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CASE COMMENT

ARTICLE

JUSTICIABILITY OF ALL HUMAN RIGHTS: SCOTTISH INDEPENDENCE AS REDRESS FOR BRITISH HUMAN RIGHTS ABUSES

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* Professor of Legal Skills, Stetson University College of Law. This Article was written with the assistance of a summer research grant, for which I am indebted to the administration of the College of Law. Special thanks to Julie Ann Embler for her incredible research support lo these many years, and to my daughter Elizabeth Piccard Reischmann for her shared interest in the Highlanders and for being an outstanding travel companion, even when her mother persisted in asking far too many personal questions of virtually every Scottish person with whom we had even the briefest encounter in July 2013. In my own defense, I did pay for her plane ticket (as well as my own; the research grant was not quite that generous).

Come boil 'round my body, Scottish blood
I'll try not to spill a drop
For I'm sure you've spilled enough
And the English f****** rule
Will mean nothing to these towns
Ah, run forever in my veins, bold Scottish blood.[1]

I. INTRODUCTION

On September 18, 2014, an overwhelming number of Scottish residents turned out to vote on one simple question: Should Scotland be an independent country? The deceptively simple yes or no question on the ballot could not begin to reflect the complex underlying issues. If the Independence Referendum had been approved—meaning a "yes" vote, the goal of Independence proponents and of the Scottish National Party (SNP)—every facet of life for the Nation and its citizens could have been affected. The presence of nuclear weapons; membership in the European Union; the very nature and name of the currency used in every transaction every day, no matter how large or small; the availability of jobs, pensions, and health and child care; and always—at the true heart of things—ownership of the North Sea oil rights: everything was on the line and reflected in that yes/no ballot question.

The debate leading up to the referendum focused[2] incessantly on politics and economics, but rarely on human rights or on the context of the long, ugly history of England's domination of Scotland and the centuries of disregard for the human rights of the Scots, which was, and will continue to be, the underlying motive for any talk of Scottish Independence. England has been actively seeking to consume and perhaps obliterate Scotland for hundreds of years, beginning (perhaps) with its systematic genocide of the most indigenous Scots, the

1. FRIGHTENED RABBIT, *Scottish Winds*, on *A Frightened Rabbit E.P.* (Atlantic Records 2011). These are the lyrics that spurred my interest in, as Scott Hutchison says, "the English f****** rule" of Scotland. Scott and his brother Grant are the founders of Frightened Rabbit, an "indie folk rock" band from Selkirk, Scotland. Having been a devoted fan for many years, I am deeply indebted to Scott for his intelligent, thought-provoking lyrics. I had the pleasure of spending a little time with the Frabbit boys in Jacksonville, Florida in October 2013 (having won a "meet and greet" with the band due to slight obsessive-compulsive behavior in buying tickets for their shows) and can assure any reader that they are as thoughtful and generous in person as in their live performances. If you ever have an opportunity to hear Frightened Rabbit live, do not mess around.

2. A note here about the tense in which this Article is written: Research began in Winter 2013, and most of the writing was completed during Winter 2014, but as of November 2014, two months after the vote took place and independence was defeated, this Article is still being edited and has not yet been submitted to any journal for possible publication. Most of the writing thus took place before the vote but after the vast majority of the campaigning had taken place.

Highlanders known as the Picts. Atrocities that took place hundreds of years ago do not make the news today, despite the fact that their consequences are ongoing, current, and never-ending. "Those who cannot remember the past are condemned to repeat it."[3] The purpose of this Article, therefore, is to draw attention and remembrance to the consequences of England's hundreds of years of human rights violations, particularly violations of civil, political, social, economic, and cultural rights, in Scotland, and to propose that these human rights violations ought to be addressed rather than suppressed regardless of the outcome of the 2014 referendum.

II. THE POINTLESS DISTINCTIONS BETWEEN "JUSTICIABLE" AND "NON-JUSTICIABLE" RIGHTS

International human rights covenants and international customary laws protect individuals, as opposed to nation-states, from violations of their economic, social, cultural, civil, and political rights.[4] Unfortunately, such violations are not generally compensable: the damage wrought cannot be adequately compensated by the payment of money.[5] This means traditional common or civil law systems of adjudication cannot provide remedies. With no remedy in traditional legal settings available, these "non-justiciable" human rights are relegated to a second tier of "soft" rights.[6] These are the non-justiciable rights about which few people talk.

When people and news reports do talk about international human rights laws and norms (and violations thereof), the focus is almost invariably on "justiciable rights." Attention-grabbing horrors cannot, and should never, be ignored: the Holocaust, genocide in Rwanda, "ethnic

3. GEORGE SANTAYANA, THE LIFE OF REASON: REASON IN COMMON SENSE 284 (1905).

4. For example, 162 nations are parties to the International Covenant on Economic, Cultural, and Social Rights; 168 are parties to the International Covenant on Civil and Political Rights. The United States is a member of the latter but not the former, and is one of a very small number of nations to decline to join most of the major human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, to which only one other nation (Palau) has declined to become a party.

5. For this reason, some human rights, including genocide, are treated as violations of international criminal, rather than civil, law.

6. Even health care has been referred to as a social right, and thus as a "soft" or "third tier" right. *See* Martin Buijsen, *The Meaning of 'Justice' in Health Care*, 27 MED. & L. 535, 540 (2008). Dr. Buijsen notes that social rights require more from states parties than non-interference; social rights protected by international law require action by governments. *Id*. at 541. How this could be seen as a "soft" right is a mystery when constitutionally guaranteed individual rights in the United States, such as freedom of speech, only require that the federal and state governments refrain from interference. A right that requires government action certainly seems more "hard" than a right that merely requires governments to stay out of individuals' way.

cleansing" in the former Yugoslavia, child soldiers in Africa, human trafficking in the Americas, the never-ending violence between Israel and Palestine, the militant Islamists' horrific methods of punishing women who attempt to exercise any human right and the practice of female genital mutilation, the use of chemical warfare by the Syrian and Egyptian governments on their own citizens, and the insertion of U.N. "peacekeeping" measures to quell or perhaps provide some form of retaliation against random acts of terrorism. These are the human rights abuses about which most cultures are aware. Violence gets our attention; it always has and it always will.[7]

These are the violations of international law that can be brought before international criminal tribunals, either permanent or ad hoc.[8] Perpetrators can be sentenced to prison, or even to death;[9] restitution in the form of money can be ordered and its payment monitored by international bodies. These are the human rights violations that can be remedied in traditional legal settings and adjudicated, and in that sense alone, horrific as they are, they lend themselves more easily to recognition and redress than the "non-justiciable" rights.

Genocides occur across the globe; genocide is not an historical event but rather a current event.[10] But citizens of the Global North and West, in "developed" nations, tend to see only what we want to see. It is simply a matter of human nature that some atrocities garner more attention than others. In the United States, for example, the horrors of the genocide in the former Yugoslavia, despite being delicately labeled "ethnic

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7. The complex reasons for our affinity for violent stories are explored *in* HIDDEN GENOCIDES: POWER, KNOWLEDGE, MEMORY (Alexander Laban Hinton ed., 2013).

8. Such tribunals include the International Criminal Court, the regional human rights courts around the globe, and special tribunals such as those established to adjudicate the atrocities in the former Yugoslavia and Rwanda. It must be noted, again, that the United States does not submit to the jurisdiction of such international criminal courts.

9. Klaus Barbie, for example, was sentenced to life in prison in 1987, approximately four decades after his participation in the Nazi's Holocaust. Barbie died in prison in 1995. The case made international headlines, as can be seen in front-pages from the *BBC News* for July 3, 1987, and the *Chicago Tribune*, July 5. *See 1987: Nazi War Criminal Klaus Barbie Gets Life*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_2492000/2492285.stm; Julian Nundy, *Barbie is Convicted, Gets Life in Prison*, CHI. TRIB., http://articles.chicagotribune.com/1987-07-05/news/8702180936_1_judge-andre-cerdini-klaus-barbie-jacques-verges.

10. William A. Schabas notes that his views of genocide are still evolving, based on "a certain logic that views progressive development as synonymous with constant expansion of definitions so as to encompass an increasingly broad range of acts." WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW xiii (2d ed. 2009). Thus, while there may be ongoing rhetorical questions about whether "cultural genocide" or "ethnic cleansing" are encompassed within the international law definition of genocide, there is no debate whatsoever about whether what is happening in Darfur and Sudan today does, indeed, constitute genocide. *Id*. The Holocaust was the Holocaust; everything else that has happened and continues to happen for a similar purpose is genocide.

cleansing," were more immediately identified than was the almost-simultaneous genocide in Rwanda because politicians and voters in the United States tend to pay more attention when people who look like us are being slaughtered.[11] While there is no method by which to determine an exact number of lives lost to each conflict, scholars estimate that perhaps 150,000 people were killed in the former Yugoslavia while perhaps one million were killed in Rwanda.[12] However many U.S. citizens inversely reflected this disparity in the quantity of horrors in the reaction to the two situations, many of whom found white-skinned corpses more relatable than black-skinned corpses. The former Yugoslavia is in Europe, not Africa, and is thus more "relatable" to most Americans. There is also a simple fact of geography: unless oil is involved, many Americans do not generally pay attention to the slaughter of non-whites from far-off continents.

While only selectively attentive to violations of justiciable human rights, most Western "developed" nations pay almost no attention to violations of the non-justiciable rights. Violations of non-justiciable international human rights norms occur at home and around the world on a daily basis, and almost never attract media attention or legal repercussions. These are violations of the norms and international covenants that protect civil, political, economic, social, and cultural rights.[13]

It is inhumane and pointless to characterize these as "non-justiciable" or "second generation" rights. Every nation on earth ought to recognize these as the quiet rights that affect every citizen of every country on a daily basis. Violations of civil, political, economic, social, and cultural rights cannot, and should not, be distinguished or separated from the more dramatic violations that grab our attention when they hit the headlines around the world, and nothing is gained by drawing the artificial line

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11. For example, it has only just come to light the full extent to which British and U.S. forces abetted the instigation of the Rwandan genocide by that country's ruling party. *See* Edward S. Herman & David Peterson, *Rwanda: The Kagame-Power Lobby's Dishonest Attack on BBC Documentary*, ALLAFRICA, http://allafrica.com/stories/201411141162.html. In contrast, the former Yugoslavia atrocities were the subject of immediate, widespread public outcry in the West, despite the disparity in reported crimes: Estimates are that one hundred thousand Serbs were killed during a three-year period in the former Yugoslavia, while between eight hundred thousand and one million mainly Tutsis were killed in one hundred days in Rwanda.

12. SANTAYANA, *supra* note 3, at 284.

13. During her tenure as the U.N. High Commissioner for Human Rights, Louise Arbour wrote in 2007 about "The Neglect of Economic, Social and Cultural Rights in Mainstream Justice," surmising that a framework of justice that revolves around the roles of an accused and a victim does not fit the notion of social, economic, or cultural rights, but that this is a flaw in the framework of justice rather than a relegation of such rights to some second- or third-tier status. Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 4 (2007).

between "justiciable" and "non-justiciable" rights. Any time atrocities are perpetrated against human beings, we need to pay attention; every human rights violation matters—not just the bloody ones.[14]

Perpetrators of violent atrocities can be prosecuted in traditional adversarial judicial settings, such as the International Criminal Court, where there are defense and prosecuting attorneys, and where a judge (or judges, or jury) hands down decisions regarding guilt or innocence. The fact that these human rights violations lend themselves to resolution in a judicial setting does not, of course, automatically make them somehow more important than violations that do not.

Violations of the quiet human rights are typically categorized and dismissed as non-justiciable for the sole reason that they are not so easily redressed.[15] Taking a person's life has been a punishable offense throughout the recorded history of the human race; but taking that person's language, culture, clothing, name, religious practices, family or community structure[16] are harder to remedy, and they cannot usually be resolved in a courtroom setting. Nonetheless these are the international human rights norms that are violated more often—and affect more people—than the atrocities that make headlines.

Civil, political, social, economic, and cultural rights are acknowledged and addressed by both customary international law—those rules that States collectively agree to out of a sense of legal responsibility and common concern[17]—and treaties. The International Covenant on Civil and Political Rights entered into force in 1976, and currently has 168 Member States, including the United States and the United Kingdom.[18] The International Covenant on Economic, Social and Cultural Rights also entered into force in 1976, and it currently has 162 Member States. The United States is notably not among those nations that have joined the Covenant on Economic, Social and Cultural Rights.

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14. Of course this discussion does not, and cannot, include the other international law violations that garner so much attention: the private law that governs trade between nations' matters to most because it involves money, and in our world, money matters more than people.

15. For in-depth analysis questioning the legitimacy of labeling some human rights "non-justicable," as well as explaining the distinction and its origins, see Tara J. Melish, *Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 238–48 (2006).

16. These atrocities have also occurred throughout the history of the world, from ancient times to modern. Many examples are available: Egyptians were enslaved, Africans were enslaved, Native Americans, Jews, homosexuals, and Roma have all been forced from their homes, stripped of their identities and cultures and languages, generations and communities decimated because some "quiet" human rights are so easily violated that the world pays no attention.

17. *See* Flores v. S. Peru Copper Co., 414 F.3d 233, 247–48 (2d Cir. 2003) (explaining that it is difficult for judges and lawyers to understand customary international law because it is created by the general customs and practices of nations, and it does not stem from any definitive source).

18. Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. DOC. A/RES/2200(XXI) (Dec. 16, 1966), at https://treaties.un.org/ Home.aspx?lang=en.

Despite the fact that President Jimmy Carter signed it in 1977, U.S. Senate ratification is not yet forthcoming. Only Belize, Colombia, Comoros, Cuba, South Africa, Sao Tome and Principe, and Palau share the U.S. failure to join this treaty.[19]

Because genocide is a crime that can be adjudicated in a traditional legal forum, a genocide survivor has the possible benefit of seeing a perpetrator punished.[20] But most human rights violations are never formally addressed or resolved. The quiet rights, such as the right to one's personal and political identity, language, and culture, as well as the rights to adequate food, shelter, health care, and education, are violated on a daily basis in every part of the world, with no ramifications or consequences to the perpetrators, leaving those whose rights are violated without redress in any public or formal setting. Those human rights violations remain unresolved for the victim and are passed from one generation to the next.[21] Just because there is no remedy, the trauma does not simply disappear into thin air. Both the injuries and the damages stay with the victims, their families, their communities, and, perhaps most importantly, with their descendants until they are somehow exorcised.

III. INTERGENERATIONAL TRAUMA: "AH, RUN FOREVER IN MY VEINS, BOLD SCOTTISH BLOOD"[22]

Ordinary people all over the world carry within them the weight of human rights violations that occurred in generations past. An unresolved

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19. All of these, and many other reliable statistics, may be found in the online U.N. treaty collection. *Id.*

20. *See generally* PHIL CLARK, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS (2010). Dr. Clark's book describes the use of gacaca courts by the Rwandan people in an effort to adjust to post-genocide life. Individuals accused of participating in the genocide were brought to local community gatherings to face the families, friends, and neighbors of those they were accused of killing. No lawyers were involved, no judges, no courtrooms. This traditional method of Rwandan dispute resolution may or may not have been well-suited to addressing the aftermath of genocide, but it did provide a forum in which those who had suffered could address the accused perpetrators while remaining in the company of their own community, without having to endure the formal judicial processes which intimidate and deter so many witnesses around the world.

21. *See* Charles Portney, *Intergenerational Transmission of Trauma: An Introduction for the Clinician,* PSYCHIATRIC TIMES (Apr. 1, 2003), http://www.psychiatrictimes.com/articles/intergenerational-transmission-trauma-introduction-clinician (describing the increased rate of post-traumatic stress disorder, depression, anxiety, and psychological distress among the offspring of parents whose lives were marked by excessive trauma). Psychiatrists began identifying intergenerational trauma in the 1800s in terms of parents transferring neuroses to their children. Post-World War II studies of Holocaust survivors and their children revealed intergenerational trauma as well. *Id.*

22. SCOTT HUTCHISON, *Scottish Winds*, *on* A FRIGHTENED RABBIT E.P. (Atlantic Records 2011).

injury inflicted on any one person or an entire race, religion, gender, or ethnic group is carried from one generation to the next, passed from parent to child to grandchild in the documented pattern known as intergenerational, or historical, trauma.[23] "Historical trauma is cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma."[24]

Historical trauma is addressed across a spectrum of disciplines but has not yet been acknowledged in most legal systems. In the United States, for example, the legal system refuses to accept historical trauma as a mitigating factor in criminal cases, despite testimony from the world's best-known experts on the matter.[25] Psychologists, psychiatrists, social workers, and mental health counsellors frequently refer to intergenerational trauma when explaining continuous and current social difficulties or living conditions of those whose histories are steeped in trauma: the children and grandchildren of survivors of the Holocaust, genocides, and ethnic cleansing all carry their parents' and grandparents' burdens down through time, passing them, like ghastly family heirlooms, from one generation to the next.

Intergenerational trauma explains why patterns of abuse, neglect, and abandonment can be traced from their roots in a group trauma, such as that suffered by Native Americans across the generations from arrival of the Europeans on this continent up to today. But criminal actions by those who carry that heavy burden of trauma are not mitigated by historical trauma in the U.S. courts. Those courts are not impressed by horrific historical trauma and do not accept explanations from expert witnesses for the behaviors of the accused. No one argues that historical trauma is a "get out of jail free" card, but psychiatrists and even some dissenting judges acknowledge that generations of decimating trauma might explain some otherwise unexplainable behaviors.

A Native American mother left her newborn child to die,[26] at least in part because she had been horribly abused by both of her own parents who had, in turn, been abused by their own parents.[27] The young mother

23. Dr. Maria Yellow Horse Braveheart, Ph.D., conceptualized historical trauma in the 1980s, as a way to articulate, and to foster a stronger understanding of, the reality in this country that life for many Native Americans cannot even approach "the American Dream." Maria Yellow Horse Braveheart, *Welcome to Takini's Historical Trauma,* http://www.historicaltrauma.com/ (accessed May 5, 2014).

24. *Id.*

25. United States v. Deegan, 605 F.3d 625, 627 (8th Cir. 2010).

26. *Id.* at 639–40.

27. Dana Deegan's family and community spoke out about the specific abuses she suffered at home and in foster care, and the relationship of those abuses to the abuses inflicted on their parents, grandparents, and community as a whole for at least four generations. Some community members initiated petitions asking President Obama to free Dana Deegan from prison; see, for example, the petition initiated by Change.org, which can be found at https://www.change.org/p/

had no support system nor any resources to turn to, due to the history of abuse and neglect that prevailed, not just in her family, but throughout her entire culture and community.[28] Her parents, the grandparents of the deceased infant, were undoubtedly abused by their own parents, who were among the generations who were raised in the U.S. federal system of Indian Boarding Schools in violation of all international human rights norms for social, economic, and cultural rights.[29] The Eighth Circuit chose not to consider that this young mother, alone in a bleak trailer on an even more bleak Reservation, with the three young children she had already borne, acted as a result of the trauma that had traumatized her parents, who in turn were traumatized by human rights violations inflicted on their parents, when she delivered, cleaned, fed, and clothed the newborn on whom she then firmly closed the trailer's door, driving away with three young children, leaving the infant to perish.[30] In a society where intergenerational trauma is ignored, human rights violations can and do thrive, as demonstrated by the ten year prison sentence imposed on the young mother described here.[31]

The current effects of historical trauma can be seen around the world, from the refugee camps in sub-Saharan Africa to the rolling hills of America's heartland. Life on the Pine Ridge Reservation in South Dakota, one of the poorest places in the United States, leaves no doubt

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clemency-for-dana-deegan. According to the *Wall Street Journal*'s April 21, 2015 issue, the U.S. Sentencing Commission is currently reviewing sentencing disparities between Native Americans and non-Indians charged with identical crimes. Dan Frosh, *Federal Panel Reviewing Native American Sentencing*, WALL ST. J. (Apr. 21, 2015), *at* http://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601. For example, a 2003 Sentencing Commission study found that in new Mexico, state court convictions for assault (even when the defendant was a Native American) averaged 6 months in jail; Native Americans charged with assault and tried in federal court, in contrast, were sentenced to an average of 54 months in prison. *Id.* Only Native Americans can be charged with federal offenses for crimes that occur on Reservation land. *See, e.g.*, The Indian Major Crimes Act, 18 U.S.C. § 1153 (2015).

28. *Id*. at 644–45; *see generally* Ann Piccard, *Death by Boarding School: The "Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013–2014) (discussing the length and brutality of Native Americans' intergenerational trauma).

29. *See supra* note 27.

30. *Deegan*, 605 F.3d at 657–58 (Bright, J., dissenting) ("None of [the] matters [included in Ms. Deegan's sister's letter] made any difference to the district court when sentencing under the guidelines.").

31. *Id.* at 627 (*affirming, en banc*, Dana Deegan's 121 month sentence), *cert. denied*, 131 S. Ct. 2094 (2011). The young mother's three daughters are growing up without their mother, whose sentence will not be completed for at least four more years. Meanwhile, the federal courts never even thought to hold the abusive, drug-addicted father of the deceased baby legally responsible in any way for the infant's death. Further, the prosecuting U.S. Attorney, who pursued a far harsher sentence than anything that might have been imposed in a state court, seems to be riding the coattails of this success in putting Dana Deegan behind bars for more than ten years right into the Lieutenant Governor's office in South Dakota. Many factors were at play in this travesty of a case; justice was not one of them.

that a history of human rights violations is not overcome in a single generation. The Lakota live with "unresolved grief" from the loss of life, land, and culture their people suffered at the hands of the United States. The rates of poverty, suicide, depression, domestic and other violence, and dysfunction in general on the Lakota's reservation are sky-high.[32]

In recognizing historical trauma, doctors and social scientists acknowledge that the past is inseparable from the present and the future. Even though the U.S. legal system does not recognize historical trauma, it is observed in other contexts, including the trauma suffered by Vietnamese who fled their country and struggled to adapt in the United States.

A young Vietnamese man, whose parents fled their country and eventually came to the United States, asked a U.S. District Court to consider the traumatic effect his parents had on him.[33] He was raised in a silent, angry home in which no one ever articulated the horrors they had witnessed or the struggles they were currently enduring.[34] The young Vietnamese man felt a cultural obligation to financially support his impoverished family, and so, even though he was a brilliant student, he turned to gambling and eventually violence to provide the financial support his culture and parents expected of him.[35] The district court remained unimpressed.[36]

Think of the children of Holocaust survivors, living with parents who survived the worst atrocities in the history of the human race. It is beyond one's imagination to think that the trauma would not be passed, in some form, from one generation to another. Two generations after the Holocaust, the son of survivors who had fled to Venezuela sought refuge from the anti-Semitic fervor there on behalf of his daughter, on whom the anti-Semitism had a disproportionate impact due to the intergenerational trauma from which she and her Jewish family suffered.[37] In his application for an immigration visa waiver to allow entry into the United States, this second-generation Holocaust survivor wrote:

> As the direct descendant of Holocaust survivors, I possess an emotional heritage which makes me exceptionally vulnerable to anxiety and depression borne of intergenerational trauma and this

32. *See* WINONA LA DUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 148 (1999).

33. *See* Sentencing Memorandum, United States v. Dinh, No. 09 Cr. 327-01, 2011 WL 1197666 (S.D.N.Y. Jan. 13, 2011), (No. 09 Cr. 327); *see also Dinh*, 2011 WL 1197666, at *6.

34. Sentencing Memorandum, *Dinh*, 2011 WL 1197666 (No. 09 Cr. 327).

35. *Id.*

36. *See Dinh*, No. Cr. 327-01, 2011 WL 1197666, at *6.

37. Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e), 2009 WL 7441650 (DHS).

> makes my American citizen daughter [IDENTIFYING INFORMATION REDACTED BY AGENCY] far more susceptible to emotional and psychological damage than other American children in the event that she is forced to live in Venezuela, surrounded by an oppressive atmosphere of anti-Semitic rhetoric and violence . . .[38]

In one state juvenile court case, the defense attempted to introduce intergenerational trauma as a mitigating factor in the murder trial of an adolescent Native American; the attempt was unsuccessful because "the witness was ill at the time of trial."[39] The court was presented with, and accepted as evidence during the sentencing phase of the trial, sordid details of the teen's life: he was physically abused by his mother and sisters on the reservation, raped by his uncle while visiting his grandmother, and began regular use of marijuana and alcohol between the ages of eight and ten.[40] At age 14 the boy attempted suicide by hanging.[41] Multiple expert reports accepted by the court diagnosed the juvenile with Post-Traumatic Stress Disorder stemming from the abuse he suffered at the hands of his closest family members, who had themselves been abused and who bore the inherited trauma of their people.[42] At the time of the sentencing of the teen, both his parents were in prison for federal narcotics conspiracy crimes.[43] Yet the court chose not to view his history as a mitigating factor in sentencing the youth, who was 15 at the time he killed a man whose sexual overtures triggered the boy's post-traumatic stress disorder.[44] The court would not even consider the possibility that intergenerational trauma could have played a part in the crime.[45] When the teen was sentenced as an adult, the generations of abuse that influenced his perpetration of the crime, although of no significance to the court, were carried with him into prison, and will remain with him, his family, the family of his victim, and our entire national experience. These horrors do not disappear, no matter how long the prison sentence may be. Nothing has been addressed.[46]

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38. *Id.*

39. *In re* Welfare of G.S.G., No. 27-JV-08-9898, 2009 WL 3736134, at *6 (Minn. Ct. App. Nov. 10, 2009).

40. *Id.* at *1.

41. *Id*.

42. *Id.* at *2.

43. *Id.*

44. *Id.* at *8–9.

45. *Id.* at *6.

46. There is a colloquial definition of insanity as doing the same thing over and over but expecting a different result. That seems to fit the methods of our criminal justice system's refusal to acknowledge intergenerational trauma.

IV. THE HIGHLAND CLEARANCES

"Many evil deeds have been associated with the abuse of the monopoly power of land ownership . . . but it is safe to say that nowhere . . . else at any time have blacker or more foul deeds been committed in the sacred name of property than in the Highlands of Scotland in those days."[47]

In the mid-1700s, at approximately the same time that England was preparing to wage its unsuccessful battle to hold onto the North American colonies, English landowners in the Scottish Highlands prepared to rid themselves of their human tenants in favor of more lucrative inhabitants: sheep. A systematic process of forcible evictions began. The tenant farmers had no legal title to the land, but "by moral law, if not by the law of the land, they had a right to the soil which had been defended with their own right arm and that of their ancestors."[48]

Tenant families acquiesced and went quietly to the shores of the North Sea, as instructed by their lords or clan leaders, not because they did not feel that they belonged to the land and the land belonged to them but because they were religious men and women who believed the ministers who told them that their eviction was God's will, the punishment they had earned for their own sins.[49] Acquiescing was God's will, and so the tenant farmers left when told to do so.[50] Those who were too old or infirm to leave were assisted by their neighbors.[51] No resistance was offered as the Highlanders were sent "to search through great privation for some foothold on rugged ground beside the western sea."[52]

The atrocities committed during the Highland Clearances, like those committed during the Holocaust, the genocide in Rwanda, the "ethnic cleansing" in the former Yugoslavia, and the "forced assimilation" of the indigenous peoples of North America, took place within organized legal and cultural systems, and demonstrate what happens to a people whose

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47. ALEXANDER MACKENZIE, THE HISTORY OF THE HIGHLAND CLEARANCES, at ix–x (2d ed. 1914).

48. *Id.* at xi.

49. *Id.* This concept of inherent evil is familiar to many members of various organized religions, including, in this country, Catholics and Baptists.

50. *Id*. "[The Crofters] regarded the minister as the stern oracle of trust, and the strict interpreter of the meaning of the ways of God to man. What happened was right. The pages that follow will show what a mean use many of these ministers made of the power which their faithful flock vested in them." *Id.*

51. *Id.* at 18 (6% Kindle e-book version) (quoting Donald Macleod, author of 'Gloomy Memories': "'Fire was immediately set to [the 100 year-old woman's] house, and the blankets in which she was carried out were in flames before she could be got out. She was placed in a little shed, and it was with great difficulty that they were prevented from firing it also. The old woman's daughter arrived while the house was on fire, and assisted the neighbours in removing her mother out of the flames and smoke, presenting a picture of horror which I shall never forget, but cannot attempt to describe.' Within five days she was a corpse.").

52. *Id.* at xiii.

social and cultural rights are destroyed with and for a purpose. These events give rise to intergenerational trauma, and the result is, without exception, a community plagued by unspoken horrors that are never officially recognized but that are carried forward to further traumatize the next generation, and the next after that, apparently without end.

Cultural anthropologists and most scholars of interdisciplinary studies, such as political scientists and sociologists, understand that historical or intergenerational trauma makes past atrocities relevant today. Psychiatrists also recognize that intergenerational trauma provides fertile soil for disproportionately high rates of depression, anxiety, and post-traumatic stress disorders in future generations. Past atrocities can never be swept under a rug because their impact spreads across generations in tangible and quantifiable ways. Put another way, individual members of any traumatized group experience their own individual traumas, and many "deposit" their trauma into their own children as if the children could somehow remedy the trauma; but children are no more able to address the trauma deposited in them by their parents than were the parents themselves, and so the children simply pass it on to their own children in the uniquely human experience referred to as "intergenerational transmission of trauma."[53]

Obviously, there can be no judicial remedy for that injury, when a legal system turns a blind eye to a demonstrated injury. This may be the true definition of a "non-justiciable" violation of human rights. When judicial remedies are either unavailable or ineffective, the injured parties sometimes attempt alternative solutions, whether intra- or extra-judicial, peaceful or violent, socially acceptable or otherwise. Some places, like South Africa, Canada, and even Greensboro, North Carolina and Tulsa, Oklahoma, have turned to peaceful, quasi-judicial, officially sanctioned and organized alternatives such as Truth and Reconciliation Commissions to give entire communities, including both victims and perpetrators, the opportunity to tell their stories and to be heard. In Canada the government not only established a Truth and Reconciliation Commission (Canadian TRC), it also distributed significant cash payments to those who survived the Canadian Indian Residential Boarding Schools, and to their heirs if the immediate victims had already passed away. The Canadian government was being neither altruistic nor magnanimous in its efforts to redress the wrongs committed between the 1880s and the 1980s; Canada acted only in response to a class-action lawsuit filed by survivors of the schools.[54] Despite its less-than-noble

53. Vamik D. Volkan, *Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity*, 32 GROUP ANALYSIS 79, 86 (2001).

54. The lawsuit was a national class action suit, but involved numerous court file numbers, named plaintiffs, named defendants, settlement dates. *See generally* WIKIPEDIA, http://en.wikipedia.org/wiki/Nora_Bernard (last visited Oct. 15, 2015).

motivating factors, however, the Canadian TRC's mission statement poignantly and accurately recognizes that "[t]he truth of our common experiences will help set our spirits free and pave the way to reconciliation."[55]

The United States, in contrast, only recently acknowledged the wrongdoing inflicted on the indigenous peoples of this nation. In an odd placement, the Senate included a one sentence apology for past atrocities in the middle of H.R. 3326, the 2010 Department of Defense Appropriations Bill. However, while issuing those brief words of apology, the Senate simultaneously made clear that its sentiment of regret, comprising all of one line in the Bill, gave rise to absolutely no cause of action by or on behalf of anyone affected by the U.S. Indian boarding schools.[56] Those U.S. schools were remarkably similar to Canada's, with the exception that the United States entrusted management of the schools to government employees while Canada "outsourced" management of its schools to the Catholic Church.

Yet both had the same impact:[57] children were stolen and forcibly "assimilated" by prohibitions against practicing their own religions, speaking their own languages, using their own names, or wearing their own clothes. Untold numbers of children were abused and died of disease or deprivation of basic human necessities and families and communities were irreparably shattered and lost.[58] Nothing on earth could compensate for such losses, even if the United States had not made it crystal clear that there is no cause of action available by which to bring any such claims to court. However, the notion that non-compensable atrocities do not give rise to legitimate causes of action—that they are, in other words, non-justiciable—is absurd.

V. THE BLOODY BRITISH RULE

In Scotland, hundreds of years of oppression began with the indigenous Picts[59] and proceeded through the Highland Clearances and

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55. Schedule "N," Mandate for the Truth and Reconciliation Commission (of the Indian Residential Schools Settlement Agreement), *available at* http://www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf (last visited Nov. 27, 2015).

56. The quote is the Canadian TRC's Mission Statement, its primary guiding principle. DEPARTMENT OF DEFENSE APPROPRIATIONS ACT OF 2010, H.R. 3326, 111th Cong. § 8113 (2009).

57. *See* Julian Brave Noisecat, *Canada Just Confronted Its 'Cultural Genocide' of Native People. Why Can't the U.S. Do The Same?*, HUFFPOST: POLITICS (Oct. 21, 2015), http://www.huffingtonpost.com/2015/06/05/native-american-boarding-schools_n_7513310.html.

58. *Id.*

59. Brian Milne, *The Tribes Within: The Search for Identity in the Modern State*, 1 STUD. TRIBES TRIBALS 29 (2003).

on into the present.[60] Scotland's ongoing limited political autonomy, perhaps the primary reason the question of independence made its way onto the ballot in 2014 when others before it had failed, could finally have been addressed if the referendum had been approved rather than rejected.[61] Ironically, the requirements for casting a vote on the referendum raised more eyebrows than, possibly, the referendum itself, as many in Scotland and around the world wondered why a sixteen-year-old school boy could cast a ballot but a sixty-year-old Scotswoman whose work had taken her to London for a few months could not.[62] Nonetheless, the referendum at least gave evidence that Scotland had spent centuries in an identity crisis, stemming from its own sordid past.

Identifying the truly indigenous Scots is not an easy task. "The ancient Celtic peoples of the British Isles were not newcomers from elsewhere but the descendants of an indigenous population whose ancestry lay in the pre-Celtic past and whose ultimate origins reached back into the Stone Age."[63] Apparently the Roman conquerors abandoned any hope of including in their conquest the high mountains in the north of Britain. "After a few half-hearted incursions, in the time of Hadrian they built a wall to protect Roman Britain, and abandoned Caledonia to its seemingly ungovernable inhabitants. Those inhabitants were of two sorts--Britons, and a people the Romans called 'Picts' from their habit of painting their bodies."[64] Thus began the image of the Scottish Highlands as home to a wild and unruly people. In the eighteenth century Scots were culturally and legally included in the nation known as Great Britain.[65]

In 1745 the English began a campaign to clear all human residents from the Scottish Highlands, to rid the land of small farms and make way for the sheep that would graze on the grasses of the emptied farmlands and produce the wool that would make the English landowner, or even the Scottish clan leader, wealthy beyond the farmers' imaginations.[66] The landlords ordered the Highland farmers, also known as crofters, to leave their homes, and those who did not leave quickly enough for the landlords' liking watched their homes burned to the ground with all of

60. *Id.* at 29–30.

61. *Scottish Referendum: Scotland Votes 'No' to Independence*, BBC NEWS, Sept. 19, 2014, http://www.bbc.com/news/uk-scotland-29270441trctrc.ca/websites/trcinstitution/index.php?p=7 (last visited Oct. 21, 2015).

62. Any resident of Scotland aged sixteen or over at the time of the referendum was eligible to vote. Scottish citizens residing anywhere beyond the country's borders, for any reason or any length of time, were not.

63. TIM CLARKSON, THE MAKERS OF SCOTLAND: PICTS, ROMANS, GAELS AND VIKINGS loc. 207 (2013) (Kindle ebook).

64. William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1066. (2010).

65. *Id.* at 1055.

66. *Id.* at 1087–88.

their earthly goods inside them.[67] "Evictions took place for the object that was at the moment most profitable. The Napoleonic Wars made sheep runs temporarily more profitable; but the moment there was more profit to be obtained from sport and deer forests, then deer forests were to a large extent substituted for sheep runs."[68]

Untold numbers of farmers were instructed to move to the coast of Scotland and become fishermen. The coastline of the North Sea became crowded with the makeshift houses of Highlanders who had neither the knowledge nor the tools required to actually subsist on fishing the frigid and dangerous waters of the North Sea.[69] Those who could not succeed may have starved in the makeshift hovels that quickly sprouted along Scotland's coast.

Viewed in the context of human history, Scotland's relationship with England is relatively young, and English control over Scotland is not as ancient as many may believe. England and Scotland were technically united in 1707, but many Scots still view that as something quite different from a union. English rule, and particularly Westminster's power over all things Scottish, looks more like conquest than union to many Scots and outsiders. The year 1707 is thus as far back as one might trace the impetus for the Fall 2014 referendum on whether to officially separate from Westminster, to form a true Scottish government, to write a Scottish Constitution, to reclaim Scotland's nationhood, and to face the challenges and opportunities that accompany existence as an independent nation.

The Scots' pride in their cultural and national identity runs deep, and nowhere is it felt more deeply than in the Highlands.[70] The unique culture and history of the Highlanders, and the intergenerational trauma that undoubtedly stems from the Highland Clearances, explain the importance of the independence referendum to those whose ancestors were Highlanders: "The Highland Clearances devastated Gaelic culture and clan society, driving people from the land their families had called home for centuries."[71]

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67. MACKENZIE, *supra* note 47, at 12–13.

68. *Id.* Loc. 148–49.

69. *See id.* at 19.

70. On Feb. 10, 2014, a Scottish Member of Parliament, Charles Kennedy, noted the unique nature of the Highlands, and the need for "sensible engagement" on the question of independence, calling for "more devolution . . . within and across Scotland. . . . And nowhere more so than here in the Highlands." *See* BBC News, *Scottish Independence: Charles Kennedy Calls for 'Positive' Campaign*, BBC NEWS, Feb. 10, 2014, http://www.bbc.com/news/uk-scotland-scotland-politics-26119778 (accessed May 25, 2014).

71. The quotation comes from the Scottish government's official Scottish education website, which devotes entire sections of Scottish history lessons to the Jacobite uprising and the Clearances: *Scotland's History – Jacobites, Enlightenment and the Clearances: The Clearances*, EDUCATION SCOTLAND, http://www.educationscotland.gov.uk/scotlandshistory/jacobitesenlightenmentclearances/clearances/ (last visited June 27, 2014).

Unlike the experts in fields as diverse as psychiatry, political science, sociology, and anthropology, international human rights courts, lawyers, and scholars do not yet recognize the effects of intergenerational trauma that would inevitably follow the Highland Clearances—and in that failure, the international human rights establishment risks enabling repetitions of past atrocities. Thousands of Highlanders were driven from their farms, forced to emigrate, or left to die of sickness and starvation on the North Sea coast, by their own clansmen working in tandem with the British upper class and their insatiable greed, in which the clan chiefs were more than happy to partake.[72] Devastation on this level does not disappear from the collective memory of a nation.

The Westminster legal system, like the systems of Canada and the United States have done in the not-so-distant past, promoted a policy of genocide. The Highland Clearances were carried out with the purpose and effect of obliterating a culture, a language, and a people. The government-sanctioned policy of the Clearances criminalized the Gaelic Highland culture by prohibiting the speaking of the Gaelic language and the wearing of traditional kilt and sporran (the pouch that served as a pocket or wallet for a man wearing a kilt), and by abolishing the heritable jurisdictions of clan lands.[73]

While genocide may seem too strong a word, it is not. There is no difference between "ethnic cleansing," "cultural genocide," and "genocide." Genocide is defined in international covenants, and accepted in customary international law, as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;

72. *See* MACKENZIE, *supra* note 47, at 94–95.

73. "Heritable jurisdictions" enabled the Highlanders to pass their farmlands from one generation to the next, resulting in some families occupying the same acreage for centuries without ever holding title to that land. The Heritable Jurisdiction Act of 1747, part of the government's Clearance policy, abolished all heritable jurisdictions, essentially divesting the Highlanders of their farms. As a small aside, this is probably as good a place as any to note that the notion of clans claiming individualized tartan kilts is largely a Hollywood myth, a la "Braveheart." Kilts were never meant to be easily seen, much less used as symbols of clan identity; bright colors would have defeated the goal of camouflage.

(e) Forcibly transferring children of the group to another group.[74]

When the English cleared the Highlands of people to make way for the more lucrative business of running sheep or deer, the result was genocide. Generations later that trauma is sure to linger. It would is unsurprising, then, that emotions tend to run high in light of the "bloody English rule."

But emotions did not, in fact, seem to run very high throughout the eighteen months of campaigning. From the very inception of the referendum campaigns none of the public opinion polls (and there were many) indicated any clear majority opinion on the referendum's single question: "Should Scotland be an independent country?" Some surveys showed the Yes-voters holding a very small lead, while others gave the No-voters a clear majority, and those results seemed to vary from one moment to the next. The six public opinion polls completed in February, 2014, showed the Yes-vote moving upward to around 40%, but according to the non-partisan WhatScotlandThinks.org, the March 2014 opinion polls were too close to call.[75] The only certainty was that people's minds were not changing based on either side's white papers, promises, or campaigns.

Scottish self-identity runs strong:

> We perhaps should not be surprised that it is proving difficult for both sides to secure a decisive change in the balance of opinion. For in part people's views are a reflection of their sense of identity, that is whether they feel Scottish or British - and people do not change their sense of identity very easily.[76]

Perhaps that sense of self-identity remains unwavering. But perhaps the rules of enfranchisement were as responsible as self-identity for the respective campaigns' apparent inability to influence voters. Several commentators, including the BBC, questioned the wisdom of giving the vote to sixteen- and seventeen-year-olds,[77] even though this was itself a compromise from the original proposal by the SNP to allow fourteen- and fifteen-year-olds to vote. The U.S. electoral system does not entertain even a possibility of allowing anyone under the age of eighteen to vote,

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74. U.N. General Assembly Resolution 260, Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948. G.A. Res. 3/260, art. II, U.N. Doc. A/RES/3/260 (Dec. 9, 1948).

75. WHAT SCOTLAND THINKS, http://whatscotlandthinks.org/questions/should-scotland-be-an-independent-country#table (last visited Oct. 18, 2015).

76. John Curtice, *Scottish Independence: What Have the Polls Been Saying?*, 18 BBC NEWS (Sept. 18, 2013), http://www.bbc.co.uk/news/uk-scotland-scotland-politics-24124631.

77. *See* Vanessa Barford, *Should 16-Year-Olds Get the Vote Following Referendum?* BBC NEWS (Sept. 23, 2014), http://www.bbc.com/news/uk-29327912.

presumably because American culture views anyone younger than eighteen as incapable of possessing the maturity, judgment, reasoning, or capability of handling such grave responsibilities as voting, drinking or purchasing alcohol, or serving in the armed forces (although we hesitate very little to give those young people the license necessary to drive an automobile, directly causing thousands of deaths on U.S. roads and highways every year[78]). It would take a Constitutional Amendment to lower the voting age to sixteen in the United States.

In addition to giving the vote to the youngest people ever allowed to vote in Scotland, the rules extended the referendum franchise to anyone legally residing in Scotland on September 18, 2014, regardless of nationality. During a week of informal conversations with Scottish residents from a wide range of backgrounds, socioeconomic levels, and nationalities (conducted the last week of July, 2013, in and around Edinburgh), it became clear to this author that age was a more troubling prospect than nationality. This was puzzling to an American voter. In the United States, only citizens may vote, regardless of whether a non-citizen is a resident of fifty years or fifty minutes, and regardless of the legality of that non-citizen's presence in this country. The only citizens (over the age of eighteen) whose voting rights are broadly limited are convicted felons. Some states do allow convicted felons to vote from prison,[79] but no state may constitutionally permit non-citizens to vote. Non-resident citizens routinely vote via absentee ballots, even if they have lived or worked abroad for dozens of years, as their right to vote is unaffected by their physical presence or absence from American soil so long as U.S. citizenship is retained. From the perspective of the United States, therefore, giving the vote to a cab driver from Bulgaria, who has lived in Edinburgh for two years on a valid E.U.-member work visa, is a concept much more foreign than allowing a sixteen-year-old to vote.

Both sides of the referendum campaign addressed the franchise questions in their campaigns. Interestingly, the very act of deciding on the franchise[80] was, at first blush, beyond the devolved powers of the Scottish Parliament: the power to change the rules of voting eligibility in Scottish political elections remained in Westminster. Through minor

78. *Teen Drivers: Get the Facts*, CENTER FOR DISEASE CONTROL AND PREVENTION (Oct. 14, 2015), http://www.cdc.gov/motorvehiclesafety/teen_drivers/teendrivers_factsheet.html. It is commonly accepted that in the United States, automobile crashes are the leading cause of death for young people ages 15–20. The Center for Disease Control and Prevention issues statistical reports that consistently show that the drivers most likely to be killed in car crashes are males between the ages of 16 and 19. *Id.*

79. For a chart outlining felon disenfranchisement laws in all fifty states, see Felony Disenfranchisement Laws in the United States, *at* http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf.

80. Scottish Independence Referendum (Franchise) Act, 2013, (A.S.P. 13), *at* http://www.legislation.gov.uk/asp/2013/13/contents.

linguistic contortions the Independence Referendum was categorized as something other than a political election and thus the franchise change was within the Scottish Parliament's powers.

As it turned out, the franchise for voting in the Independence Referendum differed from general Scottish franchise rules primarily in expanding the vote to those ages sixteen and seventeen years. The Bulgarian taxi driver would be allowed to vote for a member of the Scottish Parliament just as he was eligible to vote on the question of independence. For him and other similarly situated non-citizen residents of Scotland, national identity was certainly not the issue when it came time to cast a vote for or against independence. The cab driver's national identity and self-identity was Bulgarian, and his disdain for all people Scottish was clear as he explained that he and his wife were gainfully employed because the Scots were more content to collect welfare and live comfortably than to work hard to improve their lot in life (the implication being clear that Bulgarians' work ethic is superior to Scots'). His inclination to vote against independence rose from concerns about his own employability should Scotland suddenly find itself cast out of the European Union, in need of applying for admission, as an independent nation, to regain the membership in the European Union that made it possible for the cab driver to legally work in Scotland in the first place.

In the Highlands, emotions undoubtedly run more to national identity and to the pride of being Highlanders, those long-suffering but most indigenous of the Scots. But the Highlands are sparsely populated; the referendum was not likely to be won or lost based on the votes of Highlanders. Given the number of Scottish citizens living abroad at the time of the referendum, it might be worth questioning whether the vote was even won or lost on the vote of Scots. The ultimate rejection of independence may not reflect in any way the existence of any strong sense of national identity or of the very real and ongoing ramifications of intergenerational trauma. The referendum, if it were decided by the votes of non-Scottish citizens, might be realistically viewed as a complete failure—for both sides.[81]

In a perfect political world, the referendum would have provided a meaningful platform from which to address hundreds of years of oppression and human rights violations on many levels. While most commentators focused on the impact independence might have on the financial state of Scotland, Britain, and the European Union, it is worth considering that the human rights violations that began with the "union" of 1707 are of equal or even greater importance. Giving the right to vote

81. It must be noted that voter turnout for the Referendum was astonishingly high, especially by U.S. standards: by all accounts, more than 84% of eligible voters cast their ballots on Sept. 18, 2014, a number so high that it broke the existing voter-turnout record in the United Kingdom, which generally sees greater voter participation than does the United States.

to non-citizens might have brought home to all Scots that the Independence Referendum, or any other legal or political process, can be but one part of any solution. The Independence Referendum could have been an opportunity to correct prejudices that stem from human rights violations which, when left unchecked, have historically escalated into crimes against humanity and could just as easily do so again in the future. It is unfortunate that this is apparently an opportunity lost in the unprecedented and unnecessary expansion of the rules of the franchise.

VI. INDEPENDENCE AS REDRESS FOR THE HIGHLAND CLEARANCES

This analysis thus returns to the difficult question of who the Scots actually are. Scotland was settled over a thousand years ago, so it is no easy task to identify its indigenous peoples. Yet, identification is a necessary step in any logical analysis of the complete failure of both sides of the referendum question to persuade voters to change their minds about independence. The question of "self-identity" raised by some commentators appears to be a non-issue outside of the Highlands. Perhaps then, the Highlanders are, for all practical purposes, Scotland's indigenous people. It is certainly they who pay the price of intergenerational trauma.

The Irish crossed the body of water now known as the Irish Sea to definitively settle in Scotland and were among Scotland's earliest inhabitants.[82] Therefore, depending on one's definition of "indigenous," the Irish could be considered as such.[83] "Indigenous" peoples have been defined as follows:

> [T]hey are the descendants - according to a common definition - of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means.[84]

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82. *See generally* TIM CLARKSON, THE PICTS: A HISTORY 1 (rev. ed. 2010).

83.

> "Picts" was the name given to a people who inherited a large part of what is now Scotland during the first millennium A.D. . . . After less than 600 years, they seem to vanish from the pages of history, leaving behind no written records of their own nor any significant trace of their language.

Tim CLARKSON, THE PICTS: A HISTORY 1 (rev. ed. 2011). The Picts did leave stone-carved monuments that can be seen throughout the Highlands. *Id.*

84. *Indigenous People Indigenous Voices FactSheet*, UNITED NATIONS PERMANENT FORUM

Factors used to determine whether a people is indigenous include self-identification on the personal and group level, as well as the following:

> Historical continuity with pre-colonial and/or pre-settler societies;
> Strong link to territories and surrounding natural resources;
> Distinct social, economic or political systems;
> Distinct language, culture and beliefs;
> Form non-dominant groups of society;
> Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[85]

If analysis of the Independence Referendum focuses on the inhabitants of the Scottish Highlands in particular, it is important to acknowledge that there were generations upon generations of "crofters." Until the Highland Clearances commenced in 1745 in the wake of the Protestant majority's defeat of the Catholic Jacobites, the crofters' heritable tenancies enabled their families to farm the same small plots of land for hundreds of years.[86]

Some historians see the Clearances as nothing more or less than authorized and warranted evictions.[87] The lawful owners of the land decided they could make more money by raising sheep than by collecting the ever-increasing rents that the crofters had been paying for generations.[88] Perhaps the saddest part of the whole process-aside from images of babies and old women being carried out in their beds as government—sanctioned soldiers set torches to the thatched roofs of their huts—was that clan chiefs aided the perpetrators and turned against their people in favor of money offered by the Southern landowners.[89] The combination of a clan leader and a clergyman proved too much for most Highlanders, who accepted their fate and went to the sea shore to eke out a living catching and selling a limited supply of fish, as they were ordered to do by the authority figures in their lives.[90] Those Highlanders who chose not to cooperate were simply burned out of their family homes.[91] The first person stories are horrific, and it is this horror that requires that

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ON INDIGENOUS ISSUES, http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (accessed May 5, 2014) (last visited Oct. 13, 2015).

85. *Id.*

86. T.M. DEVINE, THE SCOTTISH NATION: A HISTORY 1700–2000, 231 (1999).

87. JAMES HUNTER, THE MAKING OF THE CROFTING COMMUNITY 57 (2d ed. 2000).

88. DEVINE, *supra* note 86; *see also* Cynthia A. Lohman, *Crofting: Securing the Future of the Scottish Highlands Through Legislative Challenge and Cultural Legacy*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 663, 669. (2007). Lohman's 45-page article devotes one scant paragraph to the Clearances.

89. DEVINE, *supra* note 86.

90. *Id.*

91. *Id.*

these stories never be forgotten.

In human rights law, it is axiomatic that for every personal story of atrocity that survives there are hundreds that are never told. This is the role of a Truth and Reconciliation Commission: to provide a forum in which the stories of perpetrators and victims alike can be both told and heard.[92] The simple yes or no question on the Scottish referendum ballot did not permit any stories to be either told or heard. When the traumatic past of a people remains unspoken, there can be no movement forward. Keeping human rights abuses anchored in the past permits those abuses to carry forward through generations as historical trauma. As the generations unfold, there is little or nothing that any legal system, not even a Truth and Reconciliation Commission, can provide in the nature of healing or redress. There is neither a simple solution nor any precedent to turn to for guidance. Some problems are simply too big for any legal system to handle.

The rules of franchise for the referendum disenfranchised many Scottish citizens, whose histories lay at the heart of the independence question. This exclusion provided fertile ground for the spreading scourge of intergenerational trauma. Ignoring historical trauma opens the door to re-imposing the traumas inflicted on generations past, which, as Elie Weisel so poignantly observed, is akin to killing the dead all over again.[93] Common wisdom has long recognized that those who ignore the past are doomed to repeat it. Ignoring the past in Scotland permits intergenerational trauma to flourish, and sets the stage for a recurrence of the attitude that enabled the Highland Clearances to happen: if some people are viewed as "less than" others, it is not difficult to debase those "lesser" people, to see them as not quite human, and thus to accept extreme and horrific violations of their human rights. The international community should keep a close watch on Scotland to see what happens to a nation that fails to account for its past. If Scotland's past is disregarded, the underlying history of Scotland, particularly the Highland Clearances, sets the stage for a terrible and unnecessary risk, no matter the outcome of the referendum vote.

A meaningful referendum would have been one that allowed the hidden stories, especially that of the Highland Clearances, to be told and heard. Only a legitimate vote for independence could have generated a legitimate independence, one decided by the people whose stories comprise Scotland's history. Money, formal apologies, or even a Truth and Reconciliation Commission, can never redress the injuries suffered or produce meaningful atonement. Independence might have generated

92. ROBERT ROTBERG, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3 (2000).

93. ELIE WIESEL, *Introduction to* NIGHT xv (2012).

the first truly significant form of reparation for "non-justiciable" human rights violations that caused extensive intergenerational trauma; however, as it stands, there will be no reparation. Even an overwhelming victory for the "yes" voters would have reflected primarily economic concerns—such as jobs, North Sea Oil, E.U. membership—rather than any recognition of the dangers of sweeping more generations of trauma under the proverbial rug. The referendum's legitimacy was compromised by the rules of the franchise, and the independence vote's outcome was rendered nearly meaningless. A singular opportunity for a traumatized people to be recognized and given non-monetary, but supremely significant reparations, has been lost. The world may never again observe such an opportunity to make international human rights norms work.

VII. CONCLUSION

After the "union" of 1707, the Highland clan chiefs engaged in assisting English landlords remove the Scottish Highlanders,[94] whose fields and houses would be plowed under and planted in grass.[95] That grass would then feed sheep whose wool could be sold in the South for a far greater profit, which would further line the pockets of those who already held the wealth and power.[96] What followed may be described as technically lawful evictions, but any common definition denotes that the Clearances resulted in genocide of the Highlanders. While genocide, like other crimes against humanity, is beyond compensation, it is not beyond justice. The Scottish referendum vote succumbed to economic pressures and thus lost the opportunity to address past atrocities. The impact of those atrocities will only continue to live on, to spread and grow through intergenerational trauma. In the long run, recognition of the underlying human rights abuses would have been more significant than independence from Westminster, for the referendum question, at its heart, arose not from economics or politics, but from the backs of hundreds of Scottish Highlanders who lost their homes, their families, their language, their culture, and ultimately their lives, at the hands of "the English f*****g rule."[97] Human rights abuses may not be compensable, but they are reparable, and therefore justiciable. It is never too late for a nation to address the wrongs in its past.

94. DEVINE, *supra* note 86, at 50.
95. *Id.*
96. *Id.*
97. SCOTT HUTCHINSON, SCOTTISH WIND (Atlantic Records 2011).

ESSAY

UNIVERSAL SUBORDINATION TO THE RULE OF LAW AS A PRECONDITION FOR THE CONCEPTUAL POSSIBILITY OF INTERNATIONAL LAW AND THE CASE FOR DEMOCRATIZING THE UNITED NATIONS

Jarvis J. Lagman[*]

The right to individual self-determination is a fundamental human right recognized under international law and codified under Article 21 of the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948.[1] However, the principle of the sovereign equality of nations gives rise to the presumption of the supremacy of national governments to enforce law within their own political domains and gives such national governments the sole right to determine, in their unmitigated discretion, the structure of their own

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1. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 at 75 (Dec. 12, 1948) (codifying the right of self-determination as a human right).

national political affairs.[2] The conflict in these countervailing policies is problematic, especially in the context of achieving world peace, because, given that international law forms the basis of agreement as to the resolution of disputes between countries, political leaders in countries whose political legitimacy is derived from non-legal, non-democratic sources of political authority are individually vested with sovereign authority without institutional accountability, meaning that such political leaders are not subordinate to the rule of law and are immune from judicial process.[3]

At minimum, the conceptual possibility of international law requires the subordination of all people, including political leaders, to the rule of law because "[i]n a rule-of-law state, no one is excluded from the jurisdiction of law, [t]here are no officials who are above the law, and no citizens outside the law."[4] In the absence of universal subordination to the rule of law, international law is rendered illusory since political leaders who are individually vested with sovereign authority, and who, as a result, are not subordinate to the rule of law, cannot be legally and irrevocably bound by the laws of contract, most notably with regard to compulsory adherence to treaties and other international agreements. Such political leaders retain the sovereign power to violate international law without legal recourse; both within their own political domains, through sovereign immunity, and outside of their political domains,

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2. *See* Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 212 (1944) (defining the sovereign equality of nations principle as containing the condition that that "no state can be bound without or against its will").

3. *See* Kelsen, *supra* note 2, at 212 (in citing the manner in which supreme authority over the affairs of a non-democratic country is vested in its sovereign leader, "the power of [the] king could not be restricted because it was by its very nature 'sovereign,' and because sovereignty mean[s] 'the absolute and perpetual power within a State'"); *see also* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002) (providing support for the proposition that international law forms the basis of agreement between nations regarding the resolution of disputes because "treaties are instrumental in that they create law that binds ratifying countries, with the goal of modifying nations' practices in particular ways").

4. *See* Terry Nardin, *Theorizing the International Rule of Law*, 34 REV. INT'L STUD. 385, 386–95 (2008). Nardin observes that for "international law [to be] conceptually possible," "the presuppositions of law conforming to the formal criteria of the rule of law [must] be met at the international level." *Id.* at 386. "The standard criteria of the rule of law [is] that there can be no secret or retroactive laws, no crimes except as provided by law, no penalties except those linked to a specific offence, no arbitrary exemptions from law." *Id.* at 395. "It is important to notice that these rule-of-law criteria are not themselves the outcome of an authoritative decision," "they cannot be altered or annulled by authority." *Id.* "In a rule-of-law state, no one is excluded from the jurisdiction of law. There are no officials who are above the law, and no citizens outside the law." *Id.* Therefore, the conceptual possibility of international law is conditioned upon international conformation to the formal criteria of the rule of law, which, at minimum, requires the subordination of all people, including political leaders, to the rule of law.

through the sovereign equality of nations principle.[5]

Thus, for international law to be uniformly effective, the essential conflict between the sovereign equality of nations principle, as represented by the vesting of sovereign authority in the persona of individual non-democratically elected political leaders, and the fundamental right to individual self-determination, as expressed through the equal right to take part in democratic elections and the hegemonic recognition of the universal primacy of the rule of law, must be resolved in a manner that harmonizes political systems to adopt democracy and the universal subordination to the rule of law in the ordering of their political affairs, but does so without violating the sovereign equality of nations principle.

The basis of the case for democratizing the United Nations is that transnational elections would operate as an instrument for democratic cultural diffusion through which political systems throughout the world would be harmonized, in the long-run, to adopt democracy and the rule of law as the basis of the authority of government. Because transnational elections to allocate power within the United Nations would not directly change the composition of domestic national governments, the introduction of democratic norms and political practices into non-democratic countries through the democratization of the United Nations would enable the worldwide diffusion of democratic culture in a manner that would not overtly threaten the sovereign power of existing political leaders nor violate the sovereign equality of nations principle (assuming that achievements in diplomacy would ultimately enable transnational elections to materialize with the unanimous consent of the global community).

This Article is intended to provide a policy framework for encouraging the harmonization of all political systems in the world to adopt the rule of law and democratic principles as the basis for the authority of government. Harmonization in this manner is imperative for two primary reasons: (1) universal subordination to the rule of law is a precondition for the conceptual possibility of international law; and (2) the right to self-determination is a fundamental human right whose suppression is in direct violation of well-established international norms,

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5. *See id.*; *see also* Kelsen, *supra* note 2, at 212. Political systems that conform to the rule of law view "law itself as the basis of a relationship among moral equals, and not solely an instrument of someone's purposes." *See* Nardin, *supra* note 4, at 395. In contrast, political systems whose political leaders are vested with sovereign authority are deemed to be morally superior in their relations with others because they cannot be restricted within their own political domains. *See* Kelsen, *supra* note 2, at 212. Ergo, the conceptual possibility of international law requires universal subordination to the rule of law by all persons, including political leaders, in order to maintain the integrity of law as the "basis of a relationship among moral equals" and "not [as] an instrument of someone's purposes."

specifically the Universal Declaration of Human Rights.[6] Through the staging of transnational democratic elections in non-democratic countries, the democratization of the United Nations would catalyze the harmonization of political systems to adopt the rule of law and democratic principles as the basis for the authority of government by utilizing the mechanics of cultural diffusion to install democratic institutional infrastructure in non-democratic countries and expose such non-democratic societies to the rituals of democratic political culture.[7] In the long-run and without directly displacing existing political hegemonies in violation of the sovereign equality of nations principle, cultural diffusion through the democratization of the United Nations would facilitate the harmonization of political systems in a controlled and peaceful manner, as compared to achieving harmonization through coercive mechanisms, such as the use of extra-national military force.[8] Once harmonization is achieved, the conceptual framework for the conduct of international law would be strengthened and the right to self-determination, as based in international law and unencumbered by potential conflict with the arbitrary fiats of individual political leaders who are not subordinate to the rule of law, could be applied in a manner that institutionalizes the formal equality of political opportunity on a global scale and democratizes global policy outcomes.[9]

I. GLOBAL DEMOCRACY, THE FORMAL EQUALITY OF POLITICAL OPPORTUNITY AND THE SIGNIFICANCE OF THE CONCEPTUAL POSSIBILITY OF INTERNATIONAL LAW

The idea of democratizing the United Nations is not new.[10] The notion

6. *See* Nardin, *supra* note 4, at 386; *see also* Universal Declaration of Human Rights, *supra* note 1, at 75.

7. *See* David Strang & John W. Meyer, *Institutional Conditions For Diffusion*, 22 THEORY & SOC'Y 487, 492 (1993) (noting that through the use of cultural diffusion, transnational governmental organizations, such as the United Nations, are "specifically designed to promote the homogenization of their members around models of progressive policy").

8. *See* Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841 (2008) (explaining the mechanisms of policy diffusion generally); *see also* Beth A. Simmons et al., *The International Diffusion of Liberalism*, 60 INT'L ORG. 781, 795–99 (2006) (explaining the mechanisms of policy diffusion as applied internationally).

9. *See* Andrew Strauss, *International Law as Democratic Law*, 103 AM. SOC'Y INT'L L. 388 (2009) (asserting that applying the democratic ideal of granting the theoretically equal opportunity to influence political outcomes to the determination of global policy would yield positive outcomes); *see also* Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212, 212 (2001) (providing a case for establishing a global parliament based on the need for greater citizen participation in the international order and in the determination of global policy).

10. *See* Bill McCarthy, *Democracy in the United Nations*, 42 U.N. CHRON. 34, 34–35

of establishing a global parliamentary assembly directly elected by the people was proposed as a part of the League of Nations.[11] Traditionally, arguments in favor of the establishment of a global parliament have centered on the need for greater citizen participation in the international order, as issues of global policy that directly affect people around the world are being shaped by unelected actors within the international system.[12]

At the core of this argument is the idea that in a modern representative democracy, equality is institutionalized in the granting of every citizen a theoretically equal opportunity to influence political outcomes.[13] The ultimate arbiters of governmental policy are representatives selected by citizens who each have an equal vote, or say, in that selection.[14] After this selection, citizens continue to influence representatives by way of interest groups, which all citizens have a formally equal opportunity to participate in forming.[15]

While this formal equality of opportunity to influence political outcomes is, for a variety of reasons, only imperfectly realized in even the most successful democracies, successful democracies are nevertheless structured to approximate this ideal because the formal equality of opportunity to participate in the political process is the governing principle that forms the basis of political authority in such democratic societies.[16] Therefore, by applying the democratic ideal to structure the allocation of political power in the transnational governmental institutions responsible for determining issues of global policy, every citizen in the world could have a theoretically equal opportunity to influence political outcomes with regard to global policy.[17] Under such a system of democratic global governance, the political authority to determine issues of global policy would be derived from the consent of the governed in the same manner as in democratic national governments.[18]

While achieving formal equality of political opportunity within the international system is the ideal, this ideal is not achievable for as long as there are countries in the world that are non-democratic and derive political legitimacy from non-legal sources of political authority because the absence of universal subordination to the rule of law renders

(2005) (providing an overview of the movement to establish a U.N. Parliamentary Assembly whose representatives are directly elected by a global electorate).

11. *Id*.
12. *See* Falk & Strauss, *supra* note 9, at 212.
13. *See* Strauss, *supra* note 9, at 388.
14. *Id*.
15. *Id*.
16. *Id.*
17. *See id.* at 389.
18. *Id.* at 390.

international law as illusory with regard to such countries.[19] Democracy requires that people be treated equally insofar as they are autonomous agents participating in the process of self-government.[20] However, in non-democratic countries that vest the absolute and perpetual power of the state in the persona of their individual sovereign political leaders, their sovereign leaders are, by definition, legally unequal with all other people within their societies because the power of such sovereign leaders are unrestricted to a degree that is not legally attainable by any others.[21] This fundamental inequality in the allocation of political power within such individual non-democratic societies renders formal equality of political opportunity within the international system legally impossible because, in those certain circumstances where duly authorized international law and the prerogatives of individual sovereign political leaders of national governments conflict, the sovereign equality of nations principle gives rise to the presumption of supremacy of the right of sovereign national governments to override international law within their own political domains, thereby rendering the conceptual possibility of international law an illusory construction.[22]

The significance of upholding the integrity of the conceptual possibility of international law is to avoid uncertainty in the event that there is a conflict in law. Specifically, the conflict in law between the sovereign equality of nations principle and the fundamental right to individual self-determination creates uncertainty because there is no prescribed procedure for determining supremacy in the event that these core tenets of international law conflict. Further, to the extent that a procedure for resolving such conflicts in international law is prescribed, universal subordination to the rule of law is necessary in order for such prescribed methods to be enforceable against all relevant parties. Therefore, substantive and sustainable change to global policy cannot be achieved until all of the political systems of the world are harmonized to adopt democracy and the rule of law as the basis of the authority of government because the conceptual possibility of international law is

19. *See* Hathaway, *supra* note 3, at 1940–41; *see also* Nardin, *supra* note 4, at 386, 395; Kelsen, *supra* note 2, at 212; Max Weber, *The Three Types of Legitimate Rule*, 4 BERKELEY PUBL'N IN SOC'Y & INST. 1, 1–11 (1958).

20. Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 28 (2006) (in support of the proposition that formal political equality amongst individual people is a pre-requisite for democracy, it is noted that "[d]emocracy requires that persons be treated equally insofar as they are autonomous participants in the process of self-government. This form of equality is foundational to democracy, because it follows from the very definition of democracy").

21. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

22. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

predicated upon universal subordination to the rule of law.[23]

II. SELF-DETERMINATION AS A FUNDAMENTAL RIGHT AND THE USE OF THE DEMOCRATIZATION OF TRANSNATIONAL INSTITUTIONS AS A MECHANISM OF CULTURAL DIFFUSION

John Locke, an influential political scientist, theorized that government is not legitimate unless it is carried on with the consent of the governed.[24] The right to self-determination is a fundamental human right that is codified under Article 21 of the Universal Declaration of Human Rights.[25] The right to self-determination, along with the balance of the provisions of the Universal Declaration of Human Rights, is well-established as a part of the canon of international law.[26] Article 21 of the Universal Declaration of Human Rights provides the following:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
>
> (2) Everyone has the right of equal access to public service in his country; and
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[27]

The right of self-determination "expressed in periodic and genuine elections," as well as the right that "the will of the people shall be the basis of the authority of government," create a mandate in support of the diffusion of democratic cultural practices into non-democratic societies.[28]

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23. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

24. *See generally* John Dunn, *Consent in the Political Theory of John Locke*, 10 HIST. J. 153 (1967) (quoting John Locke and discussing the role of consent in the legitimacy of government); C.W. Cassinelli, *The "Consent" of the Governed*, 12 W. POL. Q. 391 (1959) (also quoting John Locke and discussing the role of consent in the legitimacy of government).

25. *See* Universal Declaration of Human Rights, *supra* note 1, at 75.

26. *See* United Nations, *Universal Declaration of Human Rights*, *in* U.N. BRIEFING PAPERS: HUMAN RIGHTS TODAY (1998) [hereinafter U.N. BRIEFING PAPERS] (discussing the history of the Universal Declaration of Human Rights and its establishment as international law).

27. Universal Declaration of Human Rights, *supra* note 1, at 75.

28. *Id.*; *see also* U.N. BRIEFING PAPERS, *supra* note 26. The right to self-determination, as articulated in Article 21 of the Universal Declaration of Human Rights, is a norm that is widely supported in the international community and serves as the basis for encouraging the diffusion of democratic culture into non-democratic countries because of its status as a fundamental human

However, in light of the countervailing imperative to respect the sovereign equality of nations, defined as the principle that "no [nation] can be bound without or against its will," non-democratic countries cannot be coerced, using extra-national military force or otherwise, to adopt democratic cultural practices in the structuring of their domestic political affairs without their consent.[29]

Given that the right to self-determination may conflict with the sovereign equality of nations principle with respect to the manner in which non-democratic societies order their political arrangements, resolution of this conflict necessitates an alternative, non-violent means of institutionalizing democratic political practices in non-democratic societies that does not breach the sovereignty of non-democratic countries.[30]

Renowned legal scholar Richard Dworkin once wrote that "in the event that fundamental principles of law conflict, there is the imperative to arrive at a resolution that coheres with existing legal principles in a manner that achieves the most morally attractive standard." Given that the fundamental right to self-determination conflicts with the sovereign equality of nations principle with respect to how non-democratic societies order their political arrangements, the optimal resolution of this conflict requires a non-coercive method of institutionalizing democratic political practices in non-democratic countries that enables the construction of democratic infrastructure in such non-democratic countries without impinging upon their sovereignty. Since transnational organizations, such as the United Nations, are "designed specifically to promote the homogenization of their members around models of progressive policy," democratizing how power is allocated within transnational governmental entities to stage democratic elections in non-democratic countries would catalyze, in the long-run, the harmonization of all political systems in the world to recognize democracy and the rule of law as the universal source

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right applicable to all people, regardless of political affiliation.

29. *See* Kelsen, *supra* note 2, at 212.

30. *See generally* Ronald Dworkin, "*Natural" Law Revisited*, 34 FLA. L. REV. 171, (1982) (stating that in the event that fundamental principles of law conflict, there is the imperative to arrive at a resolution that coheres with existing legal principles in a manner that achieves the most morally attractive standard); *see also* Universal Declaration of Human Rights, *supra* note 1, at 75; Kelsen, *supra* note 2, at 212. Although the fundamental right to self-determination may conflict with the sovereign equality of nations principle, if non-democratic countries refuse to consent to the adoption of democracy as the basis of the authority of their governments, the injustice that arises from the violation of the right to self-determination is comparable to the injustice that arises from the violation of the sovereign equality of nations principle. In such situations where no resolution to this conflict is possible, then the dispositive question is whether the enforcement of principles of comity or the enforcement of human rights achieves the most morally attractive standard. However, the framework proposed herein endeavors to provide a solution that makes the dispositive balancing of such values unnecessary.

of political authority by utilizing the mechanics of cultural diffusion in a manner that is specifically calibrated to leverage the homogenizing power of such transnational organizations to facilitate the transition from non-democratic governance to democratic governance without violating the sovereign equality of nations principle.[31]

The idea that cultural diffusion can function as a transformation agent is well established.[32] Generally diffusion is the process by which an innovation is communicated through channels over time among the members of a social system and subsequently causes changes in the structure and function of that social system.[33] Given that inadequate communication channels inhibit the function of cultural diffusion as a transformation agent,[34] the democratization of how political power is allocated within transnational governmental entities to stage democratic elections and build democratic infrastructure in non-democratic countries would function to create new channels through which democratic cultural practices could be communicated to people in non-democratic countries for the purpose of catalyzing the harmonization of all political systems in the world to recognize democracy and the rule of law as the universal source of political authority.[35]

Specifically, by democratizing leadership positions within transnational governmental organizations to hold elections in non-democratic societies, the ritualized practice of periodically holding such elections would serve as a channel through which democratic culture could be diffused into non-democratic societies.[36] For example, although such elections would have no direct impact on the composition of the political hegemony, the staging of transnational democratic elections within non-democratic countries would provide such countries with a model for conducting democratic elections that governments in such

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31. *See* Strang & Meyer, *supra* note 7, at 492–93.

32. *See* EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 5 (5th ed. 2003) (explaining the mechanics of cultural diffusion).

33. *See id.* at 6. Based on the Innovation-Decision Process Model first formulated by Rogers, the diffusion of an innovation so that it ultimately transforms the hegemonic practices of a social system involves a five-step process: (1) *Knowledge*: individuals within a social system first become exposed to the existence of an innovation and gain an understanding of how it functions; (2) *Persuasion*: individuals within a social system form a favorable or unfavorable attitude toward the innovation; (3) *Decision*: individuals within a social system engage in activities that lead to a choice to adopt or reject the innovation; (4) *Implementation*: individuals within a social system adopt the innovation on a probationary basis to determine its usefulness and suitability; and (5) *Confirmation*: individuals within a social system seek reinforcement of an innovation-decision already made and decide whether to continue to use the innovation on a continual basis or reject the innovation on the basis of new unfavorable information. *See id.* at 169.

34. *See id.*

35. Shipan & Volden, *supra* note 8, at 841.

36. *See id.* at 843–44; *see also* Simmons et al., *supra* note 8, at 799–801.

countries can "learn" from or "emulate."[37] Further, assuming that the logistical infrastructure necessary to hold democratic elections, such as the establishment of voting precincts, the creation of voting rolls, the acquisition of voting equipment, would already have been institutionalized because of the a priori staging of transnational democratic elections, the transition from non-democratic to democratic governance would be primed for implementation because the infrastructure needed to enable the operation of governments whose authority are based on democratic principles under the rule of law would already have been established. Thus, as considered in the long-run, the diffusion of democratic political norms and practices into non-democratic societies through cultural diffusion enabled by the democratization of transnational governmental organization, coupled with prospective increases in the influence of interest groups within non-democratic countries advocating for the adoption of democratic reforms, would effect a harmonization of political systems to adopt democratic principles under the rule of law as the basis of the authority of government on a global scale.[38]

Because the sovereign equality of nations principle mandates that "no [nation] can be bound without or against its will," the imposition of democratic policies to govern the political practices of non-democratic societies by radically de-stabilizing non-democratic political hegemonies through the use of coercion is not optimal.[39] In the alternative, the use of non-coercive mechanisms of cultural diffusion, which are specifically calibrated to avoid direct displacement of pre-existing political hegemonies, would facilitate the diffusion of democratic policies into non-democratic countries in a manner that complies with the principle of the sovereign equality of nations and mitigates conflict with existing hegemonic political leadership.[40] Further, because of the significant enforcement and monitoring costs associated with effecting policy

37. *See* Shipan & Volden, *supra* note 8, at 843–44; *see also* Simmons et al., *supra* note 8, at 799–801.

38. *See* Shipan & Volden, *supra* note 8, at 841; *see also* Strang & Meyer, *supra* note 7, at 492.

39. *See* Kelsen, *supra* note 2, at 212. A distinction must be made between the use of coercion in effectuating the democratization of the political practices of transnational governmental entities and the use of coercion in effectuating the democratization of the political practices of non-democratic sovereign national governments. The use of coercion in effectuating the democratization of the political practices of transnational governmental entities is justifiable as a means to create a universal standard by which nations must abide in international affairs, which is a standard that arguably exceeds the scope of authority of any individual country. In contrast, the use of coercion in effectuating the democratization of the political practices of non-democratic sovereign national governments is arguably less justifiable because the political practices of an individual nation are more firmly within the scope of its sovereign authority.

40. *See id.*

change using coercive mechanisms of cultural diffusion, which are caused by native resistance to the establishment of democratic institutions and the ongoing risk of regression to a priori non-democratic political practices as conflicting political cultural values compete for dominance within a society, policy change through non-coercive mechanisms of diffusion would enable relatively less costly transitions from non-democratic to democratic modes of governance as compared to policy change engendered through coercion.[41]

Given that the right to self-determination is a fundamental human right recognized under international law and that universal subordination to the rule of law is a precondition for the conceptual possibility of international law, political systems throughout the world must be harmonized to recognize democratic governance under the rule of law as the source of their political authority.[42] Democratizing the manner in which power is allocated within transnational governmental organizations would create a new channel for peacefully transmitting democratic culture into non-democratic societies by using non-coercive mechanisms of cultural diffusion to build democratic infrastructure within non-democratic societies in a manner that does not directly conflict with existing political hegemonies.[43] Further, since democratic culture would be diffused into such societies in a manner that is non-coercive and is compatible with the sovereign equality of nations principle, democratic institutions so established within non-democratic societies are more likely to be sustainable, with minimized risk of regression to a priori non-democratic political norms and practices and with relatively lower costs attributable to enforcement and monitoring, because of the relatively lower stakes of such elections with regard to the status of the hegemony.[44] In the long-run, such cultural diffusion would enable the harmonization of political systems throughout the world to adopt democratic principles under the rule of law as the basis for the authority of government, which would strengthen the conceptual framework of international law and propagate the uniform enforcement of the right to self-determination on a global scale.

41. *See* Simmons et al., *supra* note 8, at 791.

42. *See* Universal Declaration of Human Rights, *supra* note 1, at 75; *see also* Nardin, *supra* note 4, at 386.

43. *See* Shipan & Volden, *supra* note 8, at 841; *see also* Simmons et al., *supra* note 8, at 795–99.

44. *See* Simmons et al., *supra* note 8, at 791.

III. HARMONIZATION OF POLITICAL LEGITIMACY TO ADOPT DEMOCRATIC PRINCIPLES AND THE RULE OF LAW AS A PREREQUISITE FOR THE CONCEPTUAL POSSIBILITY OF INTERNATIONAL LAW

At the heart of every political system is an assumption of what constitutes the source of legitimacy upon which a governmental entity relies to exercise rightful authority over the governed, a concept otherwise known as political legitimacy.[45] Max Weber, an influential sociologist and political economist, theorized that political legitimacy is derived from one of three main sources: traditional authority, charismatic authority and legal authority.[46] Legitimacy derived from traditional authority is based upon societal customs and practices that are rooted in the history of the society being governed.[47] An example of political systems that derive legitimacy from tradition are monarchies, which vest the absolute and perpetual power of the state in the persona of specific individuals on the basis of culturally determined lines of succession.[48] In contrast, political systems that derive legitimacy from charismatic authority are largely reliant upon the character, reputation and personal qualities of their sovereign leader, a person whose importance within a particular society is significant enough that the absolute and perpetual power of the state is vested in the individual persona of such person.[49] In such political systems, individual political leaders transcend the rule of law in a manner analogous to that of political leaders in systems whose political legitimacy is derived from traditional authority.[50] An example of political systems that derive legitimacy from charismatic authority are dictatorships, which vest the absolute and perpetual power of the state in the persona of specific individuals on the basis of personal power. Lastly, political systems that derive legitimacy from legal authority are based upon institutional law and procedure, wherein institutions founded upon and subordinate to the rule of law govern as agents of the public.[51] In such political systems, the absolute and perpetual power of the state is not vested in the persona of any one individual, but rather, is vested in the rule of law itself.[52] All three forms of political legitimacy are employed in varying degrees and combinations to legitimize the authority of political systems across the world.[53] However, the fragmentation in how

45. *See* Weber, *supra* note 19, at 1–11 (providing a theoretical framework outlining the different forms and sources of political legitimacy).

46. *See id.*

47. *See id.*; *see also* Kelsen, *supra* note 2, at 212.

48. *See* Weber, *supra* note 19, at 1–11.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See also* U.S. Central Intelligence Agency World Factbook, *available at* https://www.

different political systems conceive of legitimacy is a source of friction between societies that employ incongruent political systems because each such political system is the manifestation of a set of cultural values and assumptions that may be incompatible with the values and assumptions that form the basis of political authority in other political systems.[54]

The fragmentation in how different political systems conceive of legitimacy is significant because a fundamental condition necessary for the conceptual possibility of international law is the universal subordination of all persons, including political leaders, to the rule of law.[55] Treaties, which serve as the foundation of positive international law, form the basis of agreement between countries as to the resolution of their disputes and are designed to create law that bind ratifying countries with the goal of modifying nations' practices in pre-determined ways.[56] However, since political systems rooted purely in charismatic and traditional authority vest the absolute and perpetual power of the state in the persona of their sovereign leaders, such sovereign leaders are not subject to domestic judicial process arising from the violation of international law because of sovereign immunity. Within their political domains, the conduct of such sovereign leaders cannot be restricted because their inherent sovereign authority transcends the rule of law.[57]

Further, such sovereign leaders are also arguably not subject to legal recourse outside of their political domains because of the sovereign equality of nations principle. Because no country can be bound without or against its will and the absolute and perpetual power of the state in non-democratic countries is vested in the persona of their sovereign leaders, legal enforcement of international law against such sovereign leaders is not ordinarily permitted without their consent.[58] In contrast, since political systems whose political legitimacy is based on legal authority vest the absolute and perpetual power of the state in the rule of law, and not in the individual persona of its political leaders, political leaders within such countries would be subject to domestic legal

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cia.gov/library/publications/resources/the-world-factbook/fields/2128.html (containing a listing of the basic forms of government in all countries in the world). In assessing the different forms of how political legitimacy is valued in political systems throughout in the world, the source of political authority of a particular country may be functionally different than its nominal characterization. For example, as characterized by the U.S. Central Intelligence Agency, the nation of Belarus deems itself a republic in name, but, in fact, operates functionally as a dictatorship. Further, the manner in which political legitimacy manifests itself in a particular country may not be purely rooted in a single archetype and, as a result, the political systems of such countries may exhibit characteristics of more than one archetype.

54. *See id.*
55. *See* Nardin, *supra* note 4, at 386.
56. *See* Hathaway, *supra* note 3, at 1940–41.
57. *See* Kelsen, *supra* note 2, at 212.
58. *See id.* at 209.

sanctions, such as impeachment, from the violation of duly authorized treaties, which assume the force of law, because such political leaders are subordinate to the rule of law and are obligated to uphold the law as a condition of their occupation of office.[59] Whether political leaders of countries whose political legitimacy is based on legal authority would be subject to legal recourse outside of their political domains for violations of international law is unclear and depends on whether such countries have consented to, by treaty or otherwise, adjudication by an extra-national tribunal.[60]

The current state of incongruence between democratic and non-democratic political systems renders international law as illusory because the universal subordination to the rule of law, which is a prerequisite for the conceptual possibility of international law, is non-existent.[61] The differences in the manner in which sovereign authority is vested permits leaders of political systems whose legitimacy is derived from traditional and/or charismatic authority with the sovereign power to violate international law, without legal recourse, in a manner that is impermissible for leaders in political systems whose political legitimacy is derived purely from legal authority.[62] Further, because the sovereign

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59. *See* U.S. CONST. art. VI, cl. 2 (the "Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."); *see also* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution."). While countries whose political legitimacy is rooted in legal authority may not universally abide by the same constitutional language regarding the treatment of treaties as *pari passu* with domestic law and the obligation for governmental officers to uphold the law as a condition of office, the U.S. Constitution is used herein as a model to exemplify the subordination of political leaders to the rule of law, which includes subordination to international law as it manifests in duly authorized treaties. *See* United States v. Nixon, 418 U.S. 683, 706 (1974) ("[N]either the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."); *see also* Courtenay R. Conrad & Emily Hencken Ritter, *Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law*, 75 J.L. & POL. 397, 398 (2013) (in support of the proposition that the most effective mechanism of enforcement of treaties against sovereign national governments, specifically human rights treaties, is by means of litigation in their domestic courts, it is noted that "[e]ffective domestic courts constrain state repression (citation omitted) and courts are enabled and emboldened to sanction violators . . . ."). While countries whose political legitimacy is rooted in legal authority may not universally contain the same constitutional provisions constraining the grant of sovereign authority to its political leaders, the decisions of the U.S. Supreme Court are used herein as a model to exemplify the subordination of political leaders to the rule of law and the absence of an absolute, unqualified immunity for political leaders from judicial process.

60. *See* Kelsen, *supra* note 2, at 213.

61. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212–13 (arguing that in reality what is created through the international organization is a sham government).

62. *See* Nardin, *supra* note 4, at 395; s*ee also* Kelsen, *supra* note 2, at 212.

equality of nations principle gives rise to the presumption of supremacy of the sole right of sovereign national governments to enforce law within their own political domains, extra-national enforcement of international law against sovereign leaders is not legal with regard to those certain countries where political leaders are not subordinate to the rule of law (notwithstanding the legal validity of the use of extra-national coercion in the form of military force or economic sanction).[63] Therefore, harmonizing the manner in which political legitimacy is valued among all political systems in the world as a means to accomplish the global recognition of the primacy of the rule of law, rooted in democratic principles, as the basis for the legitimacy of government is a prerequisite for achieving a lasting state of peace between nations; the conceptual possibility of international law requires, at minimum, universal subordination by all people, including political leaders, to the rule of law.[64]

IV. THE CASE FOR THE DEMOCRATIZATION OF THE UNITED NATIONS

The United Nations is an international governmental organization committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights.[65] Historically, the United Nations has taken action on a wide range of issues, and provides a forum for its member states to express their views and harmonize their actions, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees.[66] Specifically, the mission of the United Nations is to keep peace throughout the world, develop friendly relations among nations, help nations work together to improve the lives of poor people, conquer hunger, disease and illiteracy and to encourage respect for each individual's rights and freedoms.[67]

Democratizing the manner in which leadership positions within the United Nations are allocated would create new channels for the diffusion of democratic culture into non-democratic societies.[68] Using the non-

63. *See* Kelsen, *supra* note 2, at 209.

64. *See* Nardin, *supra* note 4, at 395.

65. *See* U.N. BRIEFING PAPERS, *supra* note 26, at 5–6.

66. *Id.*

67. *Id.*

68. *See* Shipan & Volden, *supra* note 8, at 842–43; *see also* Simmons et al., *supra* note 8, at 799–801. The idea of democratizing the manner in which power is allocated within the United Nations is a fluid concept because of the broad spectrum of variation in which the concept could manifest. For example, a proposal for the creation of a U.N. Parliamentary Assembly, comprised of representatives directly elected by people across the world, is a variation that would allow for the limited democratization of the United Nations through the election of members of a specially

coercive mechanisms of cultural diffusion, the ritual practice of periodically staging elections to allocate political power within the United Nations would serve as a logistical model from which democratic political practices and related institutional infrastructure could be established to govern in non-democratic societies.[69] In the long-run, the diffusion of democratic culture into non-democratic societies using non-coercive mechanisms of cultural diffusion would facilitate a harmonization of political systems to institutionalize democratic political practices and adopt democratic principles under the rule of law as the basis of the authority of government.[70] Because the individual right to self-determination is a fundamental human right firmly established under international law and the Universal Declaration of Human Rights, the proposal set forth herein to periodically stage transnational elections to allocate political power within the United Nations for the purpose of facilitating the diffusion of democratic culture into non-democratic countries is supported by a strong mandate and would operate to significantly advance the mission of the United Nations and improve the lives of people all over the world.[71]

The democratization of the United Nations would catalyze the harmonization of global political systems to adopt democratic principles under the rule of law as the basis of the authority of government by utilizing the mechanics of cultural diffusion to install democratic institutional infrastructure in non-democratic countries and to expose such non-democratic societies to the rituals of democratic political practice.[72] The harmonization of the current state of incongruence between democratic and non-democratic political systems is imperative

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designated parliamentary body which does not affect other leadership positions in the United Nations, such as the Secretary-General or members of the Security Council. *See* McCarthy, *supra* note 10, at 34. Another variation would expand the concept of democratizing the United Nations to also hold transnational elections for the office of Secretary-General, who would serve as the popularly elected "spokesman" for the world. While the exact contours of how the democratization of the United Nations would manifest is ultimately the province of diplomacy, the key insight is that the ritual practice of periodically staging democratic elections in non-democratic countries would: (1) expose members of non-democratic societies to democratic culture and the rule of law in a manner and to an extent that is not possible when exposure is limited only to non-democratic political practices; and (2) install the infrastructure of democratic political institutions in non-democratic countries in a manner and to an extent that is not possible under the current configuration of their political systems.

69. *See* Shipan & Volden, *supra* note 8, at 842–43; *see also* Simmons et al., *supra* note 8, at 799–801.

70. *See* Strang & Meyer, *supra* note 7, at 492.

71. *See* Universal Declaration of Human Rights, *supra* note 1, at 75; *see also* U.N. BRIEFING PAPERS, *supra* note 26 (the mission of the United Nations is to "encourage respect for each individual's rights and freedoms," which includes the right to self-determination).

72. *See* Strang & Meyer, *supra* note 7, at 492; *see also* Shipan & Volden, *supra* note 8, at 842–43; Simmons et al., *supra* note 8, at 799–801.

because universal subordination to the rule of law is a precondition for the conceptual possibility of international law.[73] Because countries that derive political legitimacy from traditional and/or charismatic political authority vest the absolute and perpetual power of the state in the persona of their political leaders, agreements under international law involving such countries are illusory since their political leaders are immune from both domestic judicial process, because of sovereign immunity, and from legal recourse outside of their political domains, because of the sovereign equality of nations principle.[74] Therefore, the harmonization of global political systems to adopt democratic principles under the rule of law as the universal basis of the authority of government, as catalyzed by the democratization of the United Nations, is a prerequisite to achieving a lasting peace between nations because the conceptual possibility of international law, at minimum, is predicated upon universal subordination by all people, including political leaders, to the rule of law.[75]

In addition to the ideological effects of democratizing the manner in which leadership positions within the United Nations are allocated, the institutionalization of the rituals of democratic political practices to stage transnational elections would also have significant pragmatic effects upon global resource distribution, methods of global data collection, access to political opportunity, the quality of the marketplace of ideas, the strength of global culture and the relevance of the United Nations in the global milieu. From a practical perspective, the democratization of the United Nations would require the establishment of democratic institutional infrastructure in order to stage transnational elections. The democratic election process is composed of five primary segments: voter registration; candidate nomination; campaigning; voting; and vote tabulation. The infrastructure that would need to be built in order to carry out the rituals contemplated by each of these segments could be leveraged to positively impact the mission of the United Nations and improve the lives of people around the world.

The voter registration process is essentially a process of data collection, similar to a census, by which each potential voter provides demographic information and other data in order to be identified as a qualified voter. The content of the data requested for registration purposes could be specifically tailored to obtain information that would otherwise be left unknown. Once registered, each voter is deemed eligible to participate in the election and their demographic information is recorded in a central log. In addition to its purpose as a means for

73. *See* Nardin, *supra* note 4, at 386, 395.

74. *See* Kelsen, *supra* note 2, at 212; *see also* Weber, *supra* note 19, at 1–11.

75. *See* Nardin, *supra* note 4, at 386, 395.

organizing voting rolls, the collection of such demographic data would enhance the quality of global data sets and could be useful in social scientific studies and in calculating resource allocation for humanitarian endeavors.

The candidate nomination process would provide individuals who may not have access to political power within their political system a means to assume a political leadership position. Given the lack of opportunities to assume leadership positions in non-democratic countries because of the relatively fixed and unequal nature of how political power is allocated in such countries, the candidate nomination process for leadership posts within the United Nations would create new opportunities for potential political leaders to assume office. Thus, democratizing the United Nations would improve the quality of political leadership, in the aggregate, because the pool of candidates eligible to assume political power would be deeper relative to the status quo.

The campaigning process would provide a means by which candidates from different societies can communicate their ideas, beliefs and values in places where such ideas and beliefs may not otherwise be expressed. Candidates for leadership positions in the United Nations would serve as conduits through which different cultural values and beliefs are disseminated across the world. Given the restrictions placed upon the free expression of ideas in certain countries throughout the world, the campaigning process would create a channel by which new cultural values and beliefs could be introduced into such countries without censorship.

The voting process, a ritual which generally requires the establishment of precincts where ballots are cast, would create centers of resource and information distribution at which, in addition to providing a venue for voting, humanitarian aid could be provided directly to people around the world in a highly efficient manner. Using data gathered during the voter registration process to organize the allocation of humanitarian aid, the establishment of voting precincts and the staging of elections would provide an effective distribution network to deliver humanitarian aid on an unprecedented scale. Food, medicine, education and other forms of humanitarian aid could be distributed in order to improve the lives of poor people, conquer hunger, disease and illiteracy and to encourage respect for each individual's rights and freedoms, all goals at the core of the mission of the United Nations.

The vote tabulation process, and media coverage thereof, would create moments of global cultural unity, similar to the Olympics, in which the competitive spectacle of deciding global elections is likely to attract interest from people across the world. Global elections would provide novel media content to be transmitted to a worldwide audience through mass communications technology, which would increase the visibility of

the United Nations and enhance its relevance in the global milieu. Increased interest in the United Nations engendered because of the spectacle of the transnational democratic process would give the organization more credibility as a political actor contributing to the course of international events and, consequently, would give the people of the world, through their suffrage, a larger stake in how global political outcomes are determined.

V. CONCLUSION

The state of incongruence between democratic and non-democratic countries poses a continuing threat to the achievement of perpetual peace between nations because international law, which forms the basis of agreement between countries as to the resolution of disputes, is illusory for as long as universal subordination by all people, including political leaders, to the rule of law is non-existent.[76] Political systems whose political legitimacy is derived from legal authority view law itself as the basis of a relationship among moral equals.[77] The function of law in such political systems whose political authority is derived from the rule of law is to uphold democratic principles and make effective those certain policies supported by the public as expressed through elections.

Ideally, the function of law in such societies is not merely to operate as a contrivance designed solely to serve as an instrument of the purposes of political leaders.[78] In contrast, political systems in which political leaders are individually vested with sovereign authority deem such leaders to be legally and morally superior in their relations with all other people and empower such leaders to use law, in their sole discretion, as an instrument for their own purposes with no legal accountability.[79] In the long-run, the harmonization of global political systems to adopt democratic principles and the rule of law as the basis for government, as catalyzed by the democratization of the United Nations, would homogenize the status of all of the people of the world so that each and every person is governed as a legal and moral equal.[80]

Harmonization in this manner would enable the satisfaction of the

76. *See* Hathaway, *supra* note 3, at 1940–41; *see also* Nardin, *supra* note 4, at 386, 395; Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

77. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

78. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

79. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

80. *See* Nardin, *supra* note 4, at 395; *see also* Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

prerequisites of the conceptual possibility of international law and, because international law forms the basis of agreement between countries as to the resolution of disputes, would strengthen the foundation for the achievement of world peace by fortifying the efficacy, enforceability, and framework of international law.[81]

The democratization of the United Nations would not be a panacea because diplomacy between nations would remain as the driving force for maintaining peace.[82] However, despite the probable diplomatic difficulty in effectuating the achievement of a truly global democracy, democratizing the United Nations to hold periodic transnational elections in non-democratic countries would, in the long-run, leverage the mechanisms of cultural diffusion to effect the harmonization of such non-democratic countries to adopt democracy and the rule of law as the basis of the authority of government. As President Woodrow Wilson declared in an address to the U.S. Congress, "we shall fight for the things which we have always carried nearest our hearts—for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free."[83] The democratization of the United Nations, by creating new channels of cultural diffusion to facilitate the universal subordination to the rule of law and uphold the integrity of the conceptual possibility of international law, would be a seminal achievement in the historic endeavor to "make the world itself at last free."

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81. *See* Shipan & Volden, *supra* note 8, at 842–43; *see also* Simmons et al., *supra* note 8, at 799–801; Strauss, *supra* note 9, at 388; Nardin, *supra* note 4, at 395; Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11. With regard to the practical considerations of effectuating the democratization of the United Nations, it is probable that diplomacy involving a portfolio of incentives and sanctions would be a necessary element in obtaining agreement from sovereign countries to consent to the staging of transnational democratic elections within their political realms. Because the outcomes of such transnational elections would not directly impact the personal stake that sovereign political leaders have within their own national governments, the success of such "carrots and sticks" diplomacy would be possible if the portfolio of incentives and sanctions is fruitful enough to override concerns regarding the threat of instability to existing political hegemonies. *See* Hathaway, *supra* note 3, at 1940–41; *see also* Nardin, *supra* note 4, at 386, 395; Kelsen, *supra* note 2, at 212; Weber, *supra* note 19, at 1–11.

82. *See* Kelsen, *supra* note 2, at 212. Because of the sovereign equality of nations principle, national governments would still maintain supremacy over their own diplomatic affairs even if the United Nations were democratized.

83. Woodrow Wilson, *War Messages*, 65th Cong., 1st Sess. Senate Doc. No. 5, Serial No. 7264, Washington, D.C., 1917, at 3–8.

NOTES

LOOKING BEYOND R2P FOR AN ANSWER TO INACTION IN THE SECURITY COUNCIL

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I. INTRODUCTION

The subject of the inability, or perhaps lack of will, of the U.N. Security Council to respond to humanitarian crises is one that has received no shortage of attention. The world has watched as the Security Council has failed to take action to address situations in Kosovo and Rwanda, and more recently in Syria and Ukraine. These failures to act have left the international community scrambling to find alternative ways to respond in the face of international crises.

This note identifies the veto power as the root of the ineffectiveness of the Security Council and examines ways in which this power is used to thwart international action both within and beyond the Security Council. It will then examine a fairly recent response to this inaction, the development of the Responsibility to Protect doctrine, which argues that states have a responsibility to take action in the face of international crises, and evaluate how well poised this doctrine is to respond to this problem.

As an alternate to the Responsibility to Protect doctrine, this note assesses two potential checks on the veto power that are already established in international law. First, the obligatory abstention housed within the U.N. Charter, which limits the ability of a Security Council member to exercise its veto power when it is a party to the dispute being addressed by the Security Council. Second, the Uniting for Peace Resolution, which provides the only possibility of an override of a Security Council veto through General Assembly action.

While none of these three instruments provide perfect solution to the longtime problem of the power wielded by the five veto-holding states, I argue that the two options already established within international law, the obligatory abstention and the Uniting for Peace Resolution, are worthy—and even superior—alternatives with which to address this issue and should not be overlooked. At a minimum, they present a useful tool for serving to legitimize actions taken pursuant to the Responsibility to Protect doctrine.

II. THE VETO POWER

A. *Inclusion in the U.N. Charter*

Throughout negotiation of the U.N. Charter (Charter) the veto power was a contentious issue, with the major powers insistent on its inclusion.[1] Concern about the veto power, which belonged to the five permanent members of the Security Council, was immediately asserted. Soon after the United Nations passed the Charter, one commentator stated "[t]he inevitable effect of conferring the right of veto upon each of the permanent members is that no decision of any importance can be taken against the will of one of the privileged states even if the state is involved in the matter to which the decision refers."[2] In the decades since, it has become clear that these concerns were not without merit.

B. *Application of the Veto Power*

As the enforcement mechanism of the United Nations, the Security Council (the Council) is responsible for the maintenance of international peace and security and is the only U.N. body which can issue binding resolutions on a Member State.[3] The Security Council has fifteen Member States, including five permanent members—Russia, China, the United States, France, and Britain—often referred to as the Permanent 5 or the P-5.[4] The ten non-permanent members are elected for two-year terms and are prohibited from serving consecutive terms.[5]

The voting requirements within the Security Council differ based on

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1. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 507 (1995).

2. Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087, 1111 (1946). Another commentator of the time, J.L. Brierly, also expressed concern regarding the veto provisions, stating "[i]t is certain . . . that the veto power has made impossible that enforcement measures should ever be taken against a Great Power" and "[t]hus the desire for a system of security ready always for immediate action, which was the leading motive behind the substitution of the Charter for the Covenant, has resulted in a system that can be jammed by the opposition of a single Great Power." J.L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y.B. INT'L L. 83, 89, 91 (1946).

3. Richard Butler, *Reform of the United Nations Security Council*, 1 PENN ST. J.L. & INT'L AFF. 23, 26–27 (2012); Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 325 (2000).

4. Brian Cox, *United Nations Security Council Reform: Collected Proposals and Possible Consequences*, 6 S.C.J. INT'L L. & BUS. 89, 92 (2009).

5. Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 328 (2000). These ten spots are traditionally distributed as: two to Asia, three to Africa, two to Latin America and the Caribbean, two to Western Europe and others, and one to Eastern Europe. Cox, *supra* note 4, at 92.

whether the vote is considered procedural or substantive.[6] For votes on procedural matters, nine affirmative votes are required.[7] For votes on substantive matters, an affirmative vote of nine members of the Security Council, including the concurring vote of each of the P-5, is required.[8] Through the requirement of concurring votes of the P-5, the Charter gives these states the power to veto a substantive matter by not casting a concurring vote.[9]

This power allows the P-5 to have a veto in four situations.[10] First, they may veto any substantive and binding decision of the Council.[11] Second, they may veto a recommendation to the General Assembly (Assembly) of a Secretary-General appointment.[12] Third, they can veto state membership applications for the United Nations.[13] Finally, they can veto any amendment to the Charter.[14] This Note will focus on the first instance, the veto of a substantive and binding decision of the Council, which allows the P-5 to veto the passage of Council resolutions.

C. *Problematic Uses of the Veto Power*

The use of the veto by the five members which hold this power has led to increasing deadlock in the Security Council. Additionally, its influence extends beyond the Security Council to other bodies of the United Nations. What seems like a relatively minor aspect of how the United Nations functions has become one of the greatest impediments in its fight to stay relevant and responsive in the face of international crises. In exploring how this power hampers Security Council and United Nation actions, I will examine four main ways in which the use of the veto power has proven problematic.

1. Private Sessions

The first problem with the P-5 veto power is that it has implications

6. U.N. Charter art. 27; Cox, *supra* note 4, at 92–93.

7. Cox, *supra* note 4, at 92.

8. Fitzgerald, *supra* note 3, at 327.

9. *Id*.; Interestingly, the question of whether a matter is considered procedural or substantive is considered a substantive question, opening the door for a P-5 party to vote that a matter is substantive in order to subject a final vote on the matter to its veto power. Cox, *supra* note 4, at 93. This is known as the double-veto. This possibility initially concerned many states, however, it has not turned out to be an issue as the double veto was not used after 1959 because of an informal agreement between the P-5. JAN WOUTERS & TOM RUYS, ROYAL INSTITUTE FOR INT'L RELATIONS, SECURITY COUNCIL REFORM, A NEW VETO FOR A NEW CENTURY? 8 (2005).

10. Butler, *supra* note 3, at 29.

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*.

far beyond an official veto vote. The P-5 sometimes threaten the use of a veto behind closed doors to convince a state not to bring a dispute to the attention of the Council. Alternately, the P-5 use their power to persuade states not to vote on certain resolutions, which results in what is known as a "hidden veto," where there are an insufficient number of member votes and the proposal is therefore automatically rejected.[15] The Council has continued to undertake most of its negotiations behind closed doors, only meeting in public to adopt resolutions on which it has already reached agreement.[16] This means that the true implications of the veto power are seldom seen and nearly impossible to measure.

2. To Shield Another State from Security Council Action

Another problematic use of the veto power occurs when P-5 states use their veto to prevent the passage of resolutions that are contrary to the interests of an ally state. This practice is known as voting "in defense of their client state."[17] One of the most noticeable examples of this use of the veto is the United States use of the veto on behalf of Israel.[18]

3. The Cascade Effect

The influence of the veto has a tendency to extend beyond the confines of the Security Council. In what has been referred to as the cascade effect, P-5 countries are able to wield this power in many other settings. When U.N. elections are held for any agency, committee, or commission, the P-5 are almost always awarded a seat because of their power and influence.[19] Although there is no ability to veto within these settings, the P-5 are often able to use their power to veto in the Council to encourage action in line with their interests in many other bodies of the United

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15. Fitzgerald, *supra* note 3, at 327.

16. Kirgis, *supra* note 1, at 518. Former Australian Ambassador to the United Nations, Richard Butler, confirmed that based on his time as part of the Security Council, he would estimate that 98% of work is done in private chambers while 2% is done in the public chamber. Butler, *supra* note 3, at 30.

17. Butler, *supra* note 3, at 31. In 1946, Kelsen predicted this powers saying that "members which have no such right may be induced to secure for themselves the friendship and protection of one of the five great powers." Kelsen, *supra* note 2, at 1119. He even went so far as to say that it was more important for a state that was not a P-5 member to have a friend or protector within the P-5 than to comply with existing law because with this protection, no action could be taken against them even in the event of a flagrant violation of the Charter. *Id.*

18. In fact, vetoes relating to the Israel/Palestine situation account for nearly half of all vetoes by the United States. JAN WOUTERS & TOM RUYS, SECURITY COUNSEL REFORM: A NEW VETO FOR A NEW CENTURY? 15 (Academia Press for the Royal Institute of for International Relations, Egmont Paper No. 9, Aug. 2005).

19. Butler, *supra* note 3, at 31.

Nations.[20]

4. To Prevent Security Council Action in Response to Humanitarian Crises

Throughout the history of the United Nations, and increasingly in recent years, P-5 members have utilized and threatened to utilize vetos to stand in the way of actions in response to international crises. This veto can be used by a member of the P-5 both to shield another aggressor state, as discussed above, and to shield itself when it is the aggressor. The situations in Kosovo and Rwanda provide examples of this use of the veto power.

When the Security Council considered its response to the fighting in Kosovo in 1998, China and Russia firmly indicated their intention to veto any use of armed force by the United Nations.[21] The inability of the Council to react to the killing of thousands of civilians eventually led to action outside of the United Nations. In March of 1999, the North Atlantic Treaty Organization (NATO) began a bombing campaign against President Milosevic's regime.[22] Although it seemed apparent that this action, taken without any Security Council authorization, was in violation of international law, it was well received. In fact, a Security Council resolution criticizing NATO's apparent violation of the Charter's prohibition on force was defeated by a vote of twelve to three.[23] A U.N. developed commission that investigated the NATO intervention found the intervention to be "illegal but legitimate."[24]

A similar deadlock occurred in the Security Council during the Rwandan genocide in 1994.[25] When the Security Council considered authorizing intervention forces in Rwanda, France and the United States blocked it and then used their hidden veto to assure that the situation was not labeled a "genocide," which has significance in requiring action from Member States.[26] Five years later, the United Nations issued a Report of the U.N. Independent Inquiry on Rwanda, which concluded that "[t]he Security Council itself bears responsibility for the hesitance to support new peacekeeping operations" and "for its lack of political will to stop

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20. *Id.*

21. WOUTERS & RUYS, *supra* note 18, at 17.

22. Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments Before the International Court of Justice*, 40 DENV. J. INT'L L. & POL'Y 167, 190 (2012).

23. *Id.*

24. Chelsea O'Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention*, 24 DUKE J. COMP. & INT'L L. 557, 565 (2014).

25. WOUTERS & RUYS, *supra* note 18, at 16.

26. *Id.*

the killing."[27]

III. RESPONSE TO INACTION: THE RESPONSIBILITY TO PROTECT DOCTRINE

At the center of almost any current debate centering on the ineffectiveness of the Security Council is the emerging Responsibility to Protect Doctrine, known as R2P. This doctrine focuses on the responsibility of each state to protect its own citizens and the ability of other states to take action when this responsibility is shirked. However, as is explored below, this doctrine suffers from intense debate regarding almost every aspect of its source and application. This underlying uncertainty has resulted in an inconsistent application of the R2P doctrine and leaves it as a questionable solution for countering Security Council inaction.

A. *Establishment of R2P*

Following the unapproved action taken by the North American Trade Organization (NATO) in response to human rights violations in Kosovo as well as the overall failure of the international community to act in response to the Rwandan genocide, the international community began to question the ability of the United Nations to respond to these situations.[28] In his 2000 Millennium Report to the General Assembly, Secretary-General Kofi Annan addressed the conflict between state sovereignty and the need for action in response to these crises and issued a challenge for the resolution of these two principles.[29] The next year, the Canadian developed International Commission on Intervention and State Sovereignty (ICISS) released a report titled The Responsibility to Protect.[30]

Although prior to this report there were discussions of a right or responsibility to act in the face of a humanitarian crisis, this was the first instance of this formulation and title. The title stuck and now the doctrine

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27. *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, Dec. 16, 1999, S/1999/1257, at 32, 37.

28. Andrew M. Bell, *Using Force Against the "Weapons of the Weak": Examining A Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention Under the Responsibility to Protect*, 22 CARDOZO J. INT'L & COMP. L. 261, 276 (2014).

29. *Id.* at 282.

30. Dana Michael Hollywood, *It Takes A Village . . . or at Least A Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions*, 19 FLA. J. INT'L L. 75, 98 (2007); Michael Small, *An Analysis of the Responsibility to Protect Program in Light of the Conflict in Syria*, 13 WASH. U. GLOBAL STUD. L. REV. 179, 180 (2014).

itself is often broadly referred to as the Responsibility to Protect, or R2P. The ICISS formulation intended to shift the focus from a right to intervene into a duty of each state to protect its own citizens and the responsibility of other states to act when a state fails in this duty.[31] According to ICISS, this responsibility to protect defeats the principle of non-intervention in such cases.[32]

This report brought the idea of R2P to the forefront of the international community and at the 2005 World Summit the United Nations General Assembly endorsed R2P, although it did not approve the entire ICISS report.[33] Notably, while the ICISS version of R2P had supported the unauthorized humanitarian interventions in extreme cases[34], the United Nations version focused only on peaceful and preventative measures.[35] Although reaction to this endorsement was generally positive among supporters of R2P, some attacked this weakened version, labeling it "R2P-lite."[36]

B. *Limitations of the R2P Doctrine*

The amount of discussion surrounding R2P's potential successes and weaknesses is too extensive to survey in this note. However, it is important to examine certain criticisms as they relate directly to how apt this doctrine is to remedying Security Council inaction. Therefore, I will not address concerns surrounding allegations that R2P is an assault on state sovereignty or other arguments which, while valid in discussing the validity of R2P, are not necessarily indicative of its ability to help with the Security Council situation. Instead, I will focus on three aspects of R2P that directly contribute to its effectiveness, or lack thereof, in providing a way forward in the face of Security Council deadlock.

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31. John F. Murphy, *Responsibility to Protect (R2P) Comes of Age? A Sceptic's View*, 18 ILSA J. INT'L & COMP. L. 413, 421–22 (2012).

32. Christopher Clarke Posteraro, *Intervention in Iraq: Towards A Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 201 (2002).

33. Jamie Herron, *Responsibility to Protect: Moral Triumph or Gateway to Allowing Powerful States to Invade Weaker States in Violation of the U.N. Charter?*, 26 TEMP. INT'L & COMP. L.J. 367, 372 (2012); Hollywood, *supra* note 25, at 101.

34. *See* Brighton Haslett, *No Responsibility for the Responsibility to Protect: How Powerful States Abuse the Doctrine, and Why Misuse Will Lead to Disuse*, 40 N.C. J. INT'L L. & COM. REG. 171, 188 (2014).

35. Monica Hakimi, *Toward A Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 252–53 (2014).

36. *Id.* at 253; Bell, *supra* note 28, at 302; Small, *supra* note 30, at 181–82.

1. Tied to the Security Council

With this in mind, the most relevant criticism focuses on the fact that many formulations, and notably the one endorsed by the United Nations and ICISS, still focus on the Security Council as the foremost authority in authorizing military action.[37] The ICISS report insisted that ultimate authority for the use of R2P remained with the Security Council.[38] As a response to recent deadlocks in the Security Council, ICISS urged P-5 members to pledge not to veto action for humanitarian crises when their vital interests were not at stake.[39] However, despite this Pollyanna outlook, the report did present two alternative methods when the Security Council was caught in a deadlock.[40] Interestingly, later reports by the Secretary-General emphasized the Security Council as the only authority which could approve action under the R2P and did not mention these two alternatives.[41]

2. Susceptibility to Abuse

While the R2P movement has garnered strong support, some smaller states have expressed concern that it could pose as a pretext for politically motivated military actions by larger states.[42] Unfortunately, this concern has been realized through the inconsistent application of R2P principles.[43] There are numerous examples of R2P being used as justification for controversial action by a state or organization. In contrast, in other cases where intervention seemed objectively justified under the R2P doctrine, none was taken.

In 2003, both the United States and the United Kingdom framed the invasion of Iraq as an application of R2P, alleging that ending Saddam Hussein's tyranny justified humanitarian intervention.[44] Unable to gain

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37. Bell, *supra* note 28, at 283–84.

38. Halil Rahman Basaran, *Responsibility to Protect: An Explanation*, 36 HOUS. J. INT'L L. 581, 591 (2014).

39. Bell, *supra* note 28, at 284; Hollywood, *supra* note 30, at 100.

40. Haslett, *supra* note 34, at 189; Major Jeremy A. Haugh, *Beyond R2P: A Proposed Test for Legalizing Unilateral Armed Humanitarian Intervention*, 221 MIL. L. REV. 1, 16 (2014) (interestingly, in its report, ICISS specifically mentioned two such alternates: (1) Action by regional organizations and (2) the Uniting for Peace Resolution).

41. Haugh, *supra* note 40, at 15.

42. Herron, *supra* note 33, at 372; Thomas G. Weiss, *R2p After 9/11 and the World Summit*, 24 WIS. INT'L L.J. 741, 748–49 (2006) (reporting the remarks of the Algerian President, stating "[w]e do not deny that the United National has the right and the duty to help suffering humanity, but we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but because we are not taking part in the decision-making process of the Security Council.").

43. Haslett, *supra* note 34, at 190.

44. Bell, *supra* note 28, at 292.

the support of the Security Council, the action was implemented without its approval.[45] This use of R2P to justify military action has been characterized as a misuse of the doctrine and is blamed for increasing mistrust in the use of R2P.[46] Next, in 2008, Russia pointed to Georgia's failure to protect Russian citizens within its borders as justification for invading the country, although there were few who believed there was a true humanitarian motivation.[47] Finally, in 2011 as protests in Libya turned violent, R2P was put into action through a Security Council resolution which established a no-fly zone over Libya and famously authorized Member States to "take all necessary measures."[48] Initial support for the intervention dissipated as the extent of NATO airstrikes became clear and many began to see the action as a guise for regime change.[49] Russia and China, who abstained from the vote passing the resolution, were extremely upset about the extent of the airstrikes and the use of a Security Council resolution to secure regime change.[50]

Although this aggressive use of R2P was damaging to its case, this harm was magnified when it became apparent that when P-5 members did not have a strong enough incentive, action would not be taken even in the face of a developing humanitarian crises.[51] A prime example of its non-use is found in the Syria situation.[52] When violence erupted in Syria in 2011, the international community took notice and urged the Security Council to take action.[53] However, the Security Council was unable to pass a resolution on the matter due to the repeated vetoes of Russia and China.[54] They voiced wariness to authorize military intervention due to concerns that the bounds of appropriate action authorized by a resolution would be overstepped, as in the case of Libya.[55] This selective use of R2P has been the basis for one of the most significant critiques of the R2P doctrine—that its use, or lack of, often coincides with a state's interests in that region.[56]

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45. Weiss, *supra* note 42, at 749–51.

46. *Id.*

47. Bell, *supra* note 28, at 292–93; Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75, 81 (2011).

48. O'Donnell, *supra* note 24, at 566.

49. *Id.* at 566–67; Alexandra T. Steele, *One Nation's Humanitarian Intervention is Another's Illegal Aggression: How to Govern International Responsibility in the Face of Civilian Suffering*, 35 LOY. L.A. INT'L & COMP. L. REV. 99, 100 (2012).

50. Murphy, *supra* note 31, at 429–30; O'Donnell, *supra* note 24, at 566.

51. Bell, *supra* note 28, at 298.

52. Murphy, *supra* note 31, at 432.

53. Small, *supra* note 30, at 190.

54. *Id.* at 190–91.

55. *Id.* at 190.

56. *Id.* at 195.

3. Questionable Legal Basis

Equally frustrating to the consistent application of R2P is the debate over whether it constitutes legitimate international law.[57] Some claim that R2P is a developing or established customary international law,[58] or even a general principle of international law.[59] The ICISS Responsibility to Protect Report pointed to several sources for the foundation of such a responsibility, although none has been affirmatively adopted in the years since.[60] As a result, any discussion of its legal source remains subject to intense debate.[61]

This lack of a clear legal basis also lends to the argument that R2P undermines international law by allowing action that is clearly outside the bounds of what is authorized under the Charter.[62] This reasoning follows the logic of a slippery slope argument, where any action outside the rules corrodes the system as it becomes more and more acceptable to take action despite a lack of Security Council approval.[63] This fractured approach to international action is exactly what the United Nations was formed to prevent.[64]

C. *Evaluation of R2P as a Solution to Security Council Inaction*

These three areas of criticism highlight the problems that are in the way of R2P serving as an effective solution to addressing international crises when a P-5 member wishes to prevent such action. The fact that the R2P doctrine remains tied to action through the Security Council is the main impediment to it serving as a solution to inaction in that body. Although earlier formulations of R2P suggested that in cases of a Council impasse the international community should take action outside the Council, the version adopted by the United Nations excluded these ideas. Further, the public's willingness to accept action taken without Council approval has been considerably weakened by the apparent abuses of R2P as a pretext for military action. The actions taken in Iraq and Libya may have served to strengthen support for the principle of non-intervention rather than gathering support for the ICISS proposition that this principle should be subordinate to the responsibility to act in these crises.[65]

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57. Haslett, *supra* note 34, at 179.
58. O'Donnell, *supra* note 24, at 578–80; Steele, *supra* note 44, at 109–10; Weiss, *supra* note 42, at 743.
59. Basaran, *supra* note 38, at 582–83.
60. Haslett, *supra* note 34, at 179–80.
61. *Id.* at 180.
62. Bell, *supra* note 28, at 267.
63. *Id.* at 297.
64. Brierly, *supra* note 2, at 90.
65. *See* Weiss, *supra* note 42, at 750.

Clarification of the principles of R2P and concrete rules governing its application will be necessary before the international community is willing to accept this principle as a legitimate method of addressing crises without the risk of abuse.

IV. EXISTING CONTROLS ON THE VETO POWER

In contrast to the R2P doctrine, there are two mechanisms which are firmly established in international law and provide a method with which to either limit the use of a veto or take action in spite of one. However, these two tools also have important limitations which must be addressed in order to maximize their effectiveness.

First, the obligatory abstention found within the U.N. Charter prevents use of veto in certain instances. Although a potentially powerful check on the veto power when a State is a party to a dispute, in practice it has been minimized and is the weaker of the two. Second, the Uniting for Peace Resolution provides authorization to the General Assembly to take action in the face of Security Council inaction. This resolution has been used in the past to effectively override a Security Council veto and, other than disfavor among P-5 states, nothing limits its applicability.

A. *Obligatory Abstention*

1. Defining Obligatory Abstention

Although the veto power grants P-5 members a great deal of power, the Charter does include a limit on its use known as the obligatory abstention, found in Article 27(3) of the Charter. Under Article 27(3) of the U.N. Charter, when dealing with substantive matters, a Security Council member who is a party to a dispute shall abstain from voting "in decisions under Chapter VI, and under paragraph 3 of Article 52."[66] The requirements of Article 27(3) boil down to three main elements: first, that it is a substantive matter; second, that a member of the Council is a party to the dispute; and, third, that the decision falls under either Chapter VI, dealing with pacific settlement of disputes, or Article 52(3), governing pacific settlements of disputes through regional agreements or agencies.[67]

Despite its apparent promise in limiting the veto power, all three of these elements are less than concrete and provide P-5 members the opportunity to change the characterization of a set of circumstances in

66. U.N. Charter art. 27, para 3.

67. Suyash Paliwal, Note, *Reviewing and Reconsidering* Medellín v. Texas *in Light of the Obligatory Abstention from Security Council Voting*, 48 COLUM. J. TRANSNAT'L L. 541, 548–49 (2010).

order to prevent application of the abstention. For instance, whether an issue is a substantive or procedural issue can be considered a substantive question subject to a Security Council vote, and therefore also a P-5 veto.

Another way states aim to circumvent the application of the abstention is by avoiding the labels of "party" or "dispute." States have often disagreed as to what level of involvement is required in order to make one a "party," which eventually resulted in the International Court of Justice (ICJ) weighing in on the issue and creating a decision mechanism.[68] States similarly avoid the term "dispute," instead using the term "situation."[69] No definition was ever established for either term, although there was an early effort to clearly define what constituted a "dispute."[70] Therefore, states continue to use this alternate terminology to prevent its application. Finally, whether the requirement that the dispute is one dealt with under Chapter VI is met is often difficult to discern as the Security Council rarely makes clear which chapter it is acting pursuant to. However, forcible measures are typically viewed as falling under Chapter VII of the Charter and therefore are not impacted by the obligatory abstention.[71]

2. Practical Application of the Obligatory Abstention

At the outset of the United Nations, Member States were respectful of the obligatory abstention and refrained from voting on matters which were implicated, often citing specifically to Article 27(3).[72] However, states have since progressed away from this voluntary enforcement of the abstention and often when a state does abstain from a vote, it claims to do so voluntarily and not due to any obligation under Article 27(3).[73] Because the obligatory abstention is rarely mentioned during Council debates, its discussion when several countries questioned the ability of

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68. Paliwal, *supra* note 67, at 560; Legal Consequences for States of the Continued Presence of South Africa in Nambia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 25 (June 21). If there is a disagreement as to whether a Council member is a party to a dispute, the International Court of Justice (ICJ) has stated that the Council must make a prior determination that (1) there is a dispute and that (2) a member of the Council is a party to that dispute. 1971 I.C.J. Rep. 16, ¶ 24. This can be decided through either a Council vote, or a Presidential ruling. Paliwal, *supra* note 67, at 560–61. While this preliminary finding requirement is not found in the Charter, and therefore subject to criticism, one commentator praised the ruling as taking account of the practical need for a clear rule. Kirgis states that this rule will allow a "straightforward Council determination, on a case-by-case basis" and will reduce the chance that a permanent member would then ignore a Council decision under Chapter VI if they did not feel they needed to abstain. Kirgis, *supra* note 1, at 511.

69. Kirgis, *supra* note 1, at 511.

70. *Id.*

71. Paliwal, *supra* note 67, at 548.

72. Kirgis, *supra* note 1, at 511.

73. WOUTERS & RUYS, *supra* note 18, at 13.

France to veto a resolution proved insightful. France, in response to the allegation it should abstain from voting because of Article 27(3), stated that it could present a list of situations where a state in a similar situation to France had used their veto without challenge from anyone within the Council.[74] This interchange suggests that P-5 members are often wiling to turn a blind eye when a fellow P-5 member chooses to exercise its veto although it is arguably prohibited by the obligatory abstention.

3. Evaluation of Obligatory Abstention as a Solution to Security Council Inaction

The numerous grey areas present in defining when the obligatory abstention applies in practice mean that it is presently more of an illusory than actual limit on the veto power. However, despite its limitations, Article 27(3) does present a rare situation where a P-5 power would be prevented from vetoing a substantive vote and therefore should not be overlooked. Once the threat of the veto from that state is gone, it is possible for the Council to then recommend procedures for settlement under Article 36 with the hope that the P-5 member would feel pressure to abide by the recommendations.[75]

Therefore, it is worth the effort to push for a more concrete definition of these elements in order to make the abstention a real check on the veto power. Although the chances of convincing the P-5 to agree to a limit on their own veto power may be slim, many would have made the same argument regarding the Security Council supporting the idea of R2P not too long ago. Considering the fact that the international community is growing tired of being rendered ineffective by the Security Council's failure to act, there is no better time to make this effort.

B. *The Uniting for Peace Resolution*

1. Justification for the Uniting for Peace Resolution

Frustrated with the deadlock in the Council during the Cold war period due to systematic vetoes by the Soviet Union, the General Assembly (Assembly) passed Resolution 377A(V), the *Uniting for Peace Resolution* (Resolution) in 1950.[76] The Resolution was introduced by the United States and sponsored by seven states.[77] It passed on November 3,

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74. *See id.* at 14.

75. Kirgis, *supra* note 1, at 508.

76. James E. Hickey, Jr., *Challenges to Security Council Monopoly Power Over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 IUS GENTIUM 77, 96–97 (2004).

77. Harry Reicher, *The Uniting for Peace Resolution on the Thirtieth Anniversary of Its*

1950 with a vote of fifty-two to five, with two abstentions.[78]

At the time, there was debate over whether the Resolution was a legitimate delegation of power to the Assembly under the Charter.[79] The argument in support of the Resolution was that Article 41(1) of the Charter secures to the Security Council the *primary responsibility* for the maintenance of international peace and security, which left open the position for a secondary guarantor of this responsibility. The preamble of the Resolution reflects this reasoning, stating "that failure of the Security Council to discharge its responsibilities on behalf of all the Member States . . . does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security."[80]

This view was substantiated in *Certain Expenses*, which dealt with the apportionment of expenses for U.N. peacekeeping operations.[81] In this case, the ICJ found that the Council's responsibility for the maintenance of international peace and security is primary, but not exclusive.[82] Therefore the Assembly does not have to defer to the Council under Art 11(2) of the U.N. Charter unless enforcement action is necessary.[83]

2. Substance and Application of the Uniting for Peace Resolution

Although the Resolution contained several parts, the most relevant part of the Resolution, Part A, states that:

> [I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of

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Passage, 20 COLUM. J. TRANSNAT'L L. 1, 7–9 (1981). The seven sponsoring states were Canada, France, Philippines, Turkey, United Kingdom, United States, and Uruguay. *Id.*

78. *Id.*

79. James Fergusson Hogg, *Peace-Keeping Costs and Charter Obligations-Implications of the International Court of Justice Decision on Certain Expenses of the United Nations*, 62 COLUM. L. REV. 1230, 1234 (1962).

80. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

81. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 168 (July 20).

82. *Id.*; Kirgis, *supra* note 1, at 533; David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 931 (1996).

83. Kirgis, *supra* note 1, at 534.

> armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.[84]

Other parts of the Resolution calling for a Peace Observation Commission, Collective measures Committee, and national armies for use "for services on behalf of the United Nations" were considered a dead letter by the 1950s.[85] Therefore, I will focus on Part A, which remains in full force.

The Resolution spells out four preconditions required in order for the Assembly to act pursuant to the Resolution.[86] First, the Security Council must have failed "to exercise primary responsibility for the maintenance of international peace and security."[87] Second, the Council's "failure" must have been due to a "lack of unanimity of the permanent members."[88] Third, there must "appear[ ] to be a threat to the peace, breach of the peace, or act of aggression."[89] And finally, as inferred from the above requirements, the Council must have dealt with the issue before the Assembly can take any action on the matter.[90]

Once these conditions are met, the Resolution is available for use. The Assembly can consider a matter pursuant to the Resolution under either of two referral procedures. First, the matter can be referred by the Security Council, with a vote of nine members.[91] Because the vote of the Security Council on whether to refer the matter is a procedural one, it is not subject to the veto under Article 27(2) of the Charter.[92] Second, the Assembly can consider a matter through a majority vote of the Member States of the United Nations. A vote by the Assembly can be triggered at the request of any Member State to invoke the Resolution.[93] Once the

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84. This vote now requires nine votes as with any procedural Council vote. Morriss, *supra* note 82, at 805 n.8. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

85. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 11 (1950).

86. Reicher, *supra* note 77, 9–20

87. Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (1950).

88. *Id.*

89. *Id.*

90. Reicher, *supra* note 77, at 9–20.

91. Morriss, *supra* note 82, at 805 n.8.

92. *Id.*

93. Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L.

referral has the requisite number of votes, the matter can be considered by the Assembly while it is in session, or, in the case that it is not, at an emergency meeting with 24-hour notice.[94]

While there are grey areas within these requirements, such as who decides what constitutes a "failure" of the Security Council or what constitutes the appearance of a threat to the peace, breach of peace, or act of aggression,[95] it is considered well-settled that a veto by a P-5 member of the Council constitutes a failure to act.[96] This has momentous implications in that it means that when a P-5 member vetoes a Council vote, the matter can then be referred to the General Assembly, which can hold an emergency meeting and, with a 2/3 vote, effectively override the veto with an Assembly resolution on the matter.[97]

The *Construction of a Wall Case* provides a clear example of how the Resolution can be used as a work-around to a Security Council veto, and perhaps also why the Resolution fell out of favor with the United States. In response to two failed attempts of the Security Council to pass a Resolution responding to a dispute over the legality of an Israeli wall in the West Bank due to a veto by the United States, the General Assembly convened an emergency session pursuant to the Resolution in May 1997.[98] This emergency session was re-convened repeatedly throughout the following years, and eventually resulted in Resolution ES-10/14 in December 2003, in which the Assembly requested an advisory opinion from the ICJ on the matter.[99]

In deciding the case, the ICJ first had to evaluate whether it had proper jurisdiction of the matter, which meant that it had to decide whether a referral from an emergency session pursuant to the Resolution was legitimate. The Court, in a press release issued on the opinion, summarized its findings in the area, stating:

REV. 317, 435–56 (2003); Robert D. Powers, Jr., *Voting in the United Nations*, 17 JAG J. 67, 82 (1963).

94. Powers, *supra* note 87, at 82.

95. Reicher, *supra* note 77, at 9–20.

96. Rebecca Kahan, *Building A Protective Wall Around Terrorists - How the International Court of Justice's Ruling in the Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827, 847 (2005); Morriss, *supra* note 81, at 931. However, this conclusion has recently been called into question. *See* Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 1, 17 (2013). Carswell argues that because a veto power is conferred on the P-5 by Article 27(3) of the Charter, its use is not necessarily a failure. Instead, he asserts that a veto "is a necessary, but not a sufficient prerequisite" for the GA to act under the Resolution.

97. L.H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, 45 AM. J. INT'L L. 129, 133 (1951).

98. Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

99. G.A. Res. ES 10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).

> The Court further refers to the fact that the General Assembly adopted resolution ES-10/14 during its Tenth Emergency Special Session, convened pursuant to [The Uniting for Peace Resolution], which provides that if the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly may consider the matter immediately with a view to making recommendations to Member States. The Court finds that the conditions laid down by that resolution were met when the Tenth Emergency Special Session was convened; that was in particular true when the General Assembly decided to request an opinion, as the Security Council was at that time unable to adopt a resolution concerning the construction of the wall as a result of the negative vote of a permanent member.[100]

The Court, proceeding to the substance of the opinion, found that the Israeli-constructed wall was contrary to international law.[101] In response to the ICJ ruling, the Assembly reconvened the emergency session and passed Resolution EC-10/15, which demanded that Israel comply with the ICJ opinion. This chain of events shows exactly how the Resolution can, in effect, allow the General Assembly to veto the veto.[102] Unfortunately, while this opinion served to legitimize the Resolution, it has not been invoked since. Of the ten times the Resolution has been used, the Assembly has recommended military force only once.[103] This is likely because while the Resolution appears to still be a viable option for the Assembly to speak in the face of a Council deadlock, there are some impediments to its use and limitations on its reach.

3. Limitations on the Uniting for Peace Resolution

The first and most significant limitation is that the General Assembly is limited to making nonbinding recommendations under the Resolution.[104] Therefore, a recommendation for the use of force by the Assembly under the Resolution does not itself justify the use of force by a state.[105] However, a recommendation by the Assembly may still carry significant force as a strong statement on the view of the majority of

100. Press Release, International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Press Release 2004/28 (July 2004).

101. G.A. Res. ES 10/14, U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

102. Gregory Khalil, Op-Ed, *Just Say No to Vetoes*, N.Y. TIMES (July 19, 2004).

103. Carswell, *supra* note 95, at 7.

104. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 503 (2010).

105. *Id.*

Member States, or through a recommendation of other action, such as economic sanctions.[106]

However, any action taken directly in opposition to a veto of one or more P-5 members could cause serious political tensions. This becomes even more of an issue should military action be seen as necessary despite the lack of Council approval. Because the United Nations does not have its own military forces, any action relies on the military and financial support of the major powers, in essence the P-5.[107] When action is taken by some of the P-5 members directly in opposition to the veto of fellow P-5 members, it weakens the authority of the Council as being the sole body capable of authorizing the use of force. This could serve to undermine the preeminence of this international body as P-5 members are less likely to view it as the ultimate authority if, upon failing to get its resolution passed, other P-5 states will ignore that veto and choose to act anyway.

Finally, and arguably most influentially, some P-5 members have come to disfavor the Resolution. The United States, once its champion, is now its biggest critic. When the Resolution was passed, there were only 60 Members States of the United Nations, meaning that the United States could count on being able to refer a situation to the Assembly and secure a vote in favor of the action it wanted. However, with 193 current members of the United Nations, a vote in favor of U.S. interest is no longer a guarantee, and presents a risk the United States would rather not take.[108]

Most recently, when the United States threatened military action in Iraq, there was a push to make use of the Resolution to pressure the United States not to take action.[109] In response, the United States engaged in a proactive campaign to prevent the use of the Resolution, sending messages to other Member States, which stated that "[g]iven the current highly charged atmosphere, the United States would regard a General Assembly session on Iraq as unhelpful and as directed against the United States."[110] The Resolution was never invoked.

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106. *Id.*

107. Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 355 (2009).

108. Carswell, *supra* note 95, at 25.

109. Michael Ratner & Jules Lobel, *A UN Alternative to War: "Uniting for Peace*," JURIST (Feb. 10, 2003); Mike Billington, *UN 'Uniting for Peace' Resolution Could Demand End to U.S. War on Iraq*, 30 EXECUTIVE INTELLIGENCE REV., Apr. 11, 2003, at 42.

110. Billington, *supra* note 108; Cohn, *supra* note 92, at 347.

4. Evaluation of the Uniting for Peace Resolution as a Solution to Security Council Inaction

The Uniting for Peace Resolution presents a rare instance where the Assembly can take action in direct response to the failure of the Security Council to do so. This resolution applies in all situations where the Council has considered the issue, which is considerably broader in application than the obligatory abstention provision. Nevertheless, the fact that the Assembly is limited to non-binding resolutions and may not authorize force is a critical limitation. In instances where a humanitarian crisis is under way and military intervention is needed, even an Assembly statement contrary to that of the Council would not be enough to provide authorization for such intervention in a manner consistent with the Charter.

However, it arguably could provide a more legitimate way of undertaking the type of military action which has been taken under the authority of R2P. Because the Security Council is the only United Nations body which can authorize the use of force, when it fails to take action, it is as though the entire United Nations fails to take action. However, under the Resolution, the Assembly can call a session in response to this failure and speak as a unified body, calling for action. Although this wouldn't be considered a legal authorization of force under the Charter, neither have some of the other interventions taken despite a Security Council veto. For example, Kosovo, where NATO decided to take action without Council authority. Public opinion widely supported this action despite its illegality, with even a United Nations commission conceding that although it was illegal, it was legitimate. Therefore, at a minimum, this resolution provides a way to shore up a clear statement of support for actions taken under the principles of R2P but without Council approval.

V. CONCLUSION AND RECOMMENDATIONS

It is clear that these three potential responses to Security Council inaction are incredibly varied. For starters—their legal basis, with one found in the Charter, one found in a resolution, and one without a clear legal basis. On this ground, it is clear that the obligatory abstention found in the Charter and the Resolution have the advantage of being established international law, which eliminates controversy over the legitimacy of their use.

Looking to the scope of each, the obligatory abstention applies in a narrower set of circumstances than either R2P or the Resolution, meaning its potential for impact on this issue is limited. The extent of situations in which R2P could apply is still subject to debate, with the version passed

by the World Summit being limited to the four crimes of genocide, ethnic cleansing, war crimes, and crimes against humanity. Arguably, despite the allowance of R2P in the case of these crimes, there will be disagreement over when the threshold of any of them has been met so as to warrant R2P action. The Resolution, on the other hand, has no limit other than that the Security Council has considered the issue. Granted, the Security Council could avoid hearing the issue, as is sometimes accomplished through the hidden veto. However, because the threat of a veto is usually what prevents such a referral, the potential for action despite a veto would encourage a referral even with a veto threat. This allows the Resolution to be directly responsive to every case which has ended with Council inaction.

The result of the use of these three tools also differs. The obligatory abstention prevents the exercise of a veto, but does not guarantee action by the Council. It is very possible that when an interested state is unable to veto action, the only impediment to action is thereby removed. Under R2P, the authorized action is, again, unclear. Although the ICISS formulation supported military intervention as a last resort, this view was not adopted at the World Summit and has been increasingly disfavored with its increasing use as a justification for questionable military action.

Finally, the roadblocks standing in the way of the effective use of these methods as a solution to Council inaction are important considerations. For R2P, the increasingly common interpretation of the doctrine authorizing action only through the Security Council is a critical limitation in allowing it to respond to inaction in that very body. Further, its developing legal basis and controlling principles are cause for many states to be uncomfortable with its use as it is subject to being manipulated to each state's own political goals. On the other hand, the obligatory abstention and the Resolution are already established and defined, although with the abstention the lack of clarity in definition has led to its decreasing applicability. For the Resolution, the biggest challenge is likely in finding an Assembly willing to speak with one voice against P-5 members who have expressed their opposition to U.N. action.

Considering the strong support behind the developing R2P doctrine despite its many unclear aspects, there is no reason that this could not also provide the impetus to finally nail down the details of the obligatory abstention and overcome the stigma of utilizing the Uniting for Peace Resolution.

CRIMINALIZING LAND-GRABBING: ARGUING FOR ICC INVOLVEMENT IN THE CAMBODIAN LAND CONCESSION CRISIS

Jessica Embree[*]

I. INTRODUCTION

"I saw the rubber bullets and the shields and the sticks. My sons were crying. I never thought this forced eviction would happen. I never believed that they would send in the armed forces to destroy community property. But at the end it happened differently."[1] These were the words uttered by a Cambodian civilian after 300 police officers dressed in full

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1. INT'L FED'N FOR HUMAN RIGHTS, QUESTIONS & ANSWERS—CRIMES AGAINST HUMANITY IN CAMBODIA FROM JULY 2002 UNTIL PRESENT 6 (2014), *available at* https://www.fidh.org/IMG/pdf/qanda_cambodia_icc-2.pdf.

riot gear, armed with guns and other weapons, escorted 500 demolition workers into Phnom Penh, Cambodia and forcefully evicted 400 families from their homes on January 24, 2009.[2] This forced eviction, as well as many other evictions in Cambodia that have occurred since July 2002, was the result of a massive land concession deal[3], also known as land-grabbing.[4]

Land-grabbing has been academically defined as "large-scale, cross-border land deals or transactions" between a State concessioner and a concessionaire regarding the lease or concession of land for various purposes.[5] It is important to note that while a land concession deal may grant exclusive rights to the concessionaire, it does not grant full ownership rights—rather, the land remains the property of the State concessioner.[6] While the roots of land-grabbing in Cambodia date back to French colonial times,[7] as of 2000, 770,000 Cambodian people, or 6% of Cambodia's total population, have been forcefully evicted from their homes to clear land that has been conceded by the Cambodian government; this includes 145,000 people forcefully evicted from their homes in the capital city of Phnom Penh.[8] At least 4,000,000 hectares of land have been confiscated and conceded by the Royal Government of Cambodia (Government), equating to about 10,000,000 acres and 22% of Cambodia's total land area.[9] In the past few years, many land concessions have been contracted to both domestic and foreign private companies for

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2. *Id.*

3. *Id.* at 5–6.

4. The terms "land concessions" and "land-grabbing" have been used interchangeably in this Article to facilitate discussion.

5. Annelies Zoomers, *Globalization and the Foreignization of Space: Seven Processes Driving the Current Global Land Grab*, 37 J. PEASANT STUDS. 429, 429 (2010), *available at* http://dx.doi.org/10.1080/03066151003595325.

6. Special Rapporteur on the Situation of Human Rights in Cambodia, *A Human Rights Analysis of Economic and Other Land Concessions in Cambodia*, para. 6, U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012) (by Surya P. Subedi) [hereinafter Special Rapporteur].

7. Andreas Neef et al., *The Politics and Ethics of Land Concessions in Rural Cambodia*, 26 J. AGRIC. ENVTL. ETHICS 1085, 1087 (2013), *available* at http://link.springer.com/article/10.1007%2Fs10806-013-9446-y.

8. GLOBAL DILIGENCE, *Communication Under Article 15 of the Rome Statute of the International Criminal Court the Commission of Crimes Against Humanity in Cambodia*, para. 7, *available at* https://www.fidh.org/IMG/pdf/executive_summary-2.pdf.; Chris Arsenault, *Cambodian Land Grabs are 'Crime Against Humanity,' Lawyers Tell ICC*, REUTERS (Oct. 7, 2014, 1:28 PM), http://www.reuters.com/article/2014/10/07/us-foundation-cambodia-landgrabs-idUSK CN0HW1R420141007.

9. Chris Arsenault, *Cambodian Land Grab Victims Seek ICC 'Crimes Against Humanity' Probe*, FARMLANDGRAB.ORG (Oct. 7, 2014), http://farmlandgrab.org/post/view/24019. For comparison purposes, most small farmers in the world own between two and three hectares of land. Michael Kugelman, *Introduction and Acknowledgments*, *in* LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 1 (Michael Kugelman & Susan L. Levenstein eds., 2009).

large-scale agriculture, mining, and infrastructure, among other things.[10] In some instances, Cambodia's ruling elite teamed up with foreign investors from Thailand, China, and Vietnam to create sugar or rubber plantations, as well as logging operations.[11]

In many instances, armed Cambodian police and military officials have been deployed to protect the interests of concessionaires by clearing the land of Cambodian civilians; in an increasing number of incidents, the armed state personnel have fired weapons in their confrontations against protesting civilians who defiantly oppose the taking of their land.[12] Notably, even civilian deaths have been reported as a result of the Government's excessive use of force.[13] Those who survive after eviction face dismal conditions in resettlement camps that are ripe with disease and food insecurity.[14] In addition to their land and housing rights being violated, evicted and displaced Cambodians also frequently suffer other human rights violations - including the right to education, health, decent work, and participation in public life.[15] Incidentally, many displaced Cambodians, land activists, and human rights defenders have been criminally charged and imprisoned for their peaceful protests and involvement in land concession disputes.[16]

Notwithstanding recent calls for reform, the Government has continued to grant large land concessions at an increasing and appalling rate; many of the concessions are given from land that is inhabited by indigenous communities, including land that is classified as protected areas and forests.[17] Despite the recent international scrutiny and demand

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10. Special Rapporteur, *supra* note 6, para. 11.

11. Arsenault, *supra* note 8.

12. Special Rapporteur, *supra* note 6, para. 158–59. Some incidents have even been captured on video. *See Borei Keila: Broken Promises*, LICADHO (Jan. 12, 2012), http://www.licadho-cambodia.org/video.php?perm=28.

13. *See* Int'l Fed'n for Human Rights, *Cambodia: A Mounting Human Rights Crisis,* FIDH (Sept. 20, 2012), https://www.fidh.org/IMG/pdf/fidh_briefing_note_-cambodia_20.09.2012_final-2.pdf. In Broma village in Kratie province, over 600 families were violently and forcefully evicted from their homes as the result of a 15,000 hectare land concession. *Id.* Heng Chantha, a 14-year-old girl, was shot and killed during the military style crackdown, employed by hundreds of armed soldiers and police. *Id.*

14. Arsenault, *supra* note 8.

15. Int'l Fed'n for Human Rights, *supra* note 13. In particular, land concessions have had a disproportionate impact on women, who are responsible for both providing an income and child rearing, as the loss of land places women at a higher risk of exposure to "violence, exploitation, joblessness, and associated psychosocial hardships." INT'L FED'N FOR HUMAN RIGHTS, *Cambodia: 60,000 New Victims of Government Land Grabbing Policy Since January 2014*, FIDH (July 22, 2015), https://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policy-since.

16. *See* INT'L FED'N FOR HUMAN RIGHTS, CAMBODIA: DETERIORATING HUMAN RIGHTS SITUATION CALLS FOR URGENT EU ACTION 5 (2014), *available at* https://www.fidh.org/IMG/pdf/cambodia_deteriorating_human_rights_situation_calls_for_urgent_eu_action.pdf.

17. *See* Special Rapporteur, *supra* note 6, para. 11.

for policy change, there has been and continues to be a lack of transparency in the reporting of land concession deals by the Government.[18]

In response to the widespread land-grabbing in Cambodia and its adverse effects on human rights, a "group of individual and independent Cambodian victims," through the help of an international lawyer, have filed a Communication before the International Criminal Court (ICC) in an effort to have the Office of the Prosecutor (OTP) initiate an investigation.[19] Garnering the support of over forty civil society organizations from around the world,[20] the Communication alleges that the "Ruling Elite" has committed a widespread and systematic attack against Cambodian civilians that amounts to the following crimes against humanity: murder, forcible transfer, illegal imprisonment, other inhumane acts, and persecution.[21]

The remainder of this Article will focus exclusively on the allegation of forcible transfer and will argue for ICC involvement in investigating and prosecuting the parties responsible for the land-grabbing crisis in Cambodia. Part II will trace the historical roots and identify the driving forces of land-grabbing. Part III will examine the land ownership rights given by the Cambodian government to individuals and to indigenous communities within Cambodia, the legal framework and procedures surrounding Cambodian land concession deals, and methods of redress for Cambodian land right disputes. Part IV will discuss in part the ICC and how the land concession crisis in Cambodia qualifies as a crime against humanity, but will also argue for ICC involvement in Cambodia.

II. HISTORY OF LAND-GRABBING

Land-grabbing is not a phenomenon limited only to Cambodia, but rather an international trend.[22] What seems to be the recent globalization

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18. *See id.* para. 87. Furthermore, official data that is reported by the Government is incomplete and irregularly updated. *See id.* para. 83. Additionally, land concessions of 1000 hectares or less are not reported. *See id.* para. 87. Perhaps most notably, the Government does not publicly disclose the revenue that is received as a result of land concessions. *See id.* para. 11.

19. GLOBAL DILIGENCE, *supra* note 8, para. 1.

20. Global Diligence, *40 NGOs From Around the World Urge ICC Prosecutor to Act on ICC Cambodia Communication,* GLOBAL DILIGENCE (Dec. 12, 2014), http://www.global diligence.com/40-ngos-around-world-urge-icc-prosecutor-act-icc-cambodia-communication/.

21. GLOBAL DILIGENCE, *supra* note 8, para. 11. The Communication defines the "Ruling Elite" as "senior members of the Royal Government of Cambodia . . . senior members of State security forces, and government-connected business leaders." *Id.* para. 3.

22. *See* Saturnino M. Borras Jr. & Jennifer Franco, *Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframining Resistance* 2 (Initiatives in Critical Agrarian Studies, Working Paper Series No. 001, 2010).

of land-grabbing is merely the repetition of history—in fact, land-grabbing finds its roots in 19th century European colonialism.[23] But rather than wealthy European nations taking the land of developing nations unilaterally by force, today we see more land concession deals being initiated by domestic governments offering to concede the land within its own borders.[24] However, in the instances where transnational corporations and foreign governments are the driving forces behind land concession deals, they are done in close partnership or collusion with domestic governments.[25] Furthermore, today's land concession deals differ from historical land-grabbing in that they are larger in scale and emphasize the exportation of staple crops rather than cash crops.[26]

In leading today's land-grabbing charge, many domestic governments are encouraging both domestic and transnational companies to enter into land concession deals for the purpose of producing and exporting food, feed, and fuel internationally.[27] This purpose is driven by the convergence of multiple global crises—food, energy, environmental, and financial.[28] Governments that abound in financial wealth but lack natural resources are turning to nations that are rich in natural resources but lack financial wealth in order to secure their own food and energy resources to sustain their populations into the future.[29] As such, one of the main crises driving the global land-grab phenomenon stems from food security.[30]

In 2008, food prices reached an all-time high that had not been seen since the 1970s.[31] The increase in prices of food staples caused riots to erupt, particularly in developing, food-exporting nations where civilians already spent the vast majority of their incomes on food.[32] In an attempt to combat the riots that were occurring at home and provide food for their people, many developing nations implemented bans on food exportation.[33] As a result, many food-importing nations experienced rising food prices and food shortages.[34]

In responding to their own food security issues, food-importing

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23. Kugelman, *supra* note 9, at 3.
24. *Id.* at 4.
25. Borras Jr. & Franco, *supra* note 22, at 4.
26. Kugelman, *supra* note 9, at 4.
27. *See* SATURNINO M. BORRAS JR. & JENNIFER C. FRANCO, POLITICAL DYNAMICS OF LAND-GRABBING IN SOUTHEAST ASIA: UNDERSTANDING EUROPE'S ROLE 5 (Kathy Cumming ed., 2011), *available at* https://www.tni.org/files/download/Political%20Dynamics%20of%20Land-grabbing%20in%20Southeast%20Asia.pdf.
28. Borras Jr. & Franco, *supra* note 22, at 4.
29. *Id.* at 4.
30. Kugelman, *supra* note 9, at 2.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.*

nations began to seek land in developing countries so that they could avoid food supply shortages by producing their own food overseas, harvesting it, and shipping it back home for consumption.[35] The response of developing nations was a positive one-they welcomed the investment of foreign capital hoping that it would boost the local economy, provide employment, and promote infrastructure.[36] However, it should be noted that not all from developing nations have welcomed land concession deals with open arms – some groups have outright opposed them due to differing social classes and ideological viewpoints.[37]

III. CURRENT LEGAL FRAMEWORK IN CAMBODIA

Land rights, and the legal framework that provides for them, can be a complicated issue in Cambodia. This mostly stems from the evolution of Cambodia's statehood.[38] From 1975–1979, the communist Khmer Rouge regime abolished private land rights and as a result, many legal documents pertaining to land rights were lost or destroyed.[39] The effects of this on private land ownership are still being felt today; many Cambodians lack legal documentation like land titles that certify the full recognition of their land rights.[40] In response to this issue, the Government established the 2001 Land Law (Land Law)[41] which creates private ownership rights to immovable properties.[42]

A. *Land Ownership Rights for Individuals*

In particular, Chapter Four of the Land Law recognizes the right to request a definitive title of ownership for people who have peacefully and incontestably possessed private land for no less than five years before the commencement of the Land Law.[43] To help facilitate the conversion of mere possession rights to full ownership rights, the Government has created sporadic and systematic titling programs, in addition to implementing new policies and regulations.[44] However, despite what

35. *Id.* at 2–3.
36. *Id.* at 3.
37. Borras Jr. & Franco, *supra* note 22, at 5.
38. *See* Arsenault, *supra* note 9.
39. *See id.*
40. Special Rapporteur, *supra* note 6, para. 49.
41. *See id.*
42. Land Law, NS/RKM/0801/14, art. 1 (July 20, 2001), *available at* http://world.moleg.go.kr/fl/download/32372/6PSM7QGNMAI0JNO1T4J9 [hereinafter Land Law].
43. *Id.* art. 30.
44. Special Rapporteur, *supra* note 6, para. 50. Agencies that are involved include: the Ministry of Land Management, Urban Planning and Construction, the World Bank, the

seems to be the progressive nature of the Government's efforts to aid civilians in obtaining land titles, there is evidence of systematic exclusion from these programs for those civilians who are most vulnerable and in need of land titling.[45] For instance, civil society organizations claim the Land Management and Administration Program, a Cambodian land-titling program, denies titling to areas that are "likely to be disputed" and are of "unclear status"—ultimately resulting in a lack of titling for civilians who live on land that has already been conceded, or on land that is being sought after by potential investors for possible land concession deals.[46] Additional concerns surrounding titling programs allege that they are mired with corruption and are frequently inaccessible because of considerable required fees that are both official and unofficial in nature.[47] Consequently, because of the holes in the sporadic and systematic titling programs, the Government has conceded increasing amounts of land, claiming that the violent and forced evictions that follow are justified due to the lack of proper titling or documentation.[48]

B. *Land Ownership Rights for Indigenous Communities*

Additionally, violent and forced evictions resulting from land concession deals are affecting indigenous communities in Cambodia, despite the legal protections afforded to them under the Land Law.[49] Chapter Three of the Land Law grants to indigenous communities the right to collective ownership of their lands, including residential and agricultural land, regardless of whether the land is being currently cultivated or if it is being reserved for shifting agriculture.[50] Furthermore, Article 23 provides that until an indigenous community is recognized as one under Cambodian law, any currently existing indigenous community has the right to manage their community and immovable property according to their customs.[51] To be recognized as an indigenous community, one would have to register with the Ministry of Interior; once a community is registered it can then apply for a collective land title.[52]

Government of Germany, the Government of Finland, the Government of Canada, the Government of Denmark, and the European commission. *Id.*

45. *Id.* para. 143. *See also* FIDH & ADHOC, *Joint Submission to the Universal Period Review of Cambodia*, para. 4 (June 2013), *available at* https://www.fidh.org/IMG/pdf/fidh_adhoc_upr_submission-1.pdf.

46. Special Rapporteur, *supra* note 6, para. 143.

47. *Id.* para. 144.

48. *Id.* para. 145.

49. *See* Ian G. Baird, *'Indigenous Peoples' and Land: Comparing Communal Land Titling and Its Implications in Cambodia and Laos*, 54 ASIA PACIFIC VIEWPOINT 269, 272 (2013).

50. Land Law, NS/RKM/0801/14, arts. 25–26 (July 20, 2001).

51. *Id.* art. 23.

52. Special Rapporteur, *supra* note 6, para. 52. In 2009, the Government implemented

However, indigenous communities have still lost their lands as the result of land concession deals, despite their efforts to obtain legal status and receive collective land titles.[53] In an effort to aid indigenous communities in their pursuit of gaining collective land titles, the Government implemented the Interministerial Circular in May 2011 for the purpose of providing interim protective measures for registered indigenous communities who are in the process of applying for and receiving their collective land titles.[54] However, the Interministerial Circular has been mostly ineffective due to a loophole that excludes land that the Government has deemed is for investment or development before the Circular came into effect in May 2011.[55] Furthermore, the 2010 Committee on Elimination of Racial Discrimination reported the occurrence of land concession deals on indigenous lands "without full consideration or exhaustion of procedures provided for, under the land law and relevant sub-decrees."[56]

C. *Legal Framework and Procedures for Land Concessions*

While the Land Law sets out private ownership rights for individuals as well as indigenous communities, it also provides the legal framework for land concessions.[57] Under Article 48, a land concession is "a legal right established by a legal document under the discretion of the competent authority, given to any natural person or legal entity or group of persons to occupy a land and to exercise thereon the rights set forth by this law."[58] Land concessions are classified by the Government for two purposes—economic or social.[59] Land concessions that are for an economic purpose allow the occupiers of the land to clear it for "industrial agricultural exploitation of land" in Cambodia.[60] Additionally, under the Land Law, land concessions do not create ownership rights, but merely

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procedures to aid indigenous communities in registering and receiving their collective land titles. *Id.*

53. *Id.* para. 54.

54. *Id.* para. 123.

55. *Id.* para. 124.

56. Comm. on the Elimination of Racial Discrimination, Rep. on its 76th Sess., Feb. 15–Mar. 12, 2010, para. 16, U.N. Doc. CERD/C/KHM/CO/8-13 (Mar. 16, 2010). Additionally, the 2011 Committee on the Rights of the Child expressed concern for Cambodian civilians, particularly for the urban poor, small-scale farmers and indigenous communities, that they continue to be pushed off their land as a result of land-grabbing and forced evictions that are executed by people in positions of power. Comm. on the Rights of the Child, Rep. on its 57th Sess., May 30–June17, 2011, para. 61, U.N. Doc. CRC/C/KHM/CO/2 (June 20, 2011).

57. Land Law, NS/RKM/0801/14, ch. 5 (July 20, 2001).

58. *Id.* art. 48.

59. *Id.* art. 49. Land concessions for economic purposes may only be granted by the Ministry of Agriculture, Forestry and Fisheries. Special Rapporteur, *supra* note 6, para. 26.

60. Land Law, NS/RKM/0801/14, art. 49 (July 20, 2001).

usage rights for the term fixed by the concession contract.[61] The maximum term set by the Land Law for land concessions is ninety-nine years.[62] And the maximum land area that can be granted per land concession is 10,000 hectares.[63] It should be noted that despite the 10,000 hectare maximum, there is evidence that shows concessionaires have circumvented this limitation by obtaining separate but adjoining concessions and using them for similar purposes.[64] Furthermore, under Article 58, land concessions may only be given on lands that are privately owned by the State.[65] Notably, the Government owns between 75–80% of land in Cambodia under the status of "state land."[66]

Additionally, in 2005, the Government implemented the Sub-Decree on Economic Land Concessions, which establishes and regulates the procedures and legal framework surrounding the granting and management of economic land concessions.[67] The criteria set out by the 2005 Sub-Decree requires that land concessions should only be granted when the following conditions have been met:

> the land has been registered and classified as state private land; a land use plan has been adopted by the provincial or municipal state land management committee, and the proposed land use is consistent with the plan; environmental and social impact assessments have been completed with respect to the land use and development plan; there are solutions for resettlement issues, in accordance with the existing legal framework and procedures; there shall be no involuntary resettlement by lawful land holders and access to private land shall be respected; and public consultations have been conducted with territorial authorities and local residents relating to the concession proposal.[68]

The 2005 Sub-Decree on Economic Land Concessions also implemented a mandate to review pre-existing land concession deals for the purpose of recording their existence and monitoring their compliance with the provisions of the 2001 Land Law and relevant sub-decrees.[69]

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61. *Id.* art. 52.
62. *Id.* art. 61.
63. *Id.* art. 59.
64. Special Rapporteur, *supra* note 6, para. 97.
65. Land Law, NS/RKM/0801/14, art. 58 (July 20, 2001).
66. Neef et al., *supra* note 7, at 1086.
67. Special Rapporteur, *supra* note 6, para. 22.
68. *Id.* para. 26.
69. *See id.* para. 27.

D. *Methods of Redress for Land Right Disputes*

For land right disputes in Cambodia, there are five formal methods of redress: the Commune Councils, the Administrative Committees, the Cadastral Commission, the National Authority for Land Conflict Resolution, and the Cambodian court system.[70] The Commune Councils are able to reconcile differences of opinion between commune citizens but are unable to make decisions regarding land disputes.[71] Administrative committees are the first instance of formal redress in cases where disputes arise during the process of registering land but have no power to issue any decision; administrative committees may only assist disputing parties with resolving their conflicts.[72]

If the administrative committee is unable to resolve the land dispute, the case is forwarded to the Cadastral Commission.[73] The Cadastral Commission is also responsible for land disputes that occur outside areas adjudicated for systematic land registration.[74] The Cadastral Commission is divided into national, provincial, and district/khan divisions; the district/khan division only has the power to support reconciliation but not to render decisions, in cases where an agreement cannot be reached, the case will be referred to the provincial division.[75] The provincial division possesses the power to issue decisions, but if a case remains unresolved it is forwarded to the national division.[76] The National Cadastral Commission has the power to issue decisions, and unhappy parties can appeal the decision within 30 days by complaining to the court.[77] It should be noted that the Cadastral Commission does not possess jurisdiction over disputes regarding registered land, those disputes must be heard directly by the court.[78]

The National Authority on Land Dispute Resolution was established by a royal decree in 2006.[79] While it has authority to hear cases "beyond the competence of the National Cadastral Commission" and hear "complaints from everywhere involving land disputes," the National Authority on Land Dispute Resolution does not have a distinct place within the Cambodian legal framework for land dispute resolution.[80] As such, it is unclear how many cases the National Authority on Land

70. *Id.* para. 55.
71. *Id.*
72. *Id.* para. 56.
73. *Id.*
74. *Id.* para. 57.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* para. 58.
79. *Id.* para. 59.
80. *Id.*

Dispute Resolution has heard and decided.[81]

Lastly, the Cambodian court system is recognized as one of three separate powers by the Constitution of Cambodia, but it should be noted that in practice, the executive branch blurs the lines of separation and autonomy by supplying the judicial branch with resources or by appointing various judges to the bench.[82] It should also be noted that the judicial system has unduly criminalized those individuals and communities who chose to exercise their land rights; similarly, human rights defenders are targeted for exercising their right to freedom of expression and assembly in protesting land right violations.[83]

IV. THE INTERNATIONAL CRIMINAL COURT

Originally signed in 1998 and brought into force in 2002 under the Rome Statute, the International Criminal Court (ICC) is a permanent institution with the authority to exercise jurisdiction over individuals for the most serious crimes of international concern.[84] That jurisdiction is limited to: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[85] Additionally, the jurisdiction of the ICC is limited both spatially and temporally; the ICC is limited to prosecuting crimes that are committed on the territory of a State,[86] and only those crimes which occur after that State becomes a party to the Rome Statute and the Rome Statute comes into force in that State.[87] In the case of Cambodia, the Rome Statute was signed on October 23, 2000 and came into force on July 1, 2002.[88]

On October 7, 2014, a Communication was filed with the ICC requesting that a preliminary examination be initiated in Cambodia; the Communication alleged that members of the Cambodian government and others committed crimes against humanity under article 5 of the Rome Statute as a result of the pervasive and systematic land-grabbing that had been executed against the Cambodian people.[89] The remainder of Part IV

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81. *Id.*

82. *Id.* para. 181.

83. *Id.* para. 182. *See also* FIDH & ADHOC, *supra* note 45, para. 33.

84. Int'l Criminal Court [ICC], *Rome Statute of the International Criminal Court*, art. 1, ICC-PIDS-LT-01-002/11_Eng (2011), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter *Rome Statute*].

85. *Id.* art. 5.

86. *Id.* art. 12(2)(a).

87. *Id.* art. 11(2).

88. Int'l Fed'n for Human Rights, *Implementation of the Rome State in Cambodian Law*, at 7, n□443/2 (Mar. 2006).

89. Int'l Fed'n for Human Rights, *Cambodia: ICC Preliminary Examination Requested into Crimes Stemming from Mass Land Grabbing*, FIDH (Oct. 7, 2014), https://www.fidh.org/

of this Article will address the legal procedure behind the initiation of an investigation by the ICC, the elements of the crime against humanity of forcible transfer, how land-grabbing in Cambodia satisfies the elements of a crime against humanity of forcible transfer, and finally, will argue why the ICC should initiate an investigation in this case and ultimately prosecute those parties determined to be responsible.

A. *Legal Procedure for Initiating ICC Investigations*

For the ICC to exercise its jurisdiction over an Article 5 enumerated crime, the crime must be reported to the Office of the Prosecutor (OTP) by a State Party or by the U.N. Security Council, or it must be a situation where the OTP has initiated an investigation of the crime pursuant to Article 15.[90] Under Article 15, the OTP has the authority to initiate preliminary investigations *proprio motu*, or by one's own volition, based off information the OTP has received regarding crimes within the jurisdiction of the ICC.[91] After analyzing the seriousness of the information received and requesting any additional information that the OTP deems necessary, if the OTP concludes that there is a reasonable basis to proceed with a full investigation, the OTP shall request authorization to conduct such an investigation from the Pre-Trial Chamber.[92] If the Pre-Trial Chamber agrees with the OTP that there exists a reasonable basis to conduct an investigation and that the case falls within the jurisdiction of the ICC, then the Pre-Trial Chamber will authorize a full investigation to be conducted.[93] By having the Pre-Trial Chamber review each case submitted by the OTP for a reasonable basis to proceed, the power of the OTP to initiate an investigation and trigger the jurisdiction of the ICC is limited and helps to maintain the credibility of the ICC in its investigations and prosecutions.[94]

During the preliminary investigation, the OTP shall consider the factors set out in Article 53, paragraph 1(a) through (1)(c) of the Rome Statute in determining whether there is a reasonable basis to proceed with a full investigation.[95] The factors the OTP shall consider are the

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90. *Rome Statute*, *supra* note 84, art. 13.

91. *Id.* art. 15(1).

92. *Id.* art. 15(2)–(3).

93. *Id.* art. 15(4).

94. Int'l Criminal Court [ICC], Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, para. 18, ICC-01/09 (Mar. 31, 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf.

95. Int'l Criminal Court [ICC], *Rules of Procedure and Evidence*, at rule 48, ICC-ASO/1/3 (Sept. 2002), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf.

following: (a) whether there is a reasonable basis to believe that a crime has been or is being committed within the jurisdiction of the ICC, (b) whether the case would be admissible under Article 17 of the Rome Statute, and (c) whether there are substantial reasons to believe that a full investigation would not serve the interests of justice taking into consideration the gravity of the crime and the interests of the victims.[96]

Under Article 17, a case is admissible in the ICC if it has not or is not being investigated or prosecuted by the State which has jurisdiction over it, and if the case is of a sufficient gravity that would justify action by the ICC.[97] The gravity analysis undertaken requires an analysis of the scale of the alleged crime, the nature and manner of commission of the alleged crime, the impact of the alleged crime on victims, as well as the qualitative dimension of any aggravating circumstances that existed at the time of the commission of the crime.[98]

In reviewing the decision of the OTP that a reasonable basis exists to proceed with a full investigation, the Pre-Trial Chamber will review the information provided by the OTP with the consideration that the case is in a preliminary stage—as such, the Pre-Trial Chamber does not expect the information provided by the OTP to be "comprehensive" or "conclusive."[99] However, the Pre-Trial Chamber must be able to conclude that there exists a reasonable or sensible justification to believe that a crime falling under the jurisdiction of the ICC has been committed or is in the process of being committed.[100] Additionally, the Pre-Trial Chamber must review the OTP's conclusion in deciding whether the case is admissible under Article 17 of the Rome Statute.[101]

B. *Elements of Crime Against Humanity of Forcible Transfer*

While the crime against humanity of forcible transfer is just one subsection of the enumerated crimes against humanity, the ICC has set precedent regarding the elements of all listed crimes against humanity through the decision of Pre-Trial Chamber II regarding the situation in the republic of Kenya.[102] In that case, the Pre-Trial Chamber looked to Article 7(1) and 7(2)(a) of the Rome Statute in determining the following elements of a crime against humanity: "(i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the

96. *Rome Statute*, *supra* note 84, art. 53(1)

97. *See id.* art. 17.

98. *See* Int'l Criminal Court, *supra* note 94, ¶ 188.

99. *See* Morten Bergsmo & Pieter Kruger, *Article 53*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1069 (Otto Triffterer ed., 2d ed. 2008).

100. Int'l Criminal Court, *supra* note 94, para. 35.

101. *Id.* para. 69.

102. *See generally id.*

widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack."[103] Furthermore, Pre-Trial Chamber II and the ICC has written additional material that extrapolates the meaning of the elements of a crime against humanity.[104]

Regarding the first element, the ICC has interpreted the meaning of the term "attack" to be not only "military attacks" but any "course of conduct involving the multiple commission of acts."[105] The phrase "directed against any civilian population" has been interpreted to mean any group that is distinguished by nationality, ethnicity, or other distinguishing features.[106] To prove this element, the Prosecutor must present evidence that shows that the attack was directed toward the whole civilian population and not just toward arbitrarily selected individuals.[107] Additionally, the term "directed" implies a degree of planning or direction that the attack must include,[108] but there is no requirement that the plan or direction be the result of a discriminatory or official state policy.[109]

Regarding the second element of a "state or organizational policy," the ICC requires that a state or organization actively promote or encourage the attack directed against the civilian population.[110] The policy can be in the form of an attack with civilians as its object, but it can also be in the form of a state or organization's deliberate failure to respond in a given circumstance—but such a policy cannot be proven only by the absence of state or organizational action.[111] The policy need not be explicitly stated, but it must be thoroughly organized and follow a regular pattern, and it must involve public or private resources.[112]

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103. *Id.* para. 79.

104. *See generally* Int'l Criminal Court, *supra* note 94. The Pre-Trial Chamber regarding the situation in the Republic of Kenya did not extrapolate on the fifth element of "knowledge of the attack," as there was no identifiable suspect presented before the ICC at that time. *Id.* para. 79. For the purposes of this Article, that element will not be addressed as a suspect has not been specifically identified by the Communication submitted to the OTP. *See generally* Global Diligence, *supra* note 8. However, it should be noted that the lack of an identified, specific suspect has not prevented the Pre-trial Chamber from moving forward in a case and authorizing a full investigation. *See* Int'l Criminal Court, *supra* note 94, at 83.

105. Int'l Criminal Court [ICC], *Elements of Crimes*, art. 7, para. 3, ICC-PIDS-LT-03-002/11_Eng (2001), *available at* http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf. *See also* Int'l Criminal Court, *supra* note 94, para. 80.

106. Int'l Criminal Court, *supra* note 94, para. 81.

107. *Id.*

108. Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 48 (Jan. 1999).

109. *Id.* at 50.

110. Int'l Criminal Court, *supra* note 105, art. 7, para. 3.

111. *Id.* at 5 n.6.

112. Int'l Criminal Court, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*,

Additionally, the ICC has found that the element of "state or organizational policy" will be satisfied by any attack which is planned, directed, and organized, as opposed to spontaneous or isolated attacks of violence.[113] Furthermore, the ICC has held that the Pre-Trial Chamber may refer to a list of factors in determining whether there was a policy to commit an attack.[114]

For the third element of "the widespread or systematic nature of the attack," the ICC has determined that element to apply disjunctively, meaning that the attack must be either widespread or systematic, but does not have to be both in order for the element to be satisfied.[115] The disjunctive "widespread" element is satisfied when the attack is large-scale in nature and results in a multitude of victims.[116] As such, it is possible for a "widespread" attack to be the cumulative effect of multiple inhumane acts, or the single effect of an extraordinarily inhumane act.[117] Contrarily, an attack qualifies as "systematic" when there exists an organized, violent nature to the attacks and it is improbable that those acts occurred randomly.[118]

Regarding the fourth element of the "nexus between individual acts and the attack," the ICC considers whether an act forms part of an attack by looking at the nature, aims, and consequences of a particular act.[119] In

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para. 396, ICC-001/04-01/07-717 (Sept. 30, 2008), *available at* http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf. *See also* Int'l Criminal Court, *supra* note 94, para. 84.

113. Int'l Criminal Court, *supra* note 112, para. 396. *See also* Int'l Criminal Court, *supra* note 94, para. 84.

114. Int'l Criminal Court, *supra* note 94, para. 88. Those factors include:

> the general historical circumstances and the overall political background against which the criminal acts are set; the establishment and implementation of autonomous political structures at any level of authority in a given territory; the general content of a political programme, as it appears in the writings and speeches of its authors; media propaganda; the establishment and implementation of autonomous military structures; the mobilization of armed forces; temporally and geographically repeated and co-ordinated military offensives; links between the military hierarchy and the political structure and its political programme; alterations to the 'ethnic' composition of populations; discriminatory measures, whether administrative or other (banking restrictions, laissez-passer, . . .); the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.

Id. para. 87.

115. *See id.* para. 94.

116. *Id.* para. 95.

117. *Id.*

118. *Id.* para. 96.

119. *Id.* para. 98.

the case where acts are isolated and differ greatly from each other in their nature, aims, and consequences, there will not exist a nexus connecting those individual acts as part of a widespread or systematic attack.[120] In those instances, the fourth element of the "nexus between individual acts and the attack" would not be satisfied.

In addition to those elements established above for all crimes against humanity, for the specific crime against humanity of forcible transfer, the Prosecutor must prove that a state or organization "deported or forcible transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts."[121] Notably, the term "forcibly" is not limited to the use of physical force, but also includes the threat of force or coercion that causes fear of violence or duress, as well as the taking advantage of a coercive environment.[122] Additionally, those deported or forcibly transferred persons must have been lawfully present in the area they were deported or forcibly transferred from.[123]

C. *Land-Grabbing in Cambodia Satisfies the Elements of the Crime Against Humanity of Forcible Transfer*

It is clear from the evidence presented to the OTP that the land-grabbing crisis taking place in Cambodia has been the result of a widespread and systematic attack directed against the Cambodian civilian population. Reportedly, 770,000 Cambodian civilians have been forcefully evicted as a result of land-grabbing since 2000.[124] Additionally, the use of military-style force[125] in multiple reported incidents of land-grabbing qualifies the land-grabbing crisis in Cambodia as an "attack."

Furthermore, the attack on Cambodian civilians was perpetrated by the Royal Government of Cambodia as part of an unstated policy. Evidence suggests that the Ruling Elite capitalized on the lack of land tenure security and titling by conceding large portions of civilian land to foreign investors.[126] While the 2001 Land Law offered land ownership rights to both individuals and indigenous communities, evidence supports the proposition that the Government systematically excluded individuals and indigenous communities from receiving their ownership rights by

120. *Id.*
121. *Id.* art. 7(1)(d)(1).
122. Int'l Criminal Court, *supra* note 105, at 6 n.12.
123. *Id.* art. 7(1)(d)(2).
124. Global Diligence, *supra* note 8, para. 7.
125. Special Rapporteur, *supra* note 6, para. 158–59.
126. Global Diligence, *supra* note 8, para. 6.

claiming that the land was in dispute or of an unclear status,[127] or was reserved for investment purposes.[128] Furthermore, the factors set out for the Pre-Trial Chamber to determine whether a state policy exists, show that the forced evictions in Cambodia are the result of a state policy; the mobilization of armed forces, discriminatory measures, and the scale of the acts of violence—in particular, deportations and expulsions or the destruction of non-military property, indicate the existence of a state policy.[129] As proof of the scale of the state policy executed by the Government, over six percent of Cambodia's total population has been forced out of their homes and forcibly transferred to other areas as a result of land-grabbing.[130]

There is also evidence to suggest that this attack executed by the Government is of both a widespread and systematic nature. The attack qualifies as widespread in that the attacks are the result of the cumulative effect of multiple forced evictions on a vast multitude of victims,[131] as indicated by the purported 770,000 victims currently accounted for. Additionally, the land-grabbing executed by the Government qualifies as a systematic attack due to the organized, violent nature of the attacks; it is improbable that those acts occurred randomly.[132] Multiple, violent forced evictions have been reported to have been executed by the hands of armed state personnel; it is highly unlikely that these forced evictions have been random, unconnected events that were not planned and ordered by the executing Government, especially considering that after many forced evictions, the disputed land was conceded by the Government in large land concession deals. Along the same lines, the forced evictions as a result of land-grabbing are not individual acts, but are connected by a nexus to form an actual attack on the Cambodian civilian population. Evidence of the systematic exclusion from land titling programs and the military style execution of the forced evictions lends support to this element.

While the land-grabbing crisis in Cambodia satisfies all of the general elements of crimes against humanity, there is room for discourse regarding the specific elements of the crime against humanity of forcible transfer. For instance, to prove the crime against humanity of forcible transfer, the Prosecutor must show that those persons who were forcefully evicted were lawfully present on their land at the time of eviction. In the case of Cambodia, an unknown portion of those persons who were evicted did not have full ownership rights, as they were excluded from

127. Special Rapporteur, *supra* note 6, para. 143.
128. *Id.* para. 124.
129. Int'l Criminal Court, *supra* note 94, para. 87.
130. Global Diligence, *supra* note 8, para. 7.
131. Int'l Criminal Court, *supra* note 94, para. 95.
132. *Id.* para. 96.

titling programs or other protections of their rights. Therefore, the Government would argue that their eviction was lawful. However, the Communication submitted to the OTP by the Cambodian victims alleges that of the 770,000 who were evicted, a significant portion were lawfully present on their land at the time of their forced eviction.[133] Regardless of what may appear to be conflicting and inconclusive evidence presented to the OTP, at this point in the case, there exists a reasonable basis for the OTP to move forward and initiate a full investigation in order to determine just how many of those 770,000 persons were lawfully present when they were forcefully evicted; thus, ultimately satisfying that element of the crime against humanity of forcible transfer.

D. *Arguing for ICC Involvement in Cambodia*

Considering that the situation in Cambodia arguably satisfies all the elements of the crime of forcible transfer, the OTP should conclude that there is a reasonable basis to believe that a crime was committed in Cambodia such that the crime falls under the jurisdiction of the ICC. Additionally, the case in Cambodia is admissible under Article 17 because there have been no relevant or genuine national criminal investigations or proceedings relating to the crimes alleged in the Communication submitted to the OTP.[134] Furthermore, this case is admissible under Article 17 because there exists a sufficient gravity that would justify action by the ICC—the mere scale alone, affecting approximately 770,000 civilians, is enough to justify the gravity of the case, let alone considering the impact on the victims in losing their homes and livelihoods.[135]

It should be noted that if the ICC were to investigate and prosecute the crimes resulting from the land-grabbing crisis in Cambodia, a country currently in peacetime, it would be a case of first impression for the ICC.[136] However, crimes against humanity can occur during peacetime or times of civil strife.[137] During the initial discussions of the Rome Conference, the Committee of the Whole debated whether a crime against humanity must be limited to acts occurring in armed conflicts of an

133. Global Diligence, *supra* note 8, para. 13.

134. Int'l Fed'n for Human Rights, *supra* note 1, at 8. It should be noted that there have been criminal cases in the Extraordinary Chambers in the Courts of Cambodia regarding prior crimes against humanity committed by the Khmer Regime against Cambodian civilians in the 1970s. Int'l Fed'n for Human Rights, *Cambodia: Sentence of 2 former Khmer Rouge Leaders to Life Imprisonment is Historic*, FIDH (Aug. 7, 2014), https://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/eccc/15879-cambodia-sentence-of-2-former-khmer-rouge-leaders-to-life-imprisonment-is.

135. *See Rome Statute*, *supra* note 84, art. 17.

136. Int'l Fed'n for Human Rights, *supra* note 1, at 7.

137. Darryl Robinson, *supra* note 108, at 46.

international nature.[138] Ultimately, in adopting the Rome Statute, the Rome Conference eliminated the required connection between armed conflicts and crimes against humanity.[139] This elimination was essential for the ICC to be able to respond to crimes against humanity committed by governments against their own civilian populations.[140]

Additionally, the ICC has previously investigated and prosecuted crimes of forcible transfer in countries that were not at war.[141] In particular, the ICC has investigated a case of forcible transfer in Kenya, where from December 27, 2007 to February 28, 2008, approximately 350,000 people were displaced within the boundaries of Kenya as the result of post-election violence following the 2007–2008 national election.[142] The post-election violence stemmed from ethnic and political parties forcefully evicting rival ethnic and political parties by mobilizing and directing targeted attacks.[143] Large numbers of Kenyan civilians were forcefully evicted as a result of direct physical violence used against them, as well as the burning of their homes and the destruction of their property.[144] Notably, the Pre-Trial Chamber found no available information to indicate that the targeted civilians and communities were not lawfully present in the areas from which they were evicted, or that such evictions were justified under international law.[145] Furthermore, in analyzing whether the case was admissible, the Pre-Trial Chamber determined that the Republic of Kenya had not domestically prosecuted any party for the forced evictions that occurred within its borders that would have made up the main elements of the case the ICC would be potentially prosecuting.[146] Additionally, the Pre-Trial Chamber analyzed the gravity of the case pursuant to article 17 of the Rome Statute; the Pre-Trial Chamber determined that many aggravating circumstances existed–many Kenyan civilians lost their homes and suffered psychological trauma, as well as there being a corresponding increase in the spread of HIV/AIDS due to the forced evictions.[147] Considering all of the above, the Pre-Trial Chamber authorized the initiation of a full investigation into

138. Phylilis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 495 (1998).

139. *Id*. at 501.

140. Robinson, *supra* note 108, at 46.

141. Int'l Fed'n for Human Rights, *supra* note 1, at 7. The ICC has prosecuted and investigated cases in Darfur, the Democratic Republic of the Congo, and Kenya. *Id*.

142. Int'l Criminal Court, *supra* note 94, para. 157.

143. *Id.*

144. *Id.* para. 164.

145. *Id.* para. 165.

146. *See id.* para. 183–85. The Republic of Kenya indicated a desire to establish a special tribunal for prosecuting cases related to the post-election violence but the tribunal had not been established at the time of the review and decision by the Pre-Trial Chamber. *Id.*

147. *Id.* para. 194–95.

the forced evictions happening in Kenya.[148] In comparison to Cambodia, the case in Kenya serves to prove that the ICC has investigated cases of forcible transfer occurring domestically during peacetime.

An additional reason for ICC involvement in the land-grabbing crisis in Cambodia stems from the fact that domestic laws and methods of redress are insufficient to handle the alleged crimes. The fact that the Government has created loopholes to the laws and programs that should be awarding civilians full ownership rights to their land shows that the implementation and enforcement of Cambodian laws are insufficient in protecting its civilians from the occurrence and effects of land concession deals. Notably, scholars have attributed the land concession crisis to the failure or inability of the Government in implementing relevant policies, rather than a complete lack of policies in place to prevent forced evictions and land concession deals.[149] Additionally, the domestic methods of redress for those Cambodians who wish to fight the land concession deals are also insufficient. For many civilians, it is overwhelmingly difficult to submit a complaint for consideration by one of the land dispute resolution bodies; the process is time-consuming and procedurally burdensome, as well as expensive to the complainant, with costs usually incurred for transportation, lost wages, and legal assistance.[150] Furthermore, many complainants report that the decisions made by the land dispute resolution bodies are inconsistent, irregular, and subject to political corruption.[151]

For those Cambodian civilians who choose to fight the land concession deals by peacefully exercising their right to freedom of expression and assembly, they are increasingly subject to harassment, abuse, and violence by the Government or private security.[152] Moreover, the Government has made a practice of prosecuting the advocates of land and housing rights under charges of criminal incitement, defamation, and disinformation.[153] For example, Mam Sonando, an outspoken critic of the Government's land-grabbing, was arrested after reporting on the radio about the Communication sent to the OTP asking for the ICC to investigate and prosecute the situation as a crime against humanity.[154] The day following Mr. Sonando's radio broadcast, the Prime Minister of

148. *Id.* at 83.

149. *See* Sokbunthoeun So & Kheang Un, *Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform*, 84 PAC. AFF. 289 (2011).

150. Special Rapporteur, *supra* note 6, para. 177.

151. *Id.*

152. FIDH & ADHOC, *supra* note 45, para. 32.

153. *Id.* para. 33.

154. FIDH, LAND AND ENVIRONMENTAL RIGHTS DEFENDERS IN DANGER: AN OVERVIEW OF RECENT CASES 12 (Dec. 2013), *available at* https://www.fidh.org/International-Federation-for-Human-Rights/human-rights-defenders/international-and-regional-protection-of-human-rights-defenders/14326-land-and-environmental-rights-defenders-in-danger-a-compilation-of-recent.

Cambodia personally called for his arrest on national television.[155] Mr. Sonando was sentenced to a five year suspended prison term with eight months served for the instigation of crime, obstruction of public officials, and unlawful interference in discharge of public duties among other things.[156]

Similar to domestic methods of redress, international methods of redress have also been insufficient to remedy the crimes of forcible transfer that have occurred in Cambodia since 2002. In 2009, the Universal Periodic Review made 91 recommendations to the Cambodian Government for improvement of human rights, nine of which involved land, housing, and natural resource rights, and all of which the Cambodian Government accepted and committed to implementing.[157] In 2013, the Universal Periodic review found Cambodia to have largely failed in its implementation of the recommendations.[158] For example, the Government did improve somewhat in its issuance of land titles and the passage of a moratorium on new economic land concessions, but the implementation of these recommendations has been inconsistent.[159] Not surprisingly, despite the sporadic implementation of recommendations, land concessions and forced evictions have continued.[160] Furthermore, almost all of the economic land concessions granted after the moratorium was passed were in protected areas where indigenous communities resided.[161] It should be noted that on January 16, 2014 the Parliament of the European Union similarly urged that Cambodia cease land concessions and implement a moratorium on forced evictions until greater transparency and accountable legal framework can be established.[162] However, evidence suggests that in the first three months of 2014, approximately 20,000 Cambodian civilians were forcefully evicted as a result of land concession deals.[163]

Additionally, in December 2009, the United Nations published its eviction guidelines that provided the baseline standard for the relocation of civilians resulting from land concession deals.[164] The guidelines

155. *Id*.
156. *Id*.
157. FIDH & ADHOC, *supra* note 45, para. 2.
158. *Id.*
159. *Id.*
160. *Id.* paras. 2, 16.
161. *Id.* para. 17.
162. European Parliament resolution of 16 Jan. 2014 on the situation of rights defenders and opposition activists in Cambodia and Laos, (2014/2515(RSP)), para. 12, *available at* http://www.europarl.europa.eu/document/activities/cont/201401/20140122ATT78068/20140122ATT78068EN.pdf.
163. *See* Global Diligence, *supra* note 8, para. 7.
164. U.N. Office of the High Commissioner for Human Rights, Cambodia Office, *United Nations Commentary and Guidelines on Eviction and Resettlement*, at 5 (Dec. 2009), *available at*

recommended that states explore all possible alternatives to evictions and ensure full consultation and participation of affected communities throughout the entire process, as well as to provide adequate compensation and restitution for those who are relocated or lose land.[165] Despite the publication of the guidelines in Cambodia, forced, systematic evictions are still occurring.

Therefore, the evidence shows that both the domestic and international methods of combatting the land concession crisis and resulting forced evictions in Cambodia have been insufficient. Considering that the situation in Cambodia satisfies all the elements of the crime against humanity of forcible transfer to such a degree that there is a reasonable basis to believe that the crime has been committed, and considering that the case would be admissible under Article 17 of the Rome Statute, the OTP should request a full investigation to be initiated and proceed with prosecuting this case as a crime against humanity. It should be noted that by doing so, the ICC would not be opening the floodgates for all cases of forcible evictions or transfers of civilians, as not all evictions are part of a widespread and systematic attack such that it would rise to the level of being a crime against humanity.[166]

V. CONCLUSIONS

Land-grabbing is not only affecting those civilians in Cambodia, but in recent years has become a global human rights issue affecting many people in poor, developing countries.[167] If the ICC decides to move forward in investigating and prosecuting this case, the ripple effects would extend beyond just bringing justice to almost three-quarter of a million victims in

Cambodia. By taking this case, the ICC would set a precedent for its involvement in other areas of the world, where widespread, systematic land-grabbing is resulting in the forced eviction of civilians from their land. Additionally, for those foreign investors involved in land concession deals, ICC involvement would encourage greater diligence in ensuring that human rights are protected in the nation of investment throughout the land concession term. For those who cannot protect themselves, and for those who are not protected by their own government, the involvement of the ICC can secure peace, land rights, and a place to call home.

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http://cambodia.ohchr.org/WebDOCs/DocPublications/EvictionsGuidelines/EvictionGuidelines-EN.pdf.

165. U.N. Office of the High Commissioner for Human Rights, *supra* note 162, para. 13.

166. GLOBAL DILIGENCE, *supra* note 19.

167. *Id.*

HUMAN SEX TRAFFICKING: AN INTERNATIONAL PROBLEM WITH AN INTERNATIONAL SOLUTION REQUIRING NATIONAL IMPLEMENTATION

Melanie Franco[*]

At ten years old, Moe was raped by her stepfather and sold to his friends.[1] At the age of 14 she ran away from home, fell into drugs, and dropped out of high school.[2] Moe managed to return home at 17, thanks to the help of a relative in the police department.[3] Moe explained that she had met two women who offered her a place to stay but ended up forcing her to sell sex to middle-aged men who would pay in cash and drugs.[4] Moe was a child prostitute in the United States, which is a form of human trafficking under the federal Trafficking Victims Protection Act and under international law.[5]

Human trafficking, a form of slavery, is an international crisis

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[*] J.D. 2015, University of Florida Levin College of Law; B.A. 2012, University of Florida. I would like to dedicate this Note to my sister, who is and always will be my hero. I owe everything to my Lord and Savior Jesus Christ; it is by God's grace that I am where I am today. I am infinitely grateful to my parents for their unconditional love and support; it is thanks to their sacrifice that I have been able to achieve my dreams. I sincerely thank Professor Berta Hernandez for all of her ongoing support, encouragement, and guidance.

1. J. David McSwane, *The Stolen Ones*, *A Herald-Tribune Special Report,* HERALD-TRIB., (May 31, 2014), http://thestolenones.heraldtribune.com.
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.

affecting 27 million people worldwide.[6] There are several laws in place to combat human trafficking, both on an international scale and within individual nations. Each effort can fall into one of four conceptual and legal frameworks: law enforcement, human rights, women's and children's rights, and labor rights.[7] The law enforcement category focuses on trafficking as a violation of criminal laws, the human rights framework focuses on trafficking as a violation of the individual's established human rights against slavery and exploitation.[8] Labor rights and women's and children's rights are specialized categories within human rights.[9] Each of these perspectives is lacking because they only focus on one aspect of the problem.[10] The law enforcement framework "is excessively prosecution-focused," with little focus on prevention and is dependent on the "innocent victim."[11] The human rights frameworks focus on international instruments that provide rights to the individual, but lack the ability to do anything to prevent trafficking or to help the victim whose rights have been violated.[12] "Each of the [international] instruments suffers from inadequate enforcement and the limited ability of the applicable monitoring bodies to assess or impose meaningful sanctions or to grant relief."[13]

If the international human rights perspective takes the right approach to combat human trafficking but is lacking the necessary enforcement, then individual nations need to be the ones to implement international laws domestically. Perhaps then we will see a concerted effort and united front to combat human trafficking across nations worldwide. This applies particularly to the United States in the way it fails to comply with international law and yet holds other countries to its own standard. This problem becomes evident in the context of decriminalizing sex trafficking victims.

Sex trafficking often looks like prostitution, making it difficult to decipher between victims and willing participants. When it comes to children under the age of 18, there is consensus on the international and domestic level that the participants will automatically be treated as victims. But adults over the age of 18 do not have that same luxury. International law is clear in its intention to combat human trafficking and the United States is right behind it in its efforts. However, the United

6. Free the Slaves, https://www.freetheslaves.net (last visited Apr. 10, 2015).

7. Karen E. Bravo, *Toward a Labor Liberalization Solution to Modern Trafficking in Humans*, 102 AM. SOC'Y INT'L L. PROC. 66, 66 (2008).

8. *Id*. at 67.

9. *Id*.

10. *Id*.

11. *Id*.

12. *Id*.

13. *Id*.

States is continuously falling short, particularly in this area of criminalizing victims. This is partly because states and their legislation are not aligning with federal legislation. This then causes problems on the international level because U.S. laws are not aligning with U.N. laws. The United States continues to patrol other countries' efforts to combat human trafficking, even though it is itself in violation of international law. What we need is a unified effort and consensus between the United Nations and individual States to agree on how to approach human trafficking and how to end it.

Part I begins with an introduction to human sex trafficking, defining the problem and shining light on some statistics. Part II identifies and analyzes the elements of sex trafficking. Part III examines the international and domestic legislation in place and the differences in how each treats the criminalization of victims. Part IV analyzes the methods to monitor national efforts against human trafficking. Part V proposes the solution of allowing international law to be implemented and enforced nationally in order to effectively fight human trafficking.

I. INTRODUCTION

In 2000 the U.N. General Assembly, together with U.S. Congress, responded to the issue of modern-day slavery with an international instrument intended to suppress and eliminate trafficking.[14] This U.N. document is known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime.[15] This protocol defines human trafficking as

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude

14. *Id*.

15. U.N. General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (Nov. 15, 2000) [hereinafter *Protocol*].

or the removal of organs[16]

The United States has its own definition under the Trafficking Victims Protection Act (TVPA),

> a. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
> b. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. A victim need *not* be physically transported from one location to another in order for the crime to fall within these definitions.[17]

Each year, between 600,000 and 800,000 people are trafficked across international borders around the world, according to the U.S. Department of State.[18] These numbers include men, women, and children.[19] But these numbers do not include people that are trafficked within the same country. According to the definition of human trafficking by the U.N. protocol, there does not need to be the transportation from one country to another for it to be considered human trafficking.[20] The U.S. Department of Justice estimates that in the United States alone there are between 18,000 and 20,000 people trafficked every year, this includes both immigrants and U.S. citizens.[21]

Human trafficking exists in all 50 states and in over 150 countries around the world.[22] Trafficking generates $32 billion per year in international trade, according to the International Labor Organization.[23] Human trafficking is the second-largest criminal industry in the world, tied with arms dealing (drug dealing is first).[24]

The U.N. Office on Drugs and Crimes reports that three-quarters of

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16. *Id*.

17. Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2015).

18. Ben Cook, *Twenty-First Century Slavery*, IBA GLOBAL INSIGHT (Dec. 2013), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4eb71983-2b09-424e-a481-272c070cac81.42, 44 (Dec. 2013).

19. *Id*.

20. *Protocol*, *supra* note 15, art. 3.

21. Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 444 (2012).

22. *Id*. at 445.

23. Cook, *supra* note 18.

24. *Id*.

victims are women and girls.[25] The 2010 Trafficking in Persons Report indicated that women made up at least 56% of trafficking victims worldwide, while the Department of Justice in the United States estimates that women make up 94% of trafficking victims in general, and 99% of sex trafficking victims.[26] The reason both numbers are so close together is because sex trafficking accounts for 83% of all trafficking reports in the United States.[27] The discrepancy between the worldwide report and the U.S. report could be due to the fact that there is no completely accurate form of reporting.[28]

The problem with these figures is that while the authorities know some victims, there is still a plethora of victims that have not been discovered because of the hidden nature of this crime.[29] There is no way to get an accurate account of how many people are trafficked, especially considering the millions of victims of forced labor in general, which may or may not be traced back to trafficking.[30] Additionally, there is a lack of awareness in the legal profession and among the general population of the developed nations, which may in turn lead to an inability to determine whether or not a victim is being trafficked.[31]

As previously mentioned, three-quarters of human trafficking victims are female. This is according to the 2012 Global Report on Trafficking in Persons by the U.N. Office on Drugs and Crime based on 29,000 victims, where 59% were women, 17% were girls, 14% were men, and 10% were boys; therefore 76% were female and 27% were children.[32] The number of child victims varies per region.[33] In Europe and Central Asia, only about 16% of victims were children, while in Africa and the Middle East, 68% of the victims were children.[34] This same report indicates that two-thirds of the perpetrators of trafficking are men, although trafficking is the most common offense women are prosecuted and convicted for.[35]

The U.N. Office on Drugs and Crime defines a trafficking flow as the track between the origin and destination of at least five victims of trafficking.[36] In 2012, the Global Report on Trafficking in Persons

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25. *Id*.
26. Sheldon-Sherman, *supra* note 21, at 449.
27. *Id*.
28. Cook, *supra* note 18.
29. *Id*.
30. *Id*.
31. *Id*.
32. U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 10 (2012).
33. *Id.*
34. *Id*.
35. *Id*. at 10–11.
36. *Id*. at 15.

reported that there were a total of 460 trafficking flows across the globe.[37] This same report indicated that victims consisted of at least 136 different nationalities and were found in 118 different countries, out of the 26,700 victims whose nationality was detected.[38]

These statistics are general facts from both the United States and other countries, but this does not get to the root of the problem. It is evident that human trafficking is a severe problem because of the large number of victims all over the world, but because this affects more than just one region or country, there needs to be a concerted effort on all fronts to address the issue.

II. THE ELEMENTS OF SEX TRAFFICKING

Sex trafficking involves physical or sexual coercion, deception, abuse of power, and bondage; the same elements found within the definition of human trafficking in general.[39] Sex trafficking is commercial sexual exploitation, and includes both international and domestic cases in which there is no border crossing.[40] Third party contributors within the trafficking industry, colloquially known as "pimps" in the west, are common contributors to the sex trafficking industry.[41] The customers who take part in the sexual exploitation transaction, sometimes referred to as "johns," tend to be males of all ages, races, and socioeconomic backgrounds.[42]

Traffickers target the vulnerable members of society, such as the poor, unemployed, drug-dependent, uneducated, or disabled.[43] Any person, despite age or gender, can be a victim of trafficking, but it is argued that women tend to be most vulnerable because of their low-status and impoverished positions in societies around the world.[44] The most common example of sex trafficking involves a trafficker taking the guise of a pseudo international "agent," who will promise an arrangement of travel, as well as job placements for women from one country to another.[45] They lure women to accompany them by promising a better life through money, education, or employment opportunities they would not

37. *Id*. at 12.
38. *Id.*
39. Cook, *supra* note 18.
40. Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 210 (2015).
41. Stephanie M. Berger, *No End in Sight: Why the End Demand Movement is the Wrong Focus for Efforts to Eliminate Human Trafficking*, HARV. J.L. & GENDER 523, 528 (2012).
42. *Id*. at 540.
43. Sheldon-Sherman, *supra* note 21, at 448.
44. *Id*. at 448–49.
45. *Id.* at 449.

be able to achieve in their own country.[46] Some jobs that have been used to lure unsuspecting women in the past include positions as waitresses and nannies.[47] Oftentimes, children are sold into trafficking by their families, in return for financial compensation and promises of future compensation.[48]

Once these victims arrive at their destination, they then discover that they have been deceived, finding themselves in a brothel and subsequently being informed that they are sex workers.[49] Their passports, identification papers, and personal belongings are taken, making them completely dependent on their trafficker.[50] They are likely beaten, locked up, and threatened with deportation or threatened that their family will be attacked.[51] They are subject to inhumane treatment and slave-like conditions, facing constant physical and psychological abuse, severe health risks, and they are unable to escape.[52] Some of the women decide to forego attempting to get help, either because of a fear of law enforcement, deportation, or simply because they do not speak the local language and would not know where to get help.[53] Their only promise of freedom is to earn their purchase price through prostitution.[54] But their purchase price includes travel and every-day living expenses that are inflated and fictitious in order to keep the victim under the belief that she is forever indebted to her trafficker.[55] Even if they do manage to escape, they are often left unable to return home either because of travel expense, danger in their home country, or simply lack of resources.[56]

Domestic sex trafficking involves the same elements as international sex trafficking, except it does not involve the transfer of victims from one country to another. It often looks like Moe's case, where runaway teenagers are lured in through the trust of a female or the affection of a male until they are deprived of their freedom and basic human rights.[57] There are still the same elements of fraud, force, or coercion, they just look different than in the international context because the victims are not foreigners who do not speak English or have had their passports taken away. This is why it is slightly harder to detect victims of domestic sex

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46. *Id*.
47. Stephanie Mariconda, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 158 (2009).
48. Sheldon-Sherman, *supra* note 21, at 449.
49. Mariconda, *supra* note 47, at 158.
50. Sheldon-Sherman, *supra* note 21, at 449.
51. *Id*.
52. *Id*. at 449–50
53. *Id*. at 450.
54. *Id.*
55. *Id.*
56. *Id*.
57. McSwane, *supra* note 1.

trafficking. They simply look like prostitutes. So, unless law enforcement officers understand the dynamics of human trafficking, they will continue to treat the "prostitute" just like any other criminal.

III. LEGISLATION

A. *International*

The United Nations has worked since the 1950s to combat human trafficking, beginning with the 1949 U.N. Convention for the Suppression of the Traffic in Persons and Exploitation of Prostitution of Others.[58] "The Convention . . . embodies abolitionist policy . . . against the traffic in persons and the exploitation of the prostitution of others. This policy comprises the abolition of any form of the regulation of prostitution, the repression of the third party profiteers, the prevention of prostitution and the rehabilitation of its victims."[59] The Convention was not ratified by every country and came into force in 1951.[60] Fifty years later the 2000 Convention against Transnational Organized Crime was adopted, which became known as the Palermo Protocol and was responsible for the Trafficking Protocol.[61] The Trafficking Protocol is the first legally binding and international document to address trafficking and has the only definition that has been agreed upon for trafficking in persons.[62] It entered into practice in 2003 and has been signed by 117 countries.[63] The Palermo Protocol focuses on the protection of freedom, rather than the regulation of the movement of people, and established the "three P paradigm" of Prevention, Protection, and Prosecution to guide government action in combating trafficking in persons.[64] Since then, more than 150 countries have become parties to the protocol, and more than 140 have criminalized sex trafficking.[65] States that ratified this instrument commit themselves to taking measures against transnational

58. United Nations, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (1949), http://polis.osce.org/library/f/3655/2833/UN-USA-RPT-3655-EN-Text%20of%20the%20Convention.pdf.

59. *Id.*

60. *Id*.

61. U.N. Office on Drugs and Crime, U.N. Convention Against Transnational Organized Crime and the Protocols Thereto (2013), http://www.unodc.org/unodc/treaties/CTOC/.

62. *Id.*

63. U.N. Treaty Collection, U.N. Convention Against Transnational Organized Crime (2000), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf.

64. Megan Ross, *A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol*, 21 DUKE J. GENDER L. & POL'Y 325, 325 (2014).

65. U.N. Treaty Collection, *supra* note 63.

organized crime, the adoption of frameworks for extradition, legal assistance and law enforcement cooperation, and the promotion of training and technical assistance for building the necessary capacity of national authorities.[66] Its purpose is to facilitate international cooperation in investigating and prosecuting trafficking, and protect and assist human trafficking victims with full respect for their rights as established in the Universal Declaration of Human Rights.[67]

B. *National*

The Trafficking Victims Protection Act is the U.S. attempt to combat trafficking. It was passed by Congress and signed into law in 2000 by President Clinton.[68] It has three primary purposes: to punish traffickers, to support countries in preventing trafficking, and provide restorative services to trafficking victims.[69] Among the goals of the TVPA are: to institute preventative measures, provide tougher penalties for traffickers, and provide assistance and protection to victims.[70]

There are two approaches to the TVPA: a prosecutor-based approach and a victim-based approach.[71] The prosecutor-based approach focuses on strengthening legislation that criminalizes trafficking and enhancing law enforcement training.[72] The victim-based approach focuses on a victim-centered model for addressing trafficking by considering rehabilitative services over prosecutorial services.[73] Both approaches agree that some of the issues and concerns under the TVPA are the lack of federal prosecutions, the lack of state involvement in combating trafficking, and a lack of focus on rehabilitating and providing services for victims.[74]

One thing the TVPA does well is appropriately define sex trafficking to include any child under the age of 18. The TVPA defines sex trafficking as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[75] The purpose of the TVPA is to "combat . . . a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure

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66. U.N. Office on Drugs and Crime, *supra* note 61.
67. *Id.*
68. Sheldon-Sherman, *supra* note 21, at 445.
69. *Id*.
70. *Id*. at 452, 454, 456.
71. *Id.* at 446.
72. *Id*.
73. *Id*.
74. *Id*.
75. Marihug Cedeño, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 CORNELL J.L. & PUB. POL'Y 153, 169 (2012).

just and effective punishment of traffickers, and to protect their victims."[76] The TVPA defines a severe form of trafficking in persons as "a commercial sex act . . . in which the person induced to perform such act has not attained 18 years of age."[77] When the person being prostituted is under the age of 18, they are automatically considered victims of sex trafficking.[78] This is because age is one of the clearest methods of determining those who are definitely victims of sex trafficking and those who only may be victims, as opposed to willing participants.[79] This is because children under the age of 18 are not considered to be capable of freely choosing to engage in commercial sex.[80] If they are not old enough to consent to sex, they are not old enough to consent to commercial sex; therefore underage prostitution is sex trafficking, regardless of whether they see themselves as victims or not.[81] The TVPA codifies this notion because for the purposes of the act, a person is considered a child when they are below the age of 18.[82] While adults subject to trafficking have to prove force, fraud, or coercion, children are exempt from such an obligation because it is automatically assumed they are victims.[83] The TVPA recognizes that a child does not have the ability to consent.[84] How a child wound up being exploited does not matter, they are automatically considered a victim of sex trafficking when they are a child subject to sexual exploitation.[85] "There should be no criminal liability for children involved in [prostitution], and such should be clearly stated in national legislation. Regardless of whether a child is a compliant victim or a non-cooperative witness, the fact remains that he or she is a child victim."[86]

A victim of a severe form of trafficking can qualify for protections under the federal government.[87] Among these protections is the guarantee that law enforcement will not detain a victim in a facility inappropriate for a victim, such as a prison.[88] Federal agents must place victims in

76. *Id*.

77. Trafficking Victims Protection Act, 22 U.S.C. § 7102 (2013).

78. Dempsey, *supra* note 40, at 210.

79. *Id*.

80. *Id*.

81. *Id*. at 211.

82. *Id.*

83. Lydia Butler, *Modern-Day Slavery Eclipsing the Sunshine State Compels Safe Harbor Legislation in Florida*, 7 INTERCULTURAL HUM. RTS. L. REV. 191, 217 (2012).

84. Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 915 (2006).

85. *Id*.

86. International Centre for Missing and Exploited Children, Child Pornography: Model Legislation and Global Review (2008), http://www.missingkids.com/en_US/archive/documents/CP_Legislation_Report.pdf.

87. Adam S. Butkus, *Ending Modern-Day Slavery in Florida: Strengthening Florida's Legislation in Combating Human Trafficking*, 37 STETSON L. REV. 297, 320 (2007).

88. *Id*.

domestic like shelters or housing for victims of abuse, and are discouraged from incarcerating trafficking victims because punishment is inconsistent with their victim status.[89] The TVPA recognizes that prosecuting prostituted minors is stigmatizing, marginalizing, and re-traumatizing for victims.[90] It takes into account that being prosecuted as a child prostitute establishes a criminal record which can lead to an enhanced criminal sentence later.[91] The victim is entitled to receive medical care, access to translation services and federal anti-trafficking programs, as well as the right to learn about their rights.[92] The TVPA also provides protection from the trafficker by giving the option to conceal the identities and locations of victims from traffickers, and even victims' families may be brought into protection.[93] Assistance is granted immediately to children and not conditioned on providing reasonable assistance in investigating and prosecuting traffickers.[94]

There is a separate provision for the interim assistance of children.[95] The Secretary of Health and Human Services must first determine whether the child is eligible, but this does not affect the child's victim status at all.[96] Even after the period of interim assistance, a child may be eligible for long-term assistance.[97] Cooperating with law enforcement is not a condition for which children may be eligible to receive long-term assistance.[98] Through this provision, children are eligible for protection longer than adults.[99]

The TVPA was originally intended to focus on foreign victims of human trafficking, but nothing in the TVPA precludes protection and services to domestic minors.[100] It therefore serves to protect and address the needs of both domestic and foreign youth victims.[101] Congress has acknowledged the need to help domestic trafficked youths in new provisions added to the TVPA in 2005, including a program to establish residential rehabilitative services for child victims encountered by state

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89. Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1792 (2012). *See also id.* at 1810.

90. *Id*. at 1820.

91. *Id*.

92. Butkus, *supra* note 87.

93. Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 257 (2008).

94. *Id*. at 255.

95. 22 U.S.C. § 7105 (2015).

96. *Id*.

97. *Id*.

98. *Id*.

99. *Id*.

100. Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 40 (2011).

101. *Id*. at 42.

law enforcement.[102] The federal government also recognized the needs of domestic victims by directly mentioning funding appropriations for programs aimed at domestic victims.[103] There was also additional training provided for federal and local law enforcement since they are typically unaware of how to treat youth prostitution cases and are the ones who address them as criminals.[104] The TVPA has always recognized that sexually exploited children are victims of a severe form of human trafficking; therefore, prostituted children qualify under the TVPA as severely trafficked.[105] This is in direct contrast to the idea of prosecuting child victims.[106]

Even though the TVPA is not perfect, it is an efficient and effective tool in combatting modern-day slavery and protecting child victims.[107] However, it is missing a localized approach to supplement it; it needs state legislation to enforce the goals of the TVPA at the local level.[108] It is also missing the same efforts to protect adult victims from being criminalized.

In the United States, 32 states have not decriminalized child victims and no state has decriminalized adult victims of sex trafficking.[109] Of the 18 states that have prohibited the criminalization of child sex trafficking victims, their legislation calls for child-protective response to juvenile prostitution, granting full immunity to child victims and specialized service to assist and not punish these victims.[110] Without these laws, prostituted children would be adjudicated delinquent or prosecuted in the adult criminal justice system.[111]

C. *Differences*

Both national and international legislation recognizes prostituted children as victims of sex trafficking under the TVPA and the Palermo Protocol.[112] The amount of states lacking legislation to protect child victims, however, is a breach of U.S. obligations under international law.[113]

Although the TVPA's efforts to protect child victims are adequate, it

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102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*. at 40–41.
106. *Id*. at 41.
107. Butler, *supra* note 83, at 224.
108. *Id*.
109. Dempsey, *supra* note 40, at 209.
110. *Id*. at 211.
111. *Id*. at 211–12.
112. *Id*. at 211.
113. *Id*. at 209.

is also missing the need to protect adult victims. It is understood that children are especially vulnerable and require extra protection, but no victim of any age should be treated as a criminal. "Adults who perform a commercial sex act induced by force, fraud, or coercion count as victims of sex trafficking," as agreed upon by (many) state laws, the TVPA, and the State Department's Annual Trafficking in Persons Report.[114] The problem is that the adult victim must be able to prove force, fraud, or coercion, which is difficult to do when arrested by a police officer.[115] Law enforcement should be trained to be able to detect signs of force, fraud or coercion when they encounter a victim. But only 29 states require law enforcement training in identifying trafficking victims.[116] This lack of training is what leads police officers to arrest victims and treat them like criminals; they cannot differentiate between a criminal and a victim because they are not aware of what constitutes a victim.[117] Victims rarely self-identify as victims, either because they do not realize that they are victims, or because they are afraid of the police, or perhaps even because they are afraid of their trafficker.[118] It also happens that even if they do identify as victims when encountered by law enforcement, they may still be treated as criminals and get arrested.[119] Part of the problem as to why victims are still criminalized is the disconnect between policy makers, law enforcement agencies, and non-governmental organizations providing services to victims, all striving to achieve their own prioritized goals.[120]

Another issue is whether sex trafficking goes beyond cases using force, fraud or coercion, and includes cases that involve an abuse of power or a position of vulnerability.[121] The international protocol does include this notion in its definition, and since the United States has ratified this protocol its legislation should conform to such a definition.[122]

The U.N. Special Rapporteur on Trafficking in Persons observed:

> For the most part, prostitution as actually practiced in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and

114. *Id*. at 212.
115. *Id*.
116. *Id*.
117. *Id*. at 213.
118. *Id.*
119. *Id.*
120. Sheldon-Sherman, *supra* note 21, at 445.
121. Dempsey, *supra* note 40, at 213.
122. *Id*. at 214.

> vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity, and poverty. Put simply, the road to prostitution and life within "the life" is rarely one marked by empowerment or adequate options.[123]

This is an international perspective, but here in the United States the idea differs. The United States continues to define trafficking according to the narrow criteria requiring proof of force, fraud, or coercion.[124] In the same way, that is what law enforcement is relying on, which is why it is so difficult to identify a victim.[125] And when victims cannot be identified, they are treated as criminals, even though under international law they are clearly trafficking victims.[126]

The United States has ratified international instruments and is therefore required under international law to comply and decriminalize victims of sex trafficking, or else be in violation of that law. The U.N. Human Rights Committee recently expressed concern over the continued criminalization of victims of sex trafficking on prostitution-related charges.[127] "The Committee criticized current practices and directed the United States to 'take all appropriate measures to prevent the criminalization of victims of sex trafficking.'"[128] Article 2 of the Protocol states that its purpose is "'to protect and assist the victims of such trafficking, with full respect for their human rights.'"[129] Article 4 establishes obligations regarding "'assistance to and protection of victims of trafficking in persons.'"[130] The protocol does not explicitly prohibit criminalization, but it is not consistent with the rest of the protocol to do so.[131] The U.S. failure to identify victims leads to criminalization of victims and is therefore in violation of the Protocol.[132]

Europe put into force the European Union Trafficking Directive in April of 2013, stating that trafficking victims should be protected from prosecution or punishment for criminal activities.[133] Europe recognized that this is essential since victims often use false documents, or are arrested for prostitution or illegal immigrant status.[134] The Directive establishes that victims are deprived of their ability to consent, have

123. *Id*.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Id*. at 216.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*. at 217.
132. *Id*.
133. Cook, *supra* note 18, at 49.
134. *Id*.

undergone trauma and are forced into this criminal activity and so reinforces that it is important to recognize them as victims and not criminals.[135] Europe is therefore taking appropriate measures to combat trafficking and decriminalize victims, in accordance with international law. Perhaps the United States should do the same.

IV. REPORTING METHODS

Every year for the past fifteen years the United States has put together and released the Trafficking in Persons Report.[136] This report has a multi-tier system ranking and assigning each world country according to their governments' efforts to comply with the minimum standards for the elimination of trafficking.[137] The minimum standards set forth, as according to the Trafficking Victims Protection Act are as follows:

> (1) The government . . . should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
> (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
> (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.
> (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.[138]

Tier rankings are based on an assessment of the enactment of laws prohibiting severe forms of trafficking, provisions of criminal punishments for trafficking offenses, criminal penalties for human trafficking amounting to at least four years' deprivation of liberty or more severe, implementation of human trafficking laws, victim identification measures, and government funding to provide victims with necessary

135. *Id*.
136. Dempsey, *supra* note 40, at 217.
137. *Id*.
138. Trafficking Victims Protection Act, 22 U.S.C. § 7106 (2013).

resources.[139] Other things that are taken into account are the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking; the extent to which the country's government does not comply with the TVPA's minimum standards; and the extent to which officials have been complicit in severe forms of trafficking.[140] It also looks at what reasonable measures have been taken to bring the government into compliance with the standards while considering the government's resources and capabilities to address and eliminate severe forms of trafficking in persons.[141]

Countries in Tier 1 are those that fully comply with the Trafficking Victims Protection Act's minimum standards, have acknowledged the existence of human trafficking, and have made efforts to address the problem.[142] Governments within this tier need to demonstrate progress in combating trafficking to maintain their ranking within the top tier.[143] These include the United States, Canada, Nicaragua, Colombia, Australia, South Korea, Israel, Taiwan, New Zealand, and most of the countries in Western Europe.[144] Tier 2 countries are those whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to do so.[145] There is also a watch list for those countries that fall into this category that have a significantly increasing number of victims and are not providing evidence of increasing efforts.[146] Africa, South America, and Eastern Europe are comprised of mainly tier 2 and tier 2 watch list countries.[147] Tier 3 consists of the countries that do not fully comply with the minimum standards and are not making an effort to do so.[148] Countries such as China, Russia, Cuba, North Korea, Papua New Guinea, and a few others within Africa and the Middle East fall within this category.[149]

The United States, a country under international obligation, is judging other countries' efforts to comply with its own standards. "If countries rank high, they remain in good standing with the United States and receive praise for appropriately tackling human trafficking. If countries rank poorly, they face a range of negative consequences, including the

139. U.S. Dep't of State, Trafficking in Persons Report (2013), *available at* http://www.state.gov/documents/organization/210737.pdf (last visited Oct. 19, 2015).

140. *Id.* at 46.

141. *Id.*

142. *Id*. at 41.

143. *Id*.

144. *Id.* at 56.

145. *Id*. at 44.

146. *Id*.

147. *Id.* at 57, 59, 62.

148. *Id*. at 46.

149. *Id.* at 57–61.

imposition of unilateral sanctions by the United States."[150] One of the criteria to determine compliance with minimum standards is the decriminalization of trafficking victims.[151] The United States expects other countries to "ensure[] that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked."[152] So the United States will impose sanctions on countries that arrest and prosecute a sex trafficking victim for prostitution and deem the country noncompliant with "minimum requirements for the elimination of human trafficking."[153] However, the United States is not following its own rules because sex trafficking victims are continuously incarcerated, fined, or penalized in the United States.[154] Yet, international law does not enforce or impose sanctions on the United States for its noncompliance.[155] "[T]he United States holds itself out as the 'global sheriff' on trafficking, demanding that other countries refrain from criminalizing victims in their own criminal justice systems."[156] "The continued criminalization of sex trafficking victims in many states . . . results in a situation where the federal government . . . hypocritically demands a level of compliance from foreign countries that it cannot effectively achieve within its own borders."[157] Another problem is that the United States is judging these countries based on its own national legislation, the TVPA.[158] It is holding other countries to its own standards, as opposed to International standards as set forth in the Protocol, when most of these countries have also ratified the protocol.[159] If the United States and the other countries have ratified such international instruments, and the United States wants to help enforce combative measures, it should be holding itself and every country to international standards.

The Trafficking in Persons Report is an efficient way to gauge each country's progress in anti-trafficking efforts. It categorizes each country's compliance with minimum standards, tracks their improvement, and lays out ways in which every government can improve.[160] It is a great way to monitor the overall increase in the efforts against trafficking, as well as discover what areas of the globe still need the most improvement. But it should come from an international

150. Dempsey, *supra* note 40, at 217.
151. *Id.* at 218.
152. *Id*.
153. *Id*.
154. *Id*.
155. *Id*.
156. *Id.*
157. *Id*. at 218.
158. U.S. Dep't of State, *supra* note 139, at 41.
159. *See id.* at 7 (noting that more than 150 countries have become parties to the protocol).
160. *Id.* at 1.

perspective, not from the United States.

In 2007, the U.N. Office on Drugs and Crime (UNODC) initiated the U.N. Global Initiative to Fight Human Trafficking (UN.GIFT) to promote the global fight on human trafficking.[161] It is based on the principle that "human trafficking is a crime of such magnitude and atrocity that it cannot be dealt with successfully by any government alone. This global problem requires a global, multi-stakeholder strategy that builds on national efforts throughout the world."[162] This is the approach the world should be taking: a concerted global effort to approach human trafficking.

Through UN.GIFT, the UNODC began a research project known as the Global Report on Trafficking in Persons that gathers data on national responses to human trafficking from 155 countries.[163] The Report measures the areas of legal and institutional framework, criminal justice response and victim assistance services in an effort to monitor trafficking trends and develop effective ways to stop it.[164] This should be the dominant and default method of reporting countries' progress in its efforts against human trafficking. A neutral and unbiased international organization should use the international standards already in place and make sure each country is in compliance.

V. CONCLUSION

Human trafficking is an international problem because it occurs in and between many countries throughout the world. The United Nations has established a protocol that addresses human trafficking and how to approach it. Countries have signed onto the protocol and have their own domestic legislations in place as well. But there is a discrepancy between the international legislation, the national legislation, and what is actually happening in the streets of cities. This is particularly true with respect to how victims are being treated in the United States. If there were a uniform approach, if the international law actually took effect in each country and was implemented in state laws in the United States, then perhaps we may see a dent being made in the fight against human trafficking. Human trafficking is a major problem that will take a unified effort to overcome. Victims need every nation and citizen to

161. U.N. Office on Drugs and Crime, About UN.GIFT, UN.GIFT.HUB, http://www.ungift.org/knowledgehub/en/about/index.html (last visited Oct. 19, 2015).

162. *Id*.

163. U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons (2009), available at http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html (last visited Oct. 19, 2015).

164. *Id.* at 12.

care and have the knowledge to identify vicitims in order to put an end to the atrocities.

CASE COMMENT

INTERNATIONAL LAW: HONORING THE LETTER AND SPIRIT OF INTERNATIONAL TREATIES
Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014)

Andres R. Cordova[*]

FACTS

Petitioner sought to have the Supreme Court equitably toll the one year period for seeking return of his abducted child under Article Twelve of the Hague Convention of International Child Abduction (Convention).[1] Petitioner filed in district court for the immediate return of his child to the United Kingdom.[2] Article Twelve of the Convention mandates the return of an abducted child when a parent files a petition for the child's return one year or less from the date of abduction.[3] After the one year period, the courts must order the child's return unless the child has become settled in its new environment.[4] Petitioner contended that the concealment of his child by Respondent was an extraordinary circumstance that prevented him from filing within a year of the child's abduction.[5] The district court denied Petitioner's petition because the one year period in Article Twelve had expired, the common-law doctrine of equitable tolling did not apply to the one year period, and the child had become settled in the United States.[6] Petitioner appealed the district court's decision to the Second Circuit, which affirmed.[7] Petitioner then appealed to the Supreme Court of the United States, which granted certiorari in order to determine whether Article Twelve's one year period

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1. Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1228 (2014).
2. Lozano v. Montoya Alvarez, 809 F. Supp. 2d 197, 202 (2011).
3. Convention on the Civil Aspects of International Child Abduction art.12, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11 [hereinafter Hague Convention]. This remedy is only available where the petitioning parent establishes that the child has been wrongfully removed from the state of its habitual residence. *See id.* art. 3 (defining wrongful removal).
4. Hague Convention, *supra* note 3, art. 12.
5. *Lozano*, 809 F. Supp. 2d at 226.
6. *Id*. Petitioner filed the petition for return on November 10, 2010 and his child was removed from the United Kingdom on July 3, 2009. Thus, the one year period of automatic return had expired. *Id*. at 219.
7. Lozano v. Montoya Alvarez, 697 F.3d 41, 45 (2012).

is subject to equitable tolling.[8] HELD, Article Twelve's one year deadline is not subject to equitable tolling because equitable tolling is contrary to the intent of the parties to the Convention.[9]

II. HISTORY

A. *The Hague Convention*

The Convention is an international treaty whose primary goals are: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) "to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[10] The Convention is a non-self-executing treaty that has been implemented in the United States by the International Child Abduction Remedies Act (ICARA).[11] Under Article Twelve of the Convention, a petitioning parent can seek the immediate return of a child to the child's country of habitual residence when the child has been "wrongfully removed or retained," and "a period of less than one year has elapsed from the date of the wrongful removal or retention."[12] After one year, the "Settled Defense" becomes available, which compels the courts to consider whether the child has become "settled in its new environment."[13] Article Twelve is intended to discourage parents from abducting children in order to forum-shop in the hopes of gaining a legal advantage in custody disputes.[14]

B. *U.S. Common-Law*

A statute of limitation is "[a]law that bars claims after a specified period."[15] A statute of limitations is presumptively subject to equitable tolling.[16] "Equitable tolling is a common-law doctrine that allows a litigant to toll a statute of limitations when the litigant establishes two

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8. Lozano v. Montoya Alvarez, 133 S. Ct. 2851 (2013).

9. Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1236 (2014).

10. Hague Convention, *supra* note 3, art. 1.

11. International Child Abduction Remedies Act (ICARA), 42 Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended 22 U.S.C. §§ 9001–9011 (2015)).

12. Hague Convention, *supra* note 3, art. 12.

13. *Id*. *See Lozano*, 134 S. Ct. at 1234 ("the expiration of the 1-year period opens the door to consideration of . . . the child's interest in settlement").

14. *See* Elisa Perez-Vera, Explanatory Report, para. 16 [hereinafter Perez-Vera Report], *available at* www.hcch.net/upload/expl28.pdf. Elisa Perez-Vera is recognized as the official reporter for the Hague Conference. *See* Lozano v. Montoya Alvarez, 697 F.3d 41, 52 (2012).

15. BLACK'S LAW DICTIONARY (9th ed. 2009).

16. Young v. United States, 535 U.S. 43, 49 (2002).

elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[17]

C. *The Current State of the Law*

Prior to the instant case, the Supreme Court had not addressed the applicability of equitable tolling to the Convention.[18] However, several circuit courts had addressed the issue.[19] Generally, the courts that have found equitable tolling applicable have concluded that: (1) equitable tolling is necessary to deter child abduction by parents seeking access to defenses that would otherwise be unavailable, and (2) the one year period qualifies as a statute of limitations, which is presumably subject to equitable tolling.[20] For example, in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the Eleventh Circuit affirmed a district court's decision to toll the beginning of the one year period to the date when a petitioning parent discovers the whereabouts of his or her child.[21] The *Furnes* Court concluded that the petitioner had made diligent efforts to locate his child, and therefore, the goals of the Convention would be furthered by denying any benefit to the respondent that derived from the child's concealment.[22] Notably, the *Furnes* court presumed that the one year period in Article Twelve, and codified in ICARA, constituted a statute of limitations.[23]

In *Lozano v. Montoya Alvarez*, predecessor to the instant case, the Second Circuit held that Article Twelve is not subject to equitable tolling.[24] First, the Second Circuit concluded that the one year period is not a statute of limitations since the remedy of return continued to be available after one year.[25] Thus, the Second Circuit rendered irrelevant any presumption that equable tolling applied to the one year period.[26] The Second Circuit relied extensively on the drafting history of the Convention to conclude that equitable tolling was not intended to apply

17. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

18. *Lozano*, 134 S. Ct. at 1231.

19. *See e.g.,* Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004) (indicating that the one year period is subject to equitable tolling where an abducting parent conceals the child's whereabouts). *Contra Lozano*, 697 F.3d at 45 (holding that equitable tolling is inapplicable to the one year period and the Convention).

20. *Furnes*, 362 F.3d at 723.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Lozano*, 697 F.3d at 52.

25. *Id*. "Unlike a statute of limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residence." *Id*.

26. *Id*.

to the Convention.[27]

II. INSTANT CASE

In the instant case, the Supreme Court affirmed the Second Circuit by holding equitable tolling inapplicable to the one year period provided by Article Twelve.[28]

First, the Court emphasized that the Convention is a treaty, and therefore, its interpretation is not aided by the general rules of common-law.[29] Thus, although statutes of limitations are presumptively subject to equitable tolling at common-law, the Court considered this presumption immaterial.[30] Notably, the Court made clear that it considered ICARA irrelevant since ICARA does not address equitable tolling and because ICARA does not purport to alter the Convention.[31]

Second, the Court determined that the parties to the Convention did not intend for equitable tolling to apply to the Convention.[32] Notably, Petitioner failed to identify a background principle of equitable tolling shared by the parties to the Convention.[33]

Third, assuming *arguendo* that the parties to the Convention shared equitable tolling as a background principle of law, the Court concluded that the one year period is not a statute of limitations since the remedy of return could still be pursued after the one year period.[34] Thus, the one year period is not a statute of limitations.[35]

Finally, the Court addressed Petitioner's argument that equitable tolling should apply to the one year period because its application would further the Convention's goal of deterring child abductions.[36] However, the Court noted that the Convention does not pursue this goal at any

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27. *Id*. at 52–54 (indicating that the Hague Convention's drafters "saw value in agreeing to a 'single time-limit of one year' and setting aside 'the difficulties encountered in establishing a child's whereabouts.'") (quoting Perez-Vera Report, *supra* note 14, para. 108).

28. *Lozano*, 134 S. Ct. at 1236.

29. *Id.* at 1232–34.

30. *Id.* at 1233.

31. "The provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention." *Id.* (alteration in original) (quoting ICARA § 9001(b)(2)).

32. *Id*.; *see* Olympic Airways v. Husain, 540 U.S. 644, 650 (2004) (indicating that the courts are tasked with interpreting treaties in a manner that is "consistent with the shared expectations of the contracting parties") (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).

33. As a matter of fact, "Lozano concede[d] that in the context of the Convention, 'foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that we have.'" *Lozano*, 134 S. Ct. at 1233 (quoting Transcript of Oral Argument at 19-20, *Lozano*, 134 S. Ct. at 1233 (No. 12-820)).

34. *Id.* at 1234.

35. *Id*.

36. *Id*.

cost.[37] In the Court's view, applying equitable tolling to the one year period would essentially rewrite the Convention.[38] Further, the Court noted that concealment is generally considered a negative factor when determining whether the Settled Defense applies.[39] Thus, the doctrine of equitable tolling is not needed in order to deal with concealment.[40]

III. ANALYSIS

A. *The Applicable Rules of Interpretation*

In deciding the instant case, the Supreme Court emphasized that different rules of interpretation apply to international treaties and domestic legislation.[41] Domestic legislation is enacted "against a background of common-law principles," whereas, international treaties are essentially compacts between parties the parties to a treaty.[42] Thus, when interpreting a treaty, the intent of the parties is dispositive.[43] By focusing its analysis on the intent of the parties to the Convention, the Court announced to the international community that the United States will not obscure the meaning of the treaties to which it is a signatory. This message is especially meaningful as applied to the Convention because of ICARA.

Arguably, the Court could have concluded that United States common-law applied to the interpretation of the Convention since ICARA is federal legislation.[44] However, the Court rejected this approach without much discussion.[45] The Court's analysis on this point opens the door to conflicts between implementing statutes and their underlying international treaties. For example, what result would the Court reach if confronted with implementing legislation that is properly considered a statute of limitations? Further, what if the intent of the parties to the treaty is unclear? In the wake of *Lozano*, the answers to these questions are not clear.[46]

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37. *Id*.
38. *Id*. at 1235.
39. *Id*. at 1236.
40. *Id*.
41. *Id*. at 1233–34.
42. Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991).
43. United States v. Choctaw Nation, 179 U.S. 494, 535 (1900).
44. Most courts that have found equitable tolling applicable have done exactly this. *See e.g.*, *Furnes*, 362 F.3d at 723.
45. *Lozano*, 134 S. Ct. at 1233–34. "Congress' mere enactment of implementing legislation did not somehow import background principles of American law into the treaty interpretation process, thereby altering our understanding of the treaty itself." *Id*.
46. One possible solution would be for the eradication of implementing statutes and the

B. *The Intent of the Parties to the Hague Convention*

The parties to the Convention did not intend for equitable tolling to apply to its provisions.[47] As the Court noted, the drafters of the Convention wrestled with the one year deadline.[48] Nonetheless, the drafters chose the deadline in order to create a bright-line rule for when a child's interests should take precedence over the interests of the child's petitioning parent.[49] Thus, the Court refused to second-guess Article Twelve.[50]

C. *Is the One Year Period a Statute of Limitations?*

The Court's decision to address whether the one year period is a statute of limitations was unnecessary since the Court had already concluded that ICARA was immaterial to its analysis and that the drafters of the Convention did not intend for equitable tolling to apply.[51] Nonetheless, the Court addressed the issue, possibly in an attempt to avoid more complex constitutional issues, such as whether common-law presumptions could theoretically apply to implementing legislation.[52]

A statute of limitation is "[a]law that bars claims after a specified period."[53] Thus, if the one year period is a statute of limitations, a petitioner under Article Twelve would be barred from seeking the remedy of return after one year. However, this is not the case.[54] The Court made clear that the one year period is not a statute of limitations since the remedy of return continues to be available after one year.[55] The expiration

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distinction between self-executing and non-self-executing treaties since treaties are arguably effective at the moment of their ratification under the Supremacy Clause. *See* Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) (suggesting that all treaties should be enforceable at the moment of ratification pursuant to the Supremacy Clause).

47. *See* Perez-Vera Report, *supra* note 14, para. 107 (indicating that the fixed one year period, "although perhaps arbitrary," was the best option).

48. *Id*.

49. *Id*.

50. *Lozano*, 134 S. Ct. at 1232.

51. *Id*. at 1233–34.

52. If the one year period is a statute of limitations, the Court's short dismissal of Petitioner's contention that ICARA is domestic legislation which opens the door to the application of United States common-law would require more attention. Further, ICARA explicitly states that it does not purport to alter the Convention. ICARA § 9001(b)(2). However, what result if this was not the case?

53. BLACK'S LAW DICTIONARY (10th ed. 2014).

54. Hague Convention, *supra* note 3, art. 12.

55. *See generally Lozano*, 134 S. Ct. at 1233. The alternative would require courts to distinguish between claims and remedies of the same name that nonetheless differ in terms of the judicial standards attached to their granting.

of the one year period merely permits the child's best interests to take precedence by way of the Settled Defense.[56] Although many courts have disagreed with the Court on this point, the Court's conclusion appears to promote uniformity.[57]

D. *Petitioner's Policy Argument*

Petitioner argued that equitable tolling should apply to the one year period in order to promote the Convention's goal of deterring child abductions.[58] The Court agreed "that the Convention reflects a design to discourage child abduction."[59] However, the Court disagreed that this presumes the applicability of equitable tolling.[60] On this point, the Court first noted that the Convention does not pursue the goal of deterring child abduction at all costs.[61] Instead, the drafters intended for the Convention to have a shifting framework with bright-line thresholds.[62] In this way, the Convention could account for the needs of individuals as well as the general goals for which it was drafted.[63]

Interestingly, the Court did not discuss equitable discretion under Article Eighteen.[64] Instead, the Court indicated that concealment is commonly considered a negative factor under the Settled Defense.[65] The concurring opinion discussed equitable discretion and the courts' ability to order return even where a child is settled.[66] As a result, the concurring opinion potentially elevated the extent of equitable discretion wielded by the courts even though the Settled Defense appears to be non-

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56. *See* Perez-Vera Report, *supra* note 14, para. 25 (indicating that a determination of the child's best interests is the guiding criterion of the exceptions to return).

57. Courts no longer have to consider whether return during the one year period is a different remedy or claim as return subject to the Settled Defense after the one year period. *See supra* text accompanying note 56.

58. *Lozano*, 134 S. Ct. at 1235–36.

59. *Id*. at 1235.

60. *Id*.

61. *Id*.

62. *See* Perez-Vera Report, *supra* note 14, para. 107 (indicating that the fixed one year period, "although perhaps arbitrary," was the best option).

63. *See Lozano*, 134 S. Ct. at 1235–36.

64. The Court mentioned that American courts have found that the concealment of children is a negative factor under the Settled Defense. *Id*. at 1236.

65. *Id.*

66. *Id*. at 1237–38 (Alito, J., concurring). The concurring opinion believes that "Article 12 places no limit on Article 18's grant of discretionary power to order return." *Id*. at 1237. Article Eighteen states: "[t]he provisions of this Chapter [including Article Twelve] do not limit the power of a judicial or administrative authority to order the return of the child at any time." *Id*. Thus, the concurring opinion believes that Article 18 renders equitable tolling unnecessary. *Id*. Further, contrary to Article Twelve, the concurring opinion opined that courts retain equitable discretion to return a child even after the child has become settled in its new environment. *Id*.

discretionary.[67]

IV. CONCLUSION

In the instant case, the Court sent a message to the international community that the U.S. will not alter the terms of the treaties to which it is a signatory. However, the Court's brief analysis concerning the effect of ICARA may prove unworkable for lower courts in cases where implementing legislation calls for the application of common-law doctrines such as equitable tolling. Further, the Court brushed over the extent of equitable discretion wielded by the courts under Article Eighteen. By doing so, a court split will likely develop as to the contradictory language found in Articles Eighteen and Twelve. The preferable approach would be to consider concealment a negative factor when determining whether a child has become settled. However, the concurring opinion went too far by indicating that the courts should retain the power to return children at any time, even after becoming settled.

67. The courts "shall also order the return of the child, unless it is demonstrated that the child is now settled. Hague Convention, *supra* note 3, art. 12.