convention against Torture (CAT) prohibit forcible repatriation where freedom or physical safety is at risk. Further, the CRC and the International

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[1] U.N. High Comm'r for Refugees, *Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness*, at 1 (2014).

[2] U.N. Hum. Rts. Council, *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, ¶ 472, U.N. Doc. A/HRC/25/CRP.1 (Feb. 17, 2014) [hereinafter COI Detailed Report].

[3] Sylvia Kim & Yong Joon Park, *Invisible Children: The Stateless Children of North Korean Refugee*s, at 6 (2015).

[4] Melanie Kirkpatrick, Escape From North Korea: The Untold Story of Asia's Underground Railroad 28 (2014) (noting that "the failure of collectivist agricultural policies, bad weather, and the collapse of the Soviet Union—North Korea's patron state—combined to create a famine").

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Kim & Park, *supra* note 3, at 6.

[9] *Id.* at 438.

[10] COI Detailed Report, *supra* note 2, at ¶ 491.

[11] Kim & Park, *supra* note 3, at 9.

Covenant on Civil and Political Rights (ICCPR) specifically discuss rights to a nationality. Chinese national law grants birth citizenship and is applicable to North Korean defectors' children, but China's strict refoulement agreement with North Korea discourages women refugees from registering their children at birth, frustrating the children's enjoyment of their Chinese birth citizenship rights. Considering China has a national security interest in upholding its refoulement policy, the international community should leverage China's desire for international prestige to encourage its cessation of refoulement of North Korean defectors.

II. Relevant International Human Rights Law

Major international human rights instruments contain a right to nationality and a non-discrimination clause to ensure equal protection of these rights. The UDHR declares in Article Fifteen that "everyone has a right to nationality" and that no one should be "arbitrarily deprived of his nationality."[12] Two international treaties, the CRC in Article 7(1) and the ICCPR in Article 24(3), not only reinforce the right to nationality but also explicitly extend the right to all children.[13] The policy of non-discrimination in the CRC and the ICCPR also protects North Korean refugees' children's right to nationality because both conventions specifically prohibit discrimination based on national or social origin, birth or other status.[14] The CRC's non-discrimination clause contains an element essential to combating discrimination toward North Korean refugees' stateless children by prohibiting discrimination based on the child's parents.[15] The ICCPR more broadly but emphatically declares protection of the right to nationality by prohibiting discrimination based on "distinction of any kind."[16]

Stateless children's right to nationality in China cannot be discussed in isolation from North Korean women refugees' right not to be repatriated. North Korean women fear compromising their defector status by claiming their children's right to nationality. Protection from refoulement is crucial and essentially the sole hindrance to North Korean-Chinese stateless children acquiring their right to nationality.[17] International human rights conventions condemn refoulement. First, Article 9(1) of the CRC protects children and parents from forced separation. Second, Article 33 of the 1954 Refugee Convention strongly protects North Korean defectors from refoulement by explicitly prohibiting refoulement of a refugee "where his life or freedom would be threatened."[18] Third, Article 3(1) of the CAT reinforces prohibition of refoulement where substantial grounds exist for danger of being subjected to torture.[19] Yet, China continues to not comply with its obligations to the international community.

Pursuant to various sources of international human rights law, States Parties have an affirmative duty to ensure enjoyment of the following rights: stateless children's right to nationality, children's right against discrimination for being born of a North Korean defector mother, and the stateless children's mothers' right for protection against refoulement to North Korea. Article 29(2) of the ICCPR requires each Member State to "[undertake] . . . necessary steps . . . to give effect to the rights" in the Covenant.[20] Similarly, Article 7(2) of the CRC requires States Parties to "ensure the implementation" of the right to acquire a nationality.[21] The CRC's implementation provision is distinct from the ICCPR, however, because it requires compliance in accordance with States Parties' obligations not only under the CRC but

[12] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 19, 1948) [hereinafter UDHR].
[13] International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[14] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; ICCPR, *supra* note 13, at Art. 2(1).
[15] CRC, *supra* note 14, at art. 2(1).
[16] ICCPR, *supra* note 13, at art. 2(1).
[17] COI Detailed Report, *supra* note 2 at ¶¶ 472–73.
[18] U.S. Department of State, *The Status of North Korean Asylum Seekers and the USG Policy Towards Them*, (2005).
[19] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT] (defining torture as, "[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed").
[20] ICCPR, *supra* note 13, at art. 29(2).
[21] CRC, *supra* note 14, at art. 7(2).

also "under the relevant international instruments in this field, in particular where the child would otherwise be stateless."[22] The 1954 Convention also aggressively mandates the implementation of the right to nationality because under Article 32, States Parties "shall in particular make every effort to expedite naturalization proceedings" and to even reduce the costs of such proceedings "as far as possible."[23]

III. National Law and Practice

Chinese law extends the right to nationality to North Korean-Chinese children. According to Article Four of China's Nationality Law, "any [child] born in China [where]… one of whose parents is a Chinese national shall have Chinese nationality."[24] Additionally, Article Six provides "person[s] born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality."

China's refoulement agreement with North Korea, however, frustrates North Korean-Chinese children's freedom to exercise their right to nationality. Stability in the Korean peninsula is a primary interest of China.[25] Some would say China fears North Korea's regime collapse over North Korea's nuclearization.[26] In light of such national security interest, China "rigorously" pursues the refoulement policy.[27] The refoulement policy stems from the China-North Korea Protocol, which disallows North Korean defectors from crossing the North Korea-Chinese border and forcibly repatriates them.[28] China's Administration Law on Exit and Entry provides that "Chinese citizens should report instances of foreigners illegally entering, residing or working in China."[29] Therefore, Chinese law pressures its citizens to expose North Korean defectors and punishes those who harbor defectors.[30]

Absent China's refoulement policy, North Korean-Chinese children would obtain nationality through birth registration. China's birth registration involves a *hukou*, a passport-like document including biographical data, current address, date and place of birth, and other identifying information.[31] China does not legally recognize marriages between North Korean women and Chinese men,[32] and North Korean-Chinese children may only obtain a *hukou* "by losing their mothers" via refoulement.[33] According to one Chinese father,

> If you want to obtain a *hukou* for a half-Chinese, half-North Korean child, you must obtain a police document verifying the mother's arrest or another form that you fill out explaining that the mother ran away. You also need signatures of three witnesses who would testify that she was repatriated or ran away, and submit them to the police. But that's not all. You have to [bribe] relevant officials.[34]

Therefore, a Chinese father cannot obtain a *hukou* for his half-North Korean child absent a bribery of a substantial amount of money that most of them do not have.[35] On the other hand, children born of two Chinese nationals can obtain a *hukou* by paying "next to nothing."[36]

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[22] *Id.*

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

[24] 中華人民共和國國籍法 (Nationality Law of the People's Republic of China), http://www.china-embassy.org/eng/ywzn/lsyw/vpna/faq/t710012.htm (promulgated on Sept. 10, 1980, effective Sept. 10, 1980).

[25] Eleanor Albert, *The China-North Korea Relationship*, Council on Foreign Rels., June 25, 2019, at A1.

[26] *Id.*

[27] COI Detailed Report, *supra* note 2, at ¶ 435.

[28] *See generally* Roberta Cohen, *China's Repatriation of North Korean Refugees*, Brookings Inst., March 5, 2012, at A1 (reporting the testimony submitted to the Congressional-Executive Committee on China).

[29] [Exit and Entry Administration Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Jun. 30, 2012, effective Jul. 1, 2013), cs.mfa.gov.cn/wgrlh/lhqz/lhqzjjs/t1120988.shtml

[30] COI Detailed Report, *supra* note 2, at ¶ 436.

[31] *See Denied Status, Denied Education*, Hum. Rts. Watch, 11 (2008), https://www.hrw.org/sites/default/files/reports/northkorea0408web.pdf.

[32] *See id.* at 2.

[33] *See id.* at 10.

[34] *Id.* at 10-11.

[35] *See* COI Detailed Report, *supra* note 2, at ¶ 458.

[36] *Denied Status, Denied Education*, *supra* note 31, at 8.

China has ratified the CRC, the 1954 Refugee Convention, and the CAT.[37] Though China has not ratified the ICCPR, as a signatory, it still has the obligation to act in good faith and not to undermine the purpose of the ICCPR.[38] In addition, China's Nationality Law complies with the principle against statelessness in the CRC, the ICCPR, and the 1954 Refugee Convention. Nonetheless, China's refoulement policy promulgated by the China-North Korea Protocol and its Administrative Law toward North Korean defectors directly violates the 1954 Refugee Convention and the CAT. China's refoulement policy also undermines the ICCPR's purpose of upholding basic human rights, which include children's right to nationality.

IV. Implications

"Stateless persons are excluded from every facet of society and are often among the most vulnerable and marginalized in society."[39] Defectors' children cannot enroll in school despite China's Compulsory Education law because they have no access to a *hukou*.[40] Many defectors' children who do obtain a *hukou* and nationality do so because of their mother's refoulement. To illustrate the toll this policy can take on a child, a six-year-old girl who lives with her Chinese father and grandparents and has obtained a *hukou* "said . . . that her mother had gone to the police station and never returned." This girl's North Korean mother was arrested and repatriated in 2005.[41]

Not only does repatriation leave children of North Korean defector women vulnerable in society due to their statelessness, but the women themselves face serious consequences if they are repatriated. Of North Korea's nineteen prison camps ("*kyohwaso*"), most of the repatriated defectors are detained in *Jeongeori Kyohwaso* and *Gaecheon Kyohwaso*.[42] A witness detained at *Gaechon Kyohwaso* from 2013 to 2014 stated prisoners "often" died due to weak health.[43] A witness who was detained from 2014 to 2015 stated prisoners worked 14 hours a day, and those who could not meet the daily work quota were severely beaten and not allowed to sleep.[44] Another witness detained in 2016 testified that the guards routinely trampled prisoners with shoes and hit inmates with hands or fists, and denied inmates access to meals or kept them awake as punishment.[45] Witnesses also testified of women who are repatriated while pregnant with the baby of Chinese men are forced to undergo abortion.[46] Female defectors have testified that the severity of punishment on forcibly repatriated women has increased under Kim Jong Un's regime.[47]

V. Steps Forward

The UN and its agencies are already urging China to stop repatriating North Korean defectors pursuant to the 1954 Convention and the CAT, but China has not been responsive.[48] China's support for North Korea may be rooted in China's interest in having a stable Korean peninsula on its northern border and to have a buffer from the democratic South Korea.[49] To counterbalance China's significant national security

[37] *See Multilateral Treaties Deposited with the SecretaryGeneral*, United Nations, https://treaties.un.org/pages/historicalinfo.aspx#China.

[38] *See UN Treaty Bodies and China*, Hum. Rts. in China (2013), http://www.hrichina.org/en/un-treaty-bodies-and-china.

[39] *See* Kim & Park, *supra* note 3, at 6; Ruma Mandal & Amanda Gray, *Out of the Shadows: The Treatment of Statelessness Under International Law*, Chatham House (Oct. 2014), 1, https://www.chathamhouse.org/sites/default/files/field/field_document/20141029StatelessnessMandalGray.pdf.

[40] *See Denied Status, Denied Education*, *supra* note 31, at 17.

[41] *See id.* at 11.

[42] Kyung-ok Do et al., *White Paper on Human Rights in North Korea 2020: Korean Institute for National Unification* 99.

[43] *Id.* at 110.

[44] *Id.* at 125.

[45] *Id.* at 108.

[46] *Id.* at 421.

[47] *Id.* at 420.

[48] *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, 176**;** Roberta Cohen, *China's Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, Brookings Inst., 1 (Jul. 2014), http://www.brookings.edu/~/media/research/files/opinions/2014/07/north-korea-human-rights-cohen/north-korea-un-cohen.pdf.; Lee Yeon Cheol, *UN Urges China to Stop Repatriation of North Korean Defectors*, VOA News (Dec. 15, 2015, 3:01 PM), http://www.voanews.com/a/united-nations-china-repatriation-north-korea-defectors/3104259.html; Kenneth Roth, *Red Handed: China is also Complicit in North Korea's Crimes Against Humanity*, Hum. Rts. Watch, (Feb. 19, 2014, 12:01 AM), https://www.hrw.org/news/2014/02/19/red-handed-china-also-complicit-north-koreas-crimes-against-humanity.

[49] *See* Albert, *supra* note 25.

interest in North Korea, what if the international community provides China with an incentive beyond formal censure to cease forcible refoulement of North Korean defectors?

Sophie Richardson, the China Director at Human Rights Watch, suggests "dial[ing] down the pomp" as a way to deal with China's human rights abuses.[50] Cementing status as a world power has always been important to China,[51] and various political and apolitical entities in the international community have continued to grant China the "pomp" it desires. Despite China's continued enforcement of its refoulement policy, the UN awarded China a seat in the United Nations Human Rights Commission in 2013 and re-elected China in 2016 and 2020.[52] In addition, the International Olympic Committee elected Beijing as the host city for the 2022 Winter Olympics,[53] making China the first nation to host both the Summer and the Winter Olympics.[54] The privileges the international community grants to China fortifies its status in the world. In doing so, the international community sends an inconsistent message to China and the rest of the world regarding the seriousness of international human rights law and human rights abuses.

To help leverage China's desire for international acknowledgement, the UN Security Council could consider curtailing certain Council member privileges to China until it ratifies the ICCPR because China is the only permanent member who has not ratified the ICCPR.[55] Second, the Chinese government has announced its intent to become a "world soccer superpower" by 2050.[56] In this case, FIFA could consider rejecting China's 2030 World Cup bid unless China ceases its refoulement of North Korean defectors.

In the interim, China should consider allowing birth registration through one parent's documentation in accordance with its Nationality Law. Further, the UN and its agencies should continue to urge China to cease refoulement.

VI. Conclusion

Approximately 30,000 children of North Korean women are stateless in China.[57] By violating defectors' rights against refoulement, tens of thousands of children are denied their right to nationality, causing them to live vulnerable, stateless lives. China is a member of the CRC, 1954 Refugee Convention, and the CAT. These three international bodies of law and the ICCPR, to which China is a signatory, together obligate China not to repatriate North Korean defectors and extend nationality to their children. China complies in letter through its nationality law but negates the practicability of the law in the defectors' children's lives through its refoulement policy. Therefore, international human rights law alone is proving to be insufficient to protect China's

[50] Sophie Richardson, *How to Deal with China's Human Rights Abuses*, Hum. Rts. Watch (Sep. 1, 2016, 4:54 PM), https://www.hrw.org/news/2016/09/01/how-deal-chinas-human-rights-abuses.

[51] *Id.*

[52] *See* Jonathan Kaiman, *China Granted Seat on UN Human Rights Council*, Guardian (Nov. 13, 2013, 10:49 AM), https://www.theguardian.com/world/2013/nov/13/china-granted-seat-un-human-rights-council; *Current Membership of the Human Rights Council*, U.N. Hum. Rts. Off. of the High Comm'r, https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2016.aspx (last visited Aug. 31, 2019); *Russia Loses UN Human Rights Council* P*lace, Saudi Arabia* R*eElected***,** RT **(**October 28, 2016, 4:52 PM), https://www.rt.com/news/364584-russia-saudi-unhrc-election/ [Hereinafter Russia Loses]; Eleanor Albert, *China Appointed to Influential UN Human Rights Council Panel*, The Diplomat (Apr. 8, 2020), https://thediplomat.com/2020/04/china-appointed-to-influential-un-human-rights-council-panel/.

[53] *See* Kriston Capps, *Why Beijing is a Terrible Choice for the 2022 Olympic Games*, CityLab (August 3, 2015), http://www.citylab.com/work/2015/08/why-beijing-is-a-terrible-choice-for-the-2022-olympic-games/400358/.

[54] *See* Stephen Wilson, *Beijing, China to be First City to Host Both Winter and Summer Olympics*, L.A. Daily News (Jul. 31, 2015, 10:10 AM), http://www.dailynews.com/events/20150731/beijing-china-to-be-first-city-to-host-both-winter-and-summer-olympics.

[55] *See China: Ratify Key International Human Rights Treaty* (October 8, 2013, 3:59 PM), https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty.

[56] *See* Charlie Campbell, *China Wants to Become a 'Soccer Superpower' by 2050*, Time (Apr. 12, 2016, 4:19 AM), https://time.com/4290251/china-soccer-superpower-2050-football-fifa-world-cup/.

[57] *See* Rachel Judah, *On Kim Jong-un's Birthday, Remember the 30,000 Stateless Children He Has Deprived of Recognition*, The Independent (Jan., 7 2018, 3:08 PM), https://www.independent.co.uk/voices/kim-jong-un-birthday-north-korea-china-children-refugees-a8146466.html.

30,000 stateless children. China will not cease refoulement of North Korean defectors to appease North Korea. Moving forward, the international community must present China with an incentive beyond compliance with international law to counter-balance its national security interest. As Human Rights Watch's China Director, Sophie Richardson, suggested, the international community must look to an entry point beyond reprimand from the UN and its agencies to get a response from China. The wellbeing of tens of thousands of stateless children and their mothers answers the question whether such a method is worth pursuing.

Mining in Guatemala: Human Rights and Investment Treaty Arbitration

by Valentina Capotosto[*]

In 2019, the Republic of Guatemala submitted preliminary objections to an arbitration initiated by a U.S. investor specializing in mining, Kappes, Cassidy & Associates ("Kappes"), arising out of a mining operation—the *Progreso VII* Project—operated by the Guatemalan mining company Exmingua.[1] In its Notice of Arbitration, Kappes initiated an lawsuit for over $300 million in damages claiming Guatemala violated the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) which gives investors covered by the treaty access to arbitration for breach of substantive rights.[2] The Notice of Arbitration comes after years of conflict over the *Progreso VII* Project, also known as the *El Tambor* mines. The heart of this case rests on access to investment treaty arbitration despite legitimate human rights concerns to protect surrounding communities impacted by natural resource exploitation.

La Puya, a community-led resistance group, was involved in the ongoing conflict by maintaining a makeshift blockade outside of the mine's entrance since its construction in 2012 to protest the mining operation's negative environmental impacts on the surrounding communities.[3] The potential for toxic waste contamination and other human health implications from the mining operation raise basic human rights concerns for the surrounding indigenous communities.[4] In May 2018, the Guatemalan Supreme Court suspended Exmingua's exploitation license for failure to consult with the local community under the International Labor Organization's Indigenous and Tribal People's Convention (ILO No. 169).[5]

Investment treaty arbitration gives investors a unique pathway to challenge sovereign action when states regulate social or environmental issues that foreign investors claim violate states' obligations under a treaty. Despite the adverse ruling from the Guatemalan Supreme Court, the DR-CAFTA allows Kappes to circumvent national courts and submit a dispute to a third-party tribunal for breach of the investment treaty.[6] The Guatemalan Supreme Court order suspending Exmingua's license arose from a constitutional claim against Guatemala's Ministry of Energy and Mines ("MEM") by the NGO *Centro de Acción Legal, Ambiental y Social de Guatemala* ("CALAS").[7] The Supreme Court ruled in favor of CALAS, finding that MEM failed to conduct consultations with the local community pursuant to ILO No. 169 before granting Exmingua's exploitation license.[8]

Article 15 of ILO No. 169 specifically calls for states to establish procedures for consultation with indigenous communities potentially affected by exploitation

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[1] Kappes v. Rep. of Guat., ICSID Case No. ARB/18/43, Respondent's Preliminary Objections Under Article 10.20.5 of CAFTA DR (Aug. 16, 2019) [hereinafter Respondent's Preliminary Objections], https://www.italaw.com/sites/default/files/case-documents/italaw10807_0.pdf.

[2] Dominican Republic-Central American Free Trade Agreement, Aug. 5, 2004, 119 Stat. 462 [hereinafter DR-CAFTA].

[3] Guatemala Human Rights Commission, *'La Puya' Environmental Movement* (Nov. 2014), https://www.ghrc-usa.org/our-work/current-cases/lapuya/.

[4] Benjamin Reeves, *Guatemala's Anti-Mining La Puya Protesters Are Under Siege*, VICE News (Apr. 12, 2014), https://www.vice.com/en_us/article/vbnpy4/guatemalas-anti-mining-la-puya-protesters-are-under-siege.

[5] Notice of Intent Pursuant to the Free Trade Agreement Between the Dominican Republic, Central America and the United States (May 16, 2018) [hereinafter Notice of Intent], https://www.italaw.com/sites/default/files/case documents/italaw9713.pdf; Convention (No. 169) concerning indigenous and tribal peoples in independent countries, *adopted* June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO No. 169].

[6] DR-CAFTA, *supra* note 2.

[7] Notice of Intent, *supra* note 5.

[8] *Id.*

of natural resources.[9] Guatemala ratified the legally binding convention in 1996, which the Minister of Labor described at the time as a "historic milestone in Guatemala's consolidation of democracy and fullest respect for internationally recognized human rights."[10] However, in 2018, Kappes said the Supreme Court's enforcement of ILO No. 169 is meritless, arguing that no state law or regulation requiring consultation existed at the time Guatemala granted Exmingua's exploitation license.[11]

While Exmingua may have played a role in violating the ILO convention, Guatemala may still be liable for violating Kappes' rights as an investor under the DR-CAFTA.[12] Exmingua, along with MEM, failed to consult with the local community pursuant to ILO No. 169, but Kappes could still be entitled to relief for breach of the DR-CAFTA. In particular, Kappes claims that Guatemala breached the National Treatment, Most-Favored Nation Treatment, Minimum Standard of Treatment, and Expropriation and Compensation provisions that protect investor's rights under Chapter 10 of the DR-CAFTA. This specific case falls in line with what has been coined as "community conflict cases" due to the unique controversy stemming from clashes with local communities and human rights concerns attached to natural resources.[13]

Despite Guatemala's attempt to mitigate MEM's failure to conform to ILO No. 169, an arbitral panel may still hold a state liable under the DR-CAFTA. One point of criticism for investment treaty arbitration arises when investment treaty cases have human rights implications. In a joint statement released after Kappes' Notice of Arbitration, a group of international organizations described investor-state arbitration as a means to "privilege corporate interests at the expense of local communities and the environment."[14] While environmental advocates strongly criticize investment treaty arbitration, investment treaties still provide an important function for attracting foreign investment — a significant part of economic growth.[15] In an attempt to address these criticisms, newer treaties such as the Canada-European Union Economic and Trade Agreement (CETA) attempt to address the right of the state to regulate health, safety, and the environment.[16] Yet, a majority of investment treaties currently in force remain silent on whether a state's legitimate public welfare interests can exclude an investor's claim.[17]

Even if the Guatemalan Supreme Court suspended Exmingua's mining operations pursuant to binding international human rights standards, Guatemala could still face liability for the hundreds of millions in damages claimed by Kappes for breach of the DR-CAFTA.[18] Investment treaties such as the DR-CAFTA give investors important access to binding treaty rights but also provide avenues for limiting a state's ability to regulate social and environmental issues without the threat of costly arbitration. While new agreements, such as the Comprehensive Economic and Trade Agreement between Canada and the European Union, attempt to address this trade-off, the almost 3,000 investment agreements currently in force

[9] ILO No. 169, *supra* note 5.
[10] Press Release, Int'l Lab. Org., Guatemala Ratifies Convention Guaranteeing Indigenous Rights, ILO/96/20 (June 13, 1996), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008061/lang--en/index.htm.
[11] Notice of Intent, *supra* note 5.
[12] Notice of Intent, *supra* note 5; DR-CAFTA, *supra* note 2 at ch. 10.
[13] George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, 96 Am. U. L. Rev. 105 (Oct. 2019).
[14] International Organizations Publish Statement in Solidarity with La Puya, Network in Solidarity with the People of Guat. (Feb. 1, 2019), https://nisgua.org/statement-solidarity-la-puya/.
[15] Arif H. Ali et al., *Mining Arbitration in Latin American: Social and Environmental Issues in Investment Arbitration Cases*, The Guide to Mining Arbitrations (Jason Fry & Louis-Alexis Bret, eds. 2019), https://globalarbitrationreview.com/chapter/1194161/mining-arbitration-in-latin-america-social-and-environmental-issues-in-investment-arbitration-cases#.
[16] Canada-European Union Comprehensive Economic and Trade Agreement, Can.-Eur. Union, Oct. 30, 2016 [hereinafter CETA], https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (provisionally entered into force Sept. 21, 2017).
[17] Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, Int'l Inst. for Sustainable Dev.: Inv. Treaty News (May 21, 2015), https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.
[18] Notice of Intent, *supra* note 5.

do not.[19] The future of investment treaty arbitration will likely rely on finding a balance between protecting human rights and recognizing the benefits of investment treaties for foreign investment and economic growth — especially in the natural resources sector.

[19] CETA, *supra* note 16; *International Investment Agreements Navigator*, U.N. Conf. on Trade & Dev.: Inv. Pol'y Hub, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Sept. 22, 2020).

How A Fisherman's Murder Revealed Morocco's Police Brutality and Ethnic Discrimination

by Nora Elmubarak[*]

Mouhcine Fikr, a fisherman, was crushed to death three years ago in the Rif region of northern Morocco when he was attempting to retrieve swordfish that police officers had confiscated and placed in a trash compactor.[1] His death in 2016 sparked the "Hirak," a socioeconomic protest movement in the Rif region. Fikr's death was a turning point for those in the Rif region; they were no longer complacent with the amount of policing in their community and the severe economic disparities that led to people like Mouhcine Fikr risking their lives. Police arrested over 450 activists in May 2017,[2] but the violence between the police and protestors is ongoing.[3] By arresting protestors and depriving prisoners of their rights, the Moroccan government is in direct violation of Article 19 and Article 20 of the Universal Declaration of Human Rights (UDHR), as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners, which establish guidelines for the

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[1] *What's Behind Morocco's Street Protests?* Al Jazeera (May 19, 2017, 5:11 PM), https://www.aljazeera.com/programmes/insidestory/2017/05/morocco-street-protests-170519194032194.html.

[2] *World Report: Morocco/Western Sahara*, Hum. Rts. Watch, https://www.hrw.org/world-report/2019/country-chapters/morocco/western-sahara (last visited Oct. 8, 2020).

[3] *Protests in Morocco Demanding Improvement of Social and Human Rights Conditions*, Middle East Monitor (Feb. 24, 2020 3:19 AM), https://www.middleeastmonitor.com/20200224-protests-in-morocco-demanding-improvement-of-social-and-human-rights-conditions/.

treatment of all prisoners to honor their humanity.[4] Fikr's death and the movement that followed has brought greater global awareness to the Moroccan government's suppression of freedom of speech, systemic discrimination, and corrupt criminal justice system.

While the Rif Hirak protests started because of one man's death, they grew out of a larger sense of discrimination in the Rif region, which is inhabited primarily by Berber communities.[5] The Rif-region Berbers claimed that the Moroccan government, led by King Mohammed VI, discriminated against them and provided them with fewer resources in comparison to their Arab counterparts.[6] Citizens in the Rif region protested for more jobs in the region, the construction of a hospital, and a highway to provide them with access to job opportunities outside of their region.[7] In September 2019, the Moroccan coastguard fired on a boat in the Mediterranean, killing a law student, Hayat Belkacem, who was fleeing from the Rif region to Europe because of increasing police violence, poverty, and limited opportunities in the area.[8] Further, in October 2019, a Tetouan trial court in northern Morocco sentenced activist Soufian al-Nguad to two years in prison for alleged incitement of insurrection, insulting Morocco's flag and symbols, and spreading anti-government sentiment after he publicly criticized the murder of Belkacem on social media.[9]

In 2018, Human Rights Watch also reported that the Moroccan government attempted to bar freedom of assembly, sanction excessive police violence, and perpetuate a corrupt criminal justice system throughout the Rif protests.[10] The Moroccan government initiated mass arrests in the Rif Region as part of its work to quell the protests by the Berber minority.[11] The Berber community is now waiting for justice to be served for all the political activists. Community members continue to organize protests to demand better resources for their communities in Morocco.

Throughout these protests, the Moroccan government has violated numerous international human rights laws. The Moroccan government has an obligation to protect the right to freedom of opinion and expression without discrimination, enshrined in Article 19 of the UDHR and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[12] Morocco violated international legal norms under Article 2 of the UDHR, which guarantees the right to be protected from discrimination. It also breached its obligations under Article 7 of the ICCPR, which protects individuals from excessive amounts of violence and Article 20 of the ICCPR, which protects the right to peaceful assembly.[13]

First, the Moroccan government violated Article 2 of the UDHR by discriminating against individuals in the Rif region by providing them with minimal acces-

[4] *See* G.A. Res. 217 (III) A, Universal Declaration on Human Rights, arts. 19, 20 (Dec. 10, 1948) [hereinafter UDHR]; United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611 (Aug. 30, 1955).

[5] *See* Evelyn Nieves, *Fighting for Basic Rights in Morocco*, N.Y. Times (Jul. 27, 2017, 4:00 AM), https://lens.blogs.nytimes.com/2017/07/27/fighting-for-basic-rights-in-morocco/.

[6] Paul Adrian Raymond, *Morocco's Berbers Urge Broader Reforms*, Al Jazeera (May 6, 2014, 7:56 AM), https://www.aljazeera.com/indepth/features/2014/03/moroccos berbers urge broader reforms 2014357321228806.html.

[7] Ursula Lindsey, *In Morocco, Protesters Organize Against Repression with New and Traditional Tactics*, Mobilization Lab (Oct. 6, 2017, 12:12 PM), https://mobilisationlab.org/stories/morocco-tactics-counter-repression/.

[8] Samia Errazzouki, *A Young Woman Embodied Morocco's Future. Instead She was Shot While Trying to Emigrate*, Wash. Post (Oct. 2, 2018, 7:01 AM), https://www.washingtonpost.com/news/democracy-post/wp/2018/10/02/a-young-woman-embodied-moroccos-future-instead-she-was-shot-while-trying-to-emigrate/.

[9] *Morocco: Free Facebook Commentator*, Hum. Rts. Watch (Feb. 8, 2019), https://www.hrw.org/news/2019/02/08/morocco-free-facebook-commentator.

[10] *World Report: Morocco/Western Sahara*, *supra* note 3.

[11] *Moroccan Human Rights Defenders Targeted Using Malicious NSO Israeli Spyware*, Amnesty Int'l (Oct. 9, 2019, 8:01 PM), https://www.amnesty.org/en/latest/news/2019/10/moroccan-human-rights-defenders-targeted-using-malicious-nso-israeli-spyware/.

[12] UDHR, *supra* note 4, art. 19.

[13] *See* UDHR, *supra* note 4, art. 2; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 105, art. 7, 20 [hereinafter ICCPR].

to job opportunities.[14] The Rif region was deliberately separated by the Moroccan government in the past to develop drug farms, and King Mohammed VI has failed to integrate the Rif region into greater Moroccan society.[15] The Rif region remains unstable due to drug trafficking and the subsequent heavy policing of the region. The government also failed to provide the promised proper highway access from the Rif region to the rest of the country and failed to construct the hospital that was promised in the 2015 development plan for the region.[16] Meanwhile, the Arab majority in the west of Morocco is steadily increasing its economic presence.[17]

Second, the government violated Article 7 of the ICCPR when five police trucks drove into a group of peaceful protestors in the Jerada region, ultimately dispersing the protestors.[18] This level of force was unjustified and put the lives of the protestors at extreme risk. This violated their right to freedom of opinion and expression guaranteed by Article 19 of the ICCPR.[19] Lastly, the government violated Article 20 of the ICCPR by preventing and interfering with the peaceful assembly of the protesters.[20] The government dispersed protestors through mass arrests in an attempt to quell activists' call for the government to respect human rights in the Rif region. The government hindered the citizens' right to speech by imposing large fines and arresting individuals, like YouTuber Omar Ben Boudouh, for allegedly offending public officials and inciting hatred. Moroccan officials heavily police political speech both online and in person, in direct violation of Article 20 rights.[21] The Royal Moroccan navy shot the law student, Hayat Belkacem, and her death is another example of the violent over-policing tactics the Moroccan government is using.[22] The Moroccan government has an obligation to protect all of its citizens' rights without discrimination based on their ethnic origin.[23]

In order to regain the trust of the people in the region, the government must release political activists like Soufian al-Nguad.[24] The government can develop a forum to assess the needs of the community members in a safe manner. The Moroccan government can address the majority of the protestors' grievances by complying with its international obligations, which include guaranteeing freedom of expression and the right to peaceful assembly, while protecting against excessive force for all of its citizens. The region's development plans need to meet consistent annual benchmarks of growth to assure the Riffians that the central government is invested in economic growth and stability in the region. The government also needs to develop a system to dissipate the drug trafficking in the region by providing alternative employment opportunities and rehabilitation services for drug users. Riffians have minimal job opportunities, causing them to flee or engage in drug trafficking; the government must also invest in re-integration programs for those incarcerated due to drug offenses in the region. Riffians must be at the forefront of all of these programs to develop a system of transparency and trust between them and the central Moroccan government.

The Moroccan government should take these protests as an opportunity to allow for the safe assembly of citizens, promote freedom of expression, provide access to equal resources to all ethnic groups in the country, and protect protestors' freedom of expression. King Mohammed VI's pardon of 1,178 detainees in July

[14] *See* UDHR, supra note 4, art. 2; Ahmed Eljechtimi, *Tens of Thousands Protest in Morocco Over Jailed Rif Activists,* Reuters (Jul. 15, 2018, 11:36 AM), https://www.reuters.com/article/us-morocco-protests/tens-of-thousands-protest-in-morocco-over-jailed-rif-activists-idUSKBN1K50R0.

[15] Abdelkader Abderrahmane, *Drug Trafficking in Northwest Africa: The Moroccan Gateway*, *Jadaliyya* (Dec. 9, 2013), https://www.jadaliyya.com/Details/29918.

[16] Sarah Feuer, *Morocco's Escalating Protests Call for a Careful Response*, Wash. Int. for Near East Pol'y (June 6, 2017), https://www.washingtoninstitute.org/policy-analysis/view/moroccos-escalating-protests-call-for-a-careful-response.

[17] Fahd Iraqi, *Morocco: The Rif — The Paradox of the North*, Afr. Rep. (Aug. 1, 2018), https://www.theafricareport.com/559/morocco-the-rif-the-paradox-of-the-north/.

[18] *See* ICCPR, *supra* note 13, art. 7; *Morocco/Western Sahara: Crackdown Against Activists for Criticizing the King, Public Institutions and Officials*, Amnesty Int'l (Feb. 11, 2020), https://www.amnesty.org/en/latest/news/2020/02/morocco-western-sahara-crackdown-against-activists-for-criticizing-the-king-public-institutions-and-officials/.

[19] *See* ICCPR, *supra* note 13, art. 19.

[20] *See id.*, art. 20.

[21] *See id.*; Amnesty Int'l, *supra* note 19.

[22] *See* Errazzouki, *supra* note 8.

[23] *See* UDHR, *supra* note 4, art. 2.

[24] *See Morocco Protests: Thousands Demand Release of Activists*, BBC (Apr. 22, 2019, 1:08 AM), https://www.bbc.com/news/world-africa-48008463.

2017 was one step towards redressing the government's human rights violations.[25] He repeated this in August 2018 and in July 2019 when he again pardoned political activists who were critical of the Moroccan government.[26] However, there has been minimal progress in fulfilling the Rif protestors' demands since Mouhcine Fikr's death catalyzed the movement three years ago.[27] The Moroccan government has an international obligation to ensure that its citizens can safely advocate for their needs without the threat of violence or imprisonment. These protests continue to reveal how the Moroccan government has engaged in human rights violations to maintain the status quo and ignore the needs of its ethnic minorities.

[25] *Moroccan King Pardons More than 1,000 Protesters*, Al Jazeera (Jul. 29, 2017, 7:49 PM), https://www.aljazeera.com/news/2017/07/moroccan-king-pardons-thousand-protesters-170729233326493.html.

[26] *Moroccan King Pardons Thousands, Including 'Hirak' Protesters*, Al Jazeera (Jul. 30, 2019, 4:50 AM), https://www.aljazeera.com/news/2019/07/moroccan-king-pardons-thousands-including-hirak-protesters-190730063730436.html; *World Report: Morocco/Western Sahara*, *supra* note 2.

[27] *See Morocco Protests*, *supra* note 25.

Sporting Institutions Turned a Blind Eye to China's Human Rights Abuses, but They Have Potential to Drive Global Change

*by Hailey Ferguson**

Foreign sports, such as basketball and soccer, enjoy a gargantuan cultural and commercial market in China. Basketball has been wildly popular for decades.[1] The love for the American sport has only continued to grow since then with over eighteen percent of Chinese athletes playing basketball today.[2] The foremost governing bodies representing soccer and basketball, FIFA and the NBA, have found commercial success in the Chinese market.[3] 187 million soccer fans hope to enjoy the 2021 FIFA Club World Cup on their home soil, now that FIFA has awarded China the hosting opportunity following a 2015 government edict that made soccer a national priority worth billions.[4] Last year, a conflict between the Houston Rockets general manager, Daryl Morey, and the Chinese government tested the strong partnership between the NBA and

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[1] Claudia Klingelhöfer, *These Are the Most Popular Sports in China*, ISPO (Jul. 6, 2017, 12:02 PM), https://www.ispo.com/en/markets/id_79708806/these-are-the-most-popular-sports-in-china.html (explaining that China boasts the highest number of soccer fans worldwide at 187 million).

[2] *Id.*

[3] *See* Daniel Victor, *Hong Kong Protests Put N.B.A. on Edge in China*, N.Y. Times (Oct. 7, 2019, 12:15 PM), https://www.nytimes.com/2019/10/07/sports/basketball/nba-china-hong-kong.html.

[4] Tariq Panja, *FIFA Set to Reward China With World Cup for Clubs*, N.Y. Times (Oct. 20, 2019), https://www.nytimes.com/2019/10/20/sports/fifa-china-world-cup-expanded.html.

China. After Morey voiced support on his private Twitter[5] account for protesters in Hong Kong, the Chinese government swiftly and publicly rebuked his statements. Morey found himself in trouble with the owner of his own team and the NBA itself following pressure from China for the league to unequivocally condemn Morey's statements.[6] Though China represents a growing market for the sports industry, it is seemingly immune to criticism related to reported human rights abuses in the country.

Human rights journalists and non-governmental organizations have long accused Beijing of human rights violations related to Beijing's response to protests in Hong Kong as well as the mass detention and forced re-education of the Uyghur community in East Turkestan.[7] International sports organizations seem to turn a blind eye to these illegal acts by the Chinese government. However, should public pressure mount, organizations like the NBA and FIFA could be powerful commercial influences to raise awareness and apply pressure on the government. Activist organizations have implored the United Nations to launch an investigation into the crimes against humanity against the Uyghur people, purported to be carried out by the Chinese government, but their pleas have not been answered.[8] Considering China's powerful position within the United Nations and their unwillingness to allow independent investigators into the area, tackling the problem through traditional legal human rights channels at the moment is futile.[9] In these instances, internal public outcry coupled with foreign commercial pressure may be more effective in exacting change. Sports organizations are in a rare position to bridge that gap and have the potential to be influential.

While the Chinese government and some Chinese citizens alike hope to disconnect politics from sports, the governing bodies of international sporting organizations inherently intertwine with politics in the countries in which they choose to do business.[10] The mutually beneficial relationships between governments and organizations like the NBA and FIFA go beyond playing host to national and international tournaments. The cultural and commercial significance of sports permeate a society, with the governing sports organizations profiting monetarily. These financial benefits foster complacency about host state human rights violations among institutions like FIFA — and even the International Olympic Committee.[11] Large, international tournaments, like the Olympics, are potential propaganda machines for host states and participants alike. However, from the governing bodies' perspective, it is too controversial, or more importantly, too commercially damaging, to start banning states from hosting tournaments based on their human rights records.[12] There are many states — such as Saudi Arabia, the United States, and others — with recognized human rights abuses that are currently still

[5] *See* Jamil Smith, *The NBA Chooses China's Money Over Hong Kong's Human Rights*, Rolling Stone (Oct. 7, 2019, 6:01 PM), https://www.rollingstone.com/politics/politics-news/daryl-morey-nba-hong-kong-houston-rockets-895706/.

[6] Matthew Yglesias, *The Raging Controversy Over the NBA, China, and the Hong Kong Protests, Explained*, Vox (Oct. 7, 2019, 4:00 PM), https://www.vox.com/2019/10/7/20902700/daryl-morey-tweet-china-nba-hong-kong.

[7] *See* Emily Feng, *As Hong Kong Protests Continue, China's Response Is Increasingly Ominous*, NPR (Aug. 13, 2019, 6:07 AM), https://www.npr.org/2019/08/13/750695968/as-hong-kong-protests-continue-chinas-response-is-increasingly-ominous; Fatima Taj, *Chinese Document Leaks Provide New Evidence of China's Persecution of Muslim Uyghur*s, Harv. Pol. Rev. (Jan. 1, 2020, 9:11 PM), https://harvardpolitics.com/world/chinese-documents-uyghurs/.

[8] *Activists Want UN to Probe 'Genocide' of China's Uighur Minority*, Al Jazeera (Sept. 15, 2020), https://www.aljazeera.com/news/2020/09/15/activists-want-un-to-probe-genocide-of-chinas-uighur-minority/?gb=true.

[9] *Id.*

[10] *Keep Anti-China Politics Out of Football, for the Sake of Sports Fans Across Asia*, S. China Morning Post (Oct. 29, 2018, 2:00 AM), https://www.scmp.com/comment/letters/article/3034557/keep-anti-china-politics-out-football-sake-sports-fans-across-asia; Nathan Reiff, *How FIFA Makes Money*, *Investopedia* (May 15, 2020, 3:00 AM), https://www.investopedia.com/articles/investing/070915/how-does-fifa-make-money.asp.

[11] Keith Bradsher & Tariq Panja, *In China, FIFA's Focus Is Soccer, Not Human Rights*, N.Y. Times (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/sports/soccer/fifa-china-soccer-human-rights.html; *see also China: Olympics Harm Key Human Rights*, Hum. Rts. Watch (Aug. 6, 2008, 8:00 PM), https://www.hrw.org/news/2008/08/06/china-olympics-harm-key-human-rights#.

[12] *China: FIFA Broke Own Rules for Club World Cup*, Hum. Rts. Watch (Nov. 27, 2019), https://www.hrw.org/news/2019/11/27/china-fifa-broke-own-rules-club-world-cup.

allowed to participate.[13] FIFA committed to comply with all internationally recognized human rights treaties, including the UN Guiding Principles on Business and Human Rights, in its guidebook on tournament host bidding.[14] Organizations, like FIFA, that operate worldwide have even published internal human rights policies that invoke international treaties such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the ILO's Declaration on Fundamental Principles and Rights at Work, among others.[15] Any organization that willingly commits itself to human rights and claims to operate within the international legal framework must be held fully accountable by the states within which it operates. If they are unwilling to act due to the financial risks, the public and individual athletes are justified in conducting strikes or boycotts, as seen most recently during the NBA playoffs following killings by police in the United States.[16]

Fans of world soccer and basketball have recently voiced disappointment in FIFA's and the NBA's decisions to engage in the colossal Chinese commercial market despite well-documented accounts that the Chinese government is violating human rights.[17] FIFA is no stranger to this criticism, as it has been embroiled in controversy surrounding the working conditions in Qatar during preparations for the 2022 World Cup.[18] The Gulf state was awarded the hosting bid ten years ago and thousands of migrant workers immigrated to Qatar to find work building stadiums and infrastructure.[19] The sudden surge of deaths of migrant workers connected to unsafe working conditions forced the Qatari government to shut down 300 work sites.[20] Even though the public outrage against the dire working conditions was swift and many inside and out of the soccer community have called for the tournament to be hosted elsewhere, FIFA has refused.[21] Reports from Human Rights Watch and Amnesty International clearly show that Qatar's government and FIFA are aware of these human rights abuses.[22] The reports also state that the outcry from international human rights organizations and the public have little effect on curbing the violations of the same international treaties that host states, like China and Qatar, and sports organizations have both committed to.[23]

China hopes to be the next frontier for sports like soccer and basketball, and it has already made mas-

[13] See Ian Vásquez & Tanja Porčnik, *The Human Freedom Index 2019: A Global Measurement of Personal, Civil, and Economic Freedom*, Cato Inst. 3-4 (2019), https://www.cato.org/sites/cato.org/files/human-freedom-index-files/cato-human-freedom-index-update-3.pdf.

[14] FIFA, FIFA's Human Rights Policy (2017), https://img.fifa.com/image/upload/kr05dqyhwr1uhqy2lh6r.pdf; UN OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011).

[15] FIFA, *supra* note 14; *see also* G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 105; Int'l Labor Org., Declaration on Fundamental Principles and Rights at Work and Its Followup (Jun. 18, 1998), https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

[16] Paolo Uggetti, *NBA, WNBA Players Stage Playoff Strike Days After Police Shoot Jacob Blake*, The Ringer (Aug. 26, 2020) https://www.theringer.com/nba/2020/8/26/21403233/nba-boycott-jacob-blake-bucks-magic.

[17] *See* Jake Simpson, *It's Every Fan's Job to Police FIFA and the Olympics Committee*, The Atlantic (Nov. 25, 2013, 10:58 AM), https://www.theatlantic.com/entertainment/archive/2013/11/its-every-fans-job-to-police-fifa-and-the-olympics-committee/281784/; *see also* Kevin Tan, *China Sports Industry Market Value and Participant Numbers Continue Steady Rise*, Sport-Business (Jul. 11, 2019, 2:45 AM), https://www.sportbusiness.com/news/sport-participant-numbers-in-china-reaches-over-64-million/.

[18] *Reality Check: Migrant Workers Rights with Four Years to the Qatar 2022 World Cup*, Amnesty Int'l (Feb. 5, 2019), https://www.amnesty.org/en/latest/campaigns/2019/02/reality-check-migrant-workers-rights-with-four-years-to-qatar-2022-world-cup/.

[19] *Qatar: Urgently Investigate Migrant Worker Deaths*, Hum. Rts. Watch (Oct. 10, 2019), https://www.hrw.org/news/2019/10/10/qatar-urgently-investigate-migrant-worker-deaths.

[20] *Id.*

[21] Ian Black, Owen Gibson, & Robert Booth, *Qatar Promises to Reform Labour Laws After Outcry Over 'World Cup Slaves,'* The Guardian (May 14, 2014 10:56 AM), https://www.theguardian.com/world/2014/may/14/qatar-reform-labout-laws-outcry-world-cup-slaves.

[22] *See Qatar*, *supra* note 19; *Reality Check*, *supra* note 18.

[23] *See Reality Check*, *supra* note 18.

sive strides in the past twenty years. The commercial potential of the market alone has made it worthwhile for sporting organizations to ignore recorded human rights abuses. As such, any interference by the international legal community in that sphere has been delegitimized.[24] Corporate entanglements between sport organizations and governments ensure that any attempt to keep politics and human rights discussions away from sports is futile. The advertising and sponsorship revenue available in the Chinese market for soccer and basketball will only continue to grow, suggesting that no unforced action by governments or sports organizations selling their product will be enough to incite real changes.[25]

The response to Mr. Morey's tweet shows that the NBA has an unbreakable and mutually beneficial relationship with China.[26] Sports organizations are, in practice, businesses that must be obligated to enforce the UN Guiding Principles on Business and Human Rights, as written by FIFA in their own guidelines.[27] These principles state that corporations should "seek to prevent or mitigate adverse human rights impacts . . . even if they have not contributed to [them]" directly.[28] The NBA and FIFA, like many businesses, operate in states that have poor human rights records; however, not many other private industries are so intertwined with the patriotism that comes along with international athletics to have an impact through their bargaining power.

The inherent value of sports organizations relies fully on the cooperation of individual athletes, and national teams made up of individuals. As we saw recently in the United States, athletes have the power to control an entire nation's conversation and influence change at the highest levels of governing institutions. The cultural popularity of sports in countries like China has the potential to affect human rights law by providing a mechanism through which investigations into human rights violations can occur. Pressure on the host state by individual athletes, in tandem with pressure from fans of the sport, may have as good a chance as any to alter a government's response to its own human rights record. Additionally, if sports organizations' governing bodies were to actually implement the human rights values written in their own published guidelines, they could plausibly influence governments to rethink their abusive policies.[29] The threat of losing the opportunity to view and participate in sport itself would ignite sufficient domestic fervor in the largest global sports market, prompting sport organizations to more carefully consider where business is taking place.

[24] *See* Howard Beck, *The NBA Can't Change China; Deal With It*, Bleacher Rep. (Oct. 19, 2019, 9:19 AM), https://bleacherreport.com/articles/2858717-the-nba-cant-change-china-deal-with-it.
[25] *See* Tim Wigmore, *Commercial and Moral Imperatives Collide as NBA Expansion in China Comes at a Price*, The Telegraph (Oct. 11, 2019, 3:28 PM), https://www.telegraph.co.uk/basketball/2019/10/11/commercial-moral-imperatives-collide-nba-expansion-china-comes/.
[26] Yglesias, *supra* note 6.
[27] See FIFA, *supra* note 14.
[28] *Id.*
[29] *See id.*

North Carolina CAFOs: An Example of Why The United States Needs to Recognize the Right to Safe, Clean Drinking Water

by Maggie Horstman[*]

North Carolina is one of the top pork producers in the nation, housing more than 9 million hogs on concentrated animal feeding operations (CAFOs).[1] Beginning in the 1990s, contract farming became the dominant method of pork production due to corporate consolidation.[2] The steep increase in factory farming, and consequentially, the increase in animal concentration and waste, has led to extensive water contamination.[3] Contract farmers are typically required to take out loans to build facilities, sign contracts with corporations, and raise the company-owned pigs according to corporate-specified methods.[4] However, contract farmers are without corporate guidance or financial support to dispose of large amounts of pig waste.[5] Waste usually ends up in pits called lagoons, fostering the growth of dangerous bacteria. When lagoons fill up, the waste is sprayed onto crop fields, releasing dangerous fumes and exposing neighboring communities to toxic air pollutants like ammonia and hydrogen sulfide.[6]

As hurricanes become more frequent in the Chesapeake Bay region, farmers are finding it increasingly difficult to contain waste inside lagoons, and micro-organisms like E. coli and fecal bacteria are now found in drinking wells in North Carolina.[7] After Hurricane Florence in 2019, forty-nine lagoons were reported to be damaged. Subsequently, tests of private wells showed a sizable increase in E. coli and total fecal coliform bacteria, in part due to farm animal waste.[8] These contaminants can cause diarrhea, cramps, nausea, and vomiting.[9]

While public water regulations are established by the Environmental Protection Agency (EPA) and enforced by the states, such regulations do not apply to private drinking wells, and residents are responsible for the safety of their own water.[10] Unfortunately, because the EPA has exempted CAFOs from notifying communities when they release dangerous toxins, there is no safeguard for private well water drinkers beyond testing the well water themselves.[11] The North Carolina Department of Environmental Quality's (DEQ) refusal to enforce stricter CAFO emission standards exposes a frightening truth: United States citizens are not guaranteed a right to safe, clean drinking water.

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[1] USDA/National Agricultural Statistics Service, *United States Hog Inventory Up 3 Percent*, Quarterly Hogs and Pigs (Dec. 2019), at 6.

[2] Jessie Stolark, *Stink, Swine, and Nuisance: The North Carolina Hog Industry and Its Waste Management Woes*, Envtl. & Energy Study Inst. (Aug. 10, 2018), https://www.eesi.org/articles/view/stink-swine-and-nuisance-the-north-carolina-hog-industry-and-its-waste-mana.

[3] *Id.*

[4] *Id.*

[5] *See id.*

[6] Jonathan Smith, *A Stench That Sickens, and An EPA That Doesn't Care*, EarthJustice (Dec. 13, 2018), https://earthjustice.org/blog/2017-november/a-stench-that-sickens-and-an-epa-that-doesn-t-care.

[7] Associated Press, *Hurricanes That Cause Major Destruction Are Becoming More Frequent, Study Says*, L.A. Times (Nov. 11, 2019, 1:09 PM), https://www.latimes.com/environment/story/2019-11-11/damaging-hurricanes-becoming-more-frequent.

[8] John Murawski, T*he Amount of E. Coli and Fecal Matter in NC Wells Has Spiked Since Hurricane Florence*, The News & Observer (Oct. 24, 2018, 3:47 PM), https://amp.newsobserver.com/news/business/article220561095.html.

[9] *Id.*

[10] *See id.* States can choose to make regulations that are more stringent than federal regulations.

[11] Emilie Karrick Surrusco, *The Storm Moved On, But North Carolina's Hog Waste Didn't*, EarthJustice (Jan. 9, 2019), https://earthjustice.org/blog/2019-january/hog-waste-creates-problems-for-north-carolina-residents.

According to the United States Geological Survey, about 2.4 million people rely on wells in their yards for water in North Carolina.[12] Many people, especially in rural areas, do not have access to the water infrastructure necessary to get access to public pipes; in fact, 1.4 million people in the United States lack access to indoor plumbing.[13] Specifically, in rural areas, seventeen percent of people report having experienced issues with safe drinking water, twelve percent of people report issues with their sewage system, and twenty-three percent of private wells tested by the United States Geological Survey showed contaminants with health concerns, including arsenic, uranium, nitrates, and E. coli.[14] Where a person lives is not the only factor determining their access to safe water; according to a study by Michigan State University, federal data does not accurately measure the water access gap, race is the strongest predicator of water and sanitation access, and poverty is a key obstacle to water access.[15] These facts are exemplified through the EPA's launch of an investigation of North Carolina for civil rights violations in 2015.[16]

Hog farm pollution is a proven contributor to widespread water pollution in North Carolina. A study published by the University of North Carolina and Johns Hopkins found that high levels of fecal bacteria in waterways were linked to industrial hog operations.[17] In an attempt to resolve water quality issues, North Carolina recently established the North Carolina Drinking Water Act, which requires the establishment of state-wide maximum contaminant levels, directs the state to consider limits on other pollutants when two or more other states have set limits on a given pollutant, requires the state to use the best available science to establish limits, and ensures contaminant limits are sufficient to protect vulnerable people, including pregnant and nursing mothers, infants, and children.[18] Unfortunately, the Act still does not guarantee clean water to all North Carolina residents because many residents from lower socio-economic backgrounds only have access to private water sources.[19] If North Carolina cannot provide public water to its citizens, it must include CAFO output restrictions in its Drinking Water Act to ensure private water is safe to consume.

The case of North Carolina CAFO pollution is just one of many examples that show the United States, with its abundant resources, fails to provide adequate water access to all its residents. Other instances of water contamination, like uranium mine leaks in a Navajo reservation's water source; lead contamination in Newark, New Jersey and Flint, Michigan; and a sewage pipe leakage in Alabama that caused a hookworm disease outbreak; among others, show that the United States has been adequately warned that it is not enough to simply ignore these ongoing crises.[20] In 2010, the United Nations established the right to water and sanitation[21] to ensure that water is sufficient, safe, acceptable, physically accessible, and affordable.[22] This right further stipulates that water be free from micro-organisms, chemical substances, and radiological hazards that create a threat to personal health.[23] Now that the EPA has provided North Carolina with a $3,682,900 grant to support efforts to improve water quality, there's no question that DEQ has the

[12] Cheryl A. Dieter et al., U.S. Dept' of Interior, Circular 1441, *Estimated Use of Water in the United States in 2015* 57 (2018).
[13] Radhika Fox, George McGraw, *Closing the Water Access Gap in the United States*, US Water Alliance.
[14] *Id.*
[15] *Id.*, at 20.
[16] Press Release, *EPA Launches Investigation of North Carolina for Civil Rights Violations*, EarthJustice (Feb. 25, 2015), https://earthjustice.org/news/press/2015/epa-launches-investigation-of-north-carolina-for-civil-rights-violations-0.
[17] Heaney, et al, *Source Tracking Swine Fecal Waste in Surface Water Proximal to Swine Concentrated Animal Feeding Operations*, Nat'l Ctr. for Biotechnology Info. (Apr. 1, 2015), https://pubmed.ncbi.nlm.nih.gov/25600418/.
[18] *Introducing the Safe Drinking Water Act*, Graig Meyer (Dec. 13, 2019), https://www.graigmeyer.com/2019/12/introducing-the-safe-water-drinking-act.
[19] *Exposure to Contaminants Among Private Well Users in North Carolina: Enhancing the Role of Public Health*, J. Envtl. Health (April 2019), https://www.neha.org/sites/default/files/jeh/JEH4.19-Column-Direct-From-CDC-EHS.pdf.
[20] Matt Black, *America's Clean Water Crisis Goes Far Beyond Flint*, Pulitzer Ctr. (Feb. 20, 2020) https://pulitzercenter.org/projects/americas-clean-water-crisis-goes-far-beyond-flint.
[21] G.A. Res., GA/10967, U.N. Doc. A/RES/64/292, 64th Sess.
[22] *The Human Right to Water and Sanitation*, U.N. Dep't of Econ. and Social Affairs, https://www.un.org/waterforlifedecade/human_right_to_water.shtml.
[23] *Id.*

resources necessary to achieve the United Nations' standards.[24]

Dutch Supreme Court Ruling Marks Sea Change in Climate Litigation

by Adrian Lewis[*]

On December 20, 2019, the Dutch Supreme Court upheld lower-court rulings on *State of the Netherlands v. Urgenda Foundation*, in which the court ordered the Dutch government to reduce the Netherlands' greenhouse gas emissions to twenty-five percent below 1990 levels by the end of 2020.[1] This successful conclusion to more than four years of court proceedings has been called the strongest legal response to climate change in history and may represent the dawn of a new era in climate litigation.[2] These proceedings are representative of environmental activists' latest strategy to prompt more ambitious government responses to the climate crisis. The European Union (EU) has been the vanguard of progressive climate policy, imposing legally binding emissions targets on member states,

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[1] *Dutch supreme court upholds landmark ruling demanding climate action*, The Guardian (Dec. 20, 2019), https://www.theguardian.com/world/2019/dec/20/dutch-supreme-court-upholds-landmark-ruling-demanding-climate-action (last visited Sep. 27, 2020).

[2] *Landmark Decision by Dutch Supreme Court*, Urgenda, https://www.urgenda.nl/en/themas/climate-case/ (last visited Aug. 23, 2020); John Schwartz, *In "Strongest" Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. Times (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html; Environmental Law Alliance Worldwide, Climate Litigation Primer, (2018), https://elaw.org/system/files/attachments/publicresource/ELAW.primer_4.pdf.

[24] Press Release, Dawn Harris-Young, *North Carolina Recieves $3,682,900 Million Grant to Support Efforts to Improve and Protect Water Quality*, U.S. Envtl. Prot. Agency (Sep. 19, 2019), https://www.epa.gov/newsreleases/north-carolina-receives-3682900-million-grant-support-efforts-improve-and-protect-0.

while seeing the member states meet them.[3] In 2018, the Netherlands reduced its greenhouse gas emissions to twenty-three percent below 1990 levels.[4] Member states across the EU should take note of the landmark decision in *Netherlands v. Urgenda* and take proactive steps to ensure their national policies aimed at combatting climate change match the precedent set by the Netherlands.[5]

Rapid advances in the scientific community's understanding of climate change have resulted in significant momentum around efforts to quantify state and corporate actors' liability for environmental degradation.[6] The widespread availability of such evidence makes it easier for lawyers to bring readily actionable claims capable of holding corporations and governments accountable for their role in creating the current climate crisis.[7] Environmental groups in the EU have adopted strategic climate litigation tactics.[8] For example, mounting public pressure led the European Commission, the twenty-seven-country bloc's executive body, to announce a "Green Deal" agenda in March 2020.[9] The EU's stated goal is to cut greenhouse gas emissions to zero by 2050, and the proposed "Green Deal" legislation would make associated country-level policy requirements legally binding and irreversible for all EU member states.

Arguments made in the *Urgenda* lawsuit, and reiterated in the Dutch Supreme Court's opinion, emphasized the disastrous effects of climate change on citizens' basic human rights and invoked the Netherlands' treaty obligations under regional and international human rights law, including the European Convention on Human Rights (ECHR).[10] The Supreme Court's decision was based on principles of international law and establishes a strong legal foundation for recognizing governments' necessary role in mitigating climate change.[11]

Urgenda Foundation, the Dutch environmental nonprofit that brought the suit, based its successful legal argument largely on the Dutch government's obligations to address environmental degradation under regional and international human rights law.[12] The central issue in the case was whether the state had a duty to impose greater reductions in greenhouse gas emissions beyond limits already imposed by Dutch climate policy.[13] While Urgenda's case was based on the State's duty of care under the national civil code, the legal argument emphasized principles articulated in Article 2 of the ECHR.[14] Article 2 ensures the right to life and has been interpreted by Dutch courts to

[3] 2020 Climate and Energy Package, European Commission, https://ec.europa.eu/clima/policies/strategies/2020_en#tab-0-1 (last visited Aug. 23, 2020); Progress Made in Cutting Emissions, European Commission, https://ec.europa.eu/clima/policies/strategies/progress_en (last visited Aug. 23, 2020).

[4] *EU Greenhouse Gas Emissions Down 23% Since 1990, Still Implementation Will Have to be Further Accelerated to Reach Current 2030 Targets*, European Commission (Oct. 31, 2019), https://ec.europa.eu/clima/news/eu-greenhouse-gas-emissions-down_en.

[5] James L. Huffman, *Dutch ruling will set precedent for courts to review climate science*, The Hill (Dec. 29, 2019, 3:00 PM), https://thehill.com/opinion/energy-environment/476166-dutch-ruling-will-set-precedent-for-courts-to-review-climate.

[6] Greenpeace International, *Who is Responsible for Climate Change?* (Greenpeace, 2013).

[7] *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change*, Int'l Bar Ass'n, https://www.ibanet.org/Climate-Change-Model-Statute.aspx (last visited Sep. 27, 2020).

[8] *Urgenda Foundation v. State of the Netherlands*, Climate Change Litigation Databases, http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ (last visited Aug. 23, 2020).

[9] Samuel Petrequin, *EU Commission Unveils Climate Law Amid Criticism*, AP News (Mar 4, 2020), https://apnews.com/22d55a676a7d49ed11a9ac2d1ad8d208.

[10] Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, 8 (Granthan Research Inst. eds., 2019), https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf.

[11] André Nollkaemper & Laura Burgers, *New Classic in Climate Change Litigation: the Dutch Supreme Court Decision in the Urgenda Case*, EJIL:Talk! (Jan. 6, 2020), https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/.

[12] Katherine Dunn, *Climate Change Litigation Enters a New Era as Court Rules that Emissions Reduction is a Human Right*, Fortune (Dec. 20, 2019, 8:40 AM), https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/.

[13] U*rgenda Foundation v. The State of the Netherlands*, Envtl. Law Alliance Worldwide, https://elaw.org/nl.urgenda.15 (last visited Aug. 23, 2020).

[14] Isabelle Kaminski, *Final Appeal in Historic Urgenda Case May Hinge on Human Rights*, Climate Docket (May 28, 2019), https://www.climatedocket.com/2019/05/28/urgenda-netherlands-emissions-human-rights/; European Convention on Human Rights, art. 2, Nov. 4, 1950, C.E.T.S. No. 194. 6, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

impose a positive obligation on states in the context of dangerous activities, such as nuclear tests, the operation of chemical factories, and the release of toxic emissions from waste-collection sites).[15] In its 2015 ruling, the Court of Appeal called the State's policy emphasis on a thirty percent reduction insufficient.[16] The court noted that as a highly developed nation, the Netherlands "has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world."[17] The court then invoked the country's international treaty obligations and explained, "the State should assume its responsibility, a sentiment that was also expressed in the United Nations Framework Convention on Climate Change and the Paris Agreement."[18]

The European Court of Human Rights (ECtHR) has also concluded that under Articles 2 and 8 of the ECHR, governments must take positive steps to safeguard human rights that are directly affected by adverse environmental factors.[19] Under the "doctrine of positive obligations," the Court has required national governments to take positive measures to mitigate harm, including (1) ending the offensive behaviors; (2) guaranteeing access to information for affected citizens; (3) ensuring the offender's compliance with applicable regulations; and (4) financing citizens' relocation in situations where the activity is deemed to be in the public interest.[20]

In *López Ostra v. Spain*, the Court held that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely," thereby violating Article 8 of the ECHR.[21] In addition, rulings from the European Court of Justice (ECJ) have held that states must uphold citizens' procedural right to access European courts for the adjudication of environmental cases.[22] Finally, the Netherlands ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1978. Under Article 11(2)(a) of the ICESCR, the Netherlands, along with seventy other signatory states, committed to take necessary measures to achieve the most efficient utilization of natural resources.[23] Under Section 2(a), States must "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources."[24]

Strategic climate litigation has seen a rapid uptake in domestic courts around the world, in countries like Norway, Ireland, Switzerland, Colombia, and

[15] *Guide on Article 2 of the European Convention on Human Rights*, (European Court of Human Rights, ed., 2020), https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf (see para. 4.49(2)(b).
[16] Sike Goldberg & Benjamin Rubinstein, *Decision of the Dutch Court of Appeal, Urgenda Foundation v Kingdom of the Netherlands – Case Summary*, Herbert Smith Freehills (Oct. 17 2018), https://www.herbertsmithfreehills.com/latest-thinking/decision-of-the-dutch-court-of-appeal-urgenda-foundation-v-kingdom-of-the.
[17] *Netherlands*, U.S. Energy Info. Admin. (Aug. 2016), https://www.eia.gov/international/analysis/country/NLD.
[18] United Nations: Framework Convention on Climate Change: Conference of the Parties, Twenty-first session, Proposal by the President, *Adoption of the Paris Agreement*, Dec. 12, 2015, https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.
[19] *Manual on Human Rights and the Environment*, 8 (Council of Europe Publishing, ed., 2nd ed. 2012), https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf.
[20] Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights* 47 (Council of Europe, ed., 1st ed. 2007), https://rm.coe.int/168007ff4d.
[21] *López Ostra vs. Spain, 1994 (Application no. 16798/90)*, ESCR-Net, https://www.escr-net.org/caselaw/2008/lopez-ostra-vs-spain-application-no-1679890 (last visited Aug 23, 2020).
[22] *Urgenda Foundation v. Netherlands*, 2015 (Case Number C/09/456689), Hague District Court, Chamber for Commercial Affairs, June 24, 2015, https://elaw.org/system/files/urgenda_0.frpdf.
[23] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Elisabeth Wickeri & Anil Kalhan, *Land Rights Issues in International Human Rights Law*, Inst. for Human Rights and Bus., https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf (last visited Aug 23, 2020).
[24] *Id.*

Pakistan.[25] While such cases have met with varying degrees of success, environmentalists are becoming more effective strategic litigants. Civil society and the scientific community have joined forces, leveraging statistical and quantitative evidence of environmental degradation to strengthen legal arguments that demand government action to combat the disastrous effects of climate change.[26]

Reflecting on the international significance of the decision, the UN High Commissioner for Human Rights, Michelle Bachelet, applauded the Dutch Supreme Court's confirmation that governments have binding obligations under international human rights law to undertake strong reductions in emissions of greenhouse gases.[27] Climate litigants should build on the Dutch Supreme Court's holding by bringing claims that emphasize the clear link between the imminent threat to life posed by climate change and EU citizens' guaranteed right to life under the ECHR, establishing a body of case law that strengthens this nascent human rights-based legal framework.[28]

International law creates norms and standards that signatory states agree to uphold in international and domestic spheres. It establishes policies that reflect the existing practices of some States but may reflect only the aspirations of others. In the European context, the ECHR establishes binding legal standards for the protection of human rights across Europe. For a legal instrument like the ECHR to have teeth however, cases like *Urgenda* must be brought before courts that will interpret the meaning of the text and determine its appropriate application.

In *Urgenda*, lawyers focused on European citizens' right to life under Article 2 of the ECHR and successfully argued for a judicial interpretation of the article that requires the Dutch government to realize quantifiable reductions in greenhouse gas emissions in order to fulfill its obligation to protect citizens' right to life. The landmark decision creates legal precedent that is binding on the domestic courts of every EU member State. The precedent it establishes can now be argued in courts across Europe, forcing national governments to pursue similar reductions. In this way, a progressive interpretation of the "right to life" by a Dutch court could result in a dramatic reduction in greenhouse gas emissions across the continent.

[25] Ucilia Wang, *Overturn Landmark Urgenda Climate Ruling*, Climate Docket (May 30, 2018), https://www.climatedocket.com/2018/05/30/urgenda-climate-ruling-netherlands/; Ucilia Wang, *Norway Court Affirms Climate Rights, but Oks Oil Leases Anyway*, Climate Docket (Jan. 5, 2018), https://www.climatedocket.com/2018/01/05/norway-climate-change-rights/; Karen Savage, *Ireland Recognizes Constitutional Right to a Safe Climate and Environment*, Climate Docket (Dec. 11, 2017), https://www.climatedocket.com/2017/12/11/ireland-constitutional-right-climate-environment-fie/; *English Summary of our Climate Case*, KlimaSeniorinnen, https://klimaseniorinnen.ch/english/ (last visited Aug. 23, 2020); Santiago Ardila Sierra, *The Colombian Government has Failed to Fulfill the Supreme Court's Landmark Order to Protect the Amazon*, DeJusticia (Apr. 5, 2019), https://www.dejusticia.org/en/climate-change-colombia-lawsuit/; Jacqueline Peel & Hari M. Osofksy, *A Rights Turn in Climate Change Litigation?*, 7 Transnat'l Envtl L. 37, 37-67 (2018).

[26] *State of Netherlands v. Urgenda Foundation*, 132 Harv. L. Rev. 2090, 2090-2097 (2019), https://harvardlawreview.org/wp-content/uploads/2019/05/2090-2097_Online.pdf.

[27] *Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change*, United Nations Human Rights Office of the High Commissioner, (Dec. 20, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E.

[28] *Netherlands v. Urgenda, Summary of the Decision* (English, not authoritative), Dec. 20, 2019, https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf; Siobhán McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 Harv. Envtl L. Rev. 431, 431-437 (2009); Jo Crichton, et al., *Human Rights Legal Framework*, GSDRC, (March 2015), https://gsdrc.org/topic-guides/human-rights/human-rights-legal-framework/.

Australia's First Nations Community and the Right to Water

by Maya Martin Tsukazaki[*]

Australia's First Nations peoples[1] have historically valued water as the essential source of life.[2] However, Australia is a continent with frequent droughts that are exacerbated by climate change.[3] Because of this, Australia's water management policies tend to prioritize water access in the more densely populated southern cities, or in northern farms and pastures.[4] These policies have often been implemented at the expense of rural First Nations communities' access to water.[5] In the Northern Territory (NT), water tainted with lead, manganese, and uranium has harmed First Nations communities.[6] In the town of Laramba, a majority-First Nations community with 350 residents, reports revealed that the drinking water has been contaminated by uranium at nearly 300 percent over the safe level for over ten years.[7] In November 2019, after the government failed to take any action based on these reports, the community of Laramba sued the NT Department of Housing for failing to solve the

[*] *Maya Martin Tsukazaki is a second-year law student, also pursuing a master's degree in international affairs from American University. The author wishes to emphasize that Aboriginal and Torres Strait Islander groups have been fighting for preservation and recognition of their land and water rights since the colonization of the continent of Australia. A few Indigenous-led organizations that are active in land and water rights advocacy today include ANTaR, https://antar.org.au/, and SEED Youth Climate Network, https://www.seedmob.org.au/.*

[1] In this article "First Nations" is used to refer to the peoples indigenous to the main island of Australia. The Australian government officially refers to indigenous Australians as Aboriginal and Torres Strait Islander people. *See Indigenous Australians: Aboriginal and Torres Strait Islander people*, Australian Inst. for Aboriginal and Torres Strait Islander Studies (AIATSIS), https://aiatsis.gov.au/explore/articles/indigenous-australians-aboriginal-and-torres-strait-islander-people (last visited 30 Sept. 2020). Some communities claim the term "Aboriginal person." *See Indigenous Terminology*, Univ. of New South Wales (2019), https://teaching.unsw.edu.au/indigenous-terminology. However, other Indigenous groups, particularly outside of the context of Australia, argue that the term "aboriginal" can be used to mean "not original." *See Why we say "Indigenous" and not "Aboriginal"*, Indigenous Innovation (June 17, 2020), https://www.animikii.com/news/why-we-say-indigenous-instead-of-aboriginal. For clarity, this article will use the term "First Nations peoples" to recognize the communities in this article as the sovereign, original inhabitants of the land. *See also Aboriginal, Indigenous, or First Nations?*, Common Ground, https://www.commonground.org.au/learn/aboriginal-or-indigenous (last visited 30 Sept. 2020).

[2] Sue Jackson, *Aboriginal Access to Water in Australia: A Social Justice Challenge for the Murray Darling Basin Plan*, Glob. Water F. (Oct. 6, 2010), https://globalwaterforum.org/2010/10/06/aboriginal-access-to-water-in-australia-a-social-justice-challenge-for-the-murray-darling-basin-plan/. This article was written before the global COVID-19 pandemic, which has heightened needs for access to clean water and sanitation.

[3] *Annual Climate Statement 2019*, Austl. Gov't Bureau Meteorology (Jan. 9, 2020), http://www.bom.gov.au/climate/current/annual/aus/#tabs=Rainfall.

[4] Virginia Marshall, *Deconstructing Aqua Nullius: Reclaiming Aboriginal Water Rights and Communal Identity in Australia*, 8 Indigenous L. Bull. 9 (2016).

[5] Elizabeth Macpherson et al., *Water in Northern Australia: A History of Aboriginal Exclusion*, The Conversation (Aug. 1, 2016), https://theconversation.com/water-in-northern-australia-a-history-of-aboriginal-exclusion-60929.

[6] Nina Lansbury Hall et al., *Getting Clean Drinking Water Into Remote Indigenous Communities Means Overcoming City Thinking*, The Conversation (Nov. 20, 2018), https://theconversation.com/getting-clean-drinking-water-into-remote-indigenous-communities-means-overcoming-city-thinking-106701.

[7] *Pleas for Action Over Uranium in Drinking Water*, ABC News (June 20, 2018), https://www.abc.net.au/7.30/pleas-for-action-over-uranium-in-drinking-water/9887966; Helen Davidson, *Uranium in Remote Communities' Water Puts 'People's Lives at Risk',* The Guardian (June 19, 2018), https://www.theguardian.com/australia-news/2018/jun/20/uranium-in-remote-communities-water-puts-peoples-lives-at-risk.

contaminated water issue.[8] However, in July 2020, the NT Civil and Administrative Tribunal found that this was not the Department of Housing's responsibility.[9] By failing to provide safe drinking water for its First Nations population in Laramba and elsewhere, Australia is violating human rights norms, as well as its domestic Native Title Act.[10]

As rainfall is somewhat heavier in the north of Australia than in the middle and southern regions of the country, the government has introduced irrigation techniques to supply water throughout the rest of the country.[11] Extreme droughts from 1997-2009 led to the implementation of the National Water Initiative ("The Initiative"), which planned new irrigation channels and dams across Australia.[12] In The Initiative, the Australian government wrote that it must consider any claims to native title before making water management decisions; however, the government failed to stipulate how to establish whether any First Nations persons held title to groundwater.[13] The Australian government has made some effort to incorporate traditional First Nations water management methods into national policy, but little has been done to include the First Nations community in water management discussions.[14] Human Rights Watch reported that severe droughts, driven by climate change, will continue to aggravate the lack of clean drinking water in Australia, disproportionately affecting small, rural, First Nations communities.[15]

The issue of First Nations water access is particularly relevant in NT, where 25.5 percent of the population is of First Nations descent.[16] While thirty percent of land in Australia is under native title (twenty-three percent in NT), only 0.01 percent of water rights belong to the First Nations population.[17] The water supply for most rural NT communities comes from bore water, or groundwater, collected from deep underground.[18] Groundwater often contains higher concentrations of potentially harmful minerals.[19] While the uranium in Laramba's water supply may have been naturally occurring in the soil, mining and farming activity has also been known to increase mineral content.[20] In 2018, reports exposed that the bore water supply in Borroloola, NT was heavily contaminated by zinc and manganese from a nearby mining operation.[21] In 2018, journalists exposed that, for the past decade, at least three rural First Nations communities in NT, including Laramba, were consuming water with uranium levels significantly higher than the maximum safe level.[22]

[8] Isabella Higgins, *Indigenous Community Launches Lawsuit Against NT Government Over Housing, Uranium Water Issues*, ABC News (Nov. 18, 2019), https://www.abc.net.au/news/2019-11-19/indigenous-community-launches-law-suit-against-nt-government/11696158.

[9] Katrina Beavin & Henry Zwartz, *Residents of Remote NT Community of Laramba Lose Legal Battle Over Uranium in Water*, ABC News (Jul. 14, 2020), https://www.abc.net.au/news/2020-07-14/nt-community-laramba-lose-legal-battle-over-uranium-in-water/12454206 (noting that the plaintiffs from Laramba plan to appeal the decision).

[10] *Native Title Act 1993* (Commonwealth) (Austl.), https://www.legislation.gov.au/Details/C2019C00054.

[11] *Climatic Extremes*, Austl. Gov't: Geoscience Austl., https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/climatic-extremes (last visited Sept. 20, 2020); Macpherson, supra note 5.

[12] Lily O'Neill et al., *Australia, Wet or Dry, North or South: Addressing Environmental Impacts and the Exclusion of Aboriginal Peoples in Northern Water Development*, 33 Env't & Plan. L. J. (2016).

[13] Marshall, *supra* note 4. While the Native Title Act refers to "indigenous" populations, this article uses the term First Nations peoples.

[14] *Id.*

[15] Elaine Pearson & Louise Chappell, *5 Human Rights Issues That Defined 2019*, The Conversation (Dec. 10, 2019), https://theconversation.com/5-human-rights-issues-that-defined-2019-126939.

[16] *2016 Census QuickStats: Northern Territory*, Austl. Bureau of Statistics, https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/7?opendocument (last updated Sept. 19, 2020).

[17] O'Neill, *supra* note 12 at 14; *Native Title Newsletter Vol. 2*, AIATSIS (2018) 1, 10-11, https://aiatsis.gov.au/sites/default/files/research_pub/1802_nativetitlenewsletter_final_web_0_2.pdf.

[18] *Environmental Health: Water Supply*, Austl. Indigenous HealthInfoNet, https://healthinfonet.ecu.edu.au/learn/determinants-of-health/environmental-health/water-supply/ (last visited Sept. 20, 2020).

[19] Isabella Higgins et al., *'Our Kids Need Proper Water': Families Plead for Action Over Uranium in Drinking Water*, ABC News (June 19, 2018), https://www.abc.net.au/news/2018-06-19/families-plead-for-action-over-uranium-in-drinking-water/9879748.

[20] Lansbury Hall, *supra* note 6; Higgins, *supra* note 8.

[21] Helen Davidson, *NT Camp Water Still Contaminated Two Weeks After Alert*, The Guardian (May 5, 2018), https://www.theguardian.com/australia-news/2018/may/05/nt-camp-water-still-contaminated-two-weeks-after-alert.

[22] Davidson, *supra* note 7.

Australia has violated human rights norms by failing to provide clean water access to its citizens, a basic human right. Australia is also violating its obligation to First Nations communities and their right to access and autonomy over safe drinking water. First, the 2002 Committee on Economic, Social and Cultural Rights (CESCR) wrote a general comment outlining the right to water, which clarified that the right to an adequate standard of living was preserved in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[23] Second, the UN General Assembly adopted Resolution 64/292 in 2010, which declared that access to clean water is a human right.[24] Australia abstained from this vote but did not dissent. Third, Article 32 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Australia signed in 2009, asserts that states must obtain consent from indigenous peoples before developing, utilizing, or exploiting natural resources that are held by those communities.[25] Additionally, Article 7 of the UNDRIP protects the indigenous individual's inherent right to life, a jus cogens standard that is echoed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the ICESCR.[26] Failure to maintain safe drinking water sources causes significant health problems, which violates the adequate standard of living obligation protected in the ICESCR.[27]

Perhaps most significantly, Australia's 1993 Native Title Act (NTA) protects the water rights of First Nations peoples.[28] Section 24HA gives Aboriginal and Torres Strait Islander peoples with title to any body of water the right to be informed and negotiate on water management and regulation.[29] This includes surface and subterranean water.[30] Section 212 states that while the Commonwealth of Australia can claim water rights, First Nations claims to water rights are not necessarily automatically extinguished.[31] Approximately twenty-three percent of the land in NT is held under native title, and according to the NTA, First Nations communities should have a greater voice over the use of the adjoining subterranean groundwater.[32]

As recommended by both the NTA and UNDRIP, Australia must commit to giving First Nations communities a voice in the approval of activities that degrade the environment and affect their communities' access to both land and water. However, the NTA also preserves the government's right to manage most natural resources, including water.[33] Thus, the Australian government still has ultimate responsibility over water management in First Nations communities. Therefore, the NT and Australian governments cannot claim that they have no responsibility for water access in communities like Laramba because, under the ICESCR, the Australian government still has an obligation provide safe drinking water to all communities.[34]

Rural access to clean water is a problem that will increase with climate change, as temperatures rise and

[23] U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rts., General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); International Covenant on Economic, Social and Cultural Rights art. 11, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICCPR].

[24] G.A. Res. 64/292 (Aug. 3, 2010).

[25] G.A. Res. 61/295, art. 32, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]; *Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights*, UN News (Apr. 3, 2009), https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights.

[26] UNDRIP, *supra* note 25 art. 7; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); ICCPR, *supra* note 23; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[27] Division of Toxicology & Human Health Sciences, *Public Health Statement: Uranium*, Agency for Toxic Substances & Disease Registry (Feb. 2013), https://www.atsdr.cdc.gov/ToxProfiles/tp150-c1-b.pdf; ICSECR, *supra* note 26.

[28] *Native Title Act 1993*, *supra* note 10. Note that the Native Title Act refers to "Aboriginal and Torres Strait Islander peoples," although the term "indigenous" is used to refer to land use agreements with Aboriginal and Torres Strait Islander communities.

[29] Katie O'Bryan, *More Aqua Nullius? The Traditional Owner Settlement Act 2010 (VIC) and the Neglect of Indigenous Rights to Manage Inland Water Resources*, 40 Melb. U. L. Rev. 547 (2016).

[30] N*ative Title Act 1993*, *supra* note 10.

[31] O'Bryan, *supra* note 29.

[32] *Native Title Newsletter*, *supra* note 17 at 10-11.

[33] *Native Title Act 1993*, *supra* note 10.

[34] Davidson, *supra* note 7.

extreme droughts and unpredictable weather grow more frequent.[35] If Australia fails to take action, there will undoubtedly be more communities like Laramba. The Australian government is violating the right to life, delineated in the ICCPR, ICESCR, and UDNRIP, by failing to provide safe drinking water to all peoples. In NT, where a significant percent of the population is rural and of First Nations descent, it is imperative that the NT government takes further action by enacting legislation to comply with the NTA and ensure that all persons have equal access to safe, clean drinking water.[36] Australia has violated international and domestic law by failing to address the issue of contaminated water for over a decade. The Australian government needs to prioritize the needs of First Nations communities to find a sustainable, safe solution to protect every Australian's right to water.

[35] U.N. Water, *Water and Climate Change*, U.N., https://www.unwater.org/water-facts/climate-change/ (last visited Sept. 20, 2020); *State of the Climate Report 2018: Australia's Changing Climate,* CSIRO & Austl. Bureau of Meteorology, https://www.csiro.au/en/Research/OandA/Areas/Assessing-our-climate/State-of-the-Climate-2018/Report-at-a-glance (last updated Dec. 20, 2019).

[36] *2016 Census QuickStats*, *supra* note 16; Royce Kurmelovs, *High Levels of Uranium in Drinking Water of NT Community*, NITV (Jul. 31, 2020), https://www.sbs.com.au/nitv/article/2020/07/31/high-levels-uranium-drinking-water-nt-community (noting that NT does not have a law setting a minimum standard for drinking water, unlike other states and territories).

U.S. "Asylum Cooperative Agreements" with Central American Countries Are Unlawful

by María Alejandra Torres[*]

At the beginning of 2020, the Trump administration announced that it would begin deporting Mexican asylum seekers to Guatemala to claim asylum there, as part of a bilateral agreement with Guatemala.[1] The United States is working on similar agreements with Honduras and El Salvador.[2] Although the media has referred to these agreements as "Safe Third Country" agreements, the U.S. government calls them "Asylum Cooperative Agreements" ("ACAs") insofar as the government has negotiated cooperation with these states

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[1] Priscilla Alvarez & Geneva Sands, *US to Send Mexican Asylum Seekers to Guatemala*, CNN Pol. (Jan. 7, 2020), https://www.cnn.com/2020/01/07/politics/us-sending-mexican-asylum-seekers-guatemala/index.html.

[2] Geneva Sands et al., *Trump Administration Begins Deporting Asylum Seekers to Guatemala*, CNN Pol. (Nov. 21, 2019), https://www.cnn.com/2019/11/21/politics/guatemala-asylum-agreement/index.html.

to divert asylum seekers from the United States.[3] The ACAs are an attempt by the current administration to prevent asylum seekers who transit through the Northern Triangle (Guatemala, Honduras, and El Salvador) and Mexico from reaching the United States. However, these ACAs violate the U.S. Refugee Act of 1980 and the UN Convention and Protocol Relating to the Status of Refugees, which both protect refugees and asylum seekers.[4]

People from Mexico and Central America migrate to and seek asylum in the United States to escape gang violence, pervasive poverty, domestic violence, economic inequality, political turmoil, the aftermath of civil wars, narco-trafficking, and natural disasters caused by climate change.[5] The immigration debate in the United States is mostly centered on curtailing immigration to the U.S. because some politicians frame immigration as individual decisions to take advantage of asylum relief, instead of analyzing how the United States has sent troops to the region, bribed governments there, and supported elites who protect U.S. business interests, thereby playing a role in engendering systemic issues.[6] Despite the history of U.S. involvement in the region, the Trump administration has not addressed the role of U.S. foreign policy in contributing to violence and destabilization in the region. Rather, it has sought to vilify immigrants, particularly those from Mexico, who are seeking refuge in the United States.[7]

The United States acceded to the 1967 Protocol to the Refugee Convention (Protocol) in 1968, and then Congress enacted the Refugee Act in 1980.[8] Article 33 of the Protocol states that "no Contracting State shall expel . . . a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or opinion."[9] Similarly, pursuant to the Immigration and Nationality Act, a Safe Third Country is one in which the life or freedom of a removed person "would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where [that person] would have access to a full and fair procedure for determining a claim to asylum."[10] That is, the country must demonstrate that it is capable of providing safety, security, and due process for asylum seekers who flee persecution because of their identities, where they will not be subjected to identical or further persecution.[11]

Guatemala, Honduras, and El Salvador do not qualify as Safe Third Countries under U.S. law. The U.S. Department of State recognizes that Central American migrants face danger in both Mexico and Guatemala because government officials and criminal gangs see them as "vulnerable prey," susceptible to extortion and violence.[12] Further, the United Nations High Commissioner for Refugees (UNHCR) reported that referral mechanisms in these countries for asylum seekers are inadequate and that authorities—police

[3] Justice for Immigrants, *Asylum Cooperative Agreement Backgrounder* (Jan. 24, 2020), https://justiceforimmigrants.org/what-we-are-working-on/asylum/asylum-cooperative-agreement-backgrounder/.

[4] Susan Gzesh, *"Safe Third Country" Agreements with Mexico and Guatemala Would Be Unlawful*, Just Security (Jul. 15, 2019), https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/; *The Refugee Act*, Office of Refugee Resettlement (Aug. 29, 2012), https://www.acf.hhs.gov/orr/resource/the-refugee-act; Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"], Apr. 22, 1954, 189 U.N.T.S. 137.

[5] Alisson O'Connor et al., *Central American Immigrants in the United States*, Migration Pol. Inst. (Aug. 15, 2019), https://www.migrationpolicy.org/article/central-american-immigrants-united-states.

[6] Jeff Faux, *How US Foreign Policy Helped Create the Immigration Crisis*, The Nation (Oct. 18, 2017), https://www.thenation.com/article/archive/how-us-foreign-policy-helped-create-the-immigration-crisis/.

[7] *See*, *e.g.*, Michelle Mark, T*rump Just Referred to One of His Most Infamous Campaign Comments: Calling Mexicans 'Rapists'*, Bus. Insider (Apr. 5, 2018), https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4.

[8] Refugee Convention, *supra* note 4; *The Refugee Act*, *supra* note 4; UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

[9] *See* Refugee Convention, *supra* note 4, art. 33.

[10] 8 U.S.C. § 1158(a)(2)(A) (2018).

[11] *See* Gzesh, *supra* note 4.

[12] *Id.*

and migration officers—lack adequate training on refugee law.[13]

The UNHCR defines a "safe country" as a non-refugee-producing country in which refugees can enjoy asylum without danger.[14] The Northern Triangle produces large numbers of refugees. According to the UNHCR, in 2018, over 30,000 Guatemalans, over 33,000 Salvadorians, and over 24,000 Hondurans filed claims for asylum in the United States.[15] If people are fleeing these countries because of pervasive violence, Mexican asylum seekers deported to these countries, as foreigners, would also see their livelihood and freedom threatened. The multifaceted violence that would threaten their livelihood and freedom contravenes Article 33 of the Protocol, which prohibits refoulement.[16] For example, Mexican asylum seekers would not have access to a full and fair procedure in Guatemala because Guatemala does not have a system in place capable of both granting asylum and protecting asylum-seekers given that it does not have sufficient interview personnel or shelters.[17] Guatemala created its own asylum system in 2001 but the commission that adjudicates cases rarely even meets because it receives very few applications.[18] Moreover, only high level officials can approve claims in Guatemala's limited asylum system, causing "massive bottlenecks" in a system that is now just beginning to function, in part because of the ACA transferees.[19] The Trump Administration's proposed ACAs with these Central American countries are not only contradictory to the reality of the region, but also unlawful under both domestic and international law. *U.T. v. Barr* is currently pending in federal court, a case challenging the ACAs with Guatemala and other states under U.S. law as a senseless policy that makes a "mockery of the United States' obligations to protect the persecuted."[20]

Seeking asylum is a fundamental human right expressed in Article 14 of the Universal Declaration of Human Rights (UDHR).[21] However, these circumstances demonstrate how the Trump Administration is circumventing existing law to prevent awarding asylum status to people who are fleeing persecution, exacerbated partly by U.S. foreign policy. Furthermore, under the Immigration and Nationality Act, all asylum seekers who arrive in the United States may apply for asylum, whether at a designated port of arrival or not.[22] The U.S. government must cease negotiating these bilateral negotiations with Central American countries and only create "Safe Third Country" agreements with countries that have the resources to provide safety and thorough administrative processes to deported asylum seekers.

[13] U.S. Dep't of State, *Guatemala 2018 Human Rights Report* (2018), https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.

[14] UNHCR, *Background Note on the Safe Country Concept & Refugee Status EC/SCP/68* (Jul. 26, 1991), https://www.unhcr.org/en-us/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html.

[15] UNHCR, *Global Trends: Forced Displacement in 2018*, https://www.unhcr.org/en-us/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html.

[16] *See* Refugee Convention, *supra* note 4, art. 33.

[17] Ashoka Mukpo, *Asylum-Seekers Are Being Abandoned in Guatemala in a New Policy Officials Call a "Total Disaster,"* ACLU (Jan. 28, 2020), https://www.aclu.org/news/human-rights/asylum-seekers-are-being-abandoned-in-guatemala-in-a-new-policy-officials-call-a-total-disaster/.

[18] David C Adams, *Guatemala's "Embryonic" Asylum System Lacks Capacity to Serve as Safe U.S. Partner, Experts Say*, Univision (Aug. 2, 2019), https://www.univision.com/univision-news/immigration/guatemalas-embryonic-asylum-system-lacks-capacity-to-serve-as-safe-u-s-partner-experts-say.

[19] *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*, Human Rights Watch (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#.

[20] *Groups File Federal Lawsuit Challenging Trump Administration's So-Called 'Safe Third Country' Asylum Policy*, ACLU (Jan. 15, 2020), https://www.aclu.org/press-releases/groups-file-federal-lawsuit-challenging-trump-administrations-so-called-safe-third.

[21] G.A. Res. 217 (III) A, Universal Declaration on Human Rights, art. 14 (Dec. 10, 1948).

[22] 8 U.S.C. § 1158(a)(1) (2018).

The Regional Systems section follows the decisions and conclusions of both the Inter-American Commission for Human Rights and the Inter-American Court of Human Rights. The following articles examine some of the issues that the Inter-American Commission addressed at its most recent hearings.

Forced Pregnancy and Gender Based Violence in Latin America

*by Miranda Carnes**

Under international human rights law, women and girls have a right to equality, life, non-discrimination, and a life free from sexual violence.[1] In particular, the American Convention on Human Rights guarantees the right to life, the right to humane treatment, and the right to equal protection under the law.[2] Additionally, because teenage girls are children, they require a heightened level of protection from their government and the international legal framework.

On October 8, 2020, civil society organizations from the Latin American region discussed *Sexual Violence, Forced Pregnancy, and Access to Health Services during the COVID-19 Pandemic*.[3] The organizations represented the rights of women in Peru, Ecuador, Guatemala, Colombia, Nicaragua, El Salvador, and Latin America, in general. In their opening remarks, the civil society organizations highlighted the dire situation of young girls in the Latin American region, noting that Latin America is the only region in the world where pregnancies of girls under fourteen

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[1] IACHR, *Violence and Discrimination against Women and Girls*, ¶ 1, OAS/Ser.L/V/II Doc 233 (November 2019).

[2] *See* American Convention on Human Rights "Pact of San Jose, Costa Rica", Nov. 22, 1969 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970) at art, 4,5,6.

[3] *Sexual violence forced pregnancy and access to health services in the context of the COVID-19 pandemic*, 177 Session Period Public Hearings, IACHR (October 8, 2020).

continue to increase. In fact, every day five girls are forced to become pregnant. These staggering statistics have serious implications for girls in Latin America, resulting in higher rates of suicide in young girls who are victims of forced pregnancy. With the COVID-19 pandemic, cases of sexual violence and forced pregnancy have increased during lockdown and quarantine procedures. Additionally, without the normal freedom of movement, women struggle to access emergency abortions or adequate OB-GYN care. The pandemic has also undoubtedly exacerbated accounts of gender-based violence and sexual violence in Latin America.

Without the added pressures of the COVID-19 pandemic, women face symptomatic discrimination in Latin America. Like many women around the world, Latin American women lack equal pay in completing the same work as their male counterparts.[4] Because of prevailing gender stereotypes, Latin American women also suffer from unequal access to work opportunities. Even worse, women in Latin America are more likely to experience sexual harassment in the workplace.[5] These harsh inequalities stem from the prevalence of strict gender roles in the region. Additionally, within the context of the COVID-19 pandemic, gender inequalities are exacerbated as women face additional barriers to accessing proper health and reproductive services. While many of these challenges are not unique to women in the Latin American region, Latin American women face a particular challenge at the hands of their governments. Many Latin American countries do not adequately address and condemn discrimination in their Constitutions and legal frameworks.[6] As a result, women and girls struggle to receive support in situations of discrimination and gender-based violence.

In order to combat increasing rates of forced pregnancy and sexual violence in Latin America, the civil society organizations presenting at the IACHR hearing made several suggestions for Latin American countries. One important aspect of the treatment of women and children in a society is the society's education. Several representatives mentioned the importance of awareness campaigns and education programs in schools. Both of these recommendations are critical to decreasing the rates of forced pregnancy in teenage girls. Awareness campaigns are important in changing the mentality of perpetrators that will likely cause forced pregnancies, as well as changing the mentality of bystanders who will be more willing to intervene. Addressing the topic of forced pregnancy in a school setting is also advantageous because children are the most vulnerable in situations of forced pregnancy. Consent education and sexual health education are critical to children's wellbeing and will help change the prevailing gender stereotypes and culture in younger generations. Additionally, sexual and reproductive health education will help young women know their worth, know how to get help, and know what they can do in a situation of forced pregnancy.

Furthermore, the civil society organizations suggested that the Ministry of Health in each country address the psychological effects of sexual violence and forced pregnancy, and the link between sexual violence and suicide in young women. By adopting a constitution that recognizes this link, each country will give young women the necessary legal recourse and support to overcome their trauma by recognizing the devastating toll of forced pregnancy on a girl under the age of fourteen. In addition to recognizing this link and understanding young women's psychological trauma, Latin American countries also need to provide better access to healthcare. Young women in rural areas, for example, need more convenient access to emergency abortions for their safety and wellbeing. Without a combination of psychological and physical support, Latin American countries are failing their young women.

Ultimately, the situation of forced pregnancy and sexual violence in Latin America is disastrous for young women in the region. Latin American countries need

[4] Rosanlega Bando, *Evidence-based gender equality policy and pay in Latin America and the Caribbean: progress and challenges*, Lat. Am. Econ. Rev. 28, 10 (2019) https://latinaer.springeropen.com/articles/10.1186/s40503-019-0075-3#citeas.

[5] *Bullying and sexual harassment in the working and educative environments. Violence against women made invisible*, Gender Equality Observatory Latin America and the Caribbean (2016) https://oig.cepal.org/sites/default/files/note_21_sexual_harassment.pdf.

[6] IACHR, *Violence and Discrimination against Women and Girls*, ¶ 96, OAS/Ser.L/V/II Doc 233 (November 2019).

to continue to tackle gender stereotypes and structural discrimination in order to support this vulnerable population.

Gender Violence and the Human Rights of Women in Cuba

*by Leila Hamouie**

Representatives from Red Defensora de los Asuntos de La Mujer (REDAMU), Cuba Independiente y Democratica (CID), and Juventud Activa Cuba Unida (JACU) explained that gender-based violence in Cuba is a product of a *macho* society based on gender stereotypes, unreliable government reporting, and a lack of independent reporting and civil society organizations.[1]

The main cases of gender-based violence ("GBV") in Cuba fell into five general categories: femicide, obstetric violence, domestic violence, sexual harassment, and violence against female human rights defenders at the hands of the Cuban authorities. The speakers emphasized that the COVID-19 pandemic has exacerbated incidents of domestic violence, as many women are trapped in isolation with their abusers.

A representative from REDAMU and CID urged the Cuban government to collect official data on GBV, to enforce arrests and imprisonment of sexual and domestic abusers, to provide training on GBV for law enforcement and health personnel, and to desist arbitrary arrests and harassment of human rights defenders. Finally, the President of the Inter-American Commission on Human Rights (IAHCR) recommended

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[1] *Gender violence and women's human rights in Cuba*, 177 Session Period Public Hearings, IACHR (October 1, 2020).

that activists in Cuba work within the existing government structures for women, namely the Ministry for Women, to bend the will of the government to combat GBV.

Many of the recommendations from REDAMU and CID members were predicated on Cuba becoming a democratic nation. Although a democratic Cuba would improve the human rights situation in the long-term, women in Cuba urgently need protection from GBV, especially in the context of the pandemic. Working within Cuba's existing government structures, as the President of IAHCR suggested, could offer a more productive short-term alternative.

Freedom of the Press in U.S. Protests

*by Abigail Rosenthal**

"There is no question in my mind that I was targeted, tackled, and arrested because I was reporting on the events around me, even though the First Amendment protects my right to do so."

Gustavo Martinez recounted his recent experience reporting on a protest in Asbury Park, New Jersey. Speaking before several NGOs and members of the Inter-American Commission for Human Rights (IACHR) at their October 7th session, Martinez detailed how law enforcement officers assaulted him despite the fact that he was clearly identified as a member of the press.[1] His story was one of many recent accounts of aggression against journalists covered in the session titled "Freedom of Expression and Journalism in United States Protests".

Along with these accounts, representatives from the Reporter's Committee for Freedom of the Press (RCFP) shared disturbing statistics regarding First Amendment violations. Since May 25th of this year, journalists reported over 850 press freedom incidents to the committee. These incidents range from journalists being falsely arrested to being blinded by rubber bullets. In comparison, just 152 such incidents were recorded in all of 2019. Disturbingly 85% of these recent aggressions were at the hands of law

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[1] *Freedom of expression and journalism in United States protests*, 177 Session Period Public Hearings, IACHR (October 7, 2020).

enforcement, the very individuals entrusted with the duty to uphold fundamental constitutional rights, such as the right to free speech and assembly. The RCFP and Fundamedios, a Latin American freedom of press NGO, called for an end to the arrests and use of excessive force against journalists. They called on the U.S. to conduct thorough investigations of each of the violations reported and to make the results of the investigations public. In addition, they suggested four broad areas for law enforcement reform— training, transparency, discipline, and proportionality.

The U.S. state representatives, Mr. Bradley Freden and Mr. Thomas Weatherall, affirmed the state's dedication to protecting free speech and generally condemned violations of this right. Freden assured the commissioners that the state will investigate and seek accountability when anyone, including law enforcement is accused of violating the law and that structural reforms were part of an "ongoing dialogue" in U.S. government. The representatives, however, declined to discuss the significant role that law enforcement has played in these violations or the specific policy reforms being considered.

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