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

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Dear Reader:

As a human rights publication, our fight to advance human rights takes the form of words—words that shed light on human rights issues and attempt to provide remedies and solutions to persons and communities affected by those violations. Our words are mindful of racial, gender, religious, sexual, socio-economic, and regional identities, and our proposed solutions to human rights violations are inclusive of diverse perspectives. We transform rhetoric into action, and we urge you to use the words in this issue to embolden your fight to advance the rights of those most marginalized and seek ways to creatively transform the law to protect and progress human rights across the globe.

In this unique issue, we present cutting-edge and intentional legal analyses on human rights issues from the voices of a diverse group of practitioners and students. Our articles, podcasts, and programming cover an impressive breadth of local and international human rights issues ranging from the ongoing international legal violations occurring in Ukraine, the need for restorative justice for marginalized communities in the United States, the right to internet access in Sri Lanka, human rights issues surrounding homelessness in Washington, D.C., gender discrimination and wrongful termination in the United States, the right to consular access in the Inter-American Human Rights System, and much more.

Beyond our regular coverage of human rights issues, we are excited to present a special column devoted to covering the rights of refugees, asylees, and migrants. The inclusion of this special column was inspired by the topic of the annual Human Rights Brief Spring symposium entitled “Reimagining the Refugee & Asylee Experience Through Law: Exploring U.S. Culpability and (Un)Exceptionalism.” In this special column, we begin by summarizing the presentations of our renowned symposium speakers. Further, we include an article looking at the protection gaps for climate disaster-induced migrants and solutions to these issues. We then provide a side-by-side analysis of the reproductive rights of migrants in the United States, and the United States’ violations of those rights from both a domestic and international legal perspective. Finally, we end by looking at the inadequacies of U.S. asylum laws for transgender asylum seekers.

As we prepare to transition our publication to its next leadership team, we cannot help but reflect on our progress in providing timely, diverse, and culturally competent legal analyses, and we are excited to see how this legacy of the Human Rights Brief manifests through the next academic year. To our publication team, we thank you for your dedication to advancing human rights—this publication would not be possible without your unwavering support. To our supporters, we are grateful for your continued backing as we all advocate for a world that is more just and more rights-respecting.

With gratitude,

Madison Bingle & Nora Elmubarak
Co-Editors-in-Chief
Human Rights Brief
In recent weeks, humanity has witnessed a war in Europe as a result of Russia's unjustified invasion of Ukraine. This war has already caused immense suffering and resulted in numerous victims, including more than four million refugees. The terrible humanitarian cost of this war produces disbelief, horror, and, for people far from the conflict, frustration at their status as mere spectators in the face of a tragedy unfolding before their eyes. The victims and the immense damage that the world has observed are not, however, the only effects of this aggression. Russia's unjustified resort to the use of force has the potential to destroy the basic principles of international law that were born from the ashes of World War II. This Article proceeds with a summary of the international legal norms that regulate the use of force in international relations, it follows with the “justifications” presented by Russia, including a commentary on Putin's statements and writings. Finally, this Article concludes by reiterating the need to reestablish full compliance with the norms concerning the use of force in international law.

Russia's invasion of Ukraine violates the principles of the Charter of the United Nations, including the prohibition of the threat or use of force against a country's territorial integrity or political independence, as indicated in Article 2(4) of the Charter. The permitted exceptions to the prohibition of the use of force are: (i) action by the Security Council under Chapter VII of the Charter—which does not apply in this case because of Russia's right of veto; and (ii) the inherent right of individual and collective self-defense in the event of an armed attack while the Security Council intervenes.

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Russia has invoked various justifications for its use of force in Ukraine. Its most flagrant argument is that it has used no force at all because it is merely performing a “peacekeeping operation.” However, Russia’s attempt to defend its actions by using misleading rhetoric does not evade its obligations under the aforementioned principles of the UN Charter. Russia’s systematic movement of troops and weapons, its crossing of Ukraine’s border without authorization, and its use of material to destroy military and civilian objectives demonstrate a clear violation of Article 2(4) of the UN Charter. Putin also attempted to justify the invasion by invoking treaties of assistance with two pro-Russia separatist provinces. Those treaties granted Russia the authority to resort to military force in the area. However, those “states” were only recognized by Russia.


9 See AFP, Putin Recognizes Independence of Pro-Russia Separatists in Ukraine, Moscow Times (Feb. 21, 2022), https://www.themoscowtimes.com/2022/02/21/putin-recognition-ukraine-separatist-territories-independent-kremlin-a76498 (quoting Putin as asking Russia’s parliament to support his recognition of the separatist provinces since, in his words, “it is necessary to take a long overdue decision, to immediately recognize the sovereignty of the Donetsk People’s Republic and the Luhansk People’s Republic”); Russia Now Has the Right to Build Military Bases in Eastern Ukraine – Treaties, Reuters (Feb. 21, 2022, 10:57 PM), https://www.reuters.com/world/europe/russia-now-has-right-build-military-bases-eastern-ukraine-agreement-2022-02-21/ (explaining that, as a result of the concluded treaties, Russia has the right to build military bases in the provinces).

moments before its “special operation,” and are not members of the UN. Rather, these territories are part of Ukraine. In any case, facts, such as Russia’s disproportionate use of force and massive military mobilization prior to the invasion reveal their status as mere pretexts. Russia has used other arguments to justify the armed attack in Ukraine, including accusations of genocide, Nazism, and the invocation of historical rights, in addition to its security needs. Russia has failed to substantiate its assertion that its presence in Ukraine is an attempt to de-Nazify Ukraine. Ukraine is a democratic state, with free and fair elections, without prejudice to the fact


13 See generally James D. Fry & Melissa H. Loja, The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes, 27 LEIDEN J. INT’L L. 727 (2014) (explaining the concept of historic title in the context of territorial disputes); see also infra notes 22–29 and accompanying text (explaining Putin’s comments regarding the application of historic title to justify a claim that Russian maintains rights over Ukrainian territory).


that, like all democratic states, it has the imperative to perfect its institutions.\(^{16}\) Democratically elected President Vlodomyr Zelensky comes from a family with a legacy of fighting persecution, and some of his Jewish family perished in the Holocaust.\(^{17}\) Russia’s arguments are unacceptable to justify the armed attack. Russia has offered no evidence to justify its claim that Ukraine has committed genocide,\(^{18}\) and, in law, whoever claims the occurrence of an event must prove it. Precisely the opposite has taken place.

Given the recent attacks, Ukraine has claimed Russian forces are committing genocide and has instituted processes to substantiate these claims. For instance, on February 26, 2022, Ukraine initiated a case before the International Court of Justice (ICJ) against Russia, challenging the country to present evidence to justify its accusations.\(^{19}\) Ukraine, moreover, argues in its Brief to the ICJ that Russia is committing acts constituting genocide in addition to making baseless accusations to justify the invasion.\(^{20}\) On March 7, 2022, Russia did not appear at the hearing set by the ICJ, thereby missing an important opportunity to present to the

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17 Gillian Brockell, *Putin Says He’ll ‘Denazify’ Ukraine. Its Jewish President Lost Family in the Holocaust*, Wash. Post (Feb. 25, 2022, 5:28 PM), https://www.washingtonpost.com/history/2022/02/25/zelensky-family-jewish-holocaust/; see Stanley, supra note 16 (“By claiming that the aim of the invasion is to ‘denazify’ Ukraine, Putin appeals to the myths of contemporary eastern European antisemitism—that a global cabal of Jews were (and are the real agents of violence against Russian Christians and the real victims of the Nazis were not the Jews, but rather this group. Russian Christians are targets of a conspiracy by a global elite, who, using the vocabulary of liberal democracy and human rights, attack the Christian faith and the Russian nation.”).


[t]he ‘special military operation’ being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population . . . . In light of these circumstances, the Court concludes that disregard of [Ukraine’s right under the Genocide Convention] could cause irreparable prejudice to this right and that there is urgency.

Id.

20 Id. at 7 (“Russia has turned the Genocide Convention on its head—making a false claim of genocide as a basis for actions on its part that constitute grave violations of the human rights of millions of people across Ukraine. Russia’s lie is all the more offensive, and ironic, because it appears that it is Russia planning acts of Genocide in Ukraine.”).
international community its supposed grounds for the use of force.\(^{21}\) In addition, pursuant to Ukraine’s acceptance of the Court’s jurisdiction, the Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan, decided to open an investigation into alleged international crimes committed by Russia on Ukrainian territory.\(^{22}\) These proceedings are pending, but certainly, the fact that Ukraine has initiated and authorized the ICC’s jurisdiction shows the country’s willingness to submit the issues of international crimes to independent adjudicatory bodies.

In publications and public comments, Putin invokes historical factors as grounds for invading Ukraine; however, these factors only have relevance if they generate legal obligations and if they fit into the exception of self-defense. That is not the case here. On the contrary, in revealing the real causes of the invasion and its purposes, such reasoning may be an important legal element in demonstrating Russia’s violation of its obligations under the UN Charter. Above all, if they are consistent and applied in practice, they are valuable evidence of the international responsibility of the state, as well as the individual responsibility of those involved in planning, instigating, or committing international crimes. Verbally, in interviews and statements,\(^{23}\) as well as in articles and books, such as in his essay *Russia at the Turn of the Millennium*,\(^{24}\) the book *First Person*,\(^{25}\) and the essay *On the Historical Unity of Russians and Ukrainians*,\(^{26}\) Putin shows a coherent and consistent view of the motives present in the invasion of Ukraine. As far as Putin is concerned, modern Ukraine is an artificial state created by the Soviet communist regime. In his view, Ukrainians and Russians are one people, united by their language, traditions, and religion.\(^{27}\) For Putin, accepting the creation of Ukraine as an independent state was a regrettable example of paralysis in the full exercise of power.\(^{28}\) From the legal point of view, Putin does not refer to the international agreements between his country and Ukraine on the occasion of Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 1994, in which Russia made specific commitments.

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\(^{28}\) See *supra* note 25.
to respect the security and independence of Ukraine. Putin fails to reference the Minsk Agreements of 2014 and 2015, which were unanimously approved by the UN Security Council, implying recognition of the real character of the state of Ukraine.

What emerges from this evidentiary material is a tsarist view of history. The Russian monarchy attempted to justify its domination and the identity of the Slavic peoples based on a common origin, religion, and traditions. This unifying concept has great similarity to the typical motto of “blood and soil” of extremist white supremacist groups and fascist groups in the United States and other countries. For Putin, the need for historical correction to the damage supposedly inflicted on Russia is a necessary tool to revert the consequences of paralysis created by the lack of will to exercise power. This exercise of power is best described as the ability to crush those who oppose one’s objectives and is contrary to human rights norms and the prohibition of the use of force.

It is not surprising that, currently, the most reactionary sectors in the West have embraced Putin’s cause since they see in the actions of the Russian leader an example to be followed by their countries—including the generation of leadership of strong men who perpetuate themselves in the leadership of their nations and in the exercise of their strength without any limit. They are united by the message of rejection of a multilateral order and the adherence to chauvinistic visions, and the rejection of value change in issues of discrimination of any kind. The chauvinistic conception of power-based superiority is contrary to the prohibition of discrimination in human rights law, another creation of humanity rising from the ashes of World War II.

Human rights law, including the prohibition of the use of force, originated as a reaction to the violations

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29 Steven Pifer, Why Care About Ukraine and the Budapest Memorandum, BROOKINGS INST. (Dec. 5, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/12/05/why-care-about-ukraine-and-the-budapest-memorandum/ (highlighting how Russia’s assurances to Ukraine in the 1994 Budapest Memorandum to protect its sovereignty against the threat of and use of force “played a key role in persuading the Ukrainian government to give up what amounted to the world’s third largest nuclear arsenal, consisting of some 1,900 strategic nuclear warheads,” under the Treaty on the Nonproliferation of Nuclear Weapons); see Daryl G. Kimball, Putin’s Assault on Ukraine and the Nonproliferation Regime, ARMS CONTROL Ass’n (Mar. 2022), https://www.armscontrol.org/act/2022-03/focus/putins-assault-ukraine-nonproliferation-regime (referencing both the 1994 Budapest Memorandum and Ukraine’s subsequent forfeiture of nuclear weapons pursuant to its accession to the Nonproliferation Treaty as a non-nuclear weapon state).


31 See Michael Schwirtz et al., Putin Calls Ukrainian Statehood a Fiction. History Suggests Otherwise, N.Y. TIMES (Feb. 21, 2022), https://www.nytimes.com/2022/02/21/world/europe/putin-ukraine.html. Putin even expresses his sympathy for the monarchy as a way to guarantee stability (a great historical hero for him is Tsar Peter the Great) and reiterates that four years are not enough to achieve his goals. See generally Max Fisher, Putin’s Case for War, Annotated, N.Y. TIMES (Feb. 24, 2022), https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote (referencing Putin’s expressed intention to “demilitarize” Ukraine, “denazify” Ukraine, and “bring to trial those who perpetrated numerous bloody crimes,” an endeavor that would foreseeably take longer than four years).

32 See Vorobyov, supra note 27.


34 See supra notes 24–25.

35 Anthony Faioia, Putin’s Praisers in the West Have Suffered Less Than You Might Think, Wash. Post (Mar. 17, 2022, 12:01 AM), https://www.washingtonpost.com/world/2022/03/17/putin-supporters-west-war-ukraine-russia/ (including Donald Trump and Brazilian President, Jair Bolsonaro, as supporters of Putin and his recent actions).
that occurred in World War II, postulating the inherent dignity and humanity of all. Each article of the Universal Declaration of Human Rights and of the universal and regional treaties states that they apply to every human being without discrimination. No one may be subjected to summary executions, disappearances, or excluded from exercising his or her civil and political rights or internationally recognized economic, social, and cultural rights. The recognition of collective political rights can be found in the principles of sovereign equality of states, self-determination, and intervention prohibition.

Alain Pellet, one of the world’s foremost jurists and President of the Institute of International Law, resigned on February 23, 2022, from Russia’s legal team and no longer represents Russia before the ICJ or any other forums. By his authority, it is worth pointing out what he said in his resignation letter after denouncing Russia’s aggression.

Your country, (Russia) so endearing in many ways, is calling into question those principles that we wanted to believe were recognized by all ‘civilized nations,’ that is, by the international community of states as a whole. And I am even sadder about this, because Russia has played an important role in the tremendous movement that led to this achievement. It was Russia that convened the two major Peace Conferences of 1899 and 1907 that gave a decisive impetus to the process of drafting the humanitarian law of war. It was the USSR that paid the highest price for the capitulation of Nazi barbarism, in Leningrad, Stalingrad or Kursk. It was also the USSR that led the struggle for the effective recognition of the right of peoples to self-determination in the United Nations, and in other fields. And now, Russia is trampling on these principles, which have been so difficult to impose on positive law, which we would like to see really in force. But what we have observed is enough. Lawyers can defend more

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41 Id.
or less questionable causes. But it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it.\textsuperscript{42}

It is worth noting that the UN Charter explicitly recognizes the principle of self-determination in the prohibition of non-intervention, established in Article 1(2) and Article 2(7) of the UN Charter.\textsuperscript{43} Both provisions do not permit the invocation of political considerations in order to limit the exercise of state sovereignty.

These principles are not just aspirations disconnected from reality, as revealed in the global reaction against Russia’s aggression. First, on the part of the Ukrainian people who, in their massive rejection of the invasion, embody their right as a state to self-determination in a strict application of international law.\textsuperscript{44} Second, people from all over the world, including in Russia, have unambiguously expressed their support and solidarity with the government and people of Ukraine.\textsuperscript{45} In these demonstrations and rejections of the atrocities suffered by Ukraine, the presence of young people stands out.\textsuperscript{46} It has been said that wars are declared by the old, and the combatants and dead are put by the young.\textsuperscript{47} But to this justified traditional criticism is added that of a generation for which technical developments, the internet, and globalization, have contributed to paradigmatic changes in the existence and redefinition of borders, in possibilities of access and communication, and in the prohibition of discrimination, mobilizing younger generations to reject any attempt to deny the common humanity of all.\textsuperscript{48}

In an extraordinary emergency special session that took place on March 2, 2022, the UN General Assembly passed a resolution condemning Russia’s invasion of Ukraine, demanding the immediate withdrawal of Russian troops from Ukraine.\textsuperscript{49} One hundred forty-one states voted in favor, thirty-five abstained, and only five voted against (Russia, Syria, Belarus, Eritrea, and North Korea).\textsuperscript{50} The resolution is of a recommendatory nature, since only the Security Council can take binding decisions. However, the rejection by only five states, including Russia, reveals a significant adherence to

\textsuperscript{42} Id.
\textsuperscript{43} UN Charter, arts. 1(2), 2(7) (adopted Oct. 24, 1945).
\textsuperscript{45} Office of the Prosecutor, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation, United Nations (Mar. 2, 2022), https://www.icc-cpi.int/Publications/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine (confirming that 39 state parties to the Rome Statute of the International Criminal Court have submitted referrals of the Situation in the Ukraine to the ICC’s Office of the Prosecutor, thereby enabling the OTP to proceed with its investigation). But see Anton Torianovski, Ivan Nechepturenko, & Valeriya Safronova, Shaken at First, Many Russians Now Rally Behind Putin’s Invasion, N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/world/europe/russia-putin-support-ukraine.html (citing a recently conducted poll, which showed that Putin’s approval rating is now eighty-three percent, a fourteen percent increase from January 2022).
\textsuperscript{46} See, e.g., Global Support for Ukraine Continues – in Pictures, Guardian (Feb. 27, 2022, 12:00 PM), https://www.theguardian.com/artanddesign/gallery/2022/feb/27/global-support-for-ukraine-continues-in-pictures (compiling pictures of protests occurring around the world); Olivia Kestin & Tess Lowery, How Our Generation is Protesting Ukraine’s Invasion in Pictures, Global Citizen (Mar. 10, 2022), https://www.globalcitizen.org/en/content/ukraine-invasion-war-protests-around-the-world/.
\textsuperscript{47} See Herbert Hoover: Quotes, Britannica, https://www.britannica.com/quotes/Herbert-Hoover (last visited Apr. 22, 2022) (“Older men declare war. But it is youth that must fight and die. And it is youth who must inherit the tribulation, the sorrow, and the triumphs that are the aftermath of war”).
\textsuperscript{48} See supra note 46.
\textsuperscript{50} Julian Borger, UN Votes to Condemn Russia’s Invasion of Ukraine and Calls for Withdrawal, Guardian (Mar. 2, 2022, 1:10 PM), https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote.
the norms prohibiting the use of force in international relations and the value of legal principles, such as sovereign equality, self-determination, and human rights. Although these principles are not guaranteed to be complied with, it seems essential to assume an individual and collective responsibility to ensure that they are implemented. As the body dedicated to ensuring peace, President Zelenskyy has argued that the UN bears a particular responsibility for enforcing compliance with these principles. On April 3, 2022, President Zelenskyy appeared before the UN Security Council, highlighting grave human rights and humanitarian violations committed by Russian forces in Ukraine and demanding action by the UN in response. Given the Security Council’s failure to take action in this case, due largely to Russia’s veto power as a permanent member, President Zelenskyy said the following: “[d]o you think the time of international law is gone? If your answer is no, then you need to act immediately.”

The UN General Assembly took up this call to action on April 7, 2022, voting to remove Russia from the Human Rights Council. This suspension comes in the wake of photos that emerged from the city of Bucha, documenting the hundreds of civilian bodies that were found in mass graves and on the city’s streets. The removal of Russia from the Council is an important step in showing the isolation of that country, but the world has witnessed the continuation of the aggression against Ukraine. Accordingly, the international community needs to consider additional steps, for example, increasing support to Ukraine, and the adoption of sanctions against those responsible for the aggression.

Without prejudice to the importance of other conflicts in the world, the significance of this war cannot be exaggerated. It should not be forgotten that the two world wars of the twentieth century originated in Europe, perhaps because of the greater political, economic, and military weight of that region—a region that, at present, has thousands of nuclear weapons and where there is a danger of superpower confrontation.

In the case of armed conflicts, only their beginnings are clear. Russia has violated the international legal order established by the UN Charter. Countless individuals within and outside of Ukraine have suffered irreparable damage from the continuous violence. Peace is at stake, and only the achievement of an international order based on law can guarantee it.

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52 DeYoung & Hudson, supra note 51.
53 Id.
54 Edith M. Lederer & Jennifer Peltz, UN Assembly Suspends Russia from Top Human Rights Body, Wash. Post (Apr. 7, 2022, 7:43 PM), https://www.washingtonpost.com/politics/ukraine-urges-un-to-suspend-russia-from-top-rights-body/2022/04/07/99a55a00-b685-11ec-8358-20aa16355fb4_story.html (quoting the U.S. Ambassador stating that, as a result of the vote, the members of the U.N. General Assembly “have collectively sent a strong message that the suffering of victims and survivors will not be ignored”).

Restorative Justice: Uplifting Human Rights for the Marginalized, Vulnerable, Victimized, and the United States as a Whole
by Meghana Vodela*

“If our desire for justice is not rooted primarily in the pursuit of restoration, then reconciliation will be nearly impossible to achieve. It is precisely because grace is undeserved that makes it grace.”
—Jamie Arpin Ricci

Introduction

It is no secret that the criminal justice system in the United States is in need of reformation. Retributive justice requires that an offender who breaks the law should receive a punishment proportional to the offense they committed. This theory of punishment emerged in the United States rapidly during the 1970s and 1980s and has been the backbone of the criminal justice system. Although the goals of retributive justice purport to encourage deterrence and rehabilitation, these goals are often unmet. Retributive justice has created a judiciary system that struggles to effectively rehabilitate and facilitate successful re-entry for offenders into society in the United States.

The use of the retributive justice system has been coined the “punitive excess era.” This form of punishment continues to jeopardize fundamental human rights due to racial disparities in enforcement (by targeting Black, Hispanic, and Indigenous populations), the implementation of harsh sentencing, and also the criminalization of social issues such as homelessness, food insecurity, safety, and mental illness.

This Article seeks to address the problems and issues that retributive justice disproportionately causes for ethnic minorities by neglecting the needs of those whose cultures are not aligned with individualistic ideologies modeled by most Eurocentric cultures. With such a lack of inclusivity in a nation as diverse as the United States, it is no surprise that retribution often results in judicial inequity.

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4 Id.
Alternatively, restorative justice bases its principles on addressing the harm caused by crime in a holistic manner, emphasizing the needs of the offender, victim, and society as a whole. Since the impact of restorative justice is astonishingly more inclusive of the needs of all cultures, especially within communities of color, it is a more effective model of justice to provide fairness and equality for all. Additionally, its principles more effectively reflect what the criminal justice system should embody in the United States: equality, an appreciation for individuality, proportionality, consistency, fairness, and justice. The implementation of restorative justice is a solution to the inequities exacerbated by the retributive method, as its impact would curtail infractions upon human rights, as the retributive approach was even historically utilized to justify the genocide of the People of the First Nations, chattel slavery, the policing, targeting, and killing of enslaved individuals, Jim Crow, and the war on drugs.

Restorative justice is clearly a more effective framework of justice in providing fairness and equality for all who are affected by crime and involved with the American justice system. The principles within this theory address the needs of communities of color, the indigent, the marginalized, and the vulnerable. The incorporation of restorative justice within the U.S. justice system will manifest a justice system that is deliberate in preserving human rights.

I. Background

Retributive justice adheres to the principle that an offender who breaks the law must receive a punishment that is proportional to their offense. While this theory emerged in the United States around the 1970s and 1980s, the history of retributive justice can be dated much further back in the history of humankind. During the beginning of all systems of law or “code,” retributive principles trumped all other notions of how rights and law should be enforced. This is the underlying foundation of the lex talionis or the principle of “eye for an eye,” a well-known idiom that can be found in various forms in biblical texts and even in one of the oldest forms of written law, the Law of Twelve Tables which was drafted by a committee of Roman judges in 451–450 BCE. This phrase exemplifies the foundation of retribution (also known as the punitive approach), which is the current model and theory from which the current U.S. criminal justice system finds its roots.

German philosopher, Immanuel Kant, added to the discourse on retributive justice by noting in his book that “judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all

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8 See Exodus 21:24 (King James); see also The Code of Hammurabi, AVALON PROJECT; https://avalon.lawyale.edu/ancient/hamframe.asp (last visited May 13, 2022).
10 Id.
11 Id.
12 Michelle S. Phelps, Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs, 45 Law & Soc’y Rev. 33, 34; see generally Small, supra note 7, at 50–51 (discussing the foundations of retribution).
cases be imposed on him only on the ground that he has committed a crime.”

Kant believed that justice could only achieve justice if every guilty person was punished and that the legitimacy of law depends on law being used to service such justice. Kant was not alone in these beliefs. Cicero’s De Legibus (first century BCE) and Hegel’s Elements of the Philosophy of Right (1821) were also key pieces in literature that thoroughly advocated for retribution as a society’s main form of justice as well.

The role that retributive justice played in the American legal system was further embraced as the punitive approach during the 1970s and 1980s when the President Lyndon B. Johnson led “War on Crime” era began due to the rise in economic distress, public concern regarding crime, and the perception of race within U.S. political institutions and culture during that time period. This movement was also supported and amplified by President Reagan, President Clinton (1994 Crime Bill), President Trump, and President Biden in their various political capacities.

The values underlying retributive justice have evolved over time and can be interpreted in multiple ways, but according to the Stanford Encyclopedia of Philosophy, there are three principles that have been consistently held as the cornerstone of retribution:

1. that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment;
2. that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and
3. that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.

However, this theory of justice is not only ineffective at deterring crime, but it also infringes upon human rights by often imposing harsh and unfair punishments upon offenders who are often victims of poverty, substance abuse disorders, or who struggle with mental health disorders. Furthermore, the punitive approach is modeled from a Eurocentric model of justice, a model that is not inclusive of the needs of all cultures. This model is tailored to suit societies that are based on individualistic cultures and values. Those who embody individualistic values see themselves as independent, autonomous beings who are only “loosely connected to the groups of which they are a part.” The level of commitment they provide to others is generally incentivized by their perceived level of benefit. The priorities of one with individualistic values are their own primary concerns, needs, personal freedoms, and achievements. If there are competing interests between the group they belong to and their own individual needs, the individual’s needs will generally trump the needs of the group. In other words, one who holds individualistic perspective will prioritize their own

[16] Id. at 105–07.
[22] Id.
[23] Id.
needs over the needs of others, and is incentivized by consequences that affect their own personal gain. For these reasons, retribution is arguably more effective when addressing a crime committed by an individualist who is only deterred or understands the gravity of their mistakes when they are met with a consequence.

However, it is important to acknowledge that not all cultures are rooted in individualistic values. Many cultures in the world (especially those of color) are collectivist cultures which use restorative practices to uphold justice within their societies.  

“Restorative practices can be traced back to the people of First Nations and Indigenous Africans [. . . .] The Nguni people spend days in a circle speaking life into a person who has done harm until they are whole (without shame) again.” Tribes such as the Nguni people believed that the remedy to harm was to heal all parties involved, including the offender. A Nguni proverb, “Umuntu, ngumuntu, ngabantu,” is translated as “I am because we are and we are because I am.”

The principles of the Nguni tribe exemplify the contrast of collectivism to individualism, as collectivism follows a more utilitarian approach and prioritizes the interests of the group over the interests of one specific individual, even when obligations to the group are not beneficial to the individual’s personal needs. Norms, obligations, and duties to groups are collectivists’ primary concerns, with high value placed on group solidarity.

There are three underlying principles of restorative justice: (1) repair: crime causes harm, and justice requires repairing that harm; (2) encounter: the best way to determine how to do that is to have the parties decide together; and (3) transformation: can cause fundamental changes in people, relationships, and communities.

A justice system that is not tailored to serve all of its people will not be able to deliver equitable justice. The lack of consideration of the needs of a collectivist ideology is especially troublesome in a country as racially diverse as the United States. Not only does our criminal justice system disproportionately affect people of color—African Americans and Hispanics make up thirty-two percent of the U.S. population, while at the same time comprising fifty-six percent of the incarcerated population—but it does not effectively serve the population that it affects the most. Along with the fact white people are less likely to be incarcerated in the United States, “[B]lacks and Hispanics are far more likely than [w] hites to be victims of violent and property crimes.” This is troubling considering that the American justice system is rooted in punitive justice, a theory that is preferred by those who identify as white in the United States.

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24 See Geert Hofstede, Culture and Organizations: Software of the Mind 50–51 (1997); see generally Zhang et al., supra note 20.
25 Sherrod, supra note 7.
27 Id.
29 Id.
30 Id.
34 Id.
As Nazgol Ghandoosh found:

Whites are more punitive than [B]lacks and Hispanics even though they experience less crime. For example, while the majority of whites supported the death penalty for someone convicted of murder in 2013, half of Hispanics and a majority of [B]lacks opposed this punishment. Compared to [B]lacks, whites are also more likely to support the “three strikes and you’re out” laws, to describe the courts as not harsh enough, and endorse trying youth as adults.35

Many communities of color globally embody collectivist and community-based cultures.36 Societal values in collectivistic cultures are more concerned with how their actions affect other members of society than in individualistic cultures, and they value their progress based on how society is progressing as a whole.37 Because retributive justice prioritizes punishing alleged offenders rather than rehabilitating them, retributive justice cannot effectively meet these needs of a collectivist culture, which promotes harmony and cohesion within a community rather than solely focusing on an individual.38 The retributive approach tends to approach crime as if the harm only affects the individual victim.39 This mentality is not shared by those who prioritize the needs of their community. In order for society to thrive, proper implementation of restorative justice requires one to reflect upon how they may inadvertently contribute to institutional and systemic harms, even if it only begins by acknowledging how one’s privilege allows them to benefit from these forms of oppression.40 For example, white and non-Black practitioners, lawmakers, and judges must acknowledge that white supremacy culture is embedded within the foundation of our justice system. Racism along with sexism, misogyny, misogynoir (anti-Black racist misogyny41), ableism, xenophobia, classicism, linguistic oppression, and curriculum violence continue to plague our justice system and will continue to do so until there is accountability and active efforts in dismantlement.42 Until these prejudices embedded within our legal system and culture are dismantled, retribution will continue to uphold the oppressive frameworks that are foundational to our judicial system and continue to harm our vulnerable populations.

However, another theory of justice more effectively grapples with the shortcomings related to punitive justice, along with more effectively meeting the needs of communities of color: the theory of restorative justice. Restorative justice is “a theory of justice that emphasizes repairing the harm caused by criminal behavior.”43 Restorative justice incorporates the needs of all who were affected by a crime. It focuses on resolving the harm that results from a crime to the benefit of all parties, rather than solely emphasizing that a crime was committed and that the alleged criminal should be punished.44 Through this philosophy, restorative justice can fill the gaps of need within communities of color.

By more effectively supporting an offender’s re-entry to society, reducing recidivism, addressing the needs of all who were harmed when a crime was committed, and acknowledging that crime cannot be simplified to a “one-size-fits-all” approach, restorative justice is

35 Id. (emphasis in original).
37 Id.
39 Id.
40 Id.
41 Id.
42 Id.
44 Id.
a more effective model of justice to provide fairness and equality for all cultures. The impact of restorative justice is much more inclusive of the needs of all cultures, especially those who identify as Black, Hispanic, and Indigenous, racial groups that are disproportionately affected by crime as both victims and mass incarceration. Hence its principles better reflect the type of values the criminal justice system should implement to uphold human rights in the United States.\footnote{See Hofstede, supra note 24.}

II. Restorative Justice Encourages Rehabilitation Which Promotes Effective Re-entry Into Society and Decreases Rates of Recidivism

Studies have found that implementing practices that focus on rehabilitation rather than a harsh punishment have better long-term effects for an incarcerated person and the society in which they exist.\footnote{Id.} By giving a voice to the harm and focusing efforts on healing rather than making sure that a specific punishment fits the crime, an incarcerated person has a better chance of effective re-entry into society.\footnote{Reentry Programs, CHARLES KOCH INST. (Sep. 5, 2018), https://charleskochinstitute.org/stories/reentry-programs/#:~:text=Successful%20reentry%20programs%20give%20former,recidivism%20and%20improving%20public%20safety. The article asserts that preparation for successful re-entry begins the day that the offender is incarcerated. One's access to mental health treatment, substance abuse recovery, community building programs, education, and skills training will yield a much higher likelihood for successful re-entry, than those who are not provided such opportunities. \footnote{Id.}} Offenders who are able to successfully participate in re-entry programs are able to effectively support themselves through legitimate employment opportunities. Stable employment for offenders creates a decrease in recidivism and an increase in public safety, which benefits society as a whole.\footnote{Id.} Since the restorative justice approach specifically focus on rehabilitating the offender, these principles have yielded success in recidivism reduction, and restitution collection, unlike the traditional retributive-justice process. The traditional retributive justice process can result in higher rates of victim dissatisfaction and lack of rehabilitation for offenders, linked to higher rates of recidivism, and even worse criminal behavior.\footnote{David Newton, Restorative Justice and Youthful Offenders, Fed. Bur. of Investigation L. Enf’t Bulletin (Oct. 6, 2016), https://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthfuloffenders#:~:text=Restorative%20justice%20entails%20more%20than,resulting%20in%20worse%20criminal%20behavior.}

A study conducted at Sam Houston State University concluded that programs that emphasize restorative justice, including victim-offender mediation and community impact panels, have more effectively decreased recidivism rates among juvenile offenders when compared to traditional punitive court procedures.\footnote{Sam Houston State University, Research Reveals Restorative Justice Reduces Recidivism, Phys.org (July 28, 2016), https://phys.org/news/2016-07-reveals-justice-recidivism.html. This study was conducted between 2000–2005 and conducted research on offenders who participated in restorative justice programming in a small, mostly rural area in the Upper Midwest region of the United States. The average age of the sample size was fifteen years old. Offenses ranged from property crimes, curfew violations, substance abuse related charges, traffic offense, disorderly conduct, to even violent crimes.} This methodology included a sample of 551 youth who were either assigned to traditional court or minimal restorative justice proceedings in a five-year span.\footnote{Id.} In this study, forty percent of juveniles committed a new offense within an average of three and a half years.\footnote{Id.} However, when the data was further broken down, it was found that recidivism rates were nearly fifty percent for youth processed through traditional juvenile courts, while those in restorative justice educational programs showed only a thirty-one percent rate for recidivism.\footnote{Id.} The statistics were even lower for those in more intensive restorative justice programs. Only twenty-four percent of offenders who participated in community panels, twenty-seven percent of those who participated in indirect mediation, and thirty-
three percent of those in direct mediation re-offended after completing those programs.\textsuperscript{54}

Jeffrey Bouffard, a professor in the Department of Criminal Justice and Criminology and Research Director for the Correctional Management Institute of Texas at Sam Houston State University, concluded the following:

Our results generally not only support the effectiveness of RJ (restorative justice) programming as compared to traditional juvenile court processing but also suggest that each type of RJ intervention, even those that are minimally involved, reduces recidivism risk relative to juvenile court proceedings [. . . .] This pattern of results would suggest that in many cases, it may be possible to use less intensive RJ approaches and still receive promising results.\textsuperscript{55}

Based on social science research, restorative justice decreased recidivism rates by helping offenders rehabilitate and successfully re-enter society. Meeting these goals and promoting the improvement of members of society rather than supporting the cycle of incarceration is undoubtedly better for society as a whole.

### III. Restorative Justice Seeks Greater Justice for All Parties Involved

Restorative justice acknowledges the offender’s crimes, the victims’ needs and all the parties, leading to greater justice for all parties involved. Practices that rely on retribution as a foundation tend not to meet the needs of persons whose values are embedded in a collectivist culture because retribution focuses on punishing an alleged criminal in a way that reciprocates the effects of the crime committed. Unfortunately, “justice” is often used as a veil to legitimize racial profiling, hypervigilant policing, mass incarceration, and even execution of Black, Indigenous, and brown people. These issues do more than disproportionately infiltrate communities of color, but they also target children who are unfortunately not shielded from these prejudicial atrocities. Restorative justice principles address crime in a holistic manner, by acknowledging the totality of harm caused by a crime, including the harm to relationships, others involved, and the community at large. For this reason, it is more effective in harm mitigation because its principles do not merely simply the implications of crime as a law being broken. This allows willing parties the opportunity to discuss such harms and collaborate for a more fruitful resolution. The principles of restorative justice takes a step further and provides alternative methods or solutions even in situations where parties may not be readily willing to meet and collaborate.\textsuperscript{56}

By taking account of the needs of all parties harmed by a particular crime and incorporating their opinions and voices when determining an appropriate punishment, restorative justice addresses the needs of collectivist values that focus on the needs of the community rather than solely the individual who committed the crime.\textsuperscript{57} For example, Islamic law and its tenets of Qisas (retaliation), Suluh (practices of conciliation), and Diyya (restitution), forgiveness, and community service are all forms of restorative justice.\textsuperscript{58} These tenets focus on the prioritization of the victim’s needs and restoration, rather than conviction of the offender.\textsuperscript{59} Diyya, in particular, calls for a payment of money to the victim who has suffered the effects of a crime.\textsuperscript{60}

\begin{thebibliography}{9}
\bibitem{54} Id.
\bibitem{55} Id.
\bibitem{57} Sherrod, supra note 7.
\bibitem{58} Absar Aftab Absar, Restorative Justice in Islam with Special Reference to the Concept of Diyya, 3 J. Victimology & Victim Just. 38, 38–52 (2020).
\bibitem{59} Id.
\bibitem{60} Id.
\end{thebibliography}
of Diyya, which can substitute any requirements that have not been met under Qisas.61

Studies in Canada have shown that restorative justice can improve victim satisfaction and generate positive mental health impacts for all participants, among other benefits.62 In 2021, the Canada Department of Justice found that victims and survivors who participated in the restorative justice process were satisfied felt more prioritized and experienced higher levels of satisfaction with the outcome of their cases. A meta-analysis by Strang et al. “showed that victims and survivors who go through a [restorative justice] process are more satisfied about the handling of their case than those who do not go through a[] [restorative justice] process.”63 Victims reported the following benefits: higher likelihood of receiving an apology from the offender, feeling safer, psychological benefits including decreased fear, anxiety, decreased anger, and increased sympathy towards the offender.64 Further, “[m]any victims and survivors have reported that the opportunity to participate in [restorative justice] and express themselves reduces their desire for revenge, and they would recommend the process to others.”65

This study also found that victims and survivors who chose to participate in the restorative justice process felt more than just satisfaction with their experiences.66 They also described feeling empowered by the process.67 This is contrasted with the experiences of victims who participated in the punitive criminal justice process.68

IV. Restorative Justice Practices

Acknowledge and Address that a One-Size-Fits-All Approach Cannot Effectively Meet the Needs of Criminal Justice

The retributive approach grants a judge a narrow range of options for punishment when a person is convicted of breaking the law, such as incarceration, imposing of hefty penalty fines, or a combination of both.69 These options are often both too limited and too generalized to achieve justice. It is important to understand that there should be no “one-size-fits-all” approach to punishments or sentencing. No two crimes are exactly the same, no two offenders have the same needs or concerns, and no two victims can be made whole with the same remedy.

Regarding why an offender is motivated to commit a violent crime, offenders from individualist cultures are often motivated by self-interest “through the pursuit of hedonism” to meet one’s needs, such as coping with personal pain or committing acts in the interest of one’s personal principles.70 Motivating factors of violent crimes by offenders from collectivist cultures are generally based on community or group issues or goals such as defending family, gang, community, saving their honor, or commitment to interpersonal obligations.71 Clinicians have found that understanding the cultural implications of offenders’ motivations is vital in their treatment, healing, and overall ability to maintain accountability for their actions.72 Furthermore, clinicians are encouraged to incorporate an understanding of cultural implications that affect offenders rather than develop “the

61 Id.
62 See generally Jane Evans, Susan McDonald & Richard Gill, Restorative Justice: The Experiences of Victims and Survivors, Canada Dep’t of Just. (2021), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p5.html. This study was conducted to bridge the gap between the needs of the Indigenous victims of crimes and the retributive process. Indigenous victims did not find satisfaction when participating in traditional court processes. Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
69 Id.
71 Id.
72 Id.
typically ‘thin’ and culturally absent stories that are developed through the criminal justice process.” If a clinician is involved with the rehabilitative process, it is important for them “to work in culturally sensitive ways with offenders within the forensic treatment process, which may even include working collaboratively with cultural representatives in order to develop a more responsive treatment process.”

V. CRITICISMS OF RESTORATIVE JUSTICE

A. The Burden of Dismantling Existing White Supremacy in the United States Justice System

Proponents of traditional judicial processes and retribution have expressed concerns regarding the implementation of restorative justice practices. One criticism of restorative justice is that the practice cannot be effectively implemented or incorporated into our justice system until racism and white supremacy are dismantled and no longer play roles in the foundation of our justice system. Critics argue that since modern western societies and the foundation of their legal systems have been generally envisioned and created by the white, heterosexual, affluent, adult, male, the systems have been created to cater to this demographic whether it’s how the law is enforced, whom it is enforced upon, and who it ultimately benefits.

Critics of restorative justice argue that the law cannot be expected to remedy racial injustices legally before they are recognized as injustices socially. There is a theory that because the U.S. justice system prioritizes the needs of white citizens, the racist nature of the the criminal justice system must be acknowledged by the majority (i.e. white America) before restorative justice can actually be implemented and effectively carried out. However this argument is paradoxical in that it believes that a solution to a problem cannot be implemented until that problem is already solved. One cannot wait for racism to stop existing in order to implement practices that deter racist policies. This argument is also inherently rooted in racism, because it fails to recognize the needs of Black, brown, and Indigenous people by stating that their needs and cultural values cannot be justified until approved by the white “standard.” Acknowledgment and agreement from white America need not and should not be the necessary prerequisites for the needs of communities of color to finally be met. The injustices faced Black, brown, and Indigenous people are injustices plagued by society in its entirety.

As Barbara Sherrod has argued:

We must respect that this process is strong enough to stand on its own, trust that people of color can model justice and be accountable to one another and our youth without the inference of whiteness [. . . .] We owe it to . . . Indigenous peoples to honor and follow this process without any addendums rooted in white culture. Because without them, we would not have this practice to decentralize whiteness and provide a holistic way of life for ourselves and our [B]lack and brown [communities].

B. Victims’ Concerns

Proponents of the punitive approach argue that restorative justice may not be effective in meeting the needs of victims. In one study, some victims were concerned that their offenders were not truly engaged in the process, nor were they truly remorseful for their crimes. Victims also expressed dissatisfaction when they did not understand what to expect from
the restorative justice process or how to prepare for
the process. Other victims were dissatisfied when
the offenders did not actually follow through on
the agreement that was made or when the victims
were not updated about the offender’s progress after
the restorative justice proceeding was completed. The
conclusions from these findings showed that
in order for the process to be arranged, an offender
must genuinely accept responsibility for their actions
and must be willing to follow through with their
rehabilitative process. This is essential not only for
the offender’s progress but for the victim’s healing
process.

These studies also showed some key components
when considering whether or not to rearrange the
restorative justice process. Researchers found that
crime reduction through restorative justice processes
were more effective to remedy violent crimes in
comparison to a property crime. The process was
also found to be more effective for crimes committed
against identifiable victims.

In no way should these studies deter the
implementation of restorative justice, but they
should provide observations on how to provide more
effective implementation. The Canadian Department
of Justice reported that victims and survivors who
participated in the restorative justice approach report
feelings of empowerment by the process, a higher
likelihood of receiving an apology from the offender,
feeling safer, and are less likely to feel vengeful toward
the offender. Victims who participated in this
approach are even more likely to recommend this
process to others. Contrary to critics’ arguments,
restorative justice is actually more effective in
focusing and addressing the needs of victims, than
retributive justice. Retribution prioritizes punishment
and convictions, which require processes that often
alienate victims’ needs.

C. Recidivism Rates

Concerns regarding recidivism are often used to
criticize restorative justice because the punishments
are not as harsh as those imposed by the punitive
approach. However, studies have shown that harsher
punishments do not deter crime. Furthermore,
restorative practices in comparison to retributive
practices more effectively combat recidivism. As
previously addressed, restorative justice programs
provide offenders with resources and opportunities
to enable their successful re-entry to society. Statistics show that restorative justice better deters
repeat offenses than those who are processed
through traditional court processes and the punitive
approach.

Conclusion

The United States’ justice system prides itself on
providing equality and justice for all. Unfortunately,
due to the plethora of various forms of prejudice
woven into our history and government, oppression
and injustices are forced upon our most vulnerable
populations every day. These forms of prejudice
include racism, sexism, xenophobia, ableism,
classism, linguistic oppression, and much more. The
punitive approach especially neglects the needs of
communities of color, especially Black, Hispanic,
and Indigenous populations, which is incredibly
worrisome considering more than fifty-six percent
of the incarcerated population are persons of color.
Persons with mental health diagnoses and substance
abuse disorders are also severely neglected by the
justice system, even though they make up a large
percentage of those who are incarcerated. Since
retribution focuses on punishing offenders without
an individualized approach, these underlying issues
that often plague offenders that the criminal justice
tends to neglect. This results in the United States

82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 Sam Houston State University, Research Reveals Restorative
Justice Reduces Recidivism, Phys.org (July 28, 2016), https://
89 Id.
90 Id.
91 Id.
justice system depriving those who are struggling with mental health or substance abuse-related disorders of the justice they deserve. Furthermore, the system does not support deterrence against future offenses, since the underlying problems are never addressed.

Because there are clear gaps within the current U.S. criminal justice system and its use of the retributive system, those gaps can be addressed by integrating the values and principles set forth by restorative justice. Although restorative justice may not be applicable or effective in every situation, it is clear that the long-standing punitive approach is inadequate in addressing the needs of all offenders. Restorative justice’s holistic approach does not hyperfocus on convictions but actually addresses the needs of victims while also addressing the needs of offenders, vulnerable populations, and society as a whole. By addressing the needs of offenders and aiding in their rehabilitation, offenders are deterred from future crime, benefiting society as a whole. Through this process, the needs of victims are more effectively met, leading to the amplification of their voices and a greater chance of restoration after the crime. The restorative justice process incorporates the collectivistic values of communities of color and uses personalized approaches that are better suited for vulnerable populations facing prejudices, mental health concerns, and substance abuse disorders. If the U.S. justice system incorporates restorative justice into the foundation of its principles, the gaps created by the traditional punitive approach can be bridged. This shift in approach could better American society as a whole and ultimately uplift access to basic human rights for all.
Amid the ongoing COVID-19 pandemic, the United States is battling yet another deadly emergency: a crisis of unhoused people. The rate of unhoused people and homeless individuals in the United States has steadily increased in recent years, affirming that the country is neither properly addressing the causes of this issue nor the needs that stem from it. Now, over two years into the pandemic, high rates of unemployment and evictions throughout the nation—especially in the nation’s capital—indicate that the homelessness crisis will only worsen. This crisis, which implicates the human right to housing, requires immediate attention and action.

While local government agencies are in a unique position to assist unhoused people, frequently, some agencies use methods that can cause significantly more harm than relief. In Washington, D.C. ("D.C.")—the city with the highest per-capita rate of unhoused individuals in the country—the Office of the Deputy Mayor for Health and Human Services (DMHSS), is one such agency and the Coordinated Assistance and Resources for Encampments Pilot Program (Pilot Program) is one such method of harm.

This Article will examine how DMHSS’s Pilot Program is not just harmful to unhoused people but illegal under U.S. federal law. DMHSS and the Pilot Program violate Title VIII of the Civil Rights Act of 1968 when the agency conducts encampment evictions before securing alternative, permanent housing for subsequently displaced persons. Moreover, because most encampment residents are

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Black, DMHSS effectively makes housing unavailable to encampment residents on the basis of race.

I. BACKGROUND

A. The United States’ Homelessness Crisis

According to the Department of Housing and Urban Development’s (HUD) 2021 Annual Homeless Assessment Report, there were 326,126 “sheltered homeless” people living in the United States during a single night in January 2021. Disturbingly, the actual number of total unhoused people living in the United States is certainly much higher. First, because the report does not include the number of unsheltered persons living throughout the country, second, because the pandemic caused significant disruptions to the counting process, and finally, because housing experts estimate that HUD’s methodology, generally, undercounts people by a significant margin. While the sheer number of unhoused people is alarming, of significant concern is that homelessness disproportionately impacts minority populations.

Notably, Black people account for more than forty percent of the unhoused people in the United States, despite making up just thirteen percent of the general population.

B. Unhoused Persons in the Nation’s Capital

The rates of unhoused people in Washington, D.C.—and the accompanying racial disparities—are especially troubling. Per capita, Washington, D.C. has the highest rate of unhoused people in the country at two times the national average. Further, while Black people make up 46.6 percent of D.C.’s population, they make up 86.4 percent of the city’s unhoused population. Due to a severe lack of affordable housing, and unsafe and restricting conditions within homeless shelters, many unhoused people in D.C. reside in encampments throughout the city. According to the most recent data, there are 199 encampments, including 327 tents, across D.C.

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8 The term “sheltered homeless” refers to people who are staying in emergency shelters, transitional housing programs, or safe havens; it does not include people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people (for example, the streets, vehicles, or parks).
12 Racial Inequalities in Homelessness, by the Numbers, NAT’L ALL. TO END HOMELESSNESS (June 1, 2020), https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/.
13 Id.
15 Kate Akalonu, Homelessness & Racial Inequity, EVERYONE HOME DC (June 11, 2021), https://everyonehomedc.org/homelessness-racial-inequity/.
II. DMHSS’ Pilot Program—A Failed Response to D.C.’s Homelessness Crisis

A. Aspirational in Theory; A Deceptive Failure in Practice

In August 2021, in response to the high number of individuals living in encampments, DMHSS quietly unveiled its Pilot Program with the expressed “goal of relocating [encampment residents] to safer permanent housing options.”18 Conceptually, the Pilot Program was designed to permanently shut down encampment locations after DMHSS provided assistance to encampment residents.19 However, a closer look at the Pilot Program quickly reveals that only certain encampment residents may receive and benefit from the program’s services.20 Those who are not eligible for assistance, those who chose not to participate in earlier outreach efforts, and those who did not have the opportunity to work with DMHSS’s outreach efforts have been and continue to be evicted by the agency without first receiving any means of alternative, permanent housing.21 Further, though some individuals who were eligible and willing to participate in the Pilot Program were connected with short-term housing, the Pilot Program has failed to secure alternative, permanent housing for even a single encampment resident thus far.22

B. A Closer Look at The Harmful and Illegal Impacts of DMHSS’s Pilot Program

In October 2021, DMHSS established the Pilot Program’s first target: the “NoMa encampment.”23

Previously located in the NoMa neighborhood at the K, L, and M Street underpasses, the NoMa encampment was among the most well-known in the city.24 For well over a decade, an established community of unhoused individuals resided in the area, with up to sixty people living there at a time.25 However, DMHSS—citing the Pilot Program—forcibly evicted encampment residents and did so without first guaranteeing alternative, permanent housing despite the agency’s promise that it would.26

The NoMa encampment was not the only community of unhoused people to suffer due to DMHSS’s harmful program. Before the end of 2021, DMHSS forcibly evicted residents from at least one other encampment.27 Additional evictions are scheduled for this year as well.28

III. Homelessness Is a Human Rights Issue

Homelessness is not just a racial and socioeconomic justice issue; it is also an internationally fundamental human right. When the Universal Declaration of Human Rights was adopted in 1948, the right to adequate housing was officially recognized as a universally applicable and accepted principle of human rights law.29 Further, in 1966, when the International Covenant on Economic, Social and Cultural Rights (ICESCR) was drafted in 1966, further refined in 1986, and yet again in 2008, the right to adequate housing became an international human right.30

As individuals are displaced and the number of people living in encampments grows, the human rights implications of the Pilot Program deepen. The U.N. Human Rights Committee, in its General Comment No. 4 “The right to adequate housing,” notes that “adequate housing” is not only a matter of physical comfort but also a means of social integration that helps protect human dignity.31 Further, the U.N. Committee on Economic, Social and Cultural Rights states that “cumulative wrongful deprivations” can result in a “cumulative impact on health,”32 and that “[a]dverse effects on the human rights of individuals and communities may come to be magnified by the cumulative nature of such deprivations of human rights.”33

The United States, as a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), is obligated to carry out its international obligations under the Covenant.34 Additionally, the U.S. is also a party to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). These international treaties affirm the human rights of all individuals, regardless of their nationality or legal status.35

A recent study by the National Low Income Housing Coalition found that prices for housing and stagnant wages have created a severe shortage of affordable housing.36

In response to these challenges, the United States has a legal and moral obligation to provide adequate housing for all individuals, regardless of their legal status or nationality. By evicting individuals from encampments without guaranteeing them alternative, permanent housing, DMHSS is failing to uphold its legal and moral obligations.

24 Id.
26 Id.
27 Maydeen Merino & Spencer Donovan, DC Evicts More Than 30 Homeless Residents From Park at New Jersey and O NW, Surrounds the Site in Fences, St. Sense Media (Dec. 8, 2021), https://www.streetensemedia.org/article/dc-evicts-30-homeless-residents-park-new-jersey-0-nw-surrounds-fences/#.Yk84qRPMJoO.
Article 11.1 included the right to an adequate standard of living, including adequate housing, as a fundamental human right. Although the United States is a signatory of the ICESCR, it has not joined the 108 states globally that have ratified the covenant. So, while the right to adequate housing as one of the most basic human needs is acknowledged internationally, the United States denies its citizens this right by refusing to recognize a legal right to housing at all.

Though the United States refuses to recognize the right to adequate housing, Title VIII of the Civil Rights Act of 1968, also referred to as the Fair Housing Act, emphasizes the importance of certain housing protections. Specifically, 42 U.S.C. § 3604(a) dictates that "it shall be unlawful to . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Despite this well-established law, the DMHSS—in evicting encampment residents before placing them in alternative, permanent housing—violates the Fair Housing Act because the Pilot Program both denies housing and makes housing unavailable to encampment residents. As Black people make up the majority of individuals living in and evicted from encampments, the evictions have a disparate impact on Black individuals specifically.

IV. Analysis

A. Encampments Are Dwellings

Encampments are legitimate dwellings, and as such, the FHA applies. Although federal and local legislatures go to great lengths to criminalize unhoused people and restrict what can be classified as a dwelling, cases throughout the United States have ruled in a wide range of circumstances that tents, as structures intended to be used for human habitation, are dwellings. In addition to the caselaw, DMHSS’ own definition of an encampment acknowledges that encampments are dwellings, stating that an encampment is “an abode such as a tent or unmovable structure . . . .” Moreover, the experiences of encampment residents themselves further affirm that encampments are dwellings, protected under the FHA. Countless individuals have lived in tents under the L Street underpass for years, some for over a decade. These people call the NoMa encampment home.

B. DMHSS Pilot Program Denies Housing to Persons Based on Race

The FHA further applies because DMHSS’ Pilot Program effectively denies housing to encampment

30 Id.
32 Id.
33 42 U.S.C. § 3604(a) 1968.
34 Id.
35 The United States Supreme Court held in Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. that disparate impact claims are cognizable under the FHA. 576 U.S. 519, 545 (2015).
36 Akalonu, supra note 12.
39 Austermuhle, supra note 14.
40 Id.
residents based on race, given that the majority of encampment residents are Black. While no data currently exists regarding the precise racial makeup of encampment residents, the racial makeup of D.C.’s unhoused population supports the claim that the overwhelming majority of encampment residents are Black. Accordingly, because DMHHS evicts encampment residents, most of whom are Black, without first ensuring that individuals receive guaranteed, alternative permanent housing before evictions take place, the agency and its Pilot Program deny and make unavailable housing to persons on the basis of race.

V. Recommendations and Conclusion

Ultimately, the existing legal protections under the Fair Housing Act that prohibit government agencies from denying a person a dwelling based on race protect encampment residents facing evictions. To ensure that DMHSS is compliant with the FHA and with the model standard set by ICESCR in recognizing a legal right to adequate housing, the agency must not close encampments until after encampment residents secure alternative, permanent housing.

41 Letter from Brian McClure, Director, Council Office of Racial Equity, to the Honorable Phil Mendelson, Chairman, Council of the District of Columbia (May 12, 2021), https://lims.dccouncil.us/downloads/LIMS/46864/Other/B24-0168-REIA__DOPA_Amendment_Act_of_2021.pdf (providing a survey of people experiencing homelessness conducted in January 2021, which found that 86.5% of the residents who experienced homelessness were Black or African American and that according to The Community Partnership for the Prevention of Homelessness, Black residents are disproportionately affected by homelessness in the District).

42 Id.
Introduction

Just over half of the world’s population has access to the internet—leaving more than forty percent of people without access to connectivity, education, economic opportunities, or a reliable means to perform daily tasks that most wealthy countries and their citizens can do with ease.¹ As the world tries to keep up with technology, almost all aspects of daily life have moved online, and this has left billions of people who still lack internet stranded without access to integral resources like emergency alerts, education, banking, telehealth, and the ability to engage in online discussion. Without the means to communicate online, both by exercising one’s voice and receiving information, people without internet access are blocked from their accessing their fundamental human rights, including freedom of speech, freedom of expression, and the right to education.²

I. Background

In a country of nearly 22 million people, less than two million Sri Lankans have fixed broadband access.⁷ Those excluded from the internet are primarily the portion of the population in rural, non-English

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speaking areas and who are at the bottom of the socio-economic pyramid. Only about forty percent of households with children have an internet connection and fifty-two percent have a computer or smartphone. By failing to ensure that their citizens are guaranteed internet access to the majority of its population, Sri Lanka is violating the ICCPR and the Sri Lankan Constitution—both which protect freedom of speech and freedom of expression and which should guarantee universal internet access. Furthermore, by failing to ensure its children have internet access, Sri Lanka is violating the CRC, as the internet is a crucial part of education.

In 1996, Sri Lanka’s government created the Telecommunications Regulatory Commission under an amendment to the Sri Lanka Telecommunications Act of 1991. The Act’s purpose is to “ensure that the telecommunication services in the country are operated in a manner which will best serve and contribute to its overall economic and social development and advancement” and “to ensure compliance by operators with international or other obligations entered into by the Government of Sri Lanka in relation to telecommunication.” This Act codifies Sri Lanka’s governmental duty to ensure its citizens have access to internet, but the country is currently falling short of this duty.

In Fernando v. Sri Lanka Broadcasting Corp., the Sri Lankan Supreme Court upheld the right to free speech and acknowledged the right to receive information—which principally accompanies free speech. Sri Lanka’s Broadcasting Corporation Education Services launched the Non-Formal Education Programme (NFEP) in 1991 but abruptly canceled the program in 1995. Two people brought suit against Sri Lanka’s Broadcasting Corporation for violating their rights under Article 14(1)(a) and thereby abridging their freedom of speech and expression. The Court ruled for the plaintiffs by reasoning that Article 14(1)(a) should not be interpreted narrowly, and that Article 14(1)(a) specifically extended the freedom of speech and expression to include the right to obtain and record information. The programming included opportunities for the listeners to engage with programs, and the petitioner in the case was an active participatory listener. The Court followed the petitioner’s view that speech is protected and requires the receipt of information. Therefore, in Sri Lanka, freedom of speech includes the right to receive information, which also gives rights to the listener.

II. LEGAL ANALYSIS

In ratifying the ICCPR and CRC and codifying freedom of speech and expression protection, Sri Lanka’s government expresses its goal to protect citizens’ freedom of speech and expression and provides the space for internet access to be protected as means of communication develop in unpredictable ways. The legal framework exists to protect Sri Lankan citizens’ rights to the internet.

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9 Sri Lanka, Freedom of the Net 2021, supra note 3.
10 CRC, supra note 6, art. 23–24, 28–29, 35; Sri Lanka, Freedom of the Net 2021, supra note 3.
12 Id.
14 Id.
15 Id. at 161, 166–67.
16 Id. at 179.
17 Id.
18 Id.
19 See id. at 177 (reasoning that freedom of speech also must also recognize freedom of the recipient to information).
In 2016, the United Nations formally declared internet access a human right protected under the ICCPR. Article 19 of the ICCPR protects the right to free speech, and reads, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." While "internet" is not specifically mentioned, the language "regardless of frontier" and "other forms of media" has been interpreted as a placeholder for new technology, as forms of communication evolve and develop, including the internet. Sri Lanka signed and ratified the ICCPR in 1980, making its provisions binding on the state. Moreover, Sri Lanka’s Constitution mirrors the ICCPR in Article 14(1)(a), which protects human rights and freedom of expression.

The Court in Fernando cited several cases to support its reasoning, including Visuvalingam v. Liyanage, a case brought after a newspaper was banned by two loyal readers, whom argued that the freedom of receipt of information was within the right to freedom of speech. While holding the ban of the newspaper to be a constitutionally lawful restriction of free speech, the Court acknowledged that public discussion was important for democracy.

The internet is a vehicle for connection, linking people across time and geographical barriers. While it holds useful tools for everyday life such as banking, education, and healthcare, the internet is also a tool people use to express themselves, engage in public discussion, and receive information. The Sri Lankan Supreme Court agreed that people’s freedom of speech, expression, and receipt of information needs to be protected to protect the human rights of people within their country.

As held in Fernando, the right to freedom of speech includes the “right to equality and right to information needed to make his freedom of speech effective.” The internet has joined—if not surpasses—the giants of communication, such as newspapers and broadcasting, where people speak and share ideas. Thus, in Sri Lanka failing to ensure their citizens have access to the internet, the government is impeding their ability to join a primary public forum, and thus violating their fundamental right to freedom of speech. With over half the population lacking the ability to engage on the internet, they are unable to receive information from news sources, connecting with friends and family through social media, accessing education, and perhaps, even receiving information or announcements from their government. Moreover, Fernando acknowledges a person’s right to make their speech effective, which is embedded in the right to freedom of speech. If the public conversation is online and a person lacks internet access, their voice risks becoming obsolete, as they are unable to join the dialogue and share their opinion or experience.

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22 ICCPR, supra note 2, art. 19.
25 Sri Lanka Constitution, supra note 6, art. 14; ICCPR, supra note 2, art. 19.
28 Id.
The internet has become a necessary tool to uphold democracy, as it is where people speak and listen to the public forum. Free speech is the very pillar which democracy rests because it preserves and informs citizens’ consent to be governed. Adequate information is paramount. If a person is restricted from information, their speech may not be informed, and lack of internet access increases this risk. As the Court in *Fernando* emphasized, “The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources.” Moreover, *Fernando* cites to the European Court of Human Rights (ECtHR), which held that the “right to receive information ‘basically prohibits a government from restricting a person from receiving information that others may wish or may be willing to impart to him.’” Although a European Court holding is not binding on domestic Sri Lankan law, it demonstrates the global view that internet has grown to become so absolute in modern day society that one without internet access is blocked from receiving adequate information. The internet hosts vast amounts of information at the click a fingertip and can reach across time and geography—a characteristic particularly important to the island of Sri Lanka. As the world grows more dependent on the internet, information is frequently posted exclusively online. A democracy requires the distribution of information to foster an informed population, and therefore, lack of internet access is not conducive to a democracy.

Furthermore, the internet is a platform to amplify voices. Much like print or simply standing atop a podium with a microphone, the internet strengthens and sharpens voices, providing vast amounts of easily accessible information. As the Sri Lankan Court said in *Visuvalingham*, free speech “rests on the assumption the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” The internet does just that—it amplifies and disseminates voices on the World Wide Web. If a pillar holding democracy is embodied in free speech and free speech is extended to the online world, the internet is a necessary platform to which all citizens of the democracy should have access.

Without access to the internet, people are excluded from information and in turn, excluded from education, which is protected by several provisions within the CRC. Signed and ratified by Sri Lanka, the CRC mandates that the state recognize a child’s right and adequate access to education, as well as education for the parents’ as it pertains to the child’s health. Much of this critical information is accessible online, and if the public discourse has shifted online, then a crucial part of modern education has to be in the virtual space.

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33 See id. at 176.  
36 See Wimal Fernando, [1996] Sri L.R. at 176 (reasoning that a democracy is rooted in the consent of those governed having access to information, which is supported by wide dissemination of information).  
37 See, e.g., O’Brien, supra note 37 (arguing against government-imposed internet shutdowns as they silence dissent and prevent users and citizens from speaking freely, hurting a nation’s development).  
39 See, e.g., O’Brien, supra, note 37.  
40 CRC, supra note 4, art. 23–24, 28–29, 35.  
41 Id., arts. 19, 23–24, 28.  
42 See id., art. 35 (describing the goals of a child’s education as protected by the CRC).
III. Recommendations

Sri Lanka still faces major roadblocks in its efforts to connect its citizens to the internet. While the country does a notable job in ensuring mobile connectivity, it lacks in fixed-broadband penetration rates, resulting in spotty network quality.\(^{43}\) Being an island, Sri Lanka is able to capitalize on submarine fiber-optic cables but lacks the last-mile infrastructure, which is the last link connecting end users.\(^{44}\) Therefore, focusing on last-mile deployment that guarantees high-quality service would be the wise prioritization.\(^{45}\) With government-funded economic incentives, the island-nation should invest in both private companies for deployment, as well as the partially government-owned broadband provider, Sri Lanka Telecom. While government-launched programs such as e-Sri Lanka have made major progress in providing internet access and education across the island, many programs have stalled.\(^{46}\) The program should be revisited, expanded, and better funded to provide citizens with the support they need to access the internet and use it confidently with the support of digital literacy programs. Furthermore, the COVID-19 pandemic largely helped the world realize how important staying connected online is for the effective continuation of a functioning society; sending additional funds to broadband deployment may be an easier effort to support politically.

Conclusion

Internet should be accessible to all people because it has become an integral part of our world and will only grow with time. Persons left without accessible internet are blocked from public discussion and basic public functions, which threatens the solidity of democracies. With most of its population lacking reliable internet access, Sri Lanka is violating its citizens’ human rights by abridging their freedom of speech, expression, and right to education as protected in Article 14(1)(a) of its Constitution, Article 19 of the ICCPR, and the CRC.

\(^{43}\) Broadband in Sri Lanka: Glass Half Full or Half Empty, supra note 5.

\(^{44}\) The Impact of the COVID-19 Pandemic on Internet Performance in Afghanistan, Nepal and Sri Lanka, supra note 4.

\(^{45}\) Id.

\(^{46}\) Broadband in Sri Lanka: Glass Half Full or Half Empty, supra note 5.

by Lauren Saxe*

INTRODUCTION

In 2020, individuals placed more than 1,000 phone calls in just six-months to the Center for WorkLife Law, which offers free legal advice to parents, pregnant employees, and other caregivers who want help getting leave or believe they are being mistreated at work.1 Dozens of parents filed lawsuits across the country in just the last year, including Lauren Martinez, who worked as an assistant office manager at a dentist’s office in Florida.2 Martinez requested to work from home because she struggled with childcare options and maternal duties throughout the workday, such as breastfeeding her newborn, but her employer denied the request.3 She had just returned from maternity leave about a month earlier, and days after her request, she was fired.4 Now, Martinez, among many other mothers and working parents who dealt with unfair workplace policies across the country, are currently filing lawsuits.5 Throughout the COVID-19 pandemic, employers in the United States have discriminated against women by penalizing them in the workplace based on their status as a parent and wrongfully terminating or otherwise forcing them to leave their job,6 violating Title VII of the Civil Rights Act of 1964.7 During the pandemic, companies have violated Title VII through discriminatory policies that disproportionately affect parents and specifically target women. While this Article focuses on women’s rights against discrimination under domestic law, it is important to note that the right against discrimination is an internationally recognized human right codified through the International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW), and although the United States has yet to ratify CEDAW to is a signatory of the CEDAW, and thus recognizes this right on an international level.8 This Article discusses the protections for parents and women granted in Title VII and applies them to companies

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4 Id.

5 Id.

6 Dockterman, supra note 2.


that employed discriminatory practices during the pandemic. Finally, this Article recommends how the U.S. government can and should hold companies liable for these violations.

I. Background

Title VII is a federal law that prohibits employment discrimination—including wrongful terminations—based on race, color, religion, sex, and/or national origin. Title VII’s prohibition of different or unfavorable treatment because of sex includes pregnancy, sexual orientation, and gender identity. Title VII also prohibits employment decisions based on stereotypes, defined as unfair or untrue beliefs, about abilities and traits associated with gender, such as being a mother. The pandemic has exacerbated workplace gender discrimination and working conditions to disproportionately affect U.S. women and their employment status over the last year and a half.

In 2020, more than three million American women dropped out of the workforce. For many, this was directly due to hardships that working from home during the pandemic required. This created a struggle to balance work-life expectations and form a new accepted workplace environment. Women across industries and titles, including secretaries and journalists, have been laid off or forced out of work during the pandemic. For years, the U.S. workplace has failed women in maintaining a balance between a successful career and a flourishing home life.

Between April 2020 to February 2021, employees filed at least fifty-eight lawsuits alleging that their employer denied emergency parental leave, did not inform employees of their right to take emergency leave, or fired employees for asking to work remotely or take leave while schools and daycares were closed. Additional parental duties have fallen on women during this time and due to some employers’ inflexibility and view that women cannot keep up with the workload as a result, firing these women directly violates Title VII. While most of these plaintiffs have filed suits under the Families First Coronavirus Response Act (FFCRA), they may also bring suit under Title VII of the Civil Rights Act.

II. Legal Analysis

Several sex-discrimination cases over the years have exemplified the legal challenges and thresholds that working women and parents battled and in many cases, won. In International Union v. Johnson Controls, Inc., workers brought a class action suit against Johnson Controls for discriminatory workplace policies under Title VII. The company enforced a policy that barred hiring all women, except for those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the Occupational Safety and Health Administration (OSHA) standard.

The U.S. Supreme Court ruled in favor of the employees who filed the class action, holding that the employer’s policy was facially discriminatory and that the employer did not establish that sex was a bona fide occupational qualification.
opinion, the Court stated that “the bias in Johnson Controls’ policy is obvious.” It further pointed out that fertile men, but not fertile women, were given the option as to whether they wanted to risk their reproductive health to obtain a specific job. Policies like this allow employers to decide what is best for their employees, making it difficult for the employees to have full autonomy over the decisions about their professional life, family planning, and their bodies. Similarly, like in the case of Lauren Martinez, companies throughout the pandemic questioned the maternal obligations of women and how it may detract from the workplace. Several companies made clear how they think women should deal with their at-home duties, and accordingly made the decision for women by dismissing them from the workforce.

Johnson Controls specifically targeted women and did not allow them the opportunity to work based on their status as potential mothers. While, ultimately, the U.S. Supreme Court ruled in favor of the workers, the Court of Appeals for the Seventh Circuit assumed that “the policy was facially neutral because it had only a discriminatory effect on women’s employment opportunities, and because it asserted purpose, protecting women’s unconceived offspring, was ostensibly benign.” This displayed the deep entrenchment of imbalanced gender views and the obstacles women routinely face, even though the Supreme Court ultimately reversed. The Supreme Court held that the policy was not neutral because it did not apply to male employees in the same way it did to female employees, even though the evidence confirms that lead exposure results in harmful physical effects on both male and female reproductive systems. It took our country’s highest legal authority to recognize a very clear violation of basic civil rights. Similarly, while the pandemic has been harmful to both men and women health-wise, we again saw women stripped of economic choice.

Gender discrimination issues are still evident in today’s workplace, and many U.S. legislatures and courts continue to protect the liberties and employment rights of men over women. Millions of women and parents left the workforce throughout the past year and a half due to inflexible work environments and/or wrongful termination. The United States is only one of seven countries today that does not provide paid leave to new mothers. The lack of policies and protections has a domino effect on women’s autonomy to make choices for their own lives. The weight of childcare and home responsibilities are not equitably taken into account in the workplace. Historically, employers have both intentionally and unintentionally made it extremely difficult for women to maintain jobs or even obtain work in the first place. Employers responsible for these wrongful terminations and inadequate, discriminatory, and sexist conditions must be held accountable for discrimination and violation of Title VII of the Civil Rights Act against women.

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26 Id. at 197.
27 Id.
28 Id. at 187.
29 Dockterman, supra note 2.
30 Id.
31 Johnson Controls, 499 U.S. at 187.
32 Id. at 188.
33 Id. at 193.
34 Id.
III. Recommendations

Part of the solution moving forward must be to continue to hold accountable those companies and organizations that place inequitable barriers and limitations on women and parents. One remedy may be more severe legal consequences for companies who do not comply with Title VII. A number of courts in prior gender discrimination cases have recognized the propriety of compensatory damages, punitive damages, and/or backpay. It is crucial that plaintiffs recover for the financial toll of lost employment, but it is equally important that corporations and organizations are disciplined when they mistreat their employees. In Kolstad v. American Dental Association, a female employee alleged that she was denied a promotion based on her sex, and the Supreme Court held that punitive damages could be awarded “without showing of egregious or outrageous discrimination, independent of employer’s state of mind.” Essentially, regardless of how severe an employer’s discriminatory acts are, the possibility to sue for punitive damages is still an option.

Additionally, in Ford Motor Company v. Equal Employment Opportunity Commission, the Equal Employment Opportunity Commission sued Ford Motor Company for refusing to hire women at one of its warehouse locations. As a result, the Court held that, absent special circumstances, the rejection of an employer’s unconditional job offer ends the accrual of potential backpay liability. This case put pressure on employers to immediately correct their behavior by offering an employee a specific performance remedy: the original role for which they applied. This was intended to avoid issues with backpay based on discriminatory hiring policies. The principles from both of these cases offer a strong roadmap as a possible route for present and future sex discrimination cases, like the cases that have been relentlessly fought over the last year and a half.

Conclusion

Holding U.S. corporations accountable is a key step to providing more equitable spaces for employees. As the sex discrimination and wrongful termination lawsuits that have stemmed from the pandemic begin to unfold, those affected must look to Title VII of the Civil Rights Act to uphold their employers to a reasonable standard of fairness. Companies across America displayed abhorrent firing processes throughout the pandemic, in direct violation of Title VII. U.S. courts need to bring justice to the many women who experienced them.

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41 Id.
42 Id. (clarifying that an employer is not necessarily vicariously liable for the decisions of its managerial agents, for purposes of imposing punitive damages, when those decisions are contrary to the employer’s good-faith efforts to comply with Title VII).
44 Id. at 219.
45 Id. at 229.
46 Id.
47 Id.
48 Cerullo, supra note 3.
Multinational oil companies and the Nigerian government have instigated extreme environmental damage throughout the Niger Delta region. The Nigerian government fosters a weak regulatory environment that allows unchecked water and soil pollution, which threatens the livelihoods of thousands. In failing to address mounting ecological catastrophe while repressing environmentalist advocacy, the Nigerian government has breached its international human rights obligations by denying residents of the Niger Delta their right to an “adequate standard of living” and “enjoyment of […] physical and mental health” under Articles 11 and 12 of the ICESCR. The Nigerian government’s violation of these laws undermines its international obligations and fails to promote national prosperity, contributing to ongoing security and humanitarian issues in Africa’s largest economy.

To confront the socio-economic issues facing Niger Delta communities hosting oil operations, the Petroleum Industry Act (PIA) mandates that “settlers” make an annual contribution of three percent of the previous year’s operating expenditure to a Host Community Development Trust Fund. The purpose of each community’s trust fund is to finance “capital projects,” including railway construction, roads, and telecommunications networks. Each community’s trust fund is led by a board of trustees that must have at least one member from the host community. However, the PIA misses the chance to reverse the environmental damage that has already taken place in the Delta, fails to put mechanisms in place to challenge oil-industry related repression, and provides insufficient funding to host communities.

This Article will discuss how the Nigerian government’s current regulatory environment for the oil industry breaches international human rights obligations by denying Niger Delta citizens their right to an “adequate standard of living” and “enjoyment of […] physical and mental health” under Articles 11 and 12 of the ICESCR. It will further explore how the recently passed PIA is insufficient to bring the Nigerian government in line with its international duties because it makes paltry investments in infrastructure in communities that host oil operations.
I. BACKGROUND

Crude oil and gas accounts for more than ninety percent of Nigerian export earnings and approximately two-thirds of government revenue.\(^6\) To entice multinationals to invest in oil extraction operations, the Nigerian government has both overlooked negligent environmental practices in the oil industry and aided in the abuse of citizens demanding more care for the Niger Delta ecosystem.\(^7\) Since the 1950s, companies such as Shell and Chevron have been responsible for hundreds of oil spills and leakages during their extraction efforts in the Niger Delta, which has wrought environmental devastation on the area.\(^8\) Nigeria loses roughly 400,000 barrels of oil to spills and leakages a day, outpacing the nation with the second highest rate of spillage, Mexico, by nearly 4,000 percent.\(^9\) Environmental degradation caused by the hydrocarbons entering the ecosystem can have a harmful effect on human communities, often leading to higher rates of infant mortality,\(^10\) liver damage,\(^11\) and emotional distress.\(^12\)

Oil corporations and the Nigerian government collaborate on security and armed operations around oil producing areas. As recently as the 1990s, companies like Shell have paid Nigerian military officials to torture and kill activists, such as Ken Saro-Wiwa, who have spoken out against environmental degradation and the company’s failure to clean-up after spills.\(^13\) Chevron, Shell, and Eni have historically rejected responsibility for the environmental issues their operations cause, opting to blame ethnic violence and theft of onsite materials by locals for the rate of spillage in the Niger Delta.\(^14\) The Nigerian government has also denied allegations that it is mishandling the money needed to finance clean-up operations and is using the military to

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\(^7\) Dulue Mbachu, The Toxic Legacy of 60 Years of Abundant Oil, Bloomberg (July 1, 2020), https://www.bloomberg.com/features/2020-niger-delta-oil-pollution/.


abuse communities by attacking public facilities and arresting citizens. Nigeria has similarly encouraged a regulatory environment that has failed to demand higher standards from oil companies operating in the Niger Delta, enabling rampant pollution to continue without a coordinated legislative or judicial response.

Nigerian President Muhammadu Buhari signed the PIA into law in August 2021. The law’s primary aim is to create a new administrative and financial framework for the national oil industry. The PIA seeks to remedy the issues brought by oil extraction by creating Petroleum Host Community Development Trusts, which are designed to provide direct social and economic benefits to communities hosting oil operations. The PIA obligates oil corporations in the Niger Delta to contribute three percent of earnings to local Host Community Development Trusts for investment in infrastructure and local clean-up efforts by trust funds. However, while broadly praised by international investors for streamlining the Nigerian oil industry and encouraging investment, Nigerian Delta stakeholders have harshly criticized the PIA for insufficiently addressing the ongoing humanitarian issues facing the region.

II. Legal Analysis

The Nigerian government is bound by the ICESCR because it ratified the treaty in 1993. ICESCR demands its parties to preserve fundamental economic, social, and cultural rights associated with quality of life. Nigeria is violating its obligations under the ICESCR because it permits widespread environmental degradation, which poses an ongoing threat to the health and livelihood of entire communities in the Niger Delta. Article 12 of the ICESCR is concerned with ensuring that states provide for “the improvement of all aspects of environmental and industrial hygiene.” This necessitates that states make a genuine effort to develop the infrastructure and economic practices needed to preserve the environment and protect the health of citizens. Additionally, Article 11 requires that states must “recognize the right of everyone to an adequate standard of living for himself and his family . . . .” Thus, under Article 11, states are obligated to facilitate policies that support communities and their quality of life. Likewise, Article 12 has further expounded that the right to health includes freedom from “exposure to harmful substances such as radiation and harmful chemical or other detrimental environmental conditions that directly or indirectly impact upon human health.”


17 Id.

18 PIA, supra note 3, § 240(2).

19 Id. § 240(2).


21 ICESCR, supra note 2, arts. 11–12.


23 ICESCR, supra note 2, art. 12.

24 Grisby, supra note 22.

25 ICESCR, supra note 2, art. 11.

26 Id.

The dire ecological circumstances and state repression of environmental advocacy presented in the Nigerian oil industry demonstrate a failure to adhere to these various agreements. Where Articles 11 and 12 of the ICESCR mandate that nations seek to advance industrial practices, the Nigerian government has regressed in its efforts to address the frequent oil spills that continue to affect communities of the Niger Delta region. Corruption and theft have been blamed for the slow clean-up efforts in the region by international observers, such as those associated with the African Commission on Human and Peoples Rights. Many of the international and domestic funds that support these efforts are unaccounted for, leading many international organizations to speculate that Nigerian officials are misusing the funds, reducing the rate at which ecological healing can occur.

Nigeria’s solution to this environmental damage, Chapter 3 of the PIA, does not go far enough to improve the socio-economic wellbeing of Niger Delta citizens bearing the brunt of environmental degradation. The three percent allocated to community development in the PIA is inadequate to address the widespread disenfranchisement and economic devastation brought by oil pollution. Using the income poverty threshold of $3.20 USD outlined by the World Bank, seventy-one percent of Nigeria’s population is living in extreme poverty. A high poverty rate mandates more extensive investment in communities facing water and soil pollution in the Niger Delta. Development trusts are a conceptually innovative means of sparking local employment and reversing the damage caused by oil extraction, but a three percent investment requirement is woefully inadequate to affect meaningful change for the communities they are designed to uplift. A three percent levy requirement may also instigate violence from Nigerians who feel the government has betrayed them.

III. Recommendations

A starting point for addressing the Niger Delta’s issues around environmental injustice would be to raise the allocation of funds by oil companies up from three percent. The PIA could also create an anonymous system for concerned workers and citizens in the area to complain to the local government about abuses directly relating to the oil industry, such as if the military were to target them for speaking against Shell’s operations. This could put Nigeria in line with its human rights duties by placing protections in place for citizens against harm in pursuance of their Article 11 right to an “adequate standard of living.”

The Nigerian government could manage the system through a website that doubles as a means of compiling the various complaints across an entire year to create an annual report that documents the number of direct instances of violence in the Niger Delta. This increased transparency could elevate the Nigerian public’s awareness of oil-related violence.

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32 Izuaka, supra note 30.
34 ICESCR, supra note 2, art. 11.
and put further pressure on the government and its corporate allies by the international community.

**Conclusion**

The Nigerian government’s efforts to attract multinational oil companies have led to the negligent nonenforcement of environmental regulations and the normalization of environmental degradation.\(^{35}\) The resulting oil spills do significant harm to the Niger Delta ecosystem and severely impact the health and livelihoods of local communities.\(^{36}\) The Nigerian government’s enabling of environmental damage violates Articles 11 and 12 of the ICESCR. The PIA seeks to address this issue in part through Chapter 3; however, the provision fails to help Nigeria comply with its international obligations because the funds provided to host communities are insufficient to meaningfully advance the standard of living and right to health of Niger Delta citizens.\(^{37}\)

The Chapter 3 provision misses the chance to reverse the environmental damage that has already taken place in the Niger Delta.\(^{38}\) It also fails to put in place enough mechanisms to call out oil industry-related state repression, and it provides too little funds to host communities. For a policy touted as an institutional revamp of the Nigerian oil industry, the PIA does little to address key humanitarian concerns in the Niger Delta. With Nigeria primed to be one of the most populous nations on Earth and with some of its most substantial oil reserves, the future of the increasingly economically and politically prominent nation and the entire West African region is reliant on responsible management of the Niger Delta ecosystem and respect for its inhabitants for socio-economic stability.\(^{39}\)

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\(^{36}\) Gabriel Eweje, *Environmental Costs and Responsibilities Resulting from Oil Exploitation in Developing Countries: The Case of the Niger Delta of Nigeria*, 69 J. Bus. ETHICS 27, 38 (2006) (discussing the scope of the environmental damage in the Niger Delta by stating that the 4,000 oil wells operated in the region are potentially compromised and pose a threat to fishing and agricultural activities needed by rural communities).

\(^{37}\) PIA, supra note 3, § 240(2).

\(^{38}\) Id. § 240(2).

The death of Sivabalan Subramaniam, an hour after the Malaysian police arrested him, has sparked national outrage. The police report indicates that Subramaniam died in the custody of police at 12:25 P.M., but the police did not notify Sivabalan’s sister that her brother was in “critical condition” at a hospital until 3:00 P.M. This story is one of many, all-too-familiar civilian encounters with the Malaysian police. The Malaysian government’s lack of checks or balances on the Royal Malaysia Police (RMP) has allowed the force to commit numerous acts of torture against persons in their custody, and in some cases, that torture has led to death.

A report by Amnesty International states that there were 140 civilian deaths in police custody from 2008 to 2018 in Malaysia. Since early 2021, multiple news sources have written articles detailing these atrocious acts, as well as the discrepancy in the accurate number of cases reported, suggesting that these numbers are actually much higher. The unhampered police powers of the Royal Malaysian Police force, and the plethora of incidents they have committed against persons in custody, constitute torture under international law.

I. Background

Unchecked police brutality continues to be an underlying problem of racism in Malaysia, just as it is in the United States. Police brutality, as defined by Amnesty International, includes torturous acts such as physical
and mental violence to coerce or persuade someone who is detained.\textsuperscript{7} Such acts may include rape, sexual harassment, and other similar acts of violence.\textsuperscript{8} Reports demonstrate that police violence include acts such as beatings, racial abuse, and unlawful killings at the hands of police.\textsuperscript{9}

Recently, through the early months of 2021, there has been a cumulation of several suspicious deaths of those while in police custody. In less than six months, six ethnic Indian men died under suspicious circumstances while detained by police.\textsuperscript{10} At present, evidence shows that police are disproportionality targeting specific ethnic minority groups in Malaysia, such as Indian men, who have endured long-standing institutionalized racism and discrimination in Malaysia.\textsuperscript{11} Immigrants also face discrimination and police brutality in Malaysia.\textsuperscript{12}

In May 2021, as previously detailed, Subramaniam, a security guard, died after being held in police custody.\textsuperscript{13} Reports stated that Subramaniam had difficulty breathing after his arrest and was taken to the Selangor Hospital where he passed away.\textsuperscript{14} Subramaniam's death occurred less than a month after police detained A. Ganapathy, a cow milk trader, who also died in a hospital as a result of police treatment while in custody.\textsuperscript{15} Subramaniam's case of police brutality led to social media hashtag trends including “#JusticeForGanapathy” and “#BrutalityinMalaysia.”\textsuperscript{16} The Malaysian Bar, an independent bar association that upholds the law and protects the interest of the legal profession and public,\textsuperscript{17} issued a press release in reaction to these instances of police brutality.\textsuperscript{18} The Malaysian Bar called for an immediate and independent investigation into Subramaniam’s passing because the “spate of unabated deaths in custody have caused an erosion of confidence in the enforcement authorities.”\textsuperscript{19}

Instances of police brutality in Malaysia are frequent.\textsuperscript{20} The Royal Malaysia Police has allegedly received several reports regarding accusations of rape.\textsuperscript{21}

\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{11} See id. (highlighting that over 23 percent of custodial deaths in 2018 were ethnic Indians, even though the community comprises only seven percent of the Malaysian population); see also Nuzhat, supra note 3 (noting that reports disagree as to whether police are actually targeting only Indians, but noting that Indians are disproportionately represented in police custody deaths).
\textsuperscript{14} Kaur, supra note 1.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{18} Firm Action Must Be Taken, supra note 13.
\textsuperscript{19} Id.
\textsuperscript{20} A Historic Opportunity: Ensuring an Effective Police Commission in Malaysia, supra note 4 (highlighting that between 2008 and 2018, there were 140 deaths in police custody).
sexual abuse and harassment, and other methods of torture. Reports of the use of chili powders and beatings are also prevalent. These recent deaths are spurring demands for independent investigation and oversight by the Malaysian government. As a further result of police brutality in Malaysia, civil society and political organizations in the country have also demanded the creation of an Independent Police Complaints and Misconduct Commission (IPCMC), as well as a new-and-improved process to select the Inspector General of Police (IGP).

II. Legal Analysis of Torture as Jus Cogens

The severity and frequency of police brutality against civilians in Malaysia violates the international jus cogens norm against torture. Jus cogens norms are internationally recognized as legal rules that States cannot ignore. While there is no exact definition or limit as to what constitutes jus cogens, most States agree that examples of jus cogens norms include torture, genocide, the prohibition of the use of force between States, the prohibition of slavery, and racial discrimination.

Malaysia is one of the only twenty-one countries in the world that is not a signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Further, Malaysia has taken no action whatsoever to affiliate with the Convention. The CAT defines torture as:

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\text{any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . punishing him for an act . . . committed or is suspected of having committed, or intimidating or coercing him . . . 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}
\]


23 Id.


28 Anne Lagerwall, Jus Cogens, OXFORD BIBLIOGRAPHIES (May 29, 2015), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml (defining jus cogens as a Latin phrase that translates to “compelling law” and includes principles of norms within the international law community that cannot be written out of laws nor set aside).

29 Id.

30 See U.N. Hum. RTS. OFF. HIGH COMM’R, Status of Ratification Interactive Dashboard: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, https://indicators.ohchr.org/ (last visited Apr. 15, 2022) (to view Malaysia’s ratification status, select “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” under “Select a Treaty” or select “Malaysia” under “Countries”).

or other person acting in an official capacity. . . 32
Under the CAT definition of torture, the Royal Malaysia Police has committed torture against its citizens. Numerous reports state that the police have engaged in brutality that rises to the level of torture, including acts of physical and mental suffering. 33
Furthermore, specific accounts, such as those of Sivabalan Subramaniam and A. Ganapathy, demonstrate police acts of severe pain and suffering based on discriminatory reasons. 34 These acts committed by the Royal Malaysia Police rise to the level of torture under the CAT because they meet the standard required of a violation of the internationally accepted *jus cogens* norm prohibiting torture.

International precedent supports accountability for perpetrators of *jus cogens* in the international legal space. Past examples demonstrate that public officials, such as police forces, have exacted torture while in power. 35 A notable example of a public official

... exacting torture includes the former president of Chile, Augusto Pinochet Ugarte. 36 Pinochet “reaffirmed the principles of international law that a state can judge the crimes of torture no matter where the acts are committed, and that not even a former head of state has immunity from prosecution.” 37 Pinochet was arrested in London on October 16, 1998, on an international arrest warrant that was issued by a Spanish judge. 38 Pinochet was ultimately charged with killing at least 4,000 people and overseeing Operation Condor, a secret police organization. 39 The decision to exercise universal jurisdiction and charge Pinochet outside of Chile demonstrates how *jus cogens* norm violations, which are encompassed within universal jurisdiction, are also applicable to public officials. 40

In Malaysia’s case, the Royal Malaysia Police’s brutality against its citizens, such as repeated accusations and reports of torture, 41 accusations of rape, and sexual harassment, are violations of *jus cogens* norms. These acts of brutality are committed by public officials and with the level of physical and mental punishment to rise to the status of torture under *jus cogens*.

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32 *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 CAT].


34 See Chen, supra note 10 (reiterating that both men succumbed to their injuries in prison as a result of brutal assault).


36 See Regina v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte) (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Q.B.) (U.K.); see also Tom Gjelten, Augusto Pinochet: Villain to Some, Hero to Others, NPR (Dec. 10, 2006), https://www.npr.org/templates/story/story.php?storyld=6606013 (highlighting the acts of torture committed by President Pinochet’s security forces both during their coup to overthrow President Salvador Allende and in Pinochet’s ensuing years in power).


39 Id.


41 2020 Country Reports, supra note 33.
Another example is the case of Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others. In this case, Mr. Jones, the respondent, argued that the prohibition of torture, as a *jus cogens* norm, supersedes other international law rules, including the rules of State immunity. This case is also largely important because it reiterated that under the principles of international law, States are required to condemn and criminalize the practice of torture and that States are further required to suppress the practice and provide trial and punishment for those found guilty of torture.

This case calls attention to States’ responsibilities to not only condemn torture but to also actively prohibit and punish those who practice it.

### III. Recommendations

Given Malaysia’s current systemic abuses by police violating internationally recognized *jus cogens* norms, the country must implement protections for persons against police brutality within its domestic legal framework. These human rights protections may arise from engagement with international bodies of law and through the enactment of domestic legislation.

To do so, Malaysia must (A) ratify the CAT; (B) strengthen its commitment to the Universal Declaration of Human Rights (UDHR); and (C) pass and commit to a national police oversight bill. These recommendations must be implemented so that the Malaysian Royal Police can begin to work towards recognizing and preventing violations of *jus cogens* norms. These recommendations would not immediately eliminate all police brutality in Malaysia, but rather these recommendations would help to provide protections to persons and instill a legal framework within Malaysian domestic laws to protect persons from torture.

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42 *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya (the Kingdom of Saudi Arabia) and others*, [2004] EWCA (Civ) 1394, [60] (Eng.).

43 *Id.*

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A. Ratification of the United Nations Convention against Torture (CAT)

These recommendations provide protection to persons against torture. Torture is a violation of *jus cogens* norms, and the most important recommendation is for Malaysia to ratify the CAT. There are many components of CAT that would be beneficial for Malaysia, such as the duty to effectively investigate allegations. In 2018, the World Organisation Against Torture (OMCT) and Suara Rakyat Malaysia (SUARAM) released a statement in support of Malaysian ratification of the CAT. This joint statement explicitly discussed the “long-standing issue of torture in police custody and inhuman treatment in prisons” and how these areas should be “prioritized as critical areas.” Ratification of the CAT would protect persons against *jus cogens* violations of torture because it would hold Malaysia accountable for its actions and broadcast to the world that these actions are impermissible.

Furthermore, an opening address at the Regional Dialogue on Malaysia’s Accession to the CAT in 2019 demonstrates the need for Malaysia’s ratification of the CAT. The current Malaysian Deputy Minister, Yb Mohamed Hanipa Maidin, explicitly called for Malaysia to improve and join the other 172 States Parties and signatories to the CAT. The Deputy Minister further stated that “Malaysia should no longer be among the 25 minority [countries] that has yet to

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44 CAT, supra note 30, art. 12.


46 *Id.*

47 Yb Mohamed Hanipa Maiden, Deputy Prime Minister, Prime Minister’s Department, Opening Address at the Regional Dialogue on Malaysia’s Accession to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (July 8, 2019), available at https://www.bheuu.gov.my/pdf/ucapan/TEKS%20UCAPAN%20YBTM/Ucapan%20YBTM%20-%20UNCAT.pdf.
make progress on combating torture and other cruel inhuman or degrading treatment or punishment.”

Within Malaysia, there is a push for ratification of the CAT, and these suggestions must turn into action, to protect all citizens. Ratification of the CAT would be one critical step toward adequately addressing police brutality in Malaysia.

B. Implementing a National Police Oversight Bill

Finally, Malaysia should also implement a police oversight bill to ensure police accountability. Implementing a police oversight bill would bring Malaysia more in line with the CAT because Article 2 of the Convention specifically denotes that each State must take effective legislative, administrative, and judicial measures to prevent acts of torture in any territory under its jurisdiction.49

There is also strong support in Malaysia to implement a national police oversight bill. Since 2019, there has been considerable discussion within the Malaysian government regarding the Independent Police Complaints of Misconduct Commission (IPCMC) Bill,50 but these discussions have yet to advance fundamental policy changes. There are many benefits to implementing a national police oversight bill, as it would: (1) promote integrity within the police force; (2) protect public interest by dealing with police misconduct; (3) formulate and put in place mechanisms for the detection, investigation, and prevention of police misconduct; (4) to advise the Malaysian government and make recommendations on appropriate measures to promote police integrity; and (5) “exercise disciplinary control” over the police.51 This bill would be a tangible step in promoting police integrity and utilizing independent sources to make certain that integrity is implemented.

However, it is important to note that some potential challenges include the appointment of members to the IPCMC, in addition to establishing a rigorous process of background screening to ensure that the members can carry out their duties without falling into any corrupt practices such as tainted investigative and enforcement authority and lack of transparency.

C. Strengthening the Universal Declaration of Human Rights (UDHR)

Currently, Malaysia has affirmed the acceptance of the Universal Declaration of Human Rights (UDHR).52 The UDHR’s provisions are broadly accepted to reflect customary international law,53 and under the Declaration, there are thirty rights and freedoms detailed, including the right to be free from torture.54 While Malaysia has agreed to follow the UDHR, the actions exhibited by the Royal Malaysia Police demonstrate otherwise. As a member of the United Nations, Malaysia has agreed to uphold the UDHR’s principles, as well as to investigate and prosecute illegal police abuse, which the country has continually failed to exercise and affirm promptly and thoroughly.55

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49 Id.
50 CAT, supra note 30, art. 2.
52 “I’m Scared to Be a Woman”: Human Rights Abuses Against Transgender People in Malaysia, HUM. RTS. WATCH 1, 63 (Nov. 7, 2021), https://www.hrw.org/sites/default/files/reports/malaysia0914_ForUpload.pdf.
53 Id.
However, it is important to note that the UDHR is only a General Assembly resolution, so it is not binding on States but rather can help better align a State with human rights principles. Importantly to note, though, is that in conjunction with ratifying the CAT, strengthening commitment to the UDHR could result in less police brutality because it establishes firmer accountability in preventing torture while also reprimanding and prosecuting those who violate such rules and standards.

**CONCLUSION**

The Royal Malaysia Police continues to violate the internationally recognized *jus cogens* norm on the prohibition of torture. These actions must be seriously considered by the Malaysian government and police force, and the police force must also be independently investigated and reviewed, otherwise conditions will only continue to worsen.

The Malaysian government should ratify the CAT, implement a national police oversight bill, and strengthen their commitment to the UDHR, in order to prevent further *jus cogens* violations. Implementing all of these recommendations will help to protect the Malaysian citizens because combined, these three recommendations will create sustainable solutions, such as accountability for the Royal Malaysia Police.
The Regional Systems Team seeks to provide up-to-date coverage of the regional human rights bodies' handling of some of our time's most pressing human rights issues. In this issue, the Regional Systems focuses on cases brought before the Inter-American Commission (IACHR) and the European Court of Human Rights (ECtHR). Each of these articles highlights the critical role of regional courts in shaping the human rights landscape of the future and putting an end to the past abuses.

The first article follows the case of Virgilio Maldonado Rodríguez before the IACHR. The piece discusses how this decision affects the rights of non-citizens in the United States to access consular services. The following two articles turn to the ECtHR. The first analyzes the ECtHR's ruling in a case pertaining to Denmark's deportation of a migrant with mental illness, and this article discusses how this decision fails to protect migrants. Finally, our Regional Systems coverage ends with a discussion on the issue of government surveillance in Bulgaria and how this human rights issue implicates Article 8 of the European Convention on Human Rights.
CONSULTING WITH CONSULS: VIRGILIO MALDONADO RODRÍGUEZ AND THE RIGHT OF CONSULAR ACCESS  
by Fabian Kopp*

On April 11, 1996, Virgilio Maldonado Rodríguez, a Mexican national, was arrested in Houston, Texas, for a bank robbery. During his interrogation by police, Mr. Maldonado confessed to an unrelated murder. This confession served as the basis for the state’s conviction of capital murder. The state trial court judge subsequently sentenced him death in 1997 and eventually commuted Mr. Maldonado’s sentence to life in prison after a series of appeals asserted the police illegally obtained the confession by preventing Mr. Maldonado’s exercise of his right to access the Mexican consulate during detention. The Inter-American Commission on Human Rights (IACHR) took Mr. Maldonado’s case to address potential due process, fair trial, and arbitrary detention deficiencies. After the IACHR review determined that the United States violated his right to consular notification and effective counsel, the United States failed to remedy the deficiencies identified by the IACHR. As Mr. Maldonado’s case demonstrates, foreign nationals’ due process rights suffer when consular access is circumscribed.

Mr. Maldonado’s IACHR petition alleges that his court-appointed counsel ineffectively represented him during the trial and subsequent appellate process. Additionally, the petitioner maintains that the police failed to notify Mr. Maldonado of his right to consular notification, in violation of Article 36 of the Vienna Convention on Consular Relations. In contrast, the United States asserts that Mr. Maldonado received extensive due process protections, multiple layers of judicial review found his counsel effective, and decisions made by counsel at trial and sentencing reflect valid decisions of legal strategy. Further, the United States insists that the IACHR may not review claims made under the Vienna Convention and that detained individuals do not have the right to demand consular assistance.

During its review of Mr. Maldonado’s case, the IACHR found that the United States did not ensure he received effective representation, failed in its obligations to notify him of his right to consular notification under Article 36.1 of the Vienna Convention, and used excessive solitary confinement during his time on death row, thereby violating Articles XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man. Particularly, the IACHR found Mr. Maldonado’s lack of consular access was an instrumental factor in denying due process and a fair trial. Under the Vienna Convention, authorities detaining a foreign national must inform the detained person of their right to consular access and allow detained foreign nationals free and private communication with their consular post upon request. Here, the United States failed to notify Mr. Maldonado of his Vienna Convention right. Given Mexico’s extensive program of consular assistance to its nationals

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2 Id.
3 Id.
4 Id. at ¶¶ 4, 5.
5 Id. at ¶¶ 1–2, 67.
6 Id. at ¶ 67.
7 Id. at ¶ 7.
8 Id. at ¶ 8.
9 Id. at ¶¶ 11–13.
10 Id. at ¶ 10.
11 Id. at ¶¶ 45, 59 (describing, respectively, the right to a fair trial, right to protection from arbitrary arrest, and the right to due process of law).
12 Id. at ¶¶ 56, 59.
14 Virgilio Maldonado Rodriguez, Case 12.871 at ¶ 55.
abroad, prompt notification as established in Article 36.1 of the Vienna Convention would have been crucial in avoiding due process violations that occurred during Mr. Maldonado’s detention and trial.\(^{15}\)

In recognition of these harms, the IACHR recommended that the United States grant Mr. Maldonado relief in the form of review of his trial and sentence to comply with fair trial, due process, and protection from arbitrary detention guidelines under the American Declaration.\(^{16}\) Additionally, the IACHR concluded that the United States should review laws, procedures, and practices affecting persons accused of capital crimes; and ensure the effectiveness of legal counsel and consular access.\(^{17}\)

As Mr. Maldonado’s case makes clear, foreign nationals’ consular access under Article 36 of the Vienna Convention implicate due process concerns. These concerns have been the subject of litigation in the IACHR, the Inter-American Court of Human Rights (IACtHR), the International Court of Justice (ICJ), and the U.S. Supreme Court.\(^{18}\) In 1999, the IACtHR issued the *Information on Consular Assistance* advisory opinion on whether Article 36 of the Vienna Convention could be considered an enforceable grant of human rights under Article 64(1) of the American Convention.\(^{19}\) In 2004, the ICJICJ took up the issue of whether a detained foreign national should be informed of their Vienna Convention rights and the local consular post notified in the *Avena* case.\(^{20}\)

In 2005, shortly after the ICJ’s conclusions, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes and found the ICJ’s interpretation of the Vienna Convention non-binding and unconvincing.\(^{21}\) In 2008, the U.S. Supreme Court explicitly prevented domestic enforcement of the ICJ’s decision.\(^{22}\) Considering the United States’ continued evasion of its obligations under the Vienna Convention, it appears unlikely that foreign nationals will receive consular notification as envisioned under the Vienna Convention, despite the proposal of a number of reforms to implement it as binding law.\(^{23}\) Without a requirement for the United States to fully comply with the Vienna Convention, the IACHR decision in Mr. Maldonado’s case will likely be toothless and the protections afforded as human rights norms under the Vienna Convention will continue to erode within the United States.

\(^{15}\) Id. at ¶¶ 54–58.

\(^{16}\) Id. at ¶ 67.

\(^{17}\) Id.


\(^{19}\) Information on Consular Assistance Case, *Advisory Opinion OC-16/99, supra* note 18, at ¶¶ 4, 141 (concluding that the Vienna Convention created an individual right to information that should be protected and the failure to observe the right led to a violation that could lead to juridical consequences).

\(^{20}\) *Avena and Other Mexican Nationals (Mex. v. U.S.),* I.C.J. Rep. 12 at ¶ 15, 153 (finding that Mexican nationals detained in the United States had a right to be informed of their Vienna Convention Art. 36.1 rights, right to timely notification of the Mexican consulate, right to timely communication with consular officials, and the right for legal representation).


\(^{22}\) *Medellin v. Texas,* 552 U.S. 491, 523, 532 (2008) (finding that neither the ICJ decision nor the President’s memorandum were directly enforceable law to override state limitations on habeas petitions).

In Savran v. Denmark, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the Danish government did not violate the European Convention on Human Rights’ (ECHR) prohibition of torture when it deported the petitioner, a man diagnosed with schizophrenia, to Turkey through a criminal sentencing in spite of the risk to his mental health. The petitioner, Arif Savran, had lived in Denmark from the age of six until his 2016 deportation, when he was thirty-one. After the government of Denmark deported him to Turkey, he had unpredictable access to medication, and he did not receive the follow-up consultations his previous treating psychiatrist in Denmark recommended. In 2015, Mr. Savran petitioned the ECtHR to hear his case. He alleged that the Danish government breached Article 3 by deporting him because it disregarded his medical needs, jeopardized his access to care, and exacerbated his condition. Reversing the lower chamber’s decision, the Grand Chamber voted to uphold a strict interpretation of the standard for finding deportations in violation of Article 3 on the basis of a medical risk.

The standard for withholding deportation due to medical risk is set out in Paposhvili v. Belgium. For a state to violate Article 3, deportation must expose the person to a substantial risk that their condition will suffer a “serious, rapid, and irreversible decline” as a result of the deporting authority’s action. This standard creates a high burden of proof for a petitioner to meet before the ECtHR will find a violation of the ECHR. Nevertheless, the ECtHR upheld a strict interpretation of this standard and found that Mr. Savran did not face a high enough risk of a swift and permanent decline as a result of his schizophrenia. The ECtHR confirmed that applicants with mental illnesses can meet the Paposhvili threshold but found that Mr. Savran’s lack of access to appropriate care did not rise to that level.

The ECtHR’s decision to uphold the Paposhvili standard calls into question the effectiveness of Article 3 protections for migrants at risk of deportation. Seven European governments intervened in Savran, advocating to maintain the high threshold of the Paposhvili standard and emphasizing the requirement of an “irreversible” decline in health. In Mr. Savran’s case, that requirement is particularly challenging to meet due to the chronic nature of his illness and the lack of consistent medical supervision which could have gathered stronger evidence. One contributing factor to this decision was the ECtHR’s skepticism about the severity of Mr. Savran’s condition, as well

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1 Savran v. Denmark, App. No. 57467/15, ¶ 148 (December 7, 2021), https://hudoc.echr.coe.int/eng?i=001-214330; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5, Nov. 4, 1950, 005 E.T.S. 4 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).


3 Id. at ¶¶ 70–71 (noting specifically that Arif Savran could not access his prescriptions because they were not reliably available near him).

4 Id. at ¶¶ 3, 68.

5 Id. at ¶¶ 88, 143.


7 Id.

8 Savran, App. No. 57467/15 at ¶ 143.

9 See id. at ¶ 137.


11 See Savran, App. No. 57467/15 at ¶¶ 110, 112 (The Dutch, French, German, Norwegian, Russian, Swiss, and United Kingdom governments intervened).

12 Id. at Partly Concurring and Partly Dissenting Opinion of Judge Serghides, ¶ 21.
as the government intervenors’ concerns that individuals may lie about mental health conditions to avoid expulsion.\(^\text{13}\)

The ECtHR has a pattern of requiring a showing of some irreversible or permanent detrimental effect resulting from a deportation, extradition, or other form of expulsion.\(^\text{14}\) For instance, the standard to stay an extradition under Article 3 requires a showing of an irreducible life sentence.\(^\text{15}\) The standard of irreversible consequences puts little to no restrictions on member states’ authority to expel individuals facing serious health risks or life in prison. If the ECtHR continues to uphold these standards, Article 3 protections will remain nominal at best.\(^\text{16}\) Savran has particularly troubling implications for individuals with mental illnesses facing deportation, as the swift and irreversible decline requirement not only imposes a high burden of proof but is also misaligned with many experiences of mental illness. The United Nations’ “Principles for the Protection of Persons with Mental Illness” establishes a right to “the best available mental health care.”\(^\text{17}\) The ECtHR’s strict Paposhvili standard as applied in Savran undercuts that right for migrants to Europe. The intervention of multiple member states indicates a political unwillingness to reshape immigration law around migrants’ health and best interests.

As Europe reacts to the current Ukrainian refugee crisis, commentators have noted an apparent hypocrisy in the willingness to take in white refugees in comparison to the European response to the Syrian refugee crisis and backlash against African migration.\(^\text{18}\) At this pivotal moment when double standards in the treatment of white migrants and migrants of color are being exposed,\(^\text{19}\) there is also an opportunity for European authorities to correct this imbalance. To fully protect the rights and well-being of migrants of color, it is necessary to confront the hostile legal environment facing vulnerable migrants whose ethnicity intersects with their mental or chronic illness. The unfavorable ruling in Savran demonstrates the need for a new push to fully recognize the right to treatment for migrants with mental illnesses.

\(^{13}\) See Savran, App. No. 57467/15 at \(\S\) 19, 113.


\(^{15}\) Vinter, App. Nos. 66069/09, 130/10, and 3896/10, \(\S\) 83–88.

\(^{16}\) See Savran, App. No. 57467/15 at Partly Concurring and Partly Dissenting Opinion of Judge Serghides, \(\S\) 16, 36 (advocating for an expansive interpretation based on the principle of effectiveness).


In recent years, government surveillance has been a hot topic in the Balkan country of Bulgaria. More specifically, there were some concerns by the general population regarding surveillance laws, the act of secret surveillance, and the system of retention and subsequent accessing of data. In fact, in August 2021, a special parliamentary commission in Bulgaria found that Bulgarian special services eavesdropped on more than 900 Bulgarians during anti-corruption protests between 2020 and 2021. Many of those targeted were students, activists, politicians, journalists, and others who spoke out against the corruption of the Bulgarian government. In *Ekimdzhiev and Others v. Bulgaria*, the European Court of Human Rights (ECtHR) took a further look into the issue of secret government surveillance and determined whether there are any flaws in the legal safeguards and oversight procedures around secret surveillance in relation to Article 8 of the European Convention on Human Rights (ECHR).

Covert government surveillance is legal under Bulgarian law, specifically under the Special Surveillance Means Act of 1997 and Articles 172 through 176 of the Code of Criminal Procedure. The legislation prescribes the methods of secret surveillance that are permitted, including visual surveillance, covert intrusions, eavesdropping and tapping telephone and electronic communications, and several other methods. Furthermore, Bulgarian law permits the retention and access of such communication data by authorities for six months. Additionally, under Bulgarian law, surveillance methods are permitted to be used for matters of national security and as when it is necessary to prevent or detect a serious intentional offense. A serious intentional offense is one that is punishable by more than five years of imprisonment. Examples of such applicable offenses include murder and terrorism, with drug offenses and racketeering being the most common for which surveillance is invoked.

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6. *Id.* ¶ 11.
7. Special Surveillance Means Act 1997, § 2(3) (Bulg.); Code of Crim. Proc., art. 172 § 1 (Bulg.).
9. *Id.* ¶ 18.
10. *Id.*
11. *Id.* ¶ 19.
In the present case, the petitioners are two Bulgarian nationals, Mihail Tiholov Ekimdzhiev and Aleksander Emilov Kashamov, and two non-governmental organizations, the Association for European Integration and Human Rights and the Access to Information Foundation. The petitioners, who are Bulgarian lawyers, have asserted that given the nature of their activities they are at risk of secret surveillance and data retention, Bulgaria is a violating their right to respect for private and family life under Article 8 of the ECHR. Article 8 of the ECHR provides:

(1) Everyone has the right to respect for his private . . . life, his home, and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as in . . . the interests of national security, . . . for the prevention of disorder or crime . . . .

More specifically, the petitioners argued that under the current laws of Bulgaria, the communications of anyone within the country could be intercepted, the retained data of anyone could be accessed by authorities, and there were no sufficient safeguards in place to protect against potential arbitrary or abusive data access and secret surveillance.

In its decision, the ECtHR found that Bulgaria’s surveillance violated Article 8 because it lacked proper judicial oversight and because the lack of clear regulation, such as the process for warrant issuance, could lead to government abuse. Further, the ECtHR found issue with the oversight of the system and did not think that the National Bureau for Control of Special Means of Surveillance could provide effective guarantees against abuse since many of the Bureau’s members were sourced from the security services and did not have proper legal qualifications. Finally, the ECtHR found that Bulgaria’s data access and retention process violated Article 8 due to lack of meaningful oversight raised concerns of potential arbitrary or abusive data access, due to there being no duty to examine individual complaints and the rules governing the work were not made available to the public.

Therefore, the ECtHR ultimately concluded that the relevant Bulgarian legislation governing secret surveillance and the retention and accessing communications data violated Article 8. Lastly, the ECtHR recognized that an appropriate form of redress would be to make the necessary changes to domestic law to ensure that the domestic laws are compatible with the ECHR.

This case can signify a change in Bulgaria and the system of secret surveillance, given that the recent election in Bulgaria has created a few shifts within the government. More specifically, Bulgaria has been ranked as the most corrupt member state of the European Union. However, in the recent parliamentary election in Bulgaria—held in November 2021—a new centrist anti-corruption party won the election indicating that the newly formed Bulgarian government will not be tolerant of corruption thus leading to reform in the secret surveillance system in respect to its populations right to privacy. Perhaps the best way to reform the system is to create a clearer and more effective system of regulation and oversight in

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12 Id. ¶ 3.
13 Id. ¶ 10.
15 Id. ¶ 250.
16 Ekimdzhiev, App. No. 70078/12 at ¶ 301.
17 Id. ¶ 281.
18 Id. ¶ 386.
19 Id. ¶ 419.
20 Id. ¶ 427.
order to prevent the violations of human rights under Article 8 of the Convention.
We are excited to present a special column devoted to covering the rights of refugees, asylees, and migrants. The inclusion of this special column was inspired by the topic of the annual Human Rights Brief Spring symposium entitled “Reimagining the Refugee & Asylee Experience Through Law: Exploring U.S. Culpability and (Un)Exceptionalism.”

In this special column, we begin by summarizing the presentations of our renowned symposium speakers. We then transition to articles by first looking at a piece that explores the protection gaps for climate disaster-induced migrants and solutions to these issues. We proceed with a side-by-side analysis of the reproductive rights of migrants in the United States, and the United States’ violations of those rights from both a domestic and international legal perspective. Finally, we end by looking at the inadequacies of U.S. asylum laws for transgender asylum seekers.
Reimagining the Refugee & Asylee Experience Through Law: Exploring U.S. Culpability and (Un)Exceptionalism
by Thea Cabrera Montejo, Angela Altieri, Katherine Pratty, and Alexandra Curbelo*

The 2022 Human Rights Brief’s (HRB) annual symposium entitled Reimagining the Refugee and Asylee Experience Through Law: Exploring U.S. Culpability and (Un)Exceptionalism featured a two-day series to recenter our perspectives on the experience of refugees and asylees. The symposium highlighted the violence that persons with lived experiences1 endure at the hands of imperialism, colonialism, capitalism, and white supremacy. The symposium was also driven by rich conversations with legal academics, practitioners, activists, and people with lived experiences, and it strived to reimagine the refugee and asylum systems to recenter people’s humanity in all their fullness.

Melissa C. del Aguila, the then-Acting Director for Washington College of Law’s (WCL) Center for Human Rights & Humanitarian Law, and Nora Elmubarak, the Co-Editor-in-Chief for the Human Rights Brief, began the event with a brief history of the HRB and the significance of student-led initiatives in the development of people-centered solutions. Thea Cabrera Montejo, the Symposium and Education Editor, introduced the esteemed keynote speaker: Karina Ambartsoumian-Clough,2 the Founder and Director of United Stateless.3 Their lived experiences make them qualified leaders and experts in issues of citizenship, cross-border movements, and statelessness. “We’re more than just stories of displacement; we’re real people,” she said.4 Ambartsoumian-Clough informed the audience about the qualifications, ethnic diversity, risks associated, and the ultimate burden of being stateless.5 To underscore the suspense and frustrations of being stateless, Ambartsoumian-Clough bravely shared her own story. As she shared photos of her Ukrainian-Armenian family, she acknowledged how her lineage is rooted in trauma due to the legacy of war. She paused for several moments to acknowledge how the current Russian invasion of Ukraine “feels like erasure.”6 Grounding the audience in the sobering present reality, Ambartsoumian-Clough illuminates how the systems that forced her to flee still exist to this day. United Stateless is committed to build community with people affected by statelessness and advocate for their human rights, specifically by providing a defined path to citizenship and nationality. Ambartsoumian-Clough’s keynote speech conveyed passion, authenticity, and power as she began the two-day symposium.

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* Thea Cabrera Montejo is the Symposium and Education Editor and a 2L. Thea, along with Angela Altieri (2L), Katherine Pratty (1L), and Alexandra Curbelo (1L), organized the 2022 annual symposium with over a hundred people in attendance. The event was a great success thanks to the support from the HRB staff, Melissa del Aguila, SECLE staff, and the AV staff.

1 A Dictionary of Media and Communication (Chandler & Munday eds., 2d ed. 2016) (defining ‘lived experiences’ as personal experience about the world gained through direct, first-hand involvement in everyday events rather than through representations constructed by other people).


4 Id. at 8:24–8:34.

5 Id. at 10:05–10:20.

6 Id. at 23:05–23:23.
Second year law student Angela Altieri moderated the symposium’s first panel titled “U.S. Culpability and Responsibility in Creating Unsafe Environments.” The panel included three lauded panelists: social scientist and scholar Elizabeth Kennedy, Afghan journalist Bilal Sarwary, and International Program Manager for CHIRLA, Arturo Viscarra. To set the scene, the panel first explored what creates an unsafe environment for refugees and migrants. Panelists were unflinching in identifying the roots of unsafe environments. Viscarra specifically noted that the roots of any unsafe environment are colonialism and capitalism. The conversation then turned to the United States’ specific culpability in creating unsafe environments. On this point, Kennedy explained that the United States does not acknowledge the reasons migrants are forced to flee their home countries and seek refuge and asylum in the country while simultaneously supporting abusive police and military structures in the countries where migrants are leaving. To further this conversation, Sarwary said that, on the ground, there is a lack of understanding of the nuances Afghan refugees experience in Pakistan. For the United States High Commissioner for Human Rights. While the overall theme of the panel was hopeful in its ideals that the United States can change its structures to become less culpable in creating unsafe environments, panelists were blunt when asked how they think the country can best reverse its culpability and called out the United States’ racism, capitalistic structure, and its support for military dictators and repressive regimes.

The second panel, “Post Arrival Experiences of Refugees and Asylees,” moderated by first-year law student Katherine Pratty, featured the panelists Sirine Shebaya of the National Immigration Project, Sheila Velez Martinez of Pitt Law, and Sunil Varghese of the International Refugee Assistance Project. In this ninety-minute discussion, the panelists shared stories of refugees and asylees whom they assisted post-arrival to the United States. They described how the policies governing the refugee and asylum application process function and ways in which they are dysfunctional, using the “Follow to Join” backlog issue as an example. They also discussed how migrants are sorted into linguistic buckets of “asylee,” “refugee,” and “immigrant,” but made note of how this categorization of people fails to reflect the realities of how and why people move and are displaced. To conclude, the panelists created a list of policy aspirations, on which they included a societal shift in how we think of human movement. In keeping with the intention of centering conversations of policy around human experiences, Ms. Shebaya reminded the audience of the real impact that migrant prosecutions have on people’s lives: When you punish people for coming in outside a port of entry, what you’re saying is that, in addition to whatever harrowing journeys they already made,

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8 Bilal Sarwary, LinkedIn, https://af.linkedin.com/in/bilal-sarwary-4a513ab2?challengeId=AQGlo_rMQxHq5QAAAAYAklbXIXANSKcKU0nnGPPUVcSXTp-pud-DEdov1O7LWEYXfzun3c4lwdcXnHUUt_gZuPagXRnOllyce8w&submissionId=cdccf7e9-d400-e416-64c0-4d58b4620f3d (last visited May 2, 2022).
11 Id. at 26:47–27:24.
12 Id. at 32.44–34:31.
13 Id. at 51:05–51:39.
18 Id. at 11:00–12:21.
19 Id. at 30:15–34:47.
20 Id. at 1:07:42–1:08:20.
they should walk 3,000 miles to the next port of entry, because sometimes that is the space that exists between two different ports of entry...  

The third and final panel of the Human Rights Brief Symposium focused on reimagining the refugee and asylee process by discussing possible remedies to current refugee laws and policies. The panel was comprised of five panelists: Professor Jaya Ramji-Nogales, Professor Jayesh Rathod, a private immigration attorney and blogger Jason Dzubow, Andrea Barron operations manager at TASSC, and Lewis Kunze who is awaiting an asylum interview with United States Citizenship and Immigration Services (USCIS). The latter three panelists focused on the affirmative asylum backlog which Andrea described as a “forgotten issue.” Jason told us the main issue with the affirmative asylum system is that “the USCIS is reviewing cases in reverse order and prioritizing the newer cases [over the] older ones.” Lewis explained to us that he has suffered severe depression and anxiety due to waiting seven years for an interview and there is still no end in sight.

Professor Ramji-Nogales offered action items that can be implemented to benefit asylum seekers, one of which is a country of origin information system to aid USCIS. A proposed solution for the affirmative backlog issue and refugee/asylee law in general is the importance of an individual’s right to the appropriate counsel which was emphasized by Professor Rathod. The panel concluded by imagining what a partnership between an asylum seeker and their legal counsel should look like and how that partnership can strengthen community ties; one suggestion was that lawyers take a backseat and allow the voices and opinions of community members to be the driving force of deciding how that partnership should ideally look like.

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21 Id. at 1:08:33–1:08:53.
26 TASSC Leadership, TASSC Int’l, https://www.tassc.org/tassc-team-bios (last visited Apr. 8, 2022);
28 Id. at 8:45.
29 Id. at 16:40–16:55.
30 See id. at 48:50–49:25
31 Id. at 20:56–22:25.
32 Id. at 27:20–27:48.
33 Id. at 1:08:40–1:11:00.
FILLING THE PROTECTION GAPS FOR CLIMATE CHANGE AND DISASTER-INDUCED MIGRANTS
by Kimberly A. Erickson*

INTRODUCTION

The number of global migrants is simultaneously increasing along with the severity of the climate crisis worldwide. Currently, neither international nor regional law addresses the environmental drivers of migration, and there are severe gaps in legal protections for this type of migrants. While the global focus is now shifting towards the drivers for climate and disaster-induced migration with recent collaborative efforts amongst the majority of states and UN initiatives, states must fill the gaps in legal protections for climate and disaster-induced migrants through comprehensive global cooperation and state action.

One potential solution to provide climate migrants with legal protection is redefining the term “refugee” so that climate migrants who cross state borders can qualify for refugee status and international assistance. However, a legal redefinition is unlikely to help most environmentally displaced persons because (1) many will remain internally displaced and unable to access international protection, (2) climate change often has slow-onset effects that do not necessarily force migration, and (3) multiple grounds for refugee status would be difficult to isolate from one another, complicating the status determination process.

Instead of a redefinition, states should implement proactive measures to develop other protected paths of migration. Such measures may include disaster prevention and preparedness, adaptation to natural hazards, and planned relocation options for environmentally vulnerable populations. Disaster preparation and response plans, sustainable adaptation efforts, and strategic relocation are more easily tailored to individual communities and their respective environmental threats than one universal refugee status that only offers post-crisis protection for external displacements. States can protect climate and disaster-induced migrants by taking steps like these to close the gap between humanitarian and development action.

I. ENVIRONMENTAL DRIVERS OF MIGRATION

A climate-induced migrant generally refers to a person that is driven from their home by sudden or gradual changes in the weather or climate. Rapid onset events are singular, discrete weather events that occur within a matter of days or even hours. Such events may include earthquakes, floods, hurricanes, landslides, severe storms, tornadoes, tsunamis, volcanic eruptions, and wildfires. Slow-onset events evolve over years from incremental changes or increased frequency or intensity of recurring events. Examples include desertification, salinization, temperature increase, land infertility, and rising sea levels. Migration may be either temporary or permanent and may be caused by seasonal conditions or a singular incident. This type of human mobility may be voluntary.

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3 Id.

4 Id. ¶¶ 26–49.

5 Wilkinson et al., supra note 1, at 1.
but it is often considered a forced movement in order to survive.⁶

Climate change is causing human suffering in many ways. Natural resources such as potable water and materials for shelter are becoming scarcer in certain areas.⁷ Crops and livestock are not able to withstand deteriorating conditions, such as extreme temperatures and precipitation patterns.⁸ Rising sea levels are pushing coastal communities further inland and sometimes completely out of their submerging home-lands.⁹ Declining conditions are rendering survival difficult and economic stability impossible to maintain.¹⁰ These extreme circumstances can become unbearable for individuals, forcing people to leave their homes, which often causes an additional and immense amount of suffering.¹¹ Displacement may compound already existing vulnerabilities and cause additional conflict because of competition over space and resources in new locations.¹² This undermines social unity and community resilience, while also creating new risks such as overpopulation and environmental degradation in the places where displaced persons are taking refuge.¹³

Climate change continues to cause slow-onset transformations that increase the frequency and severity of natural disasters,¹⁴ thus sustaining aggressive growth of disaster and climate-induced migration. In 2018, there were 17.2 million new internal displacements

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⁶ See id. at 3; see also Régis Blanc, Migration and Forced Displacement: Two Sides of the Same Coin?, HELVETAS (Dec. 9, 2021), https://www.helvetas.org/en/switzerland/how-you-can-help/follow-us/blog/Other/Migration-and-Forced-Disposition-Two-Sides-of-the-Same-Coin (explaining that the voluntary characterization of migration is debatable since the traditional distinction of displacement is rooted more in the context of war rather than environmental influences).


associated with natural disasters, and in 2019, there were an additional 24.9 million. New internal disaster-induced displacements amounted to nearly triple the number of internal displacements caused by conflict and violence in 2019. These numbers are likely an underestimate and only reflect displacements that were forced, internal, and results of sudden-onset disasters. Not reflected in the data is the number of migrants who moved across state borders, those who migrated due to slow-onset climate change, and those who were displaced but are unaccounted for by states or organizations.

The World Bank has estimated that if no reductive action is taken, there will be 143 million internal climate migrants by 2050 within the regions of Latin America, South Asia, and Sub-Saharan Africa. Although the international community has acknowledged that climate migrants make up a large portion of the world's forcibly displaced population and that the population is expected to grow continuously and rapidly, no international response has been agreed upon or implemented. While a majority of these climate migrants are expected to move internally, there will be displaced persons forced out of their countries of origin as well. However, it is not one or the other that requires attention but rather the combination of both internal and external displacements that warrants an international response. The World Bank estimates that, with mitigating measures, the world can reduce climate-induced migration by up to eighty percent. Therefore, an organized effort to reduce negative human contributions to climate change, improve the resiliency of vulnerable communities, and develop effective response plans is necessary for states to address the climate migration crisis.

II. Qualifications for Refugee Status

In international law, there is no formal definition for a climate migrant nor recognition of climate migrants as refugees, which limits their eligibility for international protection. The 1951 UN Convention Relating to the Status of Refugees (1951 Convention) and the corresponding 1967 UN Protocol (1967 Protocol) amendment define a refugee as any person who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. To qualify as a refugee, a person must show fear of individualized persecution, not merely generalized

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17 Id. at 1.
22 Kumari Rigaud et al., supra note 19, at xxiv.
violence, and must be displaced outside of their country of origin.\textsuperscript{25}

Fear of persecution and displacement outside the country of origin may or may not apply to climate migrants. Environmentally displaced persons may experience a fear of persecution in addition to climate or disaster-related issues because there are often several overlapping or intertwining reasons for displacement.\textsuperscript{26} Attempting to classify a person as a refugee based on one type of persecution can be difficult for organizations and agencies tasked with addressing displacement crises, and even impossible if the person is internally displaced rather than having been forced outside of their nation’s borders.\textsuperscript{27} The inability of a climate migrant to obtain a refugee status may lead to a significant deprivation of international protection.\textsuperscript{28}

In some circumstances, regional law may permit a disaster-displaced person to obtain refugee status. This is usually a result of other threats such as violence and persecution that have become exacerbated by a natural disaster and which a person may use as evidence to qualify as a refugee.\textsuperscript{29} Some regional laws, such as the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) and the Declaración de Cartagena Sobre los Refugiados (Cartagena Declaration) in Latin America, include events or circumstances that seriously disturb public order and compel a person to flee their home to seek refuge in another state as a basis for refugee status.\textsuperscript{29} These treaties do not specifically address climate change or natural disasters, but the language creates a possibility that such conditions could be considered when evaluating an externally displaced person’s eligibility for refugee status. However, regional laws that grant refugee status to certain displaced persons are not always binding and protections afforded to refugees are limited to particular regions.

\section*{III. Broadening the Definition of “Refugee” to Encompass Environmental Drivers of Migration}

One possible avenue to increase international protection of climate-displaced persons is to officially enumerate climate change and natural disasters as acceptable grounds for refugee status. There are numerous arguments for and against the formal redefinition of “refugee” as stated in the 1951 Convention and the 1967 Protocol,\textsuperscript{31} many of which apply to regional redefinition as well.\textsuperscript{32} While broadening the definition of “refugee” by amending these UN conventions may be a progressive step, there are valid arguments that it is not a realistic measure, nor will it substantially address the expansion of aid for climate and disaster-induced migrants.

One advantage of amending the currently recognized definitions is to update treaties that are too outdated to appropriately respond to modern challenges, such as climate change,\textsuperscript{33} while still retaining

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} See Sanjula Weerasinghe, In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence \& Disaster or Climate Change, U.N. High Com’r for Refugees 9 (Dec. 2018), https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pl?redloc=y&docid=5c4987324.
\item \textsuperscript{27} Dina Ionesco, Let’s Talk About Climate Migrants, Not Climate Refugees, UN SUSTAINABLE DEV. GOALS (June 6, 2019), https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/.
\item \textsuperscript{28} See Dignity in Movement, supra note 28, at 42–44.
\item \textsuperscript{29} Id. at 44–45.
\item \textsuperscript{30} E.g., Convention Governing the Specific Aspects of Refugee Problems in Africa, Organization of African Unity, Sept. 10, 1969, 1001 U.N.T.S. 45, art. 1, ¶ 2; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. 3, ¶ 3, Nov. 22, 1984.
\item \textsuperscript{31} DIGNITY IN MOVEMENT, supra note 28, at 55 (2015).
\item \textsuperscript{32} \textsuperscript{33} See Adrienne Millbank, The Problem with the 1951 Refugee Convention, PARLIAMENT OF AUSTL. (Sept. 5, 2000), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0001/01rp05#:~:text=The%20crux%20of%20criticism%20is,refugees%20in%20their%20own%20countries).
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exclusion clauses that prevent suspected criminals from taking advantage of refugee status. The UN adopted the 1951 Convention for the purpose of solving migration issues that arose during the post-World War II era. Rather than creating novel contemporary problems, acknowledging climate change and its consequences generates awareness of its longstanding effects on vulnerable populations. With international or regional validation as drivers of migration, states can address climate change and natural disasters more directly by specifying protective provisions for forcibly displaced migrants that fall under this category of refugee.

Broadening the definition of “refugee” could make international assistance more accessible for displaced persons presently ineligible for refugee status. However, allowing millions more displaced persons to access refugee channels would likely overwhelm destination states and exhaust their resources. Some advocates even believe the guidelines set forth in the 1951 Convention and other regional treaties were too broad to begin with and should be narrowed because the world already cannot manage the needs of so many refugees. However, turning a blind eye to displaced persons merely ignores a problem that will not go away, whether those persons are classified as refugees or otherwise.

There are other reasons for rejecting the redefinition of “refugee” in the 1951 Convention. The UN High Commissioner for Refugees (UNHCR) argues that the 1951 Convention is the only universal refugee instrument that is still relevant today, filling its role as a united front that offers refuge to persons fleeing persecution. But perhaps, instead of trying to fit climate-induced migrants into the same mold, more beneficial solutions could be derived from more specifically tailored agreements. Climate-induced migrants will also not be able to reap the benefit of being put into this definition because they are most often internally displaced, thus disqualifying them from protection. The 1951 Convention would not be able to offer international protection to displaced persons as long as they remain within their own country (or even if a migrant crossed into a non-signatory state). That obligation would fall squarely on the countries of origin. Many internally displaced persons (IDPs) may not be interested in crossing state borders to seek international aid, instead preferring to remain as close to home as possible due to family or community ties and endeavoring to obtain assistance from their respective states. Financial barriers may also prevent IDPs from traveling across national borders to seek

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36 Convention Relating to the Status of Refugees, supra note 24, art. 33; Protocol Relating to the Status of Refugees, supra note 24, art. 33; Spyridoula Katsoni, The Future of “Climate Refugees” in International Law, Völkerrechtsblog (May 6, 2021), https://voelkerrechtsblog.org/the-future-of-climate-refugees-in-international-law/ (referencing the principle of non-refoulement that prohibits a state from returning any refugee to a territory where his life or freedom would be threatened).
37 Has the Refugee Convention Outlived Its Usefulness?, New Humanitarian (Mar. 26, 2012), https://www.thenewhumanitarian.org/analysis/2012/03/26/has-refugee-convention-outlived-its-usefulness (arguing that non-refoulement and status determination procedures are time-consuming, costly, and can be abused by migrants seeking to avoid immigration controls).
38 Kumari Rigaud et al., supra note 19, at xiv.
39 Millbank, supra note 33, at 18.
40 Wilkinson et al., supra note 1, at 4.
asylum or other types of international protection, such as temporary aid that may be more readily available across borders.\textsuperscript{43}

Since the 1951 Convention bases its classifications on a displaced person's geographic location, it prioritizes mobility over need.\textsuperscript{44} Under this framework, the UNHCR and states give priority to migrants that have been willing and able to arrive in a signatory state over migrants that have found temporary shelter in camps, non-signatory states, or their own countries of origin.\textsuperscript{45} Migrants who are less mobile or those that only have the resources to journey to a camp instead of a port of entry are no less deserving of legal and physical protection than others seeking safety.\textsuperscript{46} The nature of movement caused by slow-onset environmental changes also tends to be gradual as climate conditions deteriorate over time, rather than the “flight” often seen with conventional refugees.\textsuperscript{47}

Critics are also concerned that amending the 1951 Convention would be a wasted effort.\textsuperscript{48} First, the nexus dynamics, or the adverse effects of climate change in the refugee context would be very difficult to reflect in a treaty.\textsuperscript{49} The overlapping and entangled drivers of migration complicate a convention’s ability to isolate grounds for classifying a person as a refugee.\textsuperscript{50} Broader definitions may even have the ill effect of actually excluding the very class of persons that a convention originally intended to protect. By allowing more people to request refugee status, more time and resources must be devoted to the determination of status procedures, which could possibly restrict or delay access for those fleeing conflict or violence.\textsuperscript{51} A related concern is that the process may be subject to a greater number of abusive claims, so states parties may be more inclined to restrict access to status procedures. In turn, this may block displaced persons who would qualify for refugee status under the current legal framework from achieving that status and gaining the protection that they deserve under a convention.\textsuperscript{52}

Another obstacle to amending the Convention is the general lack of public empathy and understanding of refugees and asylees, especially with nationalist sentiments on the rise recently worldwide.\textsuperscript{53} Without sufficient media attention and public empathy to drive political agendas, it is unlikely that a significant number of states would be interested in spending the time on negotiations and willing to become signatories to an updated convention.\textsuperscript{54} There are already 148 signatories to the 1951 Convention and the 1967 Protocol,\textsuperscript{55} yet there is not enough state participation to accept all the refugees that fall under the current convention. States parties to international or regional agreements claim to be either at capacity for

\textsuperscript{43} Id.

\textsuperscript{44} Millbank, supra note 33, at 14.

\textsuperscript{45} See id.

\textsuperscript{46} See id. (describing the difficulty experienced by women migrating with children and their exposure and vulnerability to human rights abuses in refugee camps).

\textsuperscript{47} Jane McAdam, Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer, 23 INT’L J. REFUGEE L. 2, 8 (2011).

\textsuperscript{48} Id. at 17 (explaining that ratification, implementation, and enforcement would be difficult to compel).

\textsuperscript{49} McAdam, supra note 34.

\textsuperscript{50} Millbank, supra note 33, at 15.

\textsuperscript{51} Id. at 10.

\textsuperscript{52} Id. at 10, 18.

\textsuperscript{53} Id. at 2, 15 (explaining that because states approach asylum as an issue of immigration control and domestic politics, the public tends to believe that most asylum seekers arriving in western countries are motivated by economic and social reasons rather than the more “obvious” images of refugees driven from destroyed homes, which elicits more cynicism and hostility towards expanded immigration rather than sympathy); McAdam, supra note 34.

\textsuperscript{54} Millbank, supra note 33, at ii, 15 (alluding to the public becoming suspicious of asylum seekers’ motives when lacking sympathy-provoking media coverage of refugees instead of supportive).

accepting refugees or unwilling to comply with their obligations.66 Directing the 1951 Convention towards even more displaced persons, even if on distinct grounds of climate or disaster displacement, is unlikely to facilitate the protection of environmental migrants. Already, there are more people that qualify as refugees than can or will be helped by states parties to existing migration agreements.57 A more appropriate and encompassing response to expanding aid for displaced persons will look away from the legal definitions of the term refugee and towards environmental adaptation and measures relating to disaster prevention, preparedness, and response.

IV. The UN’s Role in Protection of Environmentally Displaced Persons

There is no singular UN agency responsible for managing climate or disaster-induced internal displacements. However, in 1991 the UN emphasized the importance of providing humanitarian assistance to victims of natural disasters, both in terms of immediate recovery and sustainable development,58 in addition to promoting prevention and preparedness efforts.59 Resolution 46/182 resulted in specific endeavors to advocate for inter-agency coordination of humanitarian responses, such as the creation of the Inter-Agency Standing Committee and the Office for the Coordination of Humanitarian Affairs (OCHA).60

After some structural reform in the 1990s, the UN designated the Emergency Relief Coordinator as the centralized leader with regard to internal displacement.61 The Coordinator has prioritized strengthening assistance and protections for disaster victims and for internally displaced persons, encompassing the environmentally displaced persons that remain within their home countries.62 One year later, the Guiding Principles on Internal Displacement were endorsed by the UN Commission on Human Rights.63 While not legally binding, the Guiding Principles have become well-recognized by heads of states as an authoritative framework for the protection of internally displaced persons,64 including those “forced or obliged to flee their homes . . . as a result of or in order to avoid the effects of . . . natural or human-made disasters.”65

Although it does not recognize climate migrants as refugees,66 the UNHCR has been asked by the UN General Assembly to take a pioneering role in addressing disaster-related displacement.67 In 2007, the then-High Commissioner for Refugees, António Guterres, urged states to address forced migration caused by environmental degradation and climate change.68 He stressed that the UNHCR has a duty to alert states of issues that hamper progressive develop-

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57 *Trends at a Glance: Forced Displacement in 2018*, U.N. High Comm’r for Refugees 2 (June 20, 2019), https://www.unhcr.org/5d08d7ee7.pdf (statistics demonstrating that 70.8 million persons were forcibly displaced at the end of 2018, yet only 25.9 million had been granted refugee status and 3.5 million were awaiting decisions on their asylum applications).


59 Id., ¶ 8.


64 G.A. Res. 60/1, ¶ 132 (Oct. 24, 2005) (as recognized by the heads of state in attendance at the 2005 World Summit in New York).

65 *GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT*, supra note 63, at 1.

66 José Riera, Senior Advisor to the Dir. of Int’l Prot., U.N. High Comm’r for Refugees, Int’l Conf. on “Millions of People without Protection: Climate Change Induced Displacement in Developing Countries”: Challenges Relating to Climate Change Induced Displacement 4 (Berlin, Jan. 29, 2013).


ment, along with the responsibility to find solutions to such challenges. The High Commissioner for Refugees created an internal task force on climate change, which monitors fluctuations in climate-induced migration and offers input to the Inter-Agency Standing Committee (IASC) task force on climate change. Through its involvement and leadership in the IASC sub-group on migration and displacement, the UNHCR developed a humanitarian advocacy strategy and began to submit joint policy papers to the annual United Nations Framework Convention on Climate Change (UNFCCC) Conferences of the Parties.

The UN General Assembly adopted the New York Declaration for Refugees and Migrants (New York Declaration) in 2016, providing member states the opportunity to reaffirm their commitment to protecting migrants and refugees. The New York Declaration acknowledges climate change, natural disasters, and other environmental factors as drivers of migration. Member states committed to addressing all drivers that create or exacerbate large movements of people. Accordingly, they also pledged to combat environmental degradation and ensure effective responses to natural disasters and the adverse impacts of climate change. Lastly, member states agreed to assist migrants experiencing natural disasters on a needs-basis in coordination with the relevant national authorities. The New York Declaration “mark[ed] a political commitment of unprecedented force and resonance,” paving the way for future covenants that focus on environment-induced migrants.

Building upon the New York Declaration is the 2018 Global Compact on Refugees, which recognizes that “climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.” The UN appreciates the gravity of the effect that climate change and natural disasters have on forcibly displaced persons that qualify for refugee status. Therefore, the UNHCR’s work protecting and supporting refugees also extends to persons both internally and externally displaced by disasters and climate change. The UNHCR offers direct assistance by providing legal advice, guidance, and development of norms to enhance the protection of rights for displaced persons. The UNHCR also conducts research and promotes policy coherence relating to disaster displacement.

UNHCR field-based activities are aimed to address internal and external displacement by ensuring sustainable responses, promoting risk reduction, and reducing the environmental impact of refugee settlements. The agency plays a leading role in the Global Protection Cluster, which assists and protects displaced persons affected by natural disasters and conflict. When needed, the UNHCR deploys emergency teams to provide services that include registration, assistance, and protection.

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69 Goodwin-Gill & McAdam, supra note 20, at 15.
70 Id. at 15.
71 Id.
73 G.A. Res. 71/1, ¶ 1 (Sept. 19, 2016).
74 Id. ¶ 43.
75 Id.
76 Id. ¶ 50.
78 New York Declaration for Refugees and Migrants, supra note 72.
79 G.A. Res. 73/12, ¶ 8 (Nov. 26, 2018).
81 Goodwin-Gill & McAdam, supra note 20, at 26.
82 Id.
83 Id. at 27.
84 Id. at 10; Who We Are, Glob. Prot. Cluster, https://www.globalprotectioncluster.org/about-us/who-we-are/ (last visited May 1, 2022).
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The 2018 Global Compact for Safe, Orderly, and Regular Migration (Global Compact) is the first migration policy that identified climate change as a direct driver of migration. The Global Compact encourages multilateral agreements as a means to address the root causes of climate change along with developing adaptation measures in vulnerable countries to prevent further forced displacement. Although the Global Compact is not legally binding, it builds upon a framework of commitments from member states in the New York Declaration, fostering international cooperation while upholding the sovereignty of states. Member states commit to “create conducive . . . environmental conditions for people to lead peaceful, productive and sustainable lives in their own country . . . while ensuring that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration.”

The Global Compact, although lacking any enforcement mechanisms, includes many recommendations to achieve this goal, such as identifying the needs of victims of slow-onset disasters and corresponding solutions, sharing data and information on migration movements amongst all member states, and developing adaptation and resilience strategies to combat both sudden and slow-onset disasters and environmental degradation. The Global Compact also supports minimizing all adverse drivers that compel people to leave their countries of origin and investing in programs with sustainable development goals. It is important for states to create and improve programs that focus on disaster resilience, disaster risk reduction, climate change mitigation and adaptation, and displacement preparation and response. The last step requires monitoring and anticipating disaster risks and threats that might trigger migration movements, strengthening early warning systems, developing emergency procedures, and supporting post-emergency recovery.

V. THE NANSSEN INITIATIVE AND THE AGENDA’S ROLE IN PROMOTING PROTECTION OF ENVIRONMENTALLY DISPLACED PERSONS

International organizations besides the UN have taken action to facilitate cooperation amongst states to expand protections for climate and disaster-displaced persons. The Nansen Initiative is a state-led process aimed at building consensus on methods to address protecting and assisting externally displaced persons in the context of disasters and climate change. While the Nansen Initiative is originally based on a bilateral agreement between Switzerland and Norway, it encourages other interested states to get involved and develop effective practices on a nonbinding basis. In 2015, the Nansen Initiative produced and endorsed

90 Id. ¶ 18.
91 Id. ¶ 21(h).
92 Id. ¶ 18(h).
93 Id. ¶ 18(i).
94 G.A. Res. 73/195, ¶ 18(b) (Dec. 19, 2018) (These programs would attempt to empower countries of origin to address: poverty, food security, health and sanitation, education, inclusive economic growth, employment, gender equality, infrastructure, urban and rural development, violence, discrimination, good governance, human rights, resilience and disaster risk reduction, and climate change mitigation and adaptation.).
95 Id. ¶ 18(b)–(c).
96 Id. ¶ 18(c).
97 The Nansen Initiative, supra note 29, at 6.
98 Id.
an Agenda with guidelines for protecting displaced persons, reducing disaster risk, building resiliency, and preparing relocation plans and disaster responses. The Agenda calls for solidarity and cooperation amongst states, regional organizations, and the international community, because potentially any and every state may encounter disaster displacement as a country of origin, transit, or destination.

To protect displaced persons, member states must take measures to both prevent and respond to disaster displacement and its causes. For prevention and preparation, the Agenda recommends mapping historical cross-border displacement movements to identify communities at risk of future displacement, amending existing policies to include procedures for identifying and admitting disaster-displaced persons, and increasing the capacity of border and immigration authorities to implement such amended policies. For response, the Agenda outlines effective practices that receiving states can follow.

At the very least, destination states should consider granting entry and temporary stay to disaster-displaced persons, as well as streamlining the visa and refugee processing system. These steps, in addition to suspending documentation requirements, would expedite migration processing of displaced person and facilitate cross-border movement for pastoralists and livestock through transhumance agreements, especially in times of drought.

The Nansen Initiative Agenda also recommends that receiving states ensure displaced persons enjoy full human rights, have access to assistance to meet basic needs, and receive personal documentation indicating their status and right to stay. During this time of stay, destination states should consider providing humanitarian protection measures for climate-displaced persons. Measures such as suspending deportation and extending or changing migration statuses would prevent displaced persons from being returned to extreme hardship or a state of disaster that cannot support returning citizens. These measures can also apply to foreigners who were already abroad when a disaster-affected their country of origin. Granting protection from return to a state of disaster shields the individual migrant, but the Agenda also encourages states to allow those migrants to remain in order to send remittances to support family members in the disaster-affected country of origin as a measure of solidarity. Regulation of admission of foreigners is an inherent right of all states, and the Nansen Initiative is careful to recognize states’ sovereignty and broad discretion when it provides guidelines for migration in the context of environmental drivers.

VI. PLANNED RELOCATION TO SHIFT IRREGULAR, UNPROTECTED MIGRATION TO STRATEGIC, PROTECTED MIGRATION

Focusing efforts on preventing and managing irregular migration rather than on subsequent, reactive protections may reduce unplanned and unprotected displacements. Instead of viewing migration as a failure to stay in place and adapt, it should be regarded as a proactive adaptation strategy, especially in the early stages of environmental degradation. Providing migrants with safer, planned pathways for reducing reliance on the changing environment and moving out of harm’s way is a strategic management solution that allows individuals and governments the ability to respond to gradual climate change in a dignified, informed, and controlled manner.

99 Id. at 7.
100 Id. at 6.
101 Id. ¶ 43.
102 Id. ¶ 47.
103 Id.
104 Id.
105 Id. ¶ 61.
106 Id. ¶ 65.
107 Id. ¶ 66.
108 Id. ¶¶ 67–68.
109 Id. ¶¶ 38–39.
States should allow some flexibility on a case-specific basis when displaced persons are prepared to return to their country or region of origin.\textsuperscript{111} With the goal of sustainable reintegration to avoid recurrent displacement if a community has deteriorated to the point of uninhabitability, displaced persons may consider returning to their country and resettling in a different location.\textsuperscript{112} Deterioration at this level may include significant destruction of residences, businesses, and infrastructure, land infertility, and risk of exposure to recurrent disasters.\textsuperscript{113} By assisting climate-induced migrants to return to a new residence within their countries of origin, receiving states will shift their responsibility back to the countries of origin. If this is not practical, then receiving states should facilitate long-term or permanent authorization to stay.\textsuperscript{114} As suggested by the Nansen Initiative Agenda, bilateral or regional agreements on regular migration may be the most effective facilitators of a planned relocation.\textsuperscript{115} Arrangements to support climate-induced migrants may be based on any number of grounds depending on states’ or regions’ needs, but most frequently they are created to support labor, family unification, or humanitarian assistance.\textsuperscript{116} Migration agreements for seasonal work can assuage displacements caused by cyclical natural disasters, such as hurricanes, tsunamis, tornados, flooding, and wildfires.\textsuperscript{117} Pastoralists\textsuperscript{118} regularly migrate to accommodate their animals’ dietary needs, but environmental stress that reduces the quality or quantity of grass and potable water force pastoralists to use increased or varied migration to cope.\textsuperscript{119} Permitting pastoral migration across state borders helps herders maintain their way of life and adjust migration routes according to environmental changes.\textsuperscript{120}

Expanded bilateral or regional labor agreements may be another method to assist individuals in at-risk communities plan for relocation. Labor agreements, while subject to the parties’ discretion, often provide new skills, education, or jobs to migrants, thereby producing employment opportunities in safer locations and the opportunity to send remittances to vulnerable communities of origin.\textsuperscript{121} Individual participants that take advantage of labor agreements will have more reliable migration pathways if permanent relocation is ever required due to substantial climate change causing inhabitability.\textsuperscript{122} These pathways can be especially important for small island states, arctic communities, and other countries experiencing significant loss of territory from climate change.\textsuperscript{123} Facilitating migration may also ease population pressure on fragile regions suffering substantial environmental degradation.\textsuperscript{124}

When negotiating agreements, states must be aware of the risk of exploitation of migrants and should therefore promote and enforce human rights.\textsuperscript{125} Host states may also be wary of migrants themselves exploiting agreements and taking advantage of state resources, but it is important to consider that long-term and permanent relocation is often a last resort for many people.\textsuperscript{126} Because of cultural ties, identity, and connection to the land, many people do not

\textsuperscript{111} See The Nansen Initiative, supra note 29, ¶ 72.
\textsuperscript{112} Id. ¶ 72.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. ¶ 88.
\textsuperscript{116} Movement Assistance, Int’l Org. for Migration, https://www.iom.int/movement-assistance (last visited May 1, 2022).
\textsuperscript{117} The Nansen Initiative, supra note 29, ¶ 88; Ionesco, supra note 56.
\textsuperscript{118} Pastoralists, Lumen, https://courses.lumenlearning.com/culturalanthropology/chapter/pastoralists/ (last visited May 1, 2022) (defining “pastoralists” as those engaged in a subsistence strategy dependent on the herding of animals and characterized by a nomadic lifestyle and extensive land use, i.e., moving to temporary pastures seasonally or as needed).
\textsuperscript{119} The Nansen Initiative, supra note 29, ¶ 87.
\textsuperscript{120} Id. ¶ 88.
\textsuperscript{121} Id. ¶ 89.
\textsuperscript{122} Id. ¶ 90.
\textsuperscript{124} The Nansen Initiative, supra note 29, ¶ 89.
\textsuperscript{125} Id. ¶ 91.
\textsuperscript{126} Id. ¶ 94.
consider relocation to be an appropriate option unless absolutely necessary for survival.\textsuperscript{127} Several small Pacific Island nations are now seriously considering regional migration plans involving permanent relocation as their “only reasonable and sustainable option,” according to Dr. Melchior Mataki, who serves as the Solomon Islands’ Secretary of the Ministry of Environment and Chair of the National Disaster Council.\textsuperscript{128} Many islands are experiencing severe erosion, relentless flooding, and salinization of farmland from rising sea levels.\textsuperscript{129} Ocean temperatures are rising, marine life and coral reefs are fading, terrestrial wildlife is seeking higher elevation, and droughts and natural disasters are becoming more severe.\textsuperscript{130} Despite all the adverse effects of climate change, many native Pacific Islanders are reluctant to leave their homes permanently,\textsuperscript{131} knowing that as they leave, it is unlikely anyone will ever return and some of the islands may no longer exist above sea level within a few decades.\textsuperscript{132}

\textsuperscript{127} The Nansen Initiative, supra note 29, ¶ 94.
\textsuperscript{130} Id. at 6–7, 15–16, 18.
\textsuperscript{131} Id. at 10, 21, 24 (explaining the importance of Pacific Islanders’ connection with their homeland for purposes of community, traditions, and identity).

\section*{VII. Adaptation Efforts to Support Environmentally Vulnerable Communities Avoid Displacement}

If planned relocation is not the most feasible solution to the deterioration of the natural environment, implementing adaptation measures can improve a community’s quality of life, economic stability, and safety of individuals. Investing in more resilient infrastructure and housing can reduce human displacements and the cost of rebuilding after a natural disaster strikes or as poor climate conditions progress.\textsuperscript{133} Natural hazards, in addition to weak infrastructure, can prevent residents from accessing healthcare, employment, and education.\textsuperscript{134} In low and middle-income countries, natural hazard disruptions can result in yearly losses of $390 billion or more.\textsuperscript{135} Examples of adaptive infrastructure include earthquake-resistant buildings and sea walls, dams, and dikes to reduce the destruction caused by flooding, landslides, and glacial melts.\textsuperscript{136} Communities can invest in natural terrestrial defenses as well by planting vegetation along coastlines to prevent erosion, flooding, and salinization of soil and freshwater sources.\textsuperscript{137} This can be an especially useful method when there is limited or unstable ground for building upon.\textsuperscript{138}

Additional adaptation measures include spatial adjustments, like relocating vulnerable buildings and infrastructure further inland to protect from rising sea levels, erosion, or frequent coastal disasters.\textsuperscript{139} Further measures may include modifying agricultural practices, planting more resilient crops, and finding alternate livelihoods.\textsuperscript{140} For an example, coastal residents that rely heavily on fishing practices for income...

\textsuperscript{133} The Nansen Initiative, supra note 29, ¶ 78.
\textsuperscript{135} Id.
\textsuperscript{136} The Nansen Initiative, supra note 29, ¶ 78.
\textsuperscript{137} Intergovernmental Panel on Climate Change, supra note 123, at 833.
\textsuperscript{138} Id. at 384.
\textsuperscript{139} Id. at 384–85.
\textsuperscript{140} The Nansen Initiative, supra note 29, ¶ 78.
may need to shift to a more sustainable occupation when rising sea temperatures or salinization have caused the ecosystem to become prohibitive for the preferred aquatic catch. Local communities may also need to alter their diet when nutrition sources, whether flora or fauna, become scarce or completely unavailable. Adaptation measures of any kind not only bolster the community that is directly affected by a disaster or climate change, but in the event that displacements do occur despite these measures, other communities are more resilient and prepared to host displaced persons.

A major cooperative adaption effort that resulted from the twenty-first session of the Conference of the Parties (COP21) to the UN Framework Convention on Climate Change (UNFCCC) is the Paris Agreement. Ratified by 189 states, the Agreement seeks to guide a global response to the threat of climate change and reduce climate-induced displacements by encouraging mitigation and adaptation strategies. The central goal is to limit the planet’s rise in temperature during the twenty-first century by reducing greenhouse gas emissions, but it also urges states parties to increase resiliency to climate change. Parties to the Agreement must report their achievements every five years with transparency and accuracy, and each communication is expected to reflect progress beyond the previous one. The Paris Agreement encourages each country to contribute to these global objectives at its highest level of ambition to effectuate worldwide change. Suggestions for advancement include national adaptation plans, updated periodically, comprised of individual state needs, priorities, plans, and actions.

An essential tool in pursuing resiliency and creating migration agreements is space for regional, bilateral, and international dialogue. Forum members generally emphasize sustainability, resiliency, and elevation of migrants’ voices. International and regional organizations for migration and conservation have developed several such dialogue forums in the past two decades, such as the International Dialogue on Migration, the Global Island Partnership, the Pacific Islands Forum, the regional Migration Dialogues for Africa, the Euro-African Dialogue on Migration and Development, the Asia Dialogue on Forced Migration, the Central America—North America

141 See Intergovernmental Panel on Climate Change, supra note 123, at 26.
142 Id. at 259.
143 The Nansen Initiative, supra note 29, ¶ 80.
146 See Paris Agreement, supra note 145, at art. 2, § 1.
147 Id. at art. 4, ¶ 2, 3, 8, 9.
148 Id. at art. 4, ¶ 3.
149 Id. at art. 7, ¶¶ 9–11.
150 G.A. Res. 73/195, ¶ 19 (Dec. 19, 2018); The Nansen Initiative, supra note 29, at ¶ 125.
Migration Dialogue,\(^{158}\) and specific programs within the Inter-American Dialogue.\(^{159}\) The European Union (EU) has also structured a variety of bi-regional dialogues concerning migration and development.\(^{160}\)

**VIII. Preparation and Response Efforts to Improve Resiliency of Environmentally Vulnerable Communities**

In addition to environmental adaptation and planned migration options, vulnerable communities can benefit significantly from disaster preparation and improved response tactics, leading to risk reduction in the future.\(^{161}\) Monitoring environmental changes, such as rainfall, soil saturation, sea levels, wind patterns, geothermic activity, and frequency and severity of natural disasters, helps communities to anticipate future destruction and hardships.\(^{162}\) In turn, this assists with disaster preparation, such as reinforcement of infrastructure and storage of survival resources, as well as disaster response plans that often include early warning signals, shelter-in-place instructions, evacuation routes, identification and location of victims, and administration of aid.\(^{163}\)

While disaster preparation is vital for all regions around the world, it is especially crucial for less developed countries where there is a high potential for a natural hazard to develop into a disaster and result in mass displacement.\(^{164}\) Low or uneven concentrations of development tend to contribute to heightened vulnerability in the context of natural disasters because economically unstable communities are the most likely to experience destruction and displacement.\(^{165}\) In addition, they are less likely to have the resources or governance to disburse benefits to aid regrowth, or even survival, for affected persons and businesses. Communities that are unable to implement preparation strategies through reinforcing infrastructure and stockpiling emergency supplies remain susceptible to environmental hazards and will continue to lack the resiliency necessary to bolster themselves against disasters.

Building policies to ensure rapid and effective responses to natural disasters can alleviate many displacements.\(^{166}\) Access to sufficient shelter, food, clean water, and other survival resources is key to providing the means for residents to maintain their physical presence in or near their communities or home countries.\(^{167}\) Even with slow-onset climate changes, if living conditions deteriorate towards an unbearable level, individuals will often turn to migration as a solution to avoid the oncoming crisis.\(^{168}\) Improving local and national resiliency and reducing reliance on migration are the most effective methods to curb displacements. Response policies can also be strengthened by transboundary cooperation among countries that share ecosystems, such as along coastlines, fault lines, and river banks.\(^{169}\)


\(^{163}\) *The Nansen Initiative*, supra note 29, ¶ 78.

\(^{164}\) Id. ¶ 79.

\(^{165}\) Id.

\(^{166}\) Id. ¶ 81.

\(^{167}\) Id.

\(^{168}\) Id. ¶ 87.

\(^{169}\) Id. ¶ 81.
Providing specific protections for IDPs in response to a disaster not supports not only individuals but also whole communities.\textsuperscript{170} Internal assistance for displaced persons dissuades those individuals from seeking support and opportunities across borders and consequently converting to external displacements.\textsuperscript{171} Preserving and protecting those who are internally displaced equips countries with the human resources to aid and speed their own rehabilitation efforts. Some effective ways to support these kinds of post-disaster reestablishment efforts is to develop incentivizing and sustainable methods for internal protections.\textsuperscript{172} Such methods may include voluntary return and reintegration at or nearby the place of origin, integration in places of refuge, or resettlement elsewhere within the country.\textsuperscript{173} These solutions apply both to displaced persons that have already crossed borders and those that have remained within their country of origin.\textsuperscript{174}

Only a small number of states and regions currently have policies that address responses and protections relating to internal displacement resulting from natural disasters.\textsuperscript{175} Even where such policies have been adopted, there is sometimes confusion regarding accountability for protecting internally displaced persons.\textsuperscript{176} Responsibility can fluctuate amongst state institutions and even between the state, regional, and international levels.\textsuperscript{177} Operational discrepancies aside, sustainable and functional approaches to reintegration, whether taking place in the same locality or elsewhere, are necessary to fill the protection gap that many displaced persons experience during the period between the initial disaster and subsequent reconstruction.\textsuperscript{178}

Preventive measures are another key to reducing the impact of natural disasters and climate change on vulnerable and even well-prepared communities. The Paris Agreement is the most direct, comprehensive multilateral attempt to implement methods for the reasonable prevention or reduction of environmental impacts around the world.\textsuperscript{179} Decreasing the negative human-generated contributions to climate change will prevent unnecessarily advancing environmental destruction of people’s homes and livelihoods.\textsuperscript{180} Global cooperation will produce the greatest success and synergy for an efficient agenda to address the aspects of climate change caused or accelerated by human activity.\textsuperscript{181} The most identifiable prevention tactic at this time is the reduction of greenhouse gas emissions.\textsuperscript{182} By curbing emissions, the Agreement aims to prevent the global average temperature from rising more than two degrees Celsius, with the intended impact of reducing the risk and impacts of climate change.\textsuperscript{183}

\textsuperscript{170} Id. ¶ 74.
\textsuperscript{171} See id. ¶ 99.
\textsuperscript{172} See id. ¶ 101.
\textsuperscript{173} Id. ¶ 102; BROOKINGS INST., INTER-AGENCY STANDING COMMITTEE FRAMEWORK ON DURABLE SOLUTIONS FOR INTERNALLY DISPLACED PERSONS 5 (Apr. 2010), https://interagencystandingcommittee.org/system/files/2021-03/IASC%20Framework%20on%20Durable%20Solutions%20for%20Internally%20Displaced%20Persons%20April%202010.pdf.
\textsuperscript{174} The Nansen Initiative, supra note 29, ¶ 102.
\textsuperscript{176} The Nansen Initiative, supra note 29, ¶ 104.
\textsuperscript{177} Id.
\textsuperscript{178} Id. ¶ 105.
\textsuperscript{180} Climate Change Around the World: A View From The UN Regional Commissions, U.N. CHRONICLE https://www.un.org/en/chronicle/article/climate-change-around-world-view-un-regional-commissions (last visited May 1, 2022) (describing how steps such as avoiding deforestation, controlling greenhouse gas emissions, and improving energy efficiency can help prevent air pollution, increased global temperatures, and associated risks of increased extreme weather events).
\textsuperscript{181} Id.
\textsuperscript{182} Heyck-Williams, supra note 14, at 8.
\textsuperscript{183} Paris Agreement, supra note 145, at art. 2, § 1.
CONCLUSION

Since the existing barriers to increasing the legal protections for climate-induced migrants persist, focusing on a legal redefinition of refugees is unlikely to help those environmentally displaced persons most at risk. Many of these individuals will remain internally displaced and unable to access international protection since climate change often has slow-onset effects that do not necessarily force migration. Grounds for refugee status under a new definition would also be difficult to isolate from one another, complicating the status determination process. Instead of relying so heavily on the reactive nature of the 1951 Convention, worldwide attention should turn towards proactive measures to develop protected and dignified paths for migration.

Providing alternative methods of preemptive protection is likely to better serve at-risk communities by strengthening disaster preparedness and improving resiliency. Adaptation efforts, disaster response plans, and strategic relocation are more easily tailored to individual communities and their environmental threats than one universal definition for legal status that only offers post-crisis protection for external displacements. Key features of success in these types of programs consider migrants’ rights to dignity, safety, and active participation. Natural disasters and climate change causing irregular, unprotected migration can be reduced when states take steps like these to close the gap between humanitarian action and development action.
**ESCAPING ACCOUNTABILITY: ICE FORCIBLY STERILIZES DETAINEE S IN DETENTION CENTERS**  
*by Mehraz Rahman*

**Introduction**

In September 2020, a whistleblower-nurse from the Immigration and Customs Enforcement (ICE) Irwin Detention Center in Georgia alleged that the ICE gynecologist, Dr. Mahendra Amin, committed medical negligence when he forcibly sterilized fifty-seven women at the center.¹ Immigrants who underwent forced hysterectomies said they did not know until later that the procedure performed on them may have been unnecessary; even though only a total of two hysterectomies are on record from the past year, many detainees said that they underwent other invasive gynecological procedures that they did not fully understand.² When five gynecologists reviewed patients’ cases from the Irwin County Detention Center, they found that Dr. Amin consistently recommended surgical interventions that were not medically necessary, even though nonsurgical treatment options were available.³ They also found that he had overstated the risks of the women’s health conditions, such as cysts and masses, and had listed symptoms that some of the women said they never experienced in order to justify such procedures.⁴

I. Background

ICE’s recent actions against migrant women are not the first time in American history the U.S. government sterilized non-English-speaking women without their consent. In the early 1970s, whistleblower Dr. Bernard Rosenfeld, then a resident at the Los Angeles County Medical Center, drew attention to women of Mexican origin sterilized by the state of California without their consent or knowledge.⁵ Dr. Rosenfeld’s whistleblowing efforts led to litigation in *Madrigal v. Quilligan*,⁶ seeking damages for plaintiffs known as the “Madrigal Ten,” who medical professionals pressured into signing English documents they did not understand asking for their consent to sterilization procedures while they were in labor.⁷ While the court denied the Madrigal Ten the remedies they sought, the case led to a wave of activism regarding the need for informed consent in procedures performed on non-English-speaking people.⁸

As demonstrated by *Madrigal*,⁹ ICE has repeatedly violated migrants’ human rights by performing forced hysterectomies without detainees’ informed consent, and their actions would fail both the strict scrutiny and undue burden tests. Thus, ICE violated migrants’ constitutionally protected rights to bodily autonomy and procreation, which are guaranteed under the

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³ Id.
⁴ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.
Fifth and Fourteenth Amendment’s Due Process Clauses and the Fifth Amendment’s Equal Protection Clause.\(^\text{10}\)

**II. Legal Analysis**

**A. Informed Consent**

By forcefully sterilizing fifty-seven migrant women, ICE violated the detainees’ right to informed consent. Under federal regulations, informed consent provides that a person who has the capacity to make a decision about their own body—or a guardian, if they are a minor—must be informed of the alternatives of the proposed procedure, discuss the risks of the procedure, and must show that they understand the proposed medical contract.\(^\text{11}\) The patient or their guardian must also sign a written document of consent that discloses the nature of the proposed procedure and discusses the elements required for informed consent.\(^\text{12}\)

In *Cruzan v. Director, Missouri Department of Health*,\(^\text{13}\) the U.S. Supreme Court expanded on the idea that informed consent is required for medical procedures, stating that the “notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.”\(^\text{14}\) As Justice Cardozo emphasized in *Schloendorff v. Society of New York Hospital*,\(^\text{15}\) the doctrine of informed consent provides that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.”\(^\text{16}\)

Gynecologists who reviewed patients’ cases from the Irwin County Detention Center found that Dr. Amin consistently recommended surgical interventions that were not medically necessary, overstated risks, and even listed symptoms that some women had never experienced to justify such procedures.\(^\text{17}\) Dr. Amin performed these sterilization procedures on many women who stated they were not suffering from the conditions that he used to justify the procedures, suggesting that he fabricated the conditions to provide cover for executing the invasive procedures.\(^\text{18}\) The women also stated that they did not explicitly know what type of procedure was being performed on them, which further indicates that Dr. Amin did not properly inform them prior to them receiving the procedures.\(^\text{19}\) Moreover, the detention center did not always use language translators for its non-English-speaking detainees, adding to the likelihood that many of the people who underwent the procedures had not given informed consent.\(^\text{20}\) Since the informed consent doctrine requires a medical provider to make sure that the patient sufficiently understands the procedure they are receiving, Dr. Amin performed these medical procedures without informed consent and violated the bodily autonomy to which everyone is entitled.\(^\text{21}\)

**B. Strict Scrutiny Test and the Right to Procreation**

ICE also violated the detainees’ constitutional rights to procreation under the strict scrutiny test.\(^\text{22}\) Under *Skinner v. Oklahoma*,\(^\text{23}\) the Supreme Court held that

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\(^{11}\) 42 C.F.R. § 50.202(f); 45 C.F.R. § 205.35(a)(2)(ii).

\(^{12}\) Id.


\(^{14}\) Id.


\(^{16}\) Id.

\(^{17}\) Id.

\(^{18}\) See *Dickerson*, supra note 2.

\(^{19}\) Id.


\(^{22}\) See *Skinner*, 316 U.S. at 544; U.S. CONST. amend. XIV.

\(^{23}\) See *Skinner*, 316 U.S. at 541, 544.
procreation is a fundamental right held by every person in the United States. The Court determined that when the government violates a fundamental right such as the right to procreate, the policy must withstand “strict scrutiny” or otherwise be found unconstitutional. Under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, the “strict scrutiny” test requires the government to demonstrate a compelling state interest and that there would be no other, less invasive method of achieving the interest. In Zadvydas v. Davis, the Supreme Court clarified that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” As such, noncitizens are included in the group of people who possess the fundamental right to procreation. Performing hysterectomies without obtaining informed consent violated detainees’ constitutional right to procreate, which can be analyzed under strict scrutiny. The strict scrutiny test may help determine whether the U.S. government, acting through ICE, violated its detainees’ constitutional rights when it forcefully sterilized them.

Under the strict scrutiny test, ICE would have difficulty demonstrating that these sterilizations served a compelling state interest. Although unlikely, ICE may be able to provide a compelling state interest to perform gynecological procedures without gaining informed consent from the migrant detainees if it claimed to relieve the migrant women of the burden of child-rearing while in ICE custody or another such interest. However, the board-certified gynecologists’ findings suggested that ICE could have achieved the type of relief it purported to provide with less invasive methods than sterilization, such as nonsurgical treatment or, in some cases, no medical treatment at all.

C. Undue Burden and Reproductive Freedoms

A U.S. court may either decide that forced hysterectomies are constitutional under the strict scrutiny test and rule that ICE met the requirements by demonstrating a compelling state interest or find that the strict scrutiny test does not apply. If the court finds that the strict scrutiny test does not apply, then ICE still violated the detainees’ constitutional rights under the undue burden test, which arose under Planned Parenthood v. Casey. This test says a U.S. court must balance the state actor’s interest with individual liberties. The state’s action also cannot have the purpose or effect of placing a substantial obstacle in the individual’s life if the state does not have a compelling interest and, therefore, the government does not have the right to restrict an individual’s pursuit of an abortion. The Court applied the undue burden test to provisions of an anti-abortion law from Pennsylvania, ultimately holding that requiring spousal notice before obtaining an abortion, requiring reporting of failure to provide such notice, and other anti-abortion provisions impose undue burdens on a woman’s choice to pre-viability abortion under the Due Process clause.

If undue burden applies to the liberty interest of abortion, as the Court determined in Casey, the same test must—by analogy—apply to the fundamental right to procreate, as the Court found in Skinner, and the right to decide whether or not to procreate by choosing to terminate or continue a pregnancy, as the Court solidified in Roe v. Wade. These Supreme Court rulings would require courts to balance ICE’s interest in forcefully sterilizing detainees with a substantial obstacle that the procedure would place in their lives. After undergoing a forced hysterectomy,

24 Id. at 544; U.S. Const. amend. XIV.
25 Skinner, 316 U.S. at 541, 544.
26 Id.; U.S. Const. amend. XIV.
28 Id.
29 See Skinner, 316 U.S. at 541.
30 See id.
31 See Dickerson, supra note 2.
33 Id. at 852–53.
34 Id.
35 Id. (upholding the essential holding of Roe v. Wade).
36 See id.
39 See Skinner, 316 U.S. at 541, 544; Casey, 505 U.S. at 852–53.
an individual faces the substantial obstacle of never being able to bear a child. This substantial obstacle goes beyond requiring spousal notice before obtaining an abortion or driving extra miles to another abortion center to obtain an abortion procedure. Infringing on the right to choose to obtain an abortion and the right to procreate, both relating to a person’s reproductive freedoms, involve severe interference with an individual’s bodily rights. Therefore, when performing forced hysterectomies, in addition to acting tortiously by violating the doctrine of informed consent, ICE also violated the detainees’ constitutional right to bodily autonomy, as grounded in the Fifth Amendment’s Due Process clause.

ICE committed egregious human rights violations by contravening migrants’ human rights when Dr. Amin performed forced hysterectomies without detainees’ informed consent. These human rights violations against constitutionally protected rights to bodily autonomy and procreation, which are guaranteed under the Fifth and Fourteenth Amendment’s Due Process Clauses and the Fifth Amendment’s Equal Protection Clause, would fail both the strict scrutiny and undue burden tests.

III. Recommendations

To provide relief for migrant women and ensure the U.S. government does not continue to violate human rights by performing forced hysterectomies without informed consent, legislators must enact policies that enforce existing laws that allow people to bring lawsuits against the United States and create avenues to diminish barriers to filing suit. Policies have tried, and failed, to address the issue of informed consent, the constitutional right to reproductive freedoms, and forced sterilizations. In 2021, the U.S. House of Representatives passed a resolution “condemning unwanted, unnecessary medical procedures on individuals without their full, informed consent.” However, this resolution fails to provide meaningful protection because it is not binding, does not require ICE to change its policies, and does not even mandate investigating ICE’s detention centers for violating its detainees’ right to informed consent.

This Article recommends that legislators create laws that explicitly provide and develop an accessible legal recourse avenue for people held in these detention centers to bring claims involving informed consent and constitutional rights regarding bodily autonomy against ICE. The laws must also, when appropriate, meaningfully allow individuals to file claims against agencies that enable ICE and the United States to fail to prevent and investigate when allegations arise. Even though ICE violates the detainees’ constitutional rights by performing forced hysterectomies, the detainees face cumbersome barriers to filing suit against ICE.

Under the Federal Tort Claims Act (FTCA), individuals may seek compensatory damages for personal injuries, death, or loss of property caused by a wrongful act of the government. However, this legislation should include a provision that makes FTCA claims more accessible to those who have undergone procedures without informed consent due to a language

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40 See Casey, 505 U.S. at 852–53.
41 U.S. Const. amend. V.
42 See Skinner, 316 U.S. at 541, 544; Casey, 505 U.S. at 852–53, 872–73, 876–88. As of April 2022, the current Supreme Court bench sits precariously perched in that it may soon overrule one or both the strict scrutiny and undue burden tests as they apply to the right to terminate pregnancies. In Dobbs v. Jackson Women’s Health, the Court is set to decide whether a Mississippi regulation banning most abortions after fifteen weeks of pregnancy is constitutional. While it is impossible to accurately predict, this Court appears ready to rule in some fashion, in either Dobbs or another near-future abortion-related case, that could alter jurisprudence surrounding reproductive rights. If the Court strikes down either or both the Roe or Casey standards, the analysis in this Article may no longer apply. Andrew C. McCarthy, Roberts and Roe: The Supreme Court Considers a Narrow Question on Abortion, HILL (Dec. 2, 2021), https://thehill.com/opinion/judiciary/583927-roberts-and-roes-the-supreme-court-considers-a-narrow-question-on-abortion/.
barrier; further, this provision should also ensure that the agencies will not be able to block detainees from filing suit by denying access to the necessary resources. Moreover, the Bivens doctrine established by the Supreme Court in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, allows individuals to file lawsuits for damages when a federal officer who is acting within the scope of their federal duties violates certain constitutional rights.

The Biden Administration has an obligation to create an interagency task force like the Interagency Task Force on the Reunification of Families, which was established in 2021 to address the separation of migrant families caused by the Trump Administration’s Zero-Tolerance Policy. Thus far, the Task Force has identified almost 4,000 children separated from their families because of this policy, made plans to build infrastructure to reunite almost 400 families, and discussed potential settlements for injured families, demonstrating the success that such task forces may have. Under an interagency task force with ICE, the Department of Homeland Security, the Department of Justice, and the Department of State, the parties must identify victims of forced sterilization procedures and engage in negotiations to provide mass settlements to victims and their families.

In addition to enforcing avenues to file suit and provide settlements, there must also be a method to hold ICE accountable for any violations of the laws or constitutional rights that protect detainees’ bodily autonomy. Once the laws are set in place and the task force has set forth recommendations or negotiated settlements, the Department of Homeland Security and the Office of the Attorney General must be vigilant in enforcing the new regulations on ICE. The chief Congressional oversight committees, United States Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Reform, already perform oversight to ensure that the laws are being appropriately enforced. In 2020, the House Committee on Oversight and Reform demanded an emergency investigation into the alleged forced hysterectomies at the ICE Irwin Detention Center and that ICE cease deportations of victims and witnesses alleging these medical atrocities. The oversight committees should more effectively exercise their powers by enforcing an investigation conducted by entities external to ICE and requesting that ICE incorporates the Committee’s report information into its facilities inspection plans.

If ICE violates migrant detainees’ constitutionally protected rights by performing forced hysterectomies, enforcing and strengthening those migrants’ ability to bring claims against ICE and the United States would deter ICE or similar governmental agencies from infringing on the fundamental right to procreate any further.

**Conclusion**

Dr. Amin performed forced hysterectomies on migrant women without informed consent and violated the bodily autonomy to which everyone is entitled because the informed consent doctrine requires a medical provider to make sure that the patient sufficiently understands the procedure they are receiving.

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45 Id.
46 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (remedy for Fourth Amendment violation); see also Davis v. Passman, 442 U.S. 228, 243–44 (1979) (holding that the right to bring a Bivens claim may apply to claims against federal officers brought under the Fifth Amendment).
48 Id.
ICE also violated the strict scrutiny test because it would have difficulty demonstrating that these sterilizations served a compelling state interest and, even if it did, that it could not have achieved the type of relief it purported to provide with less invasive methods than sterilization, such as nonsurgical treatment or, in some cases, no medical treatment at all. The right to choose to obtain an abortion and the right to procreate, both relating to a person’s reproductive freedoms, involve severe interference with an individual’s bodily rights. Since the undue burden test applies to the liberty interest of abortion, the same test must also apply to the fundamental right to procreate. Under this test, in addition to acting tortiously by violating the doctrine of informed consent, ICE also violated the detainees’ constitutional right to bodily autonomy, as grounded in the Fifth Amendment’s Due Process clause.

The path forward in preventing forced sterilizations on individuals held in ICE detention centers is threefold: first, secure migrant women’s existing avenues to bring informed consent tort claims and constitutional claims regarding the right to procreate against governmental agencies and the United States; second, ensure that these avenues are actually accessible, regardless of detention statuses or language barriers; third, a method to hold ICE accountable to survivors and their families for violating their detainees’ constitutional rights. The legislation this Article proposes would help topple barriers to filing suit and enforce ICE’s accountability in not violating migrants’ human rights. The United States’ long-standing practices of forcefully sterilizing migrant and incarcerated women must end.

51 See Casey, 505 U.S. at 852–53.
52 See id.
53 U.S. Const. amend. V.
Introduction

In September 2020, news broke that the U.S. Immigration and Customs Enforcement (ICE) performed forced sterilizations on detained migrant women at the Irwin County Detention Center (ICDC) in Ocilla, Georgia. The forced sterilizations arose within the context of the Trump Administration’s harsh anti-migrant policies\(^2\) and the United States’ sordid history of forcibly sterilizing minority groups.\(^3\) This Article will examine how forced sterilizations against migrants are part of a broader systematic medical crisis in immigration detention centers including, a lack of consent to treatment, accessibility to treatments, and, at times, death.\(^4\) However, by performing forced sterilizations on detained migrant women, the United States is violating its obligations under the Convention Against Torture and the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Nelson Mandela Rules).\(^5\)

I. Background

While there are widespread reports of reproductive injustice against persons detained in ICE facilities, specific evidence that ICE personnel were performing

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\(^1\) Eeesha Pandit, The Many Abuses at the Irwin County Detention Center in Georgia, Nation (Oct. 30, 2020), https://www.thenation.com/article/society/hysterectomies-sterilization-irwin-county/ (noting that this detention center, run by La Salle Corrections is a private government contractor for the Department of Homeland Security and ICE, and tasked with running detention facilities. La Salle Corrections currently operates nineteen facilities, including ICDC).


forced sterilizations on migrant women came from the ICDC facility, operated by LaSalle Corrections.6 Dawn Wooten a nurse at the facility, exposed this practice when she filed a complaint about doctors performing a large number of hysterectomies on patients without their consent.7 Her complaint is corroborated by multiple migrant women, some of whom remained in the facility until May 2021, when all women were removed from the facility.8 Dr. Mahendra Amin, a facility doctor, performed the majority of the forced sterilizations and was known by nurses as the “Uterus Collector” due to his pattern of behavior.9 Dr. Amin performed these hysterectomies by inaccurately explaining the procedure to the patients, not explaining the procedure to the patient in their native language, or by not explaining the procedure at all.10 Statements from surviving women demonstrate that they never consented to the procedure, and most women did not know their uterus had been removed until they woke up after surgery.11 ICE, Dr. Amin, and the LaSalle Corrections facility have continued to deny all allegations of forced sterilizations against migrant women.12

The United States has an abhorrent history of forced sterilization. Throughout the country’s history, it has used forced sterilizations to control “undesirable populations,” consisting of non-white, physically disabled, and mentally ill individuals.13 Particularly relevant to the forcible sterilization of migrant women, the United States has continually practiced reproductive coercion and experimental procedures on both Latinx women.14 However, the United States now condemns other countries that engage in forced sterilization.


7 Pandit, supra note 1.


11 O’Toole, supra note 8.

12 Aguilera, supra note 10.

13 Jacques & Rowland, supra note 3 at 132–34; see Buck v. Bell, 274 U.S. 200 (1927) (holding that someone mentally disabled had no right against forced sterilization). But cf. Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding a petty criminal does have a constitutional right against forced sterilization). The author notes that these groups were subject to forcible sterilization all throughout history, but particularly starting with eugenics research in the early 1900’s. See generally Inka Sklodowska Boehm, Comment, Punishment and Prejudice: Reproductive Coercion in Immigration and Customs Enforcement Detention Centers 29 AM. U. J. GENDER, SOC. POL’Y & L. 530, 534 (2022) (describing the impact of reproductive coercion in the civil immigration context and arguing that the Eighth Amendment should apply to detainees who experienced reproductive coercion).

14 See Boehm, supra note 13, at 531 (defining reproductive coercion as “involving behaviors that manipulate, impede, and interfere with an individual’s control over their reproductive health-related decisions.”); id. at 533 (discussing how Puerto Rican women were given the first oral contraceptive pill without discussing the risks, how Latinx women were given hysterectomies when they had minimal indications of gynecological problems, and how reproductive coercion routinely happened to women of color throughout U.S. history).
Most recently, the United States sanctioned China for using forced sterilizations against Uyghur people despite its own role in the recent forced sterilizations of immigrant women.\textsuperscript{15} Because forced sterilizations have been recognized as torture, a prohibition of the torturous practice is considered a jus cogens norm.\textsuperscript{16} Therefore, states must adhere to the prohibition, regardless of their consent.\textsuperscript{17} Nonetheless, as demonstrated by the United States and China, many states still partake in the horrific practice.\textsuperscript{18}

**II. Analysis**

The United States signed the Convention against Torture on April 18, 1988, and ratified the Convention on October 21, 1994.\textsuperscript{19} Although the Convention is binding on the United States, the Senate issued certain declarations, reservations, and understandings that affect the United States’ implementation of the Convention.\textsuperscript{20} A major reservation was declaring that the Convention is not self-executing, and therefore requires domestic implementing legislation.\textsuperscript{21} Another reservation was regarding the understanding of Article 1, which defines torture for purposes of the Convention.\textsuperscript{22} Under the United States’ reservation, torture must be “an act specifically intended to inflict severe physical or mental pain and suffering,” and is intended to only apply to acts directed against individuals who are in custody or under physical control.\textsuperscript{23} Domestic implementing legislation allows for migrants to bring suit against the United States for suffering physical or mental harm at the hands of federal officers.\textsuperscript{24} Crimes or treatment purported by immigration officials fall within this statute as well, potentially giving those in detention facilities a right to action.\textsuperscript{25}

The practice of forced sterilization has been recognized as torture, and it matches the United States’ definition of torture for the Convention.\textsuperscript{26} The migrant women were held in the custody of the Department of Homeland Security.\textsuperscript{27} However, Dr. Amin, was not a government official or agent, but rather was an independent doctor contracted to work at the facility. This, however, does not mean that the Convention Against Torture does not apply.\textsuperscript{28}

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\textsuperscript{16} See Ronli Sifris, Conceptualizing Involuntary Sterilization as “Severe Pain or Suffering” for the Purposes of Torture Discourse, 28 NETHERLANDS Q. HUM. RTS. 523, 528 (2010) (analizing that because forced sterilization has been recognized as torture, the jus cogens norm against torture applies to forced sterilizations); see generally Forced Sterilization As A Human Rights Violation: Recent Developments, INT’L JUST. RES. CTR. (Mar. 21, 2019), https://ijrcenter.org/2019/03/21/forced-sterilization-as-a-human-rights-violation-recent-developments/.

\textsuperscript{17} J. Brock McClane, How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?, 13 ILSA J. INT’L L. 1, 13 (1989).


\textsuperscript{19} CAT, supra note 5; Senate Consideration of Treaty Document 100-20 (Oct. 27, 1990).


\textsuperscript{21} See id.; see also 18 U.S.C. § 2340 (implementing CAT Art. I into U.S. domestic law); 18 U.S.C. § 1346(b) (giving migrants a right to action against the United States for Crimes or treatment purported by immigration officials fall within this statute as well, potentially giving those in detention facilities a right to action.

\textsuperscript{22} See 18 U.S.C. § 2340 (defining the United States’ understanding of the definition of torture for CAT).

\textsuperscript{23} Id.

\textsuperscript{24} See 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2680(h).

\textsuperscript{25} 8 U.S.C. § 1357; see also Sandoval v. United States, 980 F.2d 1057, 1059 (5th Cir. 1993) (holding that the federal government can still hold liability based on the negligent acts of contractors/Government employees in placing a detained person in the care of a contractor).

\textsuperscript{26} See Sifris, supra note 16 (stating that forced sterilization is internationally recognized as torture).

\textsuperscript{27} See Detention Management, U.S. IMMIGR. & CUSTOMS ENFR’T, https://www.ice.gov/detain/detention-management (last visited Apr. 17, 2022) (stating that ICE detainees are placed in ERO custody in the nation’s civil immigration detention system). For a more thorough analysis, see infra (discussing how migrants are treated as prisoners within the U.S. despite solely being held in civil custody).

\textsuperscript{28} Sandoval, 980 F.2d at 1059.
negligently placed these women in the hands of Dr. Amin, who was not a board-certified gynecologist, and previously was the subject of at least two different lawsuits alleging medical neglect. Therefore, DHS and the United States government are still liable for violating the Convention Against Torture. To match the definition of torture, the forced sterilizations must have been intended to inflict severe physical suffering. Evidence from the complaint shows that hysterectomies were performed on almost every patient of Dr. Amin, despite these procedures being medically unnecessary. If these procedures were not medically necessary, the only other reason to perform forced sterilization would be to cause severe physical or mental suffering. Because the forced sterilizations were the result of government negligence at the hands of a government contractor and were performed to induce physical and mental suffering, the Convention Against Torture clearly applies. By allowing this practice to occur, the United States has violated its obligation under the Convention and has broken its promise to uphold fundamental human rights.

The Mandela Rules were adopted by the UN General Assembly, in 2015. The Rules are soft law, meaning they are non-binding on member states; however, they have been accepted as internationally recognized minimum standards. While the United States has not codified the Mandela Rules in its domestic law, ICE has developed a set of Performance Based National Detention Standards (PBNDS) that are implemented in every detention facility. Last updated in 2016, parts of the PBNDS are directly comparable to parts of the Mandela Rules. Mandela Rules 32(1)(b) and 32(1)(d) specifically apply to the practice of forced sterilization. Rule 32(1)(b) incorporates the right of prisoners to bodily autonomy with regards to their health and informed consent. Rule 32(1)(d) contains an absolute prohibition on engaging in acts that may constitute torture, including medical or scientific experimentation that may be detrimental to a prisoner’s health, such as the removal of a prisoner’s organs. Section 4.3(D) of the PBNDS correlates to these rules, and states that informed consent must be obtained prior to providing any kind of medical treatment, and that consent forms, translated with language assistance if needed, will be signed and placed in the medical file. Section D additionally prohibits forced treatment. This correlates both to the stipulation in 32(1)(b) of the Mandela Rules that detainees have autonomy with their own health and shall have informed consent, as well as 32(1)(d), which prohibits acts constituting torture. However, the PBNDS do not contain any language prohibiting acts of torture by ICE personnel.

29 Davis, supra note 8.
30 See Sifris, supra note 16 (arguing that without medical justification, forced sterilizations and reproductive coercion is a form of torture and a violation of human rights).
31 See Pandit, supra note 1.
32 Nelson Mandela Rules, supra note 5. The 2015 Mandela Rules, supersede the 1955 Standard Minimum Rules for the Treatment of Prisoners but are largely based off this framework.
33 See id. ("…aware that Standard Minimum Rules for the Treatment of Prisoners have been the universally acknowledged minimum standards for the detention of prisoners and that they have been of significant value and influence, as a guide, in the development of correctional laws, policies and practices since their adoption by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1955.")
34 U.S. IMMIGR. & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS § 4.3(D), at 264 (2011) [hereinafter PBNDS].
35 Compare id. (stating that individuals in detention shall be afforded certain rights, including the right to medical care, safe and sanitary conditions, and free from retaliatory punishment), with Nelson Mandela Rules, supra note 5 (noting the similarities in the idea of both instruments, particularity in regard to medical, legal, and religious subjects).
36 Nelson Mandela Rules, supra note 5, at Rule 32.
37 Id. at Rule 32(1)(b).
38 Id. at Rule 32(1)(d).
39 PBNDS, supra note 34, § 4.3(D) at 264.
40 Id.
41 Nelson Mandela Rules, supra note 5.
42 PBNDS, supra note 34, at 241.
that ICE itself did not intend to follow or be bound by the Mandela Rules.\textsuperscript{43}

However, on a state-by-state basis, the United States has slowly started implementing the Mandela Rules in legislation regarding prison facilities.\textsuperscript{44} Additionally, one of President Biden's campaign promises was to ensure humane prison conditions, codifying many of the Mandela Rules into domestic law.\textsuperscript{45} Because the United States is in the General Assembly to the UN and must adhere to its general policy principles, and because the implementation of the Rules and the jus cogens norms are occurring, ICE is bound by the Mandela Rules. Additionally, the similarities between the two instruments mean that for the limited application of forced sterilization at ICE detention centers in the United States, the PBNDS renders the Mandela Rules enforceable.

Based on its voluntary adoption of standards for detention centers, which directly correlate to the Mandela Rules, the United States is violating its comment to uphold the principles enshrined in the Mandela Rules. ICE broke Rules 32(1)(b) and (d) and PBNDS Section D by not obtaining informed consent of the immigrant women before performing surgery, not adequately explaining the procedure in their native language before obtaining consent, and the serious harm and forced treatment of the sterilizations. These events are corroborated first-hand not only by whistleblower Dawn Wooten\textsuperscript{46} but also by women subjected to sterilizations.\textsuperscript{47} There has been a clear violation of the international obligation under these rules and of a domestic obligation under the PBNDS. It is possible that the government will argue that the Mandela Rules do not apply, as the migrant women were not categorically defined as prisoners by statute. However, the treatment of migrants by the Trump Administration and ICE show that the government considered them to be prisoners.\textsuperscript{48}

In President Trump's first year in office, his administration drastically increased contracts with private prisons to serve as detention centers.\textsuperscript{49} Private prison corporations profit off of housing migrants who have been detained, which contributes to the overcrowding of migrants in prison facilities.\textsuperscript{50} Despite a Department of Homeland Security report describing squalid

\textsuperscript{43} See ICE Detention Standards, U.S. IMMIGR. & CUSTOMS ENF’R (Nov. 9, 2021), https://www.ice.gov/factsheets/facilities-pbnnds (listing the reasons for the updated PBNDS in 2016 as to ensure consistency with federal legal and regulatory requirements as well as prior ICE policies and statements [emphasis added] which shows that ICE is only tailoring their standards to federal minimum standards of conduct for civil detention).


\textsuperscript{46} Pandit, supra note 1.

\textsuperscript{47} O'Toole, supra note 8.


\textsuperscript{50} See Monsy Alvarado et al., supra note 32 (In 2020, ICE paid the Jackson Parish Correctional Facility, operated by La Salle Corrections $74.35 per day for each migrant they housed).
and overcrowded conditions at detention centers operated by ICE and Border and Customs Patrol, former President Trump and his Administration dismissed any claims of wrongdoing.⁵¹ They repeatedly blamed horrific conditions on migrants coming to the U.S. and saw no problems with overcrowding, denial of legal services, or unreasonable periods of detention.⁵² Many detention centers enroll migrants in voluntary work programs, where migrants work for less than one dollar a day.⁵³ Furthermore, solitary confinement is used for extended periods of time, without proper protections or tracking from ICE.⁵⁴ Detention centers are often recognized as worse than prison, as migrants have no constitutional protections, and ICE provides little transparency.⁵⁵ These examples show that the treatment of migrants goes beyond the standard of civil detention.⁵⁶ Migrants are treated akin to those incarcerated in the criminal legal system, and are given no additional protections or privileges, despite typically only committing a civil infraction.

III. Recommendations

The women who have been forcibly sterilized at the hands of ICE personnel have very little recourse available to them. Although they would be able to show that the United States is in violation of its PBNDS and the Mandela Rules, it is unlikely that the Standards or the Mandela Rules would be enforced by any court or federal agency. These women could have filed a formal grievance process within ICE or filed an official


⁵² Donald Trump (@realDonaldTrump), Twitter (July 3, 2019), https://twitter.com/realDonaldTrump/status/1146514575048790019?ref_src=twsrc%5Etfw (“If Illegal Immigrants are unhappy with the conditions in the quickly built or refitted detention centers, just tell them not to come. All problems solved!”); Emma Winger & Eunice Cho, ICE Makes it Impossible for Immigrants in Detention to Contact Lawyers, ACLU (Oct. 29, 2021) https://www.aclu.org/news/immigrants-rights/ice-makes-it-impossible-for-immigrants-in-detention-to-contact-lawyers/ (ICE detention facilities have restricted the most basic forms of communication towards detained migrants); Maria Sacchetti, ICE Holds Growing Numbers of Immigrants at Private Facilities Despite Biden Campaign Promise to End Practice, Wash. Post (Dec. 1, 2021 6:26 PM), https://www.washingtonpost.com/national-security/2021/12/01/ice-country-jails-migrants/ (The average detainee’s length of stay is 43 days, but agency data shows some have been in detention for months or years).


⁵⁵ See Boehm, supra note 13, at 547 (arguing that detention centers resemble prisons and criminal incarceration); see also Stacy Brustin, I Toured an Immigration Detention Center. The Prison-Like Atmosphere Was Mind-Numbing, USA TODAY (May 16, 2019), https://www.usatoday.com/story/opinion/voices/2019/05/16/ice-immigration-detention-center-like-prison-otero-column/1190633001/.

⁵⁶ Mark Noferi, Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm 27 J. CIV. RTS. & ÉCON. DEV. 533, 546, 552 (2014) (asserting that the civil detention standard is far different than the criminal detention standard, and that if implemented correctly, the immigration detention model would not resemble criminal incarceration).
complaint with the Department of Homeland Security, ICE’s parent agency. Both processes are arduous and would result in little help to those who have been brutalized. Because these two mechanisms are not overseen by an impartial party, such as a judge or jury, they are unlikely to yield results and help protect future reproductive abuses from happening. Under the United States’ implementation of the Convention Against Torture, the affected women would be able to file a federal claim, and likely obtain damages for the physical and mental suffering caused by DHS, ICE, and Dr. Amin.

Approximately forty migrant women who ICE personnel subjected to nonconsensual procedures as well as Dawn Wooten filed a complaint in September of 2020 against Dr. Amin, ICE, and DHS. This complaint focused solely on ICE and DHS violating the PBNDS and did not bring in either domestic or international law. However, a future suit could easily bring in the Convention Against Torture as a legal basis for a suit. Many of the migrant women who alleged the abuse filed complaints and were subsequently deported. In December of 2020, a federal class action lawsuit was filed with the Middle District of Georgia. Although several motions have been filed in the lawsuit, there has been no hearing on the substantive content within the lawsuit.

The Biden Administration has ordered ICE to stop detaining migrants at the ICDC while the federal investigation is pending. The Administration has also denounced poor treatment of migrants and has claimed it is working to uphold their fundamental human rights. However, the number of migrants in detention has continued to grow under President Biden. Additionally, despite President Biden’s executive order banning new private prison contracts, the amount of money private prisons make from holding detained migrants continued to grow. Despite President Biden’s promises and the promises of his Administration, there has been no movement to eliminate the practice of private prisons holding detained migrants, and no federal action has been taken to enjoin ICE or ICE personnel from committing similar acts or reform ICE policies. The Biden Administration must ensure that ICE personnel do not commit similar acts by explicitly prohibiting unnecessary and involuntary medical acts for detainees and by protecting the reproductive autonomy of migrant women.

58 See PBNDS, supra note 34, § 6.2, at 416 (requiring all formal grievances be filed at the facility where the incident happened, and containing no confidentiality protections against those that do file); File a Civil Rights Complaint, supra note 57 (requiring the complaint form be filled out, and then email or faxed to DHS, with an alternative to email is using the monitored phone in the facilities, or printing out the form and filing it out and mailing it in when mail is regulated).
61 See id.
65 Id.
66 Maria Sacchetti, ICE to Stop Detaining Immigrants at Two County Jails Under Federal Investigation, Wash. Post. (May 20, 2021, 10:00 AM), https://www.washingtonpost.com/immigration/ice-detentions-county-jails-halted/2021/05/20/9c0bd1de-b8de-11eb-a6b1-81296da0339b_story.html.
67 See id.
68 Sacchetti, supra note 39 (reporting on the increased numbers of migrants in and out of detention facilities under President Biden).
With regard to reparations, the United States should federally take action to ensure that these atrocities never occur again. Given the severity of the human rights violations, the United States must conduct a thorough and independent investigation into forced sterilizations at ICE detention facilities to ensure its compliance with international law. At minimum, the United States should adopt the existing federal standard of consent at detention centers. Further, the United States should commit to ending both forced and coerced sterilizations, regardless of the nationality, immigration status, race, or sexuality of its potential victims.

**Conclusion**

The most recent accounts of forced sterilization at ICDC showcase not only the larger problems within the immigration system but are emblematic of the United States’ history of crimes against migrant women. By committing forced sterilizations against migrant women, the United States is violating its obligations under the Convention Against Torture and the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Nelson Mandela Rules). As evidenced by the atrocities, the United States needs to recognize their obligation under the Rules and must reaffirm and strengthen its obligations under the Convention against Torture. Both the Rules and the Convention against Torture directly prohibit the appalling acts that occurred at the Irwin County Detention Center, and the United States must be held liable for its violations of these international instruments. Only with accountability will the United States be able to move forward and work on preventing the future abuse of migrant women.

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70 For further discussion, see Boehm, supra note 13, at 558.
A PARTICULAR SOCIAL GROUP: THE INADEQUACY OF U.S. ASYLUM LAWS FOR TRANSGENDER CLAIMANTS
by Marnie Leonard

INTRODUCTION

The right to seek asylum has long been recognized as a fundamental human right in international law.1 The United States affirmed its intention to uphold this right by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees and by passing its domestic legislation in the form of the Refugee Act of 1980.2 Despite these commitments, the United States continues to fail a key group of asylum seekers—those seeking asylum based on their gender identity.

Gender identity is not an enumerated basis upon which to seek asylum in either the 1951 Refugee Convention or the Refugee Act of 1980.3 As a result, anyone seeking asylum on the basis of gender identity must do so under the catch-all category of “membership in a particular social group.” The U.S. government’s lack of guidance on interpreting this category provides immigration judges significant discretion in ruling on transgender claimants’ cases, thus leaving these applicants at particular risk of immigration judges denying their applications due to outright bias. Transgender asylum seekers face unique challenges, but the U.S. government often conflates the experiences of some LGBTQ+ asylum seekers with others.5

To protect transgender people’s right to seek asylum in the United States, it is essential that immigration judges and asylum officers deciding their cases have a better understanding of basic gender identity concepts so that they are unable to deny applications based on implicit or explicit bias.7 To accomplish this, the United States must amend the Refugee Act of 1980 to include gender identity as a basis for seeking asylum. Additionally, the Department of Justice (DOJ) must issue guidance on interpreting the “particular social group” category for transgender applicants.

1 Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (1951) [hereafter the 1951 Refugee Convention].
3 See 1951 Refugee Convention, supra note 1; Refugee Act of 1980, supra note 2.

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7 When an individual is aware of their prejudice toward a particular group, that is explicit bias; implicit bias occurs when someone has subconsciously developed prejudice towards a particular group. See U.S. DEP’T OF JUST., UNDERSTANDING BIAS: A RESOURCE GUIDE 2–3, https://www.justice.gov/file/1437326/download (last visited Apr. 17, 2022) (training Department of Justice employees to avoid bias policing).
which includes information on the unique challenges that transgender people face throughout the asylum process. This article provides a background on gender-based asylum in the United States, an analysis of U.S. asylum law as it pertains to gender identity-based claims and proposes policy recommendations that would help ensure that transgender asylum seekers in the United States are protected from persecution and discrimination that international law affords them.

I. Background

In 2015, the Ninth Circuit Court of Appeals heard Edin Avendano-Hernandez’s asylum case.8 Avendano-Hernandez, a transgender Mexican woman, applied for asylum after her family, the Mexican police, and the Mexican military sexually abused her because of her gender identity and perceived sexual orientation.9 Despite Avendano-Hernandez’s application explicitly stating that she is a transgender woman, her immigration judge referred to her using male pronouns.10 While the Board of Immigration Appeals (BIA) referred to her using female pronouns, it found her ineligible for withholding from removal on the basis that Mexico had recently passed laws aimed at protecting gay people.11 Until the Ninth Circuit heard Avendano-Hernandez’s case, U.S. courts tended to consider gender nonconformity to be a by-product of sexual orientation and, thus, decided transgender claimants’ cases using precedent set by gay and lesbian claimants.12 This forced lawyers to make sexual orientation-based arguments for their transgender clients because that was the basis that judges historically understood. These arguments served to create a cycle in which there was no gender identity precedent to follow because lawyers were making sexual orientation-based arguments.13 When it became clear that U.S. immigration courts would no longer consistently find that identifying as gay was dangerous in Mexico, Avendano-Hernandez’s lawyers had to argue that the persecution transgender people face in Mexico is distinct from the persecution faced by people identifying as gay or lesbian.14 The United States Court of Appeals for the Ninth Circuit found that the immigration judge and the BIA had perpetuated the same misconceptions about gender identity that Avendano-Hernandez experienced in Mexico, and it remanded the BIA’s denial of her withholding from removal claim.15 This Ninth Circuit decision set the first precedent for evaluating gender identity-based claims as distinct from sexual orientation-based claims under U.S. immigration law.16

However, for Alejandra Barrera, a transgender Salvadoran woman, the decision in Avendano-Hernandez did little to ensure her protection under U.S. asylum law. Although the holding in Avendano-Hernandez was a significant step forward, it is not binding precedent outside the Ninth Circuit. Barrera requested asylum for the sexual abuse she experienced in her home country by presenting herself at the U.S. border in 2017.17 The immigration judge in Barrera’s case denied her asylum claim because of chronological discrepancies between testimony she gave at a hearing in 2018 and her initial asylum interview in 2017.18 The immigration judge said this made her claims of past persecution and fear of future persecution in El Salvador not credible, and the BIA affirmed.19 These denials may have been, at least in part, the result of “bias and rank incompetence.”20 Barrera appealed her case, and in 2020, her petition for review to the

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8 Avendano-Hernandez v. Lynch, 800 F.3d 1075 (9th Cir. 2015).
9 Id. at 1075.
10 Id.
11 Id.
13 Id.
14 Avendano-Hernandez, 800 F.3d at 1091.
15 Id. at 1075, 1082.
16 Vogler, supra note 12, at 440.
18 Barrera v. Barr, 798 F. App’x 312 (10th Cir. 2020) (granting Barrera’s petition for review and remanding the case to the BIA to clarify its finding that Barrera did not have evidence of a well-founded fear of future persecution).
19 Id. at 313.
20 Oztaskin, supra note 17.
Tenth Circuit Court of Appeals was granted. She is currently still awaiting the Tenth Circuit’s decision, but if her claim is denied, the U.S. Immigration and Customs Enforcement (ICE) could deport Barrera to El Salvador, a country known to be particularly dangerous for transgender women, and where she is a known transgender activist. Barrera’s experience demonstrates that as long as immigration judges and asylum officers lack an understanding of the unique challenges transgender people face, they will continue to deny transgender claimants’ applications and risk sending them back to countries in which they are very likely to face significant persecution.

II. Analysis

The Refugee Act of 1980 offers protection to those facing persecution due to their race, nationality, religion, political opinion, or membership in a particular social group (PSG category). Claimants must show they experienced persecution in their home country based on one of those categories, and that they have a well-founded fear of future persecution. For transgender claimants, this essentially means they must prove their membership to the “transgender” social group and, therefore, prove their gender identity to the decisionmaker of their case.

In 2008, the BIA set forth a precedent requiring that PSG category claimants be “socially distinct,” meaning the society from which a claimant seeks asylum must meaningfully differentiate “individuals who have the shared characteristic from individuals who do not have it.” This precedent has exacerbated the issue of immigration courts conflating sexuality and gender, as many cultures do not distinguish between gay and gender nonconforming people, so lawyers have been even more likely to make sexuality-based arguments for transgender claimants.

Additionally, there is a one-year application filing deadline for all asylum seekers. This provides an additional challenge for transgender claimants because many cannot safely begin their physical transition—a process that often takes years to complete—until they arrive in the United States. Many transgender people facing discrimination and violence in their home countries choose to wait to transition until they reach the United States because visibly not conforming to gender norms would put their safety at even higher risk. These transition timelines can also be challenging because immigration courts have tended to require that a claimant has consistently identified as transgender throughout their life. It can be difficult to prove this before the filing deadline passes if the claimant has not begun transitioning. Between 2014 and 2016, three transgender claimants were denied asylum either completely or in part because

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21 Barrera, 798 F. App’x at 324.
24 Id.
25 Vogler, supra note 12, at 441.
27 Vogler, supra note 12, at 440 (explaining that many cultures have a “heteronormative understanding of lifestyle” that lumps anything that doesn’t conform into a “gay, not normal” category).
30 Vogler, supra note 12, at 448.
31 Id. at 451.
they did not come out and physically transition as soon as they realized they were trans. There is also no guidance for the judges deciding the credibility of someone’s account of their gender identity and the persecution they faced.

Bias also plays a role when judges are given the discretion to decide a transgender claimant’s credibility. The collective understanding of gender identity and gender nonconformity in the United States has rapidly progressed over the last ten years, but transgender people still face significant discrimination in the United States. This ongoing discrimination indicates that transgender asylum claimants may face a higher risk of having their claims denied due to a decisionmaker’s bias than other asylum seekers. In Avendano-Hernandez’s case, for example, the immigration judge that initially tried her case refused to use she/her pronouns and continued to misgender her throughout her hearing. In the Jeune, Talipov, and Moiseev cases in which immigration judges denied the claimants asylum status, the judges promulgated misconceptions about the transitioning process for transgender individuals, especially those seeking asylum from environments in which it was not safe to transition. These cases demonstrate that many immigration judges harbor significant bias toward transgender persons, and they lack an understanding of gender identity and the transitioning process.

Heightened legal protections that would ensure the safety and fair treatment of transgender claimants.

### III. Policy Recommendations

To comply with its international obligations under the 1951 Refugee Convention and to ensure transgender persons are afforded their right to seek asylum under U.S. law, the U.S. Congress must amend the Refugee Act of 1980, and the DOJ and DHS must issue agency guidance for immigration judges on interpreting the PSG category. This guidance should include information on the unique challenges transgender asylum claimants face in their country of origin, and the metrics judges should use to determine transgender claimants’ credibility. A congressional amendment to the Refugee Act of 1980 and DOJ guidance for judges would eliminate the conflation of gender identity with sexual orientation when making legal arguments or analyzing claims. To promote more consistent decisions from immigration judges and asylum officers, the DOJ and the DHS should issue guidance on the unique challenges that gender-nonconforming people face throughout the asylum process, such as the inability to begin transitioning in their countries of origin, the fluidity of gender identity, and the effects of confusing gender with sexuality. More direction from the DOJ and DHS would not prevent all bias that transgender claimants face in the process of seeking asylum in the United States, but it would make it clear when an immigration judge is overstepping their authority. This guidance would also give immigration judges less discretion to insert their own biases.

For example, the DOJ and DHS could look to the guidance issued by Canada’s Immigration and Refugee Board (IRB) in 2017. This guidance explained how Canadian immigration officers should screen
LGBTQ+ claimants to ensure their fair treatment under the law.\textsuperscript{37} In particular, the IRB guidance addresses how transgender people face unique challenges as asylum claimants and should not be conflated with other LGBTQ+ asylum seekers.\textsuperscript{38} Several other countries have enacted legislation making gender and sexual orientation an explicit basis for seeking asylum to which the United States could look to as examples. Sweden's Aliens Act allows asylum claims on “grounds of . . . gender, sexual orientation, or other membership of a particular social group.”\textsuperscript{39} Portugal similarly includes gender as a basis for seeking asylum, and the text of the law states that gender identity can fall under its PSG category.\textsuperscript{40} Spain, France, the Netherlands, and South Africa also refer to gender as a basis for seeking asylum.\textsuperscript{41} By including gender identity as a basis for seeking asylum in the Refugee Act of 1980 and following these countries' examples by issuing guidance regarding gender identity in asylum claims, the United States could drastically reduce immigration judges’ ability to issue decisions based on biases or misunderstandings of gender identity concepts and ensure greater protections for transgender claimants.

**Conclusion**

U.S. asylum law leaves transgender claimants particularly at risk of having to return to their home countries and face persecution. U.S. law also leaves too much room for discretion by asylum decisionmakers, who are individuals that may be biased or lack understanding of gender identity issues. Transgender people are particularly vulnerable to persecution because of their often-public nonconformity with binary gender roles and expression. It is, therefore, imperative that laws and policies provide an explicit basis upon which transgender claimants can seek asylum in the United States. It is also important that U.S. immigration officials are given guidance on adjudicating their applications. The United States can ensure that transgender people’s right to seek asylum from persecution is protected and that transgender asylum seekers are given equal treatment under the law by amending the Refugee Act of 1980 to include gender identity as a basis for seeking asylum and issuing administrative guidance to immigration judges about gender identity concepts. This guidance could also include the challenges transgender asylum claimants face. These solutions would be the best way for the United States to ensure that transgender people’s right to seek asylum from persecution is protected and that transgender asylum seekers are given equal treatment under the law.


\textsuperscript{38} Immig. & Refugee Bd. of Canada, Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics §§ 8.5.2.2, 8.5.4, https://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx (last revised Dec. 17, 2021) (explaining that transgender individuals may be particularly at risk for discrimination and violence because of their non-conformity to socially accepted norms and may be more vulnerable to risks because of a lack of legal recognition of their identity in many countries).

\textsuperscript{39} ch. 4 Utlänningslag (Svensk författnings-samling [SFS] 2005:716), https://www.government.se/contentassets/784b3d7be3a54a0185f284bb2683055/aliens-act-2005_716.pdf (Swed.).

\textsuperscript{40} Lei de Asilo n. °26/2014 de 5 de maio [Asylum Act no. 26/2014 of 5 May], https://www.sefpt/en/Documents/LeideAsilo(Lei26_2014)EN.pdf (Port.).
