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Recognizing Women's Rights at Work: Health and Women Workers
in Global Supply Chains

*Erika R. George, Candace D.
Gibson, Rebecca Sewall, and David
Wofford*

Displaced: A Proposal for an International Agreement to Protect
Refugees, Migrants, and States

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Women and the Making of the Tunisian Constitution

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REMARKS ON NEW LEGAL FRONTIERS

International Law and Stability in Cyberspace

Brian J. Egan

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Recognizing Women’s Rights at Work: Health and Women Workers in Global Supply Chains

Erika R. George*
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David Wofford****

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Our working conditions are horrible. We basically never get a day off. . . I was ill as well. But I had no choice but to go to work, because they had threatened not to pay me if I didn’t.

(Mushamat Sokina Begum, Survivor, Rana Plaza Bangladesh)¹

The improvement of girls’ and women’s health becomes not only a moral, but also an economic imperative because healthy workers have more energy, improved mental health, and are less likely to be absent from work than unhealthy ones.

(The Lancet Commission on Women, Health and Sustainable Development)²

I.
INTRODUCTION

Across the world, millions of women in developing countries are working in global supply chains to produce the foods we eat and the products we use. Women workers in developing countries are primarily concentrated in agribusiness³ and in certain manufacturing sectors.⁴ Women working in global

1. Hasnain Kazim (Ella Ornstein, trans.), *Bangladesh Seamstress: ‘I Had No Choice but to Go to Work’*, SPIEGEL ONLINE INT’L (May 16, 2013), <http://www.spiegel.de/international/world/bangladesh-factory-worker-discusses-horrible-working-conditions-a-899976.html>.

2. Ana Langer et al., *Women and Health: The Key for Sustainable Development*, 386 THE LANCET 1165, 1169 (2015), [http://dx.doi.org/10.1016/S0140-6736\(15\)60497-4](http://dx.doi.org/10.1016/S0140-6736(15)60497-4).

3. The authors define agribusiness as large-scale business operations involved in farming, seed supply, agrichemicals, farm machinery, processing, and manufacturing and/or the packaging and distribution of products.

4. ILO, GLOBAL EMPLOYMENT TRENDS FOR WOMEN 28 (2012),

supply chains have new opportunities to earn more money in the formal economy and to enjoy more autonomy than ever before. Yet, while women enjoy greater autonomy as they earn more money, they still encounter challenges including low wages relative to the wages of men, life in dormitories, and pressure to send remittances home. Often women who migrate for work are disconnected from their families and from the other private and public support systems where they live. The pressure to meet production schedules, the poor quality of most workplace nurses and doctors, the limited availability of affordable health care, and the ignorance of managers of the particular needs of women workers all conspire to harm the health of women workers.

Women workers in global supply chains in many poor countries have little or no access to quality health care. The health needs of these women workers are significantly different from those of men. The general health and well-being of women can be harmed by work conditions through restrictive policies and practices that fail to recognize the unique needs of women workers. The relationship between health and work permeates all aspects of a worker's daily life and does not cease when the workday ends. This is especially true for women who may also have domestic duties as care givers. A broader assessment of the systemic risks to women workers' general health and the potential violations of their health rights is essential and too often has been overlooked.

Much attention has been paid to important, acute violations of sexual harassment and violence, as well as exposure to chemicals. The less acute, but no less important, long-term harms to women from the lack of access to general and reproductive health services and products, the poor quality of workplace infirmaries and practices of workplace health providers, and the poor sanitary conditions at work have received inadequate attention. These harms and potential rights violations remain unrecognized because occupational health and safety standards and public health standards have not been aligned. The largely gender-blind approach of Occupational Safety and Health (OSH) strategies hides from the world the negative impact of particular workplace policies and practices on women's health. Business policies and practices regulating global supply chains have yet to take women's health seriously as both a human rights concern and a fundamental business interest. The failure to align OSH and public health standards with international human rights standards leaves businesses open to the risk of complicity in creating or supporting conditions that may cost women workers their health and livelihoods.

http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_195447.pdf (noting that globally, in 2012, over a third of women were employed in agriculture, almost half in services, and a sixth in industry, with a quarter of women in East Asia employed in industry); OXFAM INT'L, *TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS* 16 (2004), <https://www.oxfam.org/sites/www.oxfam.org/files/rights.pdf> (noting that due to trade liberalization, women workers occupied sixty to ninety percent of labor intensive jobs in clothing and fresh produce global supply chains in 2004).

As the global economy has changed dramatically over the last thirty years and with it the gender composition of the workforce, it is time to rethink the occupational safety and health standards that have served as the lens through which companies uphold the health rights and safety of workers. Women workers, and men as well, have been harmed by a long-standing divide between health rights in the workplace as defined by OSH standards and health rights as defined by international human rights law. While the protection of human rights is primarily a government responsibility, there is growing interest in ensuring that private sector companies also abide by internationally recognized human and labor rights. The United Nations Guiding Principles on Business and Human Rights (“Guiding Principles” or “UNGPs”) recognize the responsibility of companies to “respect” human rights in their operations.⁵

The Guiding Principles offer an opportunity to call into question old assumptions that health rights at the workplace should be defined primarily by OSH standards as separate from the general right to health under international law. Additionally, new non-legally binding frameworks promote the idea that states and corporations should take a more comprehensive view of the health needs of workers including sexual and reproductive health, occupational health and safety, workplace health services, and the general well-being of workers. These new frameworks include a growing number of voluntary principles, corporate codes of conduct, and certification and reporting schemes that are designed to prevent companies from inflicting harm on workers and citizens or infringing their human rights. These new mechanisms rely on market forces, corporate commitments, and public shaming instead of legal institutions for enforcement. The Guiding Principles and a range of other new non-legal or quasi-legal mechanisms that some may consider to be outside the realm of the rights system or beyond the scope of corporate social responsibility could allow for a more robust re-envisioning of the ability of the business community to influence the right to health in the workplace. These new standards and strategies may hold the potential to provide an avenue for advancing reproductive health rights in the workplace and beyond.

The Guiding Principles mandate that businesses respect the human rights enshrined in the International Bill of Human Rights and in the International Labour Organization (ILO)’s Declaration on Fundamental Principles and Rights at Work. Due diligence processes and risk impact assessments are the main recommended means for ensuring compliance with companies’ commitments to respect international human rights. Because OSH as a conceptual framework and regulatory order is not sufficient to identify the risk of health rights violations to women workers, we argue companies should not anchor their due diligence and risk assessment in OSH conventions and settle for a check-the-box

5. Special Rep. of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework, ¶ 1, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Guiding Principles].

solution where worker health is at risk. Rather, a more robust appreciation of the substantive content of the human right to health on the part of business enterprises could result in better health outcomes for all workers and reduce the risk of rights abuses in the workplace. We re-examine the right to health of women workers and explore the reasons for aligning OSH with human rights health standards relevant to global business enterprises.

We use a gender lens to bring the lack of alignment between standard approaches to occupational safety and health and international human rights standards into sharper focus.⁶ Looking through a gender lens we find a more consistent, and ultimately more business-friendly, approach to improving the health of women workers—and, thereby, all workers could benefit from aligning OSH policy priorities with new principles designed to incorporate respect for human rights into business practices. In Part II, we give an overview of the impact of globalization on the health of women workers and outline the current application of occupational health standards. In Part III, we analyze the right to health for women under international law as well as the non-human rights mechanisms that inform the role of the workplace in ensuring worker health. In Part IV, we review the Guiding Principles with particular attention devoted to the due diligence responsibilities of corporations as relevant to the health of women workers. Finally, we conclude with a preliminary set of recommendations for aligning OSH with general health rights to inform the development of due diligence and human rights impact assessment processes consistent with the UNGPs.

II.

GLOBALIZATION, WOMEN'S HEALTH, AND WOMEN WORKERS IN GLOBAL SUPPLY CHAINS

Globalization and the development of market economies in poor and low income countries have had significant and in large part positive impacts on women, including on their gender roles and employment opportunities. Growth in many emerging market economies is characterized by global supply chains made up of national-level producers providing goods internationally. In the international system, transnational retailers and brands possess significant power to directly and indirectly influence labor conditions in their supply chains.⁷

6. The authors use the term gender lens to describe an analytical approach that identifies and describes the differential impact on women and men of norms, policies and practices in society and in the workplace. We use a gender lens in this Article to understand the unique challenges women face in pursuing their health rights and the ways systems, institutions, and policies must change to achieve women's equality. See *Using a Social Change Lens to Advance Gender Equality*, WOMEN'S FOUND. OF MINN., http://www.wfmn.org/PDFs/WFM_AdvancingEqualityLogicModelTraining.pdf (last visited Mar. 4, 2016).

7. Tiana O'Konek, *Corporations and Human Rights Law: The Emerging Consensus and its Effects on Women's Employment Rights*, 17 CARDOZO J.L. & GENDER 261, 265 (2011).

A growing number of poor women are joining the workforces in countries that export produce and products manufactured for global consumption. In some industries, such as apparel, women comprise a majority of the workforce, sometimes as much as 80% or more in the garment industry.⁸ Many of the women entering the workforce are undereducated.⁹ Women often migrate from their homes in rural areas to cities, not to mention other countries, because they want and need work.¹⁰ An estimated 105 million workers leave their homes to find work in other countries, including in the supply chains of international corporations.¹¹ Nearly 50% of those leaving their countries are women who claim their primary motivation for migrating is employment.¹² The number of internal migrants is equally significant.¹³

Migration and the changing composition of the workforce are driven in part by the active efforts of factories and industrial farms to recruit workers. Manufacturers and agribusiness are drivers in efforts to actively recruit these women—and men—to leave their homes to work in enterprises that produce the goods they supply to the global export economy.¹⁴

A. Women's Health in Globalized Communities

Globalization and related changes, such as urbanization, have brought benefits for women including shifting gender norms and granting working women greater autonomy over their lives.¹⁵ Globalization has contributed to reduced gender inequality through increasing the likelihood that a girl will get

8. ILO, PROGRESS AND POTENTIAL: HOW BETTER WORK IS IMPROVING GARMENT WORKERS' LIVES AND BOOSTING FACTORY COMPETITIVENESS 11 (2016), http://betterwork.org/dev/wp-content/uploads/2016/09/BW-Progress-and-Potential_Web-final.pdf; see also Peder Michael Pruzan-Jorgensen, *Business Must Close the Gender Gap*, BSR BLOG (Mar. 7, 2016), www.bsr.org/en/our-insights/blog-view/business-must-close-the-gender-gap.

9. OXFAM INT'L, *supra* note 4, at 18.

10. Eva Diemel, *The Future of Women's Empowerment in Global Supply Chains*, BSR BLOG (Mar. 6, 2014), <http://www.bsr.org/en/our-insights/blog-view/the-future-of-womens-empowerment-in-global-supply-chains>.

11. INT'L ORG. FOR MIGRATION, MIGRATION INITIATIVES 2014: HEALTH OF MIGRANTS (2013), http://publications.iom.int/bookstore/free/Migration_Initiatives2014_web.pdf.

12. ILO, PROMOTING DECENT WORK FOR MIGRANT WORKERS 1 (2015), http://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-migrant/documents/publication/wcms_344703.pdf.

13. U.N. DEP'T OF ECON. & CULTURAL AFFAIRS (POPULATION DIV.), TECHNICAL PAPER 2013-1 - CROSS NATIONAL COMPARISONS OF INTERNAL MIGRATION: AN UPDATE ON GLOBAL PATTERNS AND TRENDS (2013).

14. *Labor Migration in China and Mongolia*, ILO, <http://www.ilo.org/beijing/areas-of-work/labour-migration/lang-en/index.htm> (last visited Mar. 4, 2016).

15. World Bank, *Globalization's Impact on Gender Equality: What's Happened and What's Needed*, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY 254, 267–68 (2012).

an education.¹⁶ Globalization has also been credited with aiding greater availability of health and social services for women and girls.¹⁷

Despite generating gains in gender equality, however, globalization's benefits and burdens have not been equitably balanced. For example, a 2015 Lancet Commission report on Women and Health notes: "Globalisation generates new challenges, its benefits have not been uniformly distributed, and effects on women have been mixed. Globalisation has increased inequality between and within countries, polarized societies by income and economic status, and accelerated disease migration—including widespread adoption of an unhealthy lifestyle and diet—contributing to the increase in NCDs [non-communicable diseases] and women's changing disease burden."¹⁸ This is particularly true for women workers, who are paid less than men and have less job security, often without union representation.¹⁹ Indeed, "[w]omen's participation in the labour market, while continuing to undertake most domestic work and care giving, is a potential burden and threat to women's health and well-being; little time is left for rest and leisure, resulting in a double burden of work," the Lancet Commission reported.²⁰

It is common to assume that poor women living in urban areas, especially with formal employment, are better off than those in rural areas. While true as a generalization, this assumption masks wide disparities based on social status and wealth. For example, a 2010 study of thirty countries found significant inequalities in access to health care and maternal health services. Poor women in urban settings were not necessarily better off than rural women even though they lived closer to health services.²¹ Furthermore, urban women were found to have no better level of reproductive health than rural women.²² There is also evidence that a significant disparity in the quality of services available to the poor and the better off exists in many cities. A 2009 study conducted in Delhi, India, found that close proximity of the poor to formal health care providers was of little value: "The quality of care available in the poor neighborhoods proved to be so low that the authors could fairly describe it as 'money for nothing.'"²³

The lack of access to quality health services, clean water, or sanitation is compounded for the urban poor who live in crowded homes and have increased

16. Langer et al., *supra* note 2.

17. *Id.*

18. *Id.* at 5.

19. *Id.*

20. *Id.*

21. Zoë Matthews et al., *Examining the "Urban Advantage" in Maternal Health Care in Developing Countries*, PLOS MED., Sept. 14, 2010, at 2, <http://dx.doi.org/10.1371/journal.pmed.1000327>.

22. Langer, *supra* note 2, at 10.

23. MARK R. MONTGOMERY, POPULATION REFERENCE BUREAU, POPULATION BULLETIN: URBAN POVERTY AND HEALTH IN DEVELOPING COUNTRIES 9 (2009), <http://www.igwg.org/pdf09/64.2urbanization.pdf>.

risk of disease from water, air, and food.²⁴ For women, these factors are further compounded by concerns for physical safety, gender norms that reduce their level of exercise, and an urban lifestyle that changes what they eat, all of which can lead to chronic illness and non-communicable diseases.²⁵ Poor women are especially vulnerable, because lower social status and gender discrimination increase their risk of unwanted or risky sex and violence, as well as their likelihood of living in bad housing conditions.²⁶ Poor women also have less autonomy to make reproductive decisions or to access the services they need, even when services are available.²⁷

The pervasive reality in low and middle income countries for many women is poor access to services and poor quality of care.²⁸ The care they do receive is typically from female health providers, the most disenfranchised people in health systems, who are, in turn, under-supported and under-valued and thus unable to reach their potential.²⁹ In an increasingly female global workforce, the Lancet Commission lamented: “Few gender-sensitive policies exist that enable women to integrate their social, biological, and occupational roles, function to their full capacity, and realise their fundamental human rights.”³⁰

B. Women’s Health, Reproductive Health, and the Workplace in the Global Economy

Employers have a significant, often negative, impact on the health and well-being of their women workers as management fails to recognize the unique needs of women. While the protection of public health remains a challenge for many countries, the poor health practices and policies in many workplaces can exacerbate this situation. Recently, public health and the international development community have aligned through the new Sustainable Development Goals (SDGs).³¹ The SDGs have called for government and business commitments to improve the health and well-being of women and girls³² and increase access to family planning.³³ The occupational health

24. *Id.* at 6.

25. Langer, *supra* note 2, at 6.

26. *Id.* at 9.

27. *Id.*

28. *Id.*

29. *Id.* at 19–20.

30. *Id.* at 11.

31. G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).

32. See Jessica Davis Pluess & Peder Michael Pruzan-Jorgensen, *Women’s Empowerment in Global Value Chains: Framework for Business Action* (Women Deliver Private Sector Pre-Conference, Working Paper, 2016), https://www.bsr.org/reports/BSR_WomenDeliver_Womens_Empowerment_Value_Chains_Consultation_Draft.pdf.

33. Ellen Starbird et al., *Investing in Family Planning: Key to Achieving the Sustainable Development Goals*, 4(2) GLOBAL HEALTH: SCI. & PRAC. 191, 191 (2006).

community approach has yet to fully align with these efforts.³⁴ Moreover, the management of business enterprises employing low-wage women workers, the multinational buyers they supply to, and the oversight agencies for workplaces have generally shown little recognition of the fact that companies could have any responsibility for the general or reproductive health of women workers, or that health beyond the narrow legal compliance to occupational safety is relevant to current OSH regulation.³⁵

Current policies and priorities reflect only a subset of women workers' health concerns, such as sexual harassment and gender based violence, chemical exposures that affect reproductive health, pre-employment pregnancy testing, and lack of maternity leave.³⁶ It is not common for observers interested in occupational concerns to focus on how poor policies and practices affect a woman worker's health day in and day out, their access to health services, or the quality of health services they receive onsite or off, which are central to a person's right to health.

Restrictive workplace policies can have disparate impacts on women and men. For instance, it is well documented that the lack of hydration and restroom breaks increase the risk of urinary tract infections for women.³⁷ And without access to operating toilets, restrooms with soap and water,³⁸ and sanitary napkins, women workers are forced to use unsanitary products, sometimes scraps from a factory's own waste, which can cause gynecological infections.³⁹ Gynecological infections are not typically considered "occupational diseases" and they do not affect men—the typical worker when OSH standards were first developed.⁴⁰ Restrictive policies, inadequate facilities, and even intimidation by

34. DANIEL MALAN ET AL., VITALITY, REPORTING ON HEALTH: A ROADMAP FOR INVESTORS, COMPANIES AND REPORTING PLATFORMS 15 (2016), <http://thevitalityinstitute.org/site/wp-content/uploads/2016/01/Vitality-HealthMetricsReportingRoadmap22Jan2016.pdf>.

35. *Id.* at 39.

36. BUS. FOR SOC. RESPONSIBILITY (BSR), HEALTHCARE DELIVERY IN RMG FACTORIES IN BANGLADESH: WHAT ARE THE MISSED OPPORTUNITIES? 1 (2014), http://www.bsr.org/reports/BSR_Healthcare_Delivery_in_RMG_Factories_in_Bangladesh.pdf; *see also* WAR ON WANT, STITCHED UP: WOMEN WORKERS IN BANGLADESHI GARMENT SECTOR 1 (2011), <http://www.waronwant.org/sites/default/files/Stitched%20Up.pdf> (describing the violations that Bangladeshi women experience in the garment industry).

37. OXFAM INT'L, *supra* note 4, at 60; *see also* OXFAM INT'L, BETTER JOBS IN BETTER SUPPLY CHAINS 11 (2010), <https://www.oxfam.org/sites/www.oxfam.org/files/b4b-better-jobs-better-supply-chains.pdf>.

38. ILO, *supra* note 4 at 60; ILO & BETTER FACTORIES CAMBODIA, THIRTY FIRST SYNTHESIS REPORT ON WORKING CONDITIONS IN CAMBODIA'S GARMENT SECTOR 5, 7 (2014).

39. WATER AID, UNILEVER & WATER SUPPLY SANITATION COLLABORATIVE COUNCIL, WE CAN'T WAIT: A REPORT ON SANITATION AND HYGIENE FOR WOMEN AND GIRLS 7 (2013), https://www.unilever.com/Images/slp-wateraid-women-girls-nov-2013_tcm244-417254_1.pdf (reporting that in one factory case study in Bangladesh, 60% of workers used rags from the factory floor as menstrual cloths, resulting in infections and absenteeism).

40. ILO, ILO LIST OF OCCUPATIONAL DISEASES (2010), http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/publication/wcms_125137.pdf.

employers can contribute to harmful health conditions that are unique to women workers. Managers in many workplaces are predominantly male⁴¹ and do not typically consider menstruation a workplace concern, if they care to think about it at all. A woman worker must think about menstruation—her ability to manage pain, access products and the ability to have some privacy affects her health, wellbeing, and productivity. When an employer requires a time card to clock restroom breaks⁴² or yells at workers to staff at their work stations,⁴³ the employer sends a clear and intimidating signal to women workers about workplace priorities and the degree of concern for women’s health needs.

Access to health services is a major problem for poor women in general, but for women workers the barriers are even higher not only because of their double burden of domestic and paid work, but also because of the hours and days they work. Most public health facilities are closed after normal work hours and on weekends, which means that women workers have access to a limited number of private health providers.⁴⁴ In workplaces with onsite infirmaries and related health programs, worker access may not be much better. When there is a sign on an infirmary wall saying “No entry without permission,” which one of the authors witnessed, the message to workers about the availability of services and importance of their health is also very clear.⁴⁵

Even in workplaces where there are good policies meant to ensure a worker’s agency to leave her post to receive health services on or offsite, middle management practices often undermine these policies. The reason is straightforward: workplaces operating in global supply chains must meet constantly changing and urgent production demands and deadlines. Many labor advocates have documented how production demands on factories and farms come at the expense of labor and human rights and voluntary codes of conduct endorsed by corporate buyers,⁴⁶ but they also come at the expense of health rights. A woman worker who was selected for a health education program one of the authors participated in was told by her line supervisor that if she attended a training session that day she would be fired. He needed to meet a deadline.⁴⁷

41. O’Konek, *supra* note 7, at 265.

42. Central News Agency, *Factory Restricts Employees’ Bathroom Use to Twice A Day*, EPOCH TIMES, May 28, 2007, <http://www.theepochtimes.com/n3/1732566-factory-restricts-employees-bathroom-use-to-twice-a-day>.

43. HUMAN RIGHTS WATCH, “WORK FASTER OR GET OUT”: LABOR RIGHTS ABUSES IN CAMBODIA’S GARMENT INDUSTRY 7 (2016), https://www.hrw.org/sites/default/files/reports/cambodia0315_brochure_web.pdf.

44. UNFPA (ASIA PAC. REG’L OFFICE), SOCIO-CULTURAL INFLUENCES ON THE REPRODUCTIVE HEALTH OF MIGRANT WOMEN 25 (2011), https://www.unfpa.org/sites/default/files/pub-pdf/Migrant_Regional.pdf.

45. David Wofford, Field observation at garment factory, Cambodia (Nov. 19, 2014) (unpublished report) (on file with author and Evidence Project/Meridian Group International, Inc.).

46. O’Konek, *supra* note 7, at 264–65.

47. This is if the workplace employs a certain number of workers, typically more than 300 workers. Project implementation team field report and oral report to David Wofford on training activities, Garment Factory, Egypt, (Nov. 22, 2009) (unpublished report) (on file with author).

While this may not rise to the level of what is conventionally understood to be a gross human rights violation, it underscores the power imbalance between women workers who seek protections or assert their rights and supervisors who can undermine programs sanctioned by their senior management. Too often a woman is only able to exercise her rights and leave her station to get health care in the case of an emergency or very serious health problem. Minor health problems persist, hampering productivity, until they become serious enough to require action costing the worker lost pay, lost work, more expensive care, and potentially longer term adverse health impacts.⁴⁸ The policies and practices of the employer directly affect whether or not women workers can access needed health care.

Workplaces can also affect the quality of care that women workers receive. First, when employers restrict, by policy or practice, the freedom of workers to access health services during working hours, this reduces the choices women workers have for quality services after hours and on weekends. Second, while many countries require larger formal workplaces to employ health care workers and provide space for a health infirmary,⁴⁹ the quality of these health providers, who are typically under-paid and under-trained nurses, tends to be very low. Many do not even have diplomas. A study of nurses in Bangladesh garment factories found “a discernible mismatch between the training received by the nurses and the actual health needs in ready-made garment (RMG) factories.”⁵⁰ They had limited training on basic diagnosis, counseling or patient education, treatment, and referral, all of which are roles they must play. The nurses did not provide information on personal hygiene, waterborne diseases, or sexually transmitted diseases, and they lacked relevant knowledge of issues important to workers, such as sexual and reproductive health. Yet 70% of the nurses said that menstrual pain was one of the top complaints they hear from workers.⁵¹ Factories hired nurses to meet compliance requirements and paid them less than in private facilities, the study noted, “but they are not legally incentivized to hire a qualified nurse or to invest in his or her professional development once hired.”⁵² Far from being the worst examples, the factories in this study were among those most committed to worker health in company goals and operations. As with workplaces everywhere, focused on occupational compliance rather than health rights, managers have no awareness of how their practices and poor standards are contributing to women workers’ health.

Many workplaces have infirmaries and health care providers that do not meet common public health standards for cleanliness, confidentiality, privacy, health information, and referral. Assessment by outside health groups regularly find poor or hazardous practices, from inconsistent handwashing and poor

48. HUMAN RIGHTS WATCH, *supra* note 43, at 3, 7–9.

49. *See, e.g.*, Bangladesh Labour Act of 2006, Chapter 8, Welfare Measures, number 89 (5).

50. BSR, *supra* note 36, at 9.

51. *Id.* at 10.

52. *Id.* at 9.

record-keeping to disposal of needles and bloody materials in unsafe containers.⁵³ Since these are not primary care facilities, much of what they do is refer patients to care. But nurses are too often unprepared to make effective referrals, as they do not know who the quality providers in the community are or where to refer women workers for their specific needs.⁵⁴ Referrals from a workplace infirmary may well reinforce norms for poor women receiving low quality services.

One of the services women workers, who are usually in prime reproductive years, need most and yet are least likely to request is reproductive health and family planning. This issue may seem far removed from the employers' obligation under occupational safety and health requirements: employers' main concern about reproductive health is a pregnant worker—and avoiding obligations.⁵⁵ It is common for workers to be denied sick leave while pregnant and to have barriers to their access to ante-natal or post-natal-care.⁵⁶ Women workers who choose to complete their pregnancies are too often denied maternity leave, even if it is required under a State's law.⁵⁷ Yet the corporate role in recruiting workers, housing them, and transporting them—as well as the business interest in helping these needs get met—requires a more comprehensive view about employers' obligations to women's reproductive health. Female migrant workers, like many displaced populations, are more likely than the general population to encounter sexual contact—both wanted and unwanted—when placed in a new unfamiliar environment.⁵⁸ Young women workers lack basic knowledge in reproductive health and their employers assume that these workers will not engage in sexual activity prior to marriage, creating an additional barrier to care, services, and information.⁵⁹ Employers may contribute to these workers' health risks, and not just occupational health risks, by limiting access to quality services onsite and off, hiring workplace health providers with limited knowledge of the health needs of women workers, failing to provide health education information in their clinics, and exacerbating these poor conditions with production demands at the workplace.

53. CAROLYN RODEHAU & DAVID WOFFORD, THE EVIDENCE PROJECT, BRIEF: STRENGTHENING FACTORY HEALTH SYSTEMS UNDER LEVI STRAUSS & CO.'S WORKER WELL-BEING INITIATIVE IN EGYPT 4 (2015), http://evidenceproject.popcouncil.org/wp-content/uploads/2016/03/Levis-Brief_3.22.16.pdf.

54. BSR, *supra* note 36, at 9.

55. HUMAN RIGHTS WATCH, *supra* note 43, at 67.

56. WAR ON WANT, *supra* note 36, at 8.

57. *Id.* at 9.

58. M. Puri & J. Cleland, *Sexual Behavior and Perceived Risk of HIV/AIDS Among Young Migrant Factory Workers in Nepal*, 38 J. ADOLESCENT HEALTH 237 (2006).

59. BSR, WOMEN'S GENERAL AND REPRODUCTIVE HEALTH IN GLOBAL SUPPLY CHAINS 6 (2006), <https://herproject.org/downloads/BSR-Womens-Health-Report-2006.pdf>.

C. *Occupational Safety and Health Conventions and the Health Concerns of Women Workers*

Occupational Health and Safety standards are based on a set of conventions, protocols, and recommendations adopted by the International Labor Organization (ILO) and ratified by Member States. Each national government sets its own laws and specific regulations governing employers and workplace safety, but these have been developed in reference and in relation to ILO standards. For a range of historical reasons, ILO standards do not fully or adequately address the right to health for women workers, even as the OSH community has tried to address the needs of a changing global workforce that increasingly includes women.

Since its inception in 1919, the ILO has been concerned with worker safety and health harms related to work. Formed as part of the Treaty of Versailles that ended World War I, its creation was driven by the belief that social injustice at the workplace could threaten the peace that was achieved.⁶⁰ It is the only tripartite United Nations organization that is represented by “governments, employers and workers of 187 member States to set labour standards, develop policies and devise programs promoting decent work for all women and men.”⁶¹ In its first two decades, it introduced ground-breaking protections for workers’ health in the areas of maternity protection, lead paint, building safety, and accidents affecting dockers.⁶² Later conventions in the 1980s represented major steps forward in workers’ health rights.⁶³

Since 1919, worker health and safety has been a continuing concern of the ILO with more than 40 conventions and recommendations addressing OSH issues.⁶⁴ Occupational safety has been an area of significant success for the ILO.⁶⁵ In the later conventions and the Promotional Framework for Occupational Safety and Health Convention from 2006, health is

60. *Origins and History*, ILO, <http://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm> (last visited Oct. 25, 2016).

61. *About the ILO*, ILO, <http://ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Oct. 25, 2016).

62. ILO, ILO MATERNITY PROTECTION (AGRICULTURE) RECOMMENDATION (NO. 12): RECOMMENDATION CONCERNING THE PROTECTION, BEFORE AND AFTER CHILDBIRTH, OF WOMEN WAGE-EARNERS IN AGRICULTURE (1921) (withdrawn), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R012. Current maternity protections are guaranteed by three ILO Conventions: Revision of the Maternity Protection Convention (No. 183), June 15, 2000, 2181 U.N.T.S. 253; Safety Provisions in the Building Industry (No. 637), June 23, 1937, 40 U.N.T.S. 233; Protection against Accidents of Workers Employed in Loading or Unloading Ships (No. 611), Apr. 27, 1932, 39 U.N.T.S. 103.

63. In the 1980s, the ILO adopted the Occupational Safety and Health Convention and the Occupational Health Services Convention. Occupational Health Services Convention (No. 161), June 26, 1985, 2 I.L.C.R. 1334; Occupational Safety and Health Convention (No. 155), June 22, 1981, 1331 U.N.T.S. 279.

64. Malan, *supra* note 34, at 15.

65. See Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 LAW & ETHICS HUM. RTS. 153 (2009).

conceptualized, as one would expect, from a labor perspective and as only related to the workplace. The ILO's Occupational Safety and Health Convention No. 155 ("Safety and Health Convention") defines health in relation to work as "indicat[ing] not merely the absence of disease or infirmity [but] also . . . the physical and mental elements affecting health which are directly related to safety and hygiene at work."⁶⁶ According to the ILO, the aim of national policy of States ratifying the Safety and Health Convention is to "prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment."⁶⁷ In other words, States are responsible for enforcing employer compliance with regulations that protect against employment-related risks that might be experienced in the workplace by *virtue of one's status as worker*. This conceptualization of health at the workplace does not include protecting health-related rights that workers have by virtue of the fact that they are *human beings*, which is the basis of all human health rights.⁶⁸

Under the ILO, the right to occupational health and safety is not a core labor standard.⁶⁹ In 1998, in response to concerns about how the ILO should respond to globalization and international trade regimes, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which defined a set of "core labor standards" and non-core substantive standards⁷⁰ and made gender equity a cross-cutting issue of its Decent Work agenda.⁷¹ The declaration has been subject to much critique and debate beyond the scope of this paper, including whether this declaration undermined the importance of socioeconomic

66. Occupational Safety and Health Convention (No. 155) art. 3(e), June 22, 1981, 1331 U.N.T.S. 279. The bulk of Convention 155 regards the creation of effective national, regional, and workplace mechanisms for implementation and compliance with other ILO standards. *Id.*

67. *Id.* at art. 4(2).

68. "Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background." *Human Rights Principles*, UNITED NATIONS POPULATION FUND, 2005, <http://www.unfpa.org/resources/human-rights-principles>.

69. Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOB. STUD. L. REV. 205, 226 (2007). Core labor standards were clarified in the 1998 Declaration on Fundamental Principles and Rights at Work [hereinafter Declaration on Fundamental Principles] in an effort to gain global consensus on labor rights. The Declaration on Fundamental Principles identified four core principles: freedom of association and the right to collective bargaining, the elimination of forced labor, the abolition of child labor and the elimination of discrimination in employment. States must respect these core principles regardless of their stage of economic development or if they have ratified certain ILO conventions. *See id.* at 226–27.

70. INT'L LABOUR OFFICE, WOMEN AT WORK: TRENDS 2016 1 (2016).

71. ILO, DECENT WORK INDICATORS: GUIDELINES FOR PRODUCERS AND USERS OF STATISTICAL AND LEGAL FRAMEWORK INDICATORS (ILO MANUAL 2ND VERSION) 19 (2013). The four strategic pillars of Decent Work are (i) International labour standards and fundamental principles and rights at work (ii) Employment creation (iii) Social protection and (iv) Social dialogue and tripartism. *Id.*

non-core rights by privileging core rights and undermined ILO enforcement.⁷² Whether or not the creation of core rights had an effect on implementation of substantive rights, there is little evidence since the 1980s that later declarations and plans⁷³ have reassessed the fundamental OSH approach to health needs and rights of women workers in light of massive social and economic changes caused by globalization. This approach addresses a long list of critical health and safety areas and sector specific risks. These include protections against asbestos and chemical exposure, prevention of occupational cancer, control of air pollution, reduction of noise and vibration in the work environment, and measures to prevent major industrial accidents.⁷⁴ ILO conventions institute permanent processes for the continued improvement of occupational health and safety, the “building of preventive safety and health culture,” and the establishment of occupational health services at businesses.⁷⁵ In addition, with respect to women, the ILO conventions and recommendations have increasingly

72. Core standards responded to criticism of the ILO's lack of focus, as well as differentiated procedural rights (core rights) that were to be part of trade agreements from substantive standards that focused on outcomes and establishing a floor. See STEVE HUGHES & NIGEL HAWORTH, INTERNATIONAL LABOR ORGANIZATION: COMING IN FROM THE COLD 53 (Thomas Weiss & Rorden Wilkinson eds., Routledge Global Institutions 2010). International law scholar Philip Alston criticized the Declaration on Fundamental Principles on several grounds, including its creation of a hierarchy among labor standards and indeterminate principles whose relationships with ILO convention standards is also undefined. Alston also notes that legal commentators observed the very limited nature of the Declaration on Fundamental Principles and general consensus that these core labor standards should have included the right to a safe and healthy workplace, protection against abusive treatment, and others. Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 483-95 (2004); see also Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda* 16 EUR. J. INT'L L. 467, 477-78 (2005); Joshua Castellino & Sarah Bradshaw, *Sustainable Development and Social Inclusion: Why A Changed Approach is Central to Combating Vulnerability* 24 WASH. INT'L L. J. 459, 480 (2015) (arguing that just development models must include compliance with core labor standards, fair wages, and decent working conditions). But see Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439, 449 (2005) (stating that workplace safety and health cannot be deemed “fundamental rights” because they are not “enabling rights,” procedural rights which allow workers to obtain other rights). Others argue that the declaration did not create a hierarchy in any constitutive way and the ILO continued operating as before in hearing complaints and adopting conventions without regard to core or non-core standards. See Hyde, *supra* note 65, at 169.

73. See generally ILO Convention Concerning the Promotional Framework for Occupational Safety and Health (No. 187), June 15, 2006, 2564 U.N.T.S. 291; INT'L LABOR ORG., ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION (June 10, 2008), http://www.ilo.org/wcmsp5/groups/public/-dgreports/-cabinet/documents/genericdocument/wcms_371208.pdf; ILO, PLAN OF ACTION (2010-2016) TO ACHIEVE WIDESPREAD RATIFICATION AND EFFECTIVE IMPLEMENTATION OF THE OCCUPATIONAL SAFETY AND HEALTH INSTRUMENTS (CONVENTION NO. 155, ITS 2002 PROTOCOL, AND CONVENTION NO. 187) (2010), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/policy/wcms_125616.pdf; see also G.A. Res. 70/1, ¶¶ 8.1-8.b, U.N. Doc. A/RES/70/1 (Oct. 21, 2015) (adopting the ILO Decent Work Agenda as part of the U.N. Sustainable Development Goals).

74. BENJAMIN ALLI, FUNDAMENTAL PRINCIPLES OF OCCUPATIONAL HEALTH AND SAFETY (2nd ed. 2008).

75. *Id.* at 10-12.

addressed gender equity and anti-discrimination standards including equal pay for equal work⁷⁶ and provisions against pregnancy discrimination and protection of maternity leave.⁷⁷

Despite these protective provisions, OSH standards do not undertake the full range of issues and potential violations that women workers in global supply chains experience because of their gender. Feminist critiques of the ILO regime often criticize it for gender bias and the exclusion of women's experiences.⁷⁸ Experts on gender, global value chains, and decent work, have noted that codes of conduct designed around ILO conventions and national labor legislation do not address gender issues that cross between the personal and workplace domains.⁷⁹ The ILO Core Labor Standards are based on the concept of a 'male breadwinner' pursuing employment in the public sphere and a 'female caregiver' confined to the private sphere.⁸⁰ Others have criticized the ILO Core Labor Standards because, although they contain anti-discrimination provisions, they do not address how gender discrimination is inherent within the structures of many labor markets, particularly the garment industry.⁸¹

The gender bias of the OSH framework is reflected in the domestic legislation and labor movements of the ILO member countries. National labor legislation often focuses on employment that follows "male norms" and on permanent, full-time employment,⁸² which makes these regimes far less capable of dealing with the labor conditions of many women workers.

The issue of gender inequality within these markets leads to the exclusion of women's experiences, including health and reproductive health needs, in global supply chains by their employers and in legal regimes and social movements that seek to better the working conditions of these workers. For example, in one case study of maquiladora workers in Nicaragua, it was noted that trade unions did not have an understanding of the wider issues facing women workers in *maquilas*, or factories in export processing zones.⁸³ This lack of understanding has led to the creation of women's organizations in Nicaragua

76. Equal Remuneration Convention (No. 100), June 29, 1951, 165 U.N.T.S. 303.

77. See generally Revision of the Maternity Protection Convention (No. 183), June 15, 2000, 2181 U.N.T.S. 253.

78. Castellino & Bradshaw, *supra* note 72, at 480.

79. Stephanie Barrientos et al., *A Gendered Value Chain Approach to Codes of Conduct in African Horticulture*, 31 *WORLD DEV.* 1511, 1517 (2003).

80. LEAH VOSKO, LAW COMMISSION OF CANADA, *CONFRONTING THE NORM: GENDER AND INTERNATIONAL REGULATION OF PRECARIOUS WORK* 2 (2004), <http://publications.gc.ca/collections/Collection/JL2-27-2004E.pdf>.

81. O'Konek, *supra* note 7, at 284.

82. Barrientos et al., *supra* note 79, at 1516.

83. MARINA PRIETO-CARRÓN, CENTRAL AMERICA WOMEN'S NETWORK, *SOCIAL REPRODUCTION AND LABOR RIGHTS: A CASE STUDY OF WOMEN WORKERS IN NICARAGUA* 2-3 (2010), <http://cawn.org/assets/CAWN%20briefing%20Feb%202010%20-Production%20Reproduction.pdf>.

focused on addressing the connections between gender and labor issues.⁸⁴ The ILO regime and national legal regimes, which inform human rights, fair trade, and corporate social accountability movements, fail to address the systemic barriers within these markets, foreclosing a rich exploration of the health rights of women at the workplace, let alone robust protection of these rights.

It is true that ILO conventions and OSH standards are meant to be a floor for labor rights⁸⁵ and governments can nonetheless provide women workers with workplace protections that take into account their experiences. Nothing in OSH conventions prevents alignment with other health recommendations or national health authorities; in fact, there are recommendations that occupational safety programs promote prevention campaigns and collaborate within the framework of public health systems.⁸⁶ Furthermore, the Better Work Programme of the ILO and International Finance Corporation, launched in 2007 to improve standards of performance in labour and working conditions and to conduct workplace monitoring, research, and education in eight countries, has an important focus on women, gender equality, and health.⁸⁷ It has incorporated reproductive health in its training activities.⁸⁸ In Cambodia, the Programme was for several years the implementing partner with Business for Social Responsibility of HERproject, a workplace initiative that provides women's reproductive and general health education.⁸⁹

In practice, however, the current application of OSH standards through labor regulation and monitoring, whether by State agencies or private entities, emphasizes inputs such as the number of fire exits and extinguishers, the use of protective clothing, the number of health providers, and the existence of health stations or infirmaries.⁹⁰ Though these are all essential concerns, there is little focus on broader health issues relevant to the workplace or on the practices and competence of workplace health providers in terms of what they actually do—the quality of care, the protocols used, and the treatment of patients. This

84. *Id.*

85. Barrientos et al., *supra* note 79, at 1516 (discussing how the ILO core conventions can supplement weak national legislation, providing a floor for labor rights); *Occupational Health as a Human Right*, ILO ENCYCLOPEDIA OCCUPATIONAL HEALTH & SAFETY (Feb. 15, 2011), <http://www.iloencyclopaedia.org/part-iii-48230/resources-institutional-structural-and-legal/30-23-resources-institutional-structural-and-legal/occupational-health-as-a-human-right>.

86. Occupational Health Service Recommendation (No. 171) art. 24, June 26, 1985, 1498 U.N.T.S. 19. Art. 26 also notes: "...occupational health services might engage in other health activities, including curative medical care for workers and their families, as authorized by the competent authority in consultation with the most representative organisations of employers and workers, where they exist." *Id.* at art. 26.

87. *Focus on Women*, BETTER WORK, <http://betterwork.org/global/?cat=92> (last visited Nov. 10, 2016).

88. *Id.*

89. *Press Release: American Eagle Outfitters and Better Work Launch HERproject Initiative in Cambodia*, BETTER WORK (Dec. 19, 2013), http://betterwork.org/global/wp-content/uploads/AEOHERProjectCambodiaPressRelease-FINAL_1.pdf.

90. *See, e.g.*, Bangladesh Labour Act of 2006, Chapter 8, Welfare Measures, number 89 (5).

approach is not aligned with the quality of care movement of public health, which is strongly linked to a human rights framework for health practices focusing on availability, accessibility, acceptability, and quality of services.⁹¹ It is also not aligned with a more holistic view of the relationship between workplace and non-workplace health, which is implicit in the emphasis on the social determinants of health.⁹² Paul Schulte, a researcher and director at the National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, writes, “Many of the most prevalent and significant health-related conditions in workers are not caused solely by workplace hazards, but also result from a combination of work and nonwork factors”⁹³ An example of this approach is the Total Worker Health program launched by the National Institute for Occupational Safety and Health in 2011 to focus on “how environmental, workplace factors can both mitigate and enhance overall worker health beyond traditional occupational safety and health concerns.”⁹⁴

Today it is increasingly clear that a reconceptualization of workplace health is warranted to recognize the growing role of women in the global workforce, a reconceptualization that is important to all workers.

III.

THE RIGHT TO HEALTH

Health-related human rights are well-established in international human rights law and are more multi-faceted than the narrower workplace rights addressed by the international occupational health and safety standards. The right to health was incorporated in the World Health Organization Constitution adopted by 61 States in July 1946 and took force in June 1948,⁹⁵ thus “predat[ing] many of the other human rights in international law.”⁹⁶ It was then

91. Karen Hardee et al., *Voluntary, Human Rights-Based Family Planning: A Conceptual Framework*, 45 *STUD. IN FAM. PLAN.* 1 (2014).

92. The World Health Organization defines social determinant of health in the Rio Political Declaration, endorsed by WHO Member States at the Sixty-fifth World Health Assembly (WHA) in May 2012, as “the conditions in which people are born, grow, live, work and age. These circumstances are shaped by the distribution of money, power and resources at global, national and local levels. The social determinants of health are mostly responsible for health inequities – the unfair and avoidable differences in health status seen within and between countries.” WHO, *RIO POLITICAL DECLARATION ON SOCIAL DETERMINANTS OF HEALTH* (2011), http://www.who.int/sdhconference/declaration/Rio_political_declaration.pdf.

93. Paul Schulte et al., *Considerations for Incorporating “Well-Being” in Public Policy for Workers and Workplaces*, 105 *AM. J. PUB. HEALTH* 31 (2015).

94. *Total Worker Health*, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <http://www.cdc.gov/niosh/twh/totalhealth.html> (last visited Nov. 10, 2016).

95. *Constitution Of WHO: Principles, World Health Organization*, WHO (2016), <http://www.who.int/about/mission/en> (last visited Nov. 10, 2016).

96. BETTY YOLANDA & CASEY B. RUBINO, A.B.A., RULE OF LAW INITIATIVE, THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS (2014), <http://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>.

incorporated in the Universal Declaration of Human Rights (UDHR) adopted in December 1948.⁹⁷ The understanding of the general right to health should provide the framework for addressing women's health rights at work. This includes reproductive health, for which international human rights instruments offer a rather expansive explanation of what reproductive health entails and what it entitles women to access with respect to health care services. The right to health requires States to ensure that their citizens can exercise these rights as well as prevent violations of these rights by third parties. In this Part, we discuss provisions of international human rights that illuminate the comprehensive nature of the right to health and speak to the realities of women workers.

Internationally recognized human rights are set forth in the human rights legal system: a complex web of laws, policies, complaint procedures, and enforcement mechanisms. Human rights law operates on three levels: the international level with the United Nation's complicated and often overlapping bodies and mandates; the regional level with regional charters (such as the European Social Charter, the African Charter on Human and Peoples' Rights, and the Arab Charter on Human Rights); and the national level with national courts and human rights commissions.

Internationally recognized human rights are articulated in customary law and international treaties (also known as Conventions or Covenants), Declarations or other consensus documents that States sign on to can also contain recognized human rights.⁹⁸ When States sign on to a treaty or covenant, they are committing themselves to follow the spirit of that document.⁹⁹ When States ratify a covenant they commit themselves to harmonizing their national laws in accordance with the principles contained in the document.¹⁰⁰ That is, they agree to implement the principles of that document through their national laws.

In the UN human rights system, each of the seven human rights covenants has its own committee—or "treaty body"—that is charged with monitoring and enforcing that covenant.¹⁰¹ Some committees are authorized to hear complaints about rights violations. The committees are responsible for determining how the

97. Universal Declaration of Human Rights, art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

98. Human Rights: A Basic Handbook for UN Staff, Office Of The High Commissioner For Human Rights, 2000, p. 5, <https://www.un.org/ruleoflaw/blog/document/human-rights-a-basic-handbook-for-un-staff> (Feb. 6, 2017); PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS (2012).

99. Vienna Convention on the Law of Treaties, Art. 18, 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

100. *Id.* Human Rights: A Basic Handbook for UN Staff, Office Of The High Commissioner For Human Rights, 2000, p. 4, <https://www.un.org/ruleoflaw/blog/document/human-rights-a-basic-handbook-for-un-staff> (Feb. 6, 2017).

101. PHILIP ALSTON & RYAN GOODMAN, *supra* note 98; Office of the United Nations High Commissioner for Hum. Rts., The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev. 1, 21 (2012), <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

rights will be interpreted and implemented. They do this by issuing statements and comments, agreeing to hear certain complaints and dismissing others that it considers outside of their purview, and responding to country reports.¹⁰² Thus, it is through the issuing of “General Comments” and the offering of “Concluding Observations” in response to country reports that the substantive content of international human rights is interpreted, updated, and adapted to respond to changes in thinking and political and social circumstances.

The interpretation of rights also shifts as a result of changes in social attitudes and awareness of new ways that rights are abused. The advocacy efforts of NGOs and international human rights experts have also played an important role in getting previously unrecognized human rights recognized by the international community and included in the interpretation of the human rights treaties.¹⁰³ For example, it was not until 1993, at the World Conference on Human Rights in Vienna, that women’s rights activists reframed violations impacting women in the “private sphere,” such as honor killings, child marriage, and violence against women, as human rights violations to be addressed systematically throughout the United Nations system.¹⁰⁴

The entire interpretation of a right is not self-evident in a single covenant or comment. A right first may be established in one covenant and then be affirmed, expounded upon, or reinterpreted to address other violations in other instruments. For example, the right to health was initially enshrined in the Universal Declaration of Human Rights and its subsequent corresponding instrument, the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰⁵ However, it is also stated as a right in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which is intended to prohibit discrimination on the basis of sex.¹⁰⁶ Similarly, some health-related rights, such as the right to access family planning information, are articulated in the ICESCR, and are also affirmed in other documents such as from the International Conference on Population and Development, which focused on population and family planning.¹⁰⁷

102. *Id.*

103. NON-STATE ACTORS AS STANDARD SETTERS, (Anne Peters et al. eds., 2009); Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006).

104. Charlotte Bunch, *Legacy of Vienna: Feminism and Human Rights*, Presentation at the International Expert Conference on Vienna + 20, 3-4 (June 27, 2013) (transcript available at <http://www.cwgl.rutgers.edu/docman/coalition-building/620-legacy-of-vienna-feminism-and-human-rights/file>).

105. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICESCR].

106. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

107. Report of the International Conference on Population and Development, International Conference on Population and Development, Cairo, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13.

The inclusion of rights contained in one instrument in subsequent instruments serves to reinforce and strengthen broader recognition of the right.¹⁰⁸ This cross-referencing of rights across different instruments reflects how these rights are interdependent and can only be fully realized when other rights are enjoyed.¹⁰⁹ The more a right is repeated and affirmed in documents, the stronger the case can be made for actors to comply with it.

Although well established, health-related human rights are often overlooked in discussions about the impact of business activities on human rights. Until recently, governments and non-governmental human rights organizations in the West were far more preoccupied with so called “first generation” civil and political rights, than they were with “second generation” economic, social and cultural rights to which ILO conventions on occupational health speak.¹¹⁰ As a result, the application of economic, social, and cultural rights was underdeveloped compared to civil and political rights.

A. *The Right to Health in International Human Rights Law*

A right to health is found in international conventions and affirmed in regional instruments.¹¹¹ These international conventions provide several protections of the right to health for women workers. Although not a legally binding instrument,¹¹² the Universal Declaration of Human Rights first recognized the right to health in 1948.¹¹³ Article 25 states that everyone has a

108. Office of the United Nations High Commissioner for Hum. Rts., The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev. 1, 18 (2012), <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>; PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS (2012).

109. *Id.*

110. *Id.*; Malcolm Shaw, International Law, 268-70 (2008); see also Frans Viljoen, *International Human Rights Law: A Short History*, UN Chronicle, (Jan. 2009), <https://unchronicle.un.org/article/international-human-rights-law-short-history>.

111. Due to limitations of the article, we do not discuss the regional conventions and domestic laws that recognize and affirm a right to health. Regional conventions such as The American Convention on Human Rights in the Area of Economic, Social & Cultural Rights Additional Protocol, the African Banjul Charter, and the Arab Charter on Human Rights explicitly declare a right to health, using the definition of the WHO Constitution. League of Arab States, Arab Charter on Human Rights, art. 39 (1)-(2)(a), March 15, 2008, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005), <https://www1.umn.edu/humanrts/instree/loas2005.html>; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social & Cultural Rights, art. 10, Nov. 16, 1999, O.A.S.T.S. No. 69; African (Banjul Charter) on Human and Peoples' Rights, art. 16, Oct. 21, 1986, 1520 U.N.T.S. 123. Finally, the European Social Charter has several articles which expressly and implicitly guarantee a right to health, including Articles 11 and 13, which provide for a right to public health, facilities for health promotion and education, and medical care for those who lack the resources to access this care. European Social Charter, Oct. 18, 1961 E.T.S. No. 035, <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642>.

112. The Universal Declaration of Human Rights [hereinafter UDHR] was adopted to exert a moral and political influence on states but many believe that specific provisions of the UDHR have become legal obligations under customary international law. INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS 135-137 (Philip Alston et al., eds., 2007).

113. Eight states abstained from voting on UDHR. *Universal Declaration of Human Rights*

right to a “standard of living adequate for the health and well-being of himself and of his family,” including the provision of medical care and necessary social services.¹¹⁴ The political climate at the time made the task of translating these principles into one document challenging, so the United Nation’s Human Rights Commission created two treaties: the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Declaration of Human Rights together with the ICCPR and the ICESCR comprise what is called the International Bill of Rights. Building on the UDHR, multiple UN treaties recognize the right to health and elaborate on its multiple aspects. We review the substantive content of the right to health in the major international instruments as relevant to the experiences of women workers in global supply chains below.

1. *The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)*

While the right to health is listed as a human right in a number of UN covenants, the ICESCR is largely recognized as the primary covenant in which the right to health and health-related human rights are established.¹¹⁵ The ICESCR contains several protections that address the needs of women workers in global supply chains. These provisions discuss the social determinants of health, including the workplace, occupational health and safety, and the right to sexual and reproductive health. In addition, the ICESCR describes State obligations to guarantee that health goods, services, and information are accessible to all who reside in a State. These obligations may help inform how corporations ensure the right to health in their workplaces.

Article 12 of the ICESCR specifically focuses on health.¹¹⁶ Article 12 recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹¹⁷ The ICESCR reiterates the definition of health found in the World Health Organization (WHO) Constitution and requires State parties to take steps necessary for the full realization of this right.¹¹⁸ The WHO Constitution defines health as a “state of complete physical,

Signatories, ETHIOPIA BLOG (Apr. 21, 2014), <http://unethiopia.org/universal-declaration-of-human-rights-signatories>.

114. Universal Declaration of Human Rights, art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

115. There are 164 state parties to the ICESCR. ICESCR, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUM. RTS. & WORLD HEALTH ORG., THE RIGHT TO HEALTH, FACT SHEET NO. 31 (2008), <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

116. “The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” ICESCR, art. 12(1), Dec. 16, 1966, 999 U.N.T.S. 171. Art. 12(2) discusses steps that states must undertake to “achieve the full realization of this right.” *Id.* at art. 12(2).

117. *Id.* at art. 12.

118. *Id.* at art. 12(1)–(2).

mental and social well-being and not merely the absence of disease or infirmity” and affirms that every person should enjoy the “highest attainable standard of health” regardless of their political belief, race, religion, or socioeconomic status.¹¹⁹

The ICESCR envisions the right to health as encompassing occupational health and safety, as well as sexual and reproductive health. For example, Article 7 of the ICESCR declares everyone has a right to safe and healthy working conditions.¹²⁰ Under this convention, the workplace environment is a social determinant of health that must be considered to realize the right to health for all persons.¹²¹ Article 12 of the ICESCR protects the “improvement of environmental and industrial hygiene,” the reduction of infant mortality, “prevention, treatment, and control of occupational disease,” and conditions enabling equal access to medical services and attention.¹²²

The crafters of the ICESCR recognized that resource constraints would prohibit States’ ability to deliver on all of the health-related human rights immediately. Therefore, the ICESCR did not require that States immediately fulfill these obligations. Instead, this covenant was subject to progressive realization, meaning that States were required to take immediate action within their financial limitations and other constraints to realize the right to health. They were, therefore, required to take “all appropriate means” to achieve the realization of the rights contained in the covenant, which are understood to include the adoption of “legislation measures” and other means.¹²³

The Committee that monitors the ICESCR engages in an ongoing process of updating the interpretation of the rights contained in the covenant in response to new thinking or new definitions of what might be considered a right or a violation. In 2000, the Committee on Economic, Social and Cultural Rights issued General Comments reflecting new thinking about women’s health and reproductive rights that emerged out of the Vienna Conference on Human

119. Constitution of the World Health Organization, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 (entered into force Apr. 7, 1948), http://www.who.int/governance/eb/who_constitution_en.pdf.

120. ICESCR, art 7(b), Dec. 16, 1966, 999 U.N.T.S. 171 (“The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular . . . safe and healthy working conditions.”)

121. The Committee on Economic, Social, and Cultural Rights (CESR) has commented that States have the duty to address determinants of health, such as: (1) access to safe drinking water and adequate sanitation; (2) safe food; (3) adequate nutrition and housing; (4) healthy working and environmental conditions; and (5) health-related education and information, including on sexual and reproductive health. Comm. Econ., Soc. and Cultural Rights, *CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 11, UN Doc. E/C.12/2000/4 (2000) [hereinafter “General Comment 14”].

122. ICESCR, art. 12(2)(a-d), Dec. 16, 1966, 999 U.N.T.S. 171 (obliging state parties to take measures to improve industrial hygiene and prevent, treat, and control occupational diseases).

123. U.N. Comm. on Econ., Soc., and Cultural Rights (CESCR), General Comment 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), ¶¶ 2-3, U.N. Doc. E/1991/23 (Dec. 14, 1990).

Rights, the International Conference on Population and Development (Cairo 1994) and the Fourth World Conference on Women (Beijing 1995).¹²⁴

Almost fifty years after the ICESCR was first crafted, the Committee issued General Comment 14¹²⁵ which included a number of important clarifications on the right to health. First, it acknowledged “that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health.”¹²⁶ These determinants include “access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”¹²⁷

Second, the Comment clarified that the Committee interprets the treaty provision related to infant mortality and child development to be understood “as requiring measures to improve child and maternal health, *sexual and reproductive health services, including access to family planning*, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.”¹²⁸ The Committee also made clear that people should have access to “*health-related education and information*.”¹²⁹

Third, the Committee specifically recognized the right of individuals to make their own reproductive decisions and to control their own bodies as part of the right to health. It noted that “[t]he right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom.”¹³⁰ In addition, the right to reproductive and sexual health has been recognized in the International Covenant on Civil and Political Rights (ICCPR). Under the ICCPR, the right to

124. General Comment 14, *supra* note 121.

125. *Id.*

126. *Id.* ¶ 4.

127. *Id.* ¶ 11.

128. *Id.* ¶ 14 (italics added).

129. *Id.* ¶ 11 (italics added).

130. *Id.* ¶ 8.

sexual and reproductive health is connected to the right to life¹³¹ and to rights of nondiscrimination, equality, and privacy.¹³²

Fourth, with respect to the provision on environmental and industrial hygiene, the Committee explained in its General Comments that the provision should be interpreted to mean: preventive measures regarding occupational accidents and disease; an adequate supply of safe and potable water; basic sanitation; the prevention and reduction of exposure to harmful substances and environmental conditions that impact human health; and the reduction of factors contributing to workplace health hazards.¹³³ The Committee further commented in Article 12 on protections for workers such as adequate housing, safe and hygienic working conditions, adequate supply of food and proper nutrition, and discouraging unhealthy behaviors such as alcoholism and drugs.¹³⁴ This guidance goes beyond the traditional requirements of occupational health and safety by providing protections that increase the mental, physical, and social wellbeing of a worker.

2. *The Availability, Accessibility, Acceptability, and Quality (AAAQ) Framework*

General Comment 14 elaborates on the idea that the right to health must be operationalized by the State so that persons can enjoy and meet the highest standard of health possible as individuals. This idea is elaborated in the AAAQ Framework established by General Comment 14.¹³⁵ The AAAQ Framework requires States to ensure that the facilities, goods, services, and conditions needed for health are accessible, available, acceptable, and of quality.¹³⁶

Under the AAAQ Framework, “availability” means that functioning public health and healthcare facilities, goods, services and programs are available in sufficient supply within the State,¹³⁷ including essential medicine such as contraception.¹³⁸ The “availability” prong also includes safe and potable

131. The UN Human Rights Committee for the International Covenant on Civil and Political Rights has utilized the right to life in Article 6 of ICCPR to declare that state parties have obligations regarding maternal mortality and unwanted pregnancies, as well as the responsibility to adopt measures to reduce infant mortality and increase life expectancy. The right to life is therefore interdependent with a right to health, including sexual and reproductive health. U.N. Human Rights Comm., General Comment No. 28: Equality of Rights Between Men and Women (Article 3), ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment 28]; U.N. Human Rights Comm., CCPR General Comment No. 6: Article 6 (Right to Life), ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

132. General Comment 28, *supra* note 131, ¶¶ 3, 20 (paragraph 20 discusses equality and the right to privacy in regards to a woman’s sexual life).

133. General Comment 14, *supra* note 121, ¶¶ 14–15.

134. *Id.*

135. *Id.* ¶ 9.

136. *Id.* ¶¶ 12(a)-(d).

137. *Id.* ¶ 12(a).

138. CTR. FOR REPRODUCTIVE RIGHTS, SUBSTANTIVE EQUALITY AND REPRODUCTIVE RIGHTS:

drinking water, adequate sanitation facilities, hospitals, clinics, and other health-related buildings, as well as trained medical and professional staff receiving competitive salaries.¹³⁹

“Accessibility” requires facilities, goods, and services to be economically affordable and geographically, safely, and physically accessible for all.¹⁴⁰ Accessibility to services and facilities must be legally and practically ensured, particularly for marginalized communities.¹⁴¹ Non-discrimination and access to seek, receive, and deliver information and ideas are part of the accessibility requirement of the AAAQ Framework.¹⁴²

The “acceptability” prong emphasizes culturally appropriate services, goods, and facilities, which are respectful of the needs of persons of various genders and ages¹⁴³ and consider the needs of marginalized communities.¹⁴⁴ In addition, this requirement mandates that services, goods, and facilities be designed to improve the health status of the individuals and communities concerned.¹⁴⁵

“Quality” refers to the State’s obligation to guarantee that *all* health facilities, goods and services are culturally, scientifically, and medically appropriate, as well as considerate of medical ethics.¹⁴⁶ This definition of “quality” includes scientifically approved and unexpired medications and equipment. It also reiterates the requirements of safe and potable drinking water, adequate sanitation, and skilled medical staff.¹⁴⁷

As a central part of public health, the AAAQ framework is integrated into new development initiatives such as Family Planning 2020, among others, and its Rights and Empowerment Principles for Family Planning.¹⁴⁸ Family Planning 2020 articulates that individuals are agents in their reproductive lives and must have access to information, services, and supplies to make these decisions.¹⁴⁹

A BRIEFING PAPER ON ALIGNING DEVELOPMENT GOALS WITH HUMAN RIGHTS OBLIGATIONS 9 (2014),

https://www.reproductiverights.org/sites/ctr.civicactions.net/files/documents/Equality_Guide_Reduced_size.pdf.

139. General Comment 14, *supra* note 121, ¶ 12(a).

140. *Id.* ¶¶ 12(b)(ii)-(iii).

141. *Id.* ¶ 12(b)(i).

142. *Id.* ¶¶ 12(b)(i), (iv).

143. *Id.* ¶ 12(c).

144. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 138, at 9.

145. General Comment 14, *supra* note 121, ¶ 12(c).

146. *Id.* ¶¶ 12(a), (c), (d).

147. *Id.* ¶ 12(d).

148. See JAN KUMAR & KAREN HARDEE, RIGHTS-BASED FAMILY PLANNING: 10 RESOURCES TO GUIDE PROGRAMMING (May 2015), <http://evidenceproject.popcouncil.org/wp-content/uploads/2015/07/Resource-Guide-of-RBA-to-FP.pdf> (discussing various family planning and contraceptive services guidelines).

149. FAMILY PLANNING 2020, RIGHTS AND EMPOWERMENT PRINCIPLES FOR FAMILY PLANNING (2014), <http://www.familyplanning2020.org/resources/4697>.

The ICESCR and the General Comments of the Committee are seen by family planning leaders as part of the array of human rights instruments that “can be used to hold governments accountable and to guide policies and programs—whether in the public, not-for-profit, or private sectors.”¹⁵⁰

Through these General Comments, the Committee has recognized how determinants of health, including the workplace, impact one’s ability to attain a standard of health. In short, under the ICESCR, the right to health entitles everyone to safe and sanitary living and working conditions, support for sexual and reproductive health, and a quality health care system that fights diseases, provides medical services to everyone, and disseminates health information.

3. *The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)*

Other international human rights instruments recognize the right to sexual and reproductive health. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognizes the right to health and reviews the responsibilities of governments to ensure this right is protected, particularly for women.¹⁵¹ CEDAW sets forth what actions are necessary (and what health-related services are required) for the State to provide in order to ensure that women are able to realize their right to health “on the basis of equality of men and women.”¹⁵² It does not establish new health-related rights or give women special rights above and beyond those accorded to men. The Committee on CEDAW has affirmed that “access to health care, including reproductive health, is a basic right under CEDAW.”¹⁵³

Like the ICESCR, CEDAW distinguishes between rights at work and within the workplace and the right to health by placing them in different articles. It reiterates and affirms a number of rights that affect health in the workplace that are established in the ICESCR, providing protections for pregnancy, maternity leave, and harmful work assignments.¹⁵⁴ It also spells out what the State needs to do to ensure that the distinct health-related needs of women are met. CEDAW declares that State parties will implement measures to ensure that women have access to health care services and information, including services

150. Karen Hardee et al., *Voluntary, Human Rights-Based Family Planning: A Conceptual Framework*, 45 *STUD. FAM. PLAN.* 1, 4 (2014).

151. CEDAW, *supra* note 106, art. 12(1) (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”).

152. *Id.* at arts. 10(h), 12.

153. U.N. Comm. on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶ 1, U.N. Doc. A/54/38/Rev.1, (1999) [hereinafter CEDAW General Comment 24].

154. CEDAW, *supra* note 106, art. 11(2).

and information regarding family planning, free from discrimination.¹⁵⁵ It also reiterates this State obligation for rural women.¹⁵⁶

Finally, under CEDAW, discrimination has occurred if State parties refuse to legally provide certain reproductive health services.¹⁵⁷ State parties to CEDAW must consider the health needs of women in vulnerable populations, noting that societal factors impact an individual's health status.¹⁵⁸ State parties must eliminate discrimination against women, throughout all stages of life, when accessing health care services, especially at points in time when women are planning their families.¹⁵⁹ As the Committee that monitors the implementation of CEDAW has been particularly focused on the application of rights to women, its General Comments help explain how the rights established in other treaties can apply to the unique circumstances of women.¹⁶⁰

4. *Other Treaties That Support a Right to Health and Sexual and Reproductive Health*

Other specialized human rights conventions focused on various vulnerable populations also affirm the broad health-related human rights contained in the ICESCR—in particular, mental health, sexual and reproductive health, and maternal health, as well as the right to family planning information and services and the right to reproductive decision making and agency. These conventions may provide further protections of the right to health for women workers in global supply chains. These instruments include:

- The 1963 Convention on the Elimination of All Forms of Racial Discrimination (CERD). The CERD was the first covenant to affirm the right to health that was contained in the ICESCR.¹⁶¹ Article 5 of the CERD obligates State parties to prohibit and eliminate discrimination and guarantee specific, civil, political, economic, social, and cultural rights to everyone without distinction as to race, color, and ethnic origin.¹⁶² It also specifically mentions the right to public health services and medical care.¹⁶³

155. *Id.* at art. 10(h).

156. *Id.* at art. 14(2)(b).

157. CEDAW General Comment 24, *supra* note 153, ¶ 11.

158. *Id.* ¶ 6.

159. *Id.* ¶ 2.

160. *See, e.g.*, CEDAW General Comment 24, *supra* note 153; U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 23: Political and Public Life*, U.N. Doc. A/52/38 (1997); U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 13: Equal Remuneration of Work of Equal Value*, U.N. Doc. A/44/38 (1989).

161. International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(iv), Dec. 21, 1965, 993 U.N.T.S. 3.

162. *Id.* at art. 5.

163. *Id.* at art. 5(e)(iv).

- The 1989 Convention on the Rights of the Child (CRC). The CRC guarantees children the right to health as it is defined in the ICESCR, which includes access to health information.¹⁶⁴ The CRC clearly states no child should be denied access to health care.¹⁶⁵
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Convention does not obligate States to protect the migrant's right to health in a manner consistent with ICESCR, but it does require States to ensure that companies provide migrants with the same conditions of work that they are required to provide nationals, thus covering occupational safety and health rights.¹⁶⁶
- The 2006 Convention on the Rights of Persons with Disabilities. This convention was meant to prevent discrimination, not create new rights. It reaffirms health rights by making specific reference to health care services "in the area of sexual and reproductive health and population-based public health programmes," and requiring "health professionals to provide care of the same quality to persons with disabilities as to others."¹⁶⁷

5. *The Right to Health in International Policy*

Beyond binding international human rights instruments there are health rights contained in various global declarations and action plans. These instruments further elaborate on the right to sexual and reproductive health for women workers in global supply chains. While not legally binding, documents from the United Nation's world conferences, which bring together governments and civil society, represent an accepted global consensus on how rights are interpreted, and often lay out priority actions for governments to take to implement their human rights obligations.¹⁶⁸ The world conferences are important because they provide an opportunity for the global community to establish new interpretations of rights, and, in this way, they move the human rights discourse forward. While many conferences are germane to our

164. Convention on the Rights of the Child, arts. 24(1) & 24(2)(e), Nov. 20, 1989, 1577 U.N.T.S. 3.

165. *Id.* at art. 24(1).

166. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 25(1)(a), Dec. 18, 1990, 2220 U.N.T.S. 3.

167. Convention on the Rights of Persons with Disabilities, art. 25, Dec. 13, 2006, 2515 U.N.T.S. 3.

168. See Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 92 (2003) ("The [Beijing] Platform for Action is not a binding legal instrument, [but] it represents a global agenda for change that women's rights activists have used to agitate for reform in their own countries."); Sarah R. Hamilton, *The Status of Women in Chile: Violations of Human Rights and Recourse Under International Law*, 25 WOMEN'S RTS. L. REP. 111, 115 (2004) (noting that "consensus decisions reached at international meetings are not formally binding").

consideration of the health rights of women workers, three are of particular importance.

The World Conference on Human Rights in Vienna in 1993¹⁶⁹ was the first significant attempt for countries to gather and collectively review and update the human rights framework since the 1960s and the end of the Cold War.¹⁷⁰ It represented a “tipping point” for women’s rights and health rights¹⁷¹ and was where the claim “women’s rights are human rights” was first made. Vienna “challenged the artificial hierarchy placing civil and political over economic and social rights,”¹⁷² breaking down outdated divisions that existed during the Cold War.¹⁷³ The conference recognized that all human rights are “indivisible” and should therefore be seen as carrying equal importance. It also shifted thinking about the State’s role in protecting human rights. Rather than an obligation not to violate the rights of its citizens, now the State could be held responsible for its failure to adequately protect its citizens from infringements upon their rights by third parties.¹⁷⁴

The idea that “women’s rights are human rights” was used in 1994 and 1995 by activists at two major international conferences, the International Conference on Population and Development Program of Action (“ICPDPOA”) and The Beijing Platform for Action at the U.N. Fourth World Conference on Women (“Beijing Platform”), to set a global agenda for women’s rights, including sexual and reproductive health.¹⁷⁵ Recognizing persistent discrimination against women—particularly in the workplace—threats to women’s health, and lack of access to adequate education, the ICPDPOA and the Beijing Platform laid out programs of action to reverse these trends.

In the ICPDPOA, the purpose of sexual health was described as “the enhancement of life and personal relations, and not merely counseling and care

169. United Nations Human Rights Office of the High Comm’r, *World Conference on Human Rights*, 14-25 June 1993, Vienna, Austria, <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> (last visited Nov. 7, 2016).

170. Navi Pillay, *Twenty years working for your rights; the 1993 world conference on human rights*, at 9, United Nations High Commissioner for Human Rights, United Nations, Geneva, 2013

171. Charlotte Bunch, *Vienna’s legacy: feminism and human rights*, in CENTER FOR ECONOMIC AND SOCIAL RIGHTS, TWENTY YEARS OF ECONOMIC AND SOCIAL RIGHTS ADVOCACY: MARKING THE TWIN ANNIVERSARIES OF THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS AND THE VIENNA DECLARATION AND PROGRAM OF ACTION 36 (2015).

172. Navi Pillay, *supra* note 170 at 9.

173. Ignazio Saiz, *Introduction*, in CENTER FOR ECONOMIC AND SOCIAL RIGHTS, TWENTY YEARS OF ECONOMIC AND SOCIAL RIGHTS ADVOCACY: MARKING THE TWIN ANNIVERSARIES OF THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS AND THE VIENNA DECLARATION AND PROGRAM OF ACTION 7 (2015).

174. Navi Pillay, *supra* note 170 at 9.

175. Susan Tolmay, *Vienna +20 - The World has Changed Considerably, as Women’s Rights are Taken More Seriously as Human Rights*, ASS’N FOR WOMEN’S RIGHTS DEV. (June 27, 2013), <https://www.awid.org/news-and-analysis/vienna-20-world-has-changed-considerably-womens-rights-are-taken-more-seriously> (interviewing with Charlotte Bunch).

related to reproduction and sexually transmitted diseases”¹⁷⁶ and it was included as part of reproductive health.¹⁷⁷ This right to sexual health is inclusive of and indivisible from other health rights: the right to life, liberty and the security of the person; the right to health care and information; the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility; the rights to autonomy and privacy in making sexual and reproductive decision-making; and the rights to informed consent and confidentiality in relation to health services.¹⁷⁸

The ICPDPOA affirmed that reproductive rights include “the right to attain the highest standard of sexual and reproductive health.”¹⁷⁹ To achieve this standard, the ICPDPOA stated that men and women need to have information on sexual and reproductive health; access to family planning methods of their choice that are safe, effective, affordable, and acceptable; other legal methods of regulating fertility; and access to appropriate health care services.¹⁸⁰ The ICPDPOA stated that men and women need to be free from discrimination, coercion, and violence to exercise their rights to reproductive and sexual health.¹⁸¹

Moreover, the ICPDPOA urged governments and employers to eliminate gender discrimination in hiring, wages, benefits, training, and job security.¹⁸² It also outlined a plan that, among other directives, called for an end to discrimination based on pregnancy status and a means for women to combine childbearing, child rearing, and breastfeeding with employment.¹⁸³

The Beijing Platform, adopted by 189 delegations,¹⁸⁴ reiterated that women have a right to health.¹⁸⁵ It connected the right to health to a woman’s well-

176. Eszter Kismödi et al., *Advancing Sexual Health Through Human Rights: The Role of the Law*, 10 GLOB. PUBLIC HEALTH 252, 252 (2015).

177. *Id.*

178. Carmel Shalev, *Right to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*, International Conference on Reproductive Health, Mumbai, India (Mar. 15-19, 1988), <http://www.un.org/womenwatch/daw/csw/shalev.htm>. Although there is no formal, international consensus on the definition of the term “sexual rights,” there is an understanding that these rights are based in human rights recognized in international and regional instruments and national constitutions and laws, thereby obliging states to respect, protect, and fulfill these rights. *See, e.g.*, Kismödi, *supra* note 176, at 253.

179. International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, ¶ 4.1, U.N. Doc. A/CONF.171/13/Rev.1 (1995), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2004/icpd_eng.pdf.

180. *Id.* ¶ 7.2.

181. *Id.* ¶ 7.3.

182. *Id.* ¶ 4.7.

183. *Id.* ¶ 4.4(f)-(g).

184. *What is SRHR?*, WOMEN WIN, <http://guides.womenwin.org/srhr/what-is-srhr> (last visited May 29, 2015).

185. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 89,

being and her ability to participate in public and private life.¹⁸⁶ It also called on governments to increase a woman's access throughout her lifespan to appropriate, affordable, and quality health care, information, and services;¹⁸⁷ strengthen women's health promotion programs;¹⁸⁸ and implement gender-specific initiatives that address sexually transmitted diseases, HIV/AIDS, and sexual and reproductive health concerns¹⁸⁹ among other tasks.

Similar to the ICPDPOA, the Beijing Platform later expanded and further clarified a plan to end discrimination against women in the workplace.¹⁹⁰ The declaration outlined a list of actions by government, private, and non-governmental stakeholders to ensure that women have equal access to employment, education, and professional training.¹⁹¹ Further actions were listed that would strengthen women's economic capacity, eliminate occupational segregation, and promote harmonization of work and family responsibilities.¹⁹²

Gita Sen of the Harvard School of Public Health notes, "Vienna, Cairo and Beijing (as these conferences are colloquially called) thus affirmed a more inclusive meaning for the right to health: for women and girls, in particular, the right to health is not only about obtaining health services or providing nutrition, clean water and sanitation but also the right to health includes the right to decision-making, control, autonomy, choice, bodily integrity and freedom from violence and fear of violence. States have a responsibility not only to provide access to health services but also to respect, protect and fulfill the above aspects of women's and girls' human rights vis-à-vis States' own actions as well as those of families, communities and the private sector."¹⁹³

B. Other International Declarations, Frameworks, and Initiatives on Workplace Health

International and European discourse¹⁹⁴ have long recognized the need for States and corporate employers to improve a worker's overall health by going

U.N. Doc A/CONF.177/20 (Oct. 17, 1995), <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> [hereinafter Beijing Platform of Action].

186. *Id.*

187. *Id.* at Chapter 1, ¶ 38.

188. *Id.* at Chapter 2, ¶ 42.

189. *Id.* at Chapter 3, ¶ 44.

190. *Id.* ¶ 178(c).

191. *Id.* ¶¶ 164–174.

192. *Id.* ¶¶ 175–180.

193. Gita Sen, *Sexual and reproductive health and rights in the post-2015 development agenda*, 9 GLOBAL PUB. HEALTH 6, 599-606 (July 10, 2014).

194. To limit the scope of this Article, the authors have only discussed declarations and ILO conventions that strongly support their argument. For a brief summary on other declarations and ILO conventions that touch on worker's health, see WHO, WHO HEALTHY WORKPLACE FRAMEWORK AND MODEL: BACKGROUND AND SUPPORTING LITERATURE PRACTICES 11-14 (2010), http://www.who.int/occupational_health/publications/healthy_workplaces_background_documentdfi

beyond their occupational safety and health obligations. A range of international frameworks and initiatives have also suggested a broader concept of occupational health and safety consideration that corporate actors should fulfill. These have recognized the multifaceted nature of the right to health for women workers in global supply chains. Various declarations and charters have also emphasized how the workplace impacts reproductive health and well-being.

Most notably, the Moscow Declaration/Position Statement on Reproductive Health at Work (“Moscow Declaration”) adopted by the International Conference: Medical and Ecological Problems of Workers’ Reproductive Health in 1998 provided a robust discussion on what states should do to mitigate the impacts of the workplace on reproductive health. The Moscow Declaration called for a plan of action to ensure primary care and a new international convention addressing reproductive health in the workplace.¹⁹⁵ Reproductive health was also addressed in the 2005 Bangkok Charter for Health Promotion in a Globalized World (“Bangkok Charter”). The Bangkok Charter notes that the health of men and women is impacted differently in a globalized world¹⁹⁶ and, for the first time, explicitly recognizes that employers and corporations should practice health promotion in the workplace, calling it “a requirement for good corporate practice.”¹⁹⁷

Other European declarations have highlighted how the workplace is a social determinant of health and that workplace practices impact not only a person’s mental health, but also their life outside of work. In 1997, the European Union in The Luxembourg Declaration on Workplace Health Promotion observed that attention only to occupational safety would not address health issues arising from globalization, changes in employment practices, and recent changes in the economy.¹⁹⁸ It noted that solving these issues requires improvements to organizational work structure, promoting active participation at work, and support of personal development.¹⁹⁹ The Barcelona Declaration on Developing Good Workplace Health Practice in Europe (“Barcelona Declaration”) in 2002 further recognized that the workplace impacts family life before and after work hours and that many mental health disorders are linked to

nal.pdf.

195. Ilise L. Feitshans, *Is There a Human Right to Reproductive Health?*, 8 TEX. J. WOMEN & L. 93, 115 (1998). The Declaration also includes prohibition or reduction of harmful occupational and environmental hazards, particularly for those who are contemplating parenting; research into environmental and occupational factors affecting reproductive health; and legal analysis of existing foreign and international laws on reproductive health.

196. , *The Bangkok Charter for Health Promotion in a Globalized World*, WHO (Aug. 11, 2005), http://www.who.int/healthpromotion/conferences/6gchp/bangkok_charter/en/.

197. *Id.* The Bangkok Charter also states that health promotion should be a core responsibility for all levels of government.

198. EUROPEAN NETWORK FOR WORKPLACE HEALTH PROMOTION, THE LUXEMBOURG DECLARATION ON WORKPLACE HEALTH PROMOTION IN THE EUROPEAN UNION (2007), http://www.eon.com/content/dam/eon-com/en/downloads/l/Luxembourg_Declaration.pdf.

199. *Id.*

stress from work.²⁰⁰ It suggested that the world of work may be the single, strongest social determinant of health.²⁰¹

The World Health Organization has produced declarations and frameworks which recognize that occupational health and safety in the workplace does not solely determine the health outcomes and well-being of workers. These instruments have called on employers to have a comprehensive approach to improving workers' health and discussing the importance of improving the health of workers' families and their communities. Their 1994 strategy on occupational health for all explicitly recognized that occupational health has developed from a "monodisciplinary risk-oriented activity to a multidisciplinary and comprehensive approach" that considers a person's "physical, mental, and social well-being, general health, and development."²⁰² In 2006, the World Health Organization, in discussing their 1994 strategy, produced the Stresa Declaration on Workers Health, stating:

There is increasing evidence that workers' health is determined not only by the traditional and newly emerging occupational health risks, but also by social inequalities such as employment status, income, gender and race, as well as by health-related behaviour and access to health services. Therefore, further improvement of the health of workers requires a holistic approach, combining occupational health and safety with disease prevention, health promotion and tackling social determinants of health and reaching out to workers, families, and communities.²⁰³

Building on the Stresa Declaration and the 1996 plan, the World Health Assembly then endorsed a global 10-year plan, "Worker's Health: global plan of action." To further the objectives of this plan of action, the WHO produced a framework for States and employers, including those in the private sector, to create healthy workplaces that address workers' health and social well-being.²⁰⁴ The WHO Healthy Workplace Framework provided the following definition:

A healthy workplace is one in which workers and managers collaborate to use a continual improvement process to protect and promote the health, safety and well-being of workers and the sustainability of the workplace by considering the following, based on identified needs: health and safety concerns in the physical work environment; health, safety and well-being concerns in the psychosocial work environment including organization of work and workplace culture; personal health resources in the workplace; and ways of participating in the

200. EUROPEAN NETWORK FOR WORKPLACE HEALTH PROMOTION, THE BARCELONA DECLARATION ON DEVELOPING GOOD WORKPLACE HEALTH PRACTICE IN EUROPE (2002), <http://www.ver.is/whp/pdf/barcelona.pdf>.

201. *Id.*

202. WHO, GLOBAL STRATEGY ON OCCUPATIONAL HEALTH FOR ALL: THE WAY TO HEALTH AT WORK ¶ 71 (1994), http://www.who.int/occupational_health/en/oehstrategy.pdf.

203. WHO, DECLARATION ON WORKERS HEALTH APPROVED AT THE SEVENTH MEETING OF THE WHO COLLABORATING CENTRES FOR OCCUPATIONAL HEALTH (2006), http://www.who.int/occupational_health/Declarwh.pdf.

204. HEALTHY WORKPLACE FRAMEWORK, *supra* note 194, at 16.

community to improve the health of workers, their families and other members of the community.²⁰⁵

The Healthy Workplace Framework provides proactive recommendations for employers to ensure that the workplace improves the health of workers by looking at factors outside of occupational health and safety. It stresses that “personal health resources in the workplace” include a supportive environment; monitoring and support for continuous physical and mental health; and employer provision of health services, information, resources, and opportunities and flexibility so that “workers can support or motivate their efforts to improve or maintain healthy personal lifestyle practices.”²⁰⁶ In addition, the Healthy Workplace Framework emphasizes that businesses and employees are part of their immediate, local environments and communities and that these necessarily impact the health of employees and their families.²⁰⁷ This framework urges businesses to provide activities, expertise, and resources to the social and physical communities that impact the physical and mental health, safety, and well-being of its workers and their family members.²⁰⁸ It is notable that the ILO’s Plan of Action 2010-2016 on OSH conventions and protocols adopts none of the more encompassing WHO language such as “holistic approach” and “health promotion” or “participating in the community to improve the health of workers.”²⁰⁹

In addition to the abovementioned frameworks, that the gender equality and women’s empowerment agenda of the United Nations has incorporated into their corporate social responsibility efforts provides additional insight regarding the role of corporations in ensuring the right to health for women workers. For instance, the focus on women’s equality at the workplace has been advanced jointly by UN Women and the UN Global Compact with the launch of the Women’s Empowerment Principles (WEPs) in 2010.²¹⁰ The Global Compact is the largest, voluntary corporate sustainability initiative with 9,000 corporate signatories in 135 countries²¹¹ that commit to applying social responsibility business practices to their operations. The seven principles, designed to promote corporate policies that advance women’s empowerment globally are based on the Calvert Women’s Principles launched in 2004 to address the need for private sector organizations to meaningfully engage and shape conversations and efforts

205. *Id.*

206. *Id.* at 93.

207. *Id.* at 94.

208. *Id.* at 94-95.

209. *Plan of Action (2010-2016) to achieve widespread ratification and effective implementation of the occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187)*, ILO (2010), http://www.ilo.org/global/standards/WCMS_125616/lang-en/index.htm.

210. *About Us, WOMEN’S EMPOWERMENT PRINCIPLES*, <http://www.wepinciples.org/Site/Faq/#2> (last visited November 3, 2016).

211. *Our Participants*, UN GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants>, (last visited on November 3, 2016).

on women's equality.²¹² Principle 3 addresses workplace health and ensuring the health, safety, and well-being of women and men workers. Several other WEPS are relevant to women working in global supply chains and promote education, training, and professional development for women; the fair treatment of women and men; and respect for human rights and nondiscrimination policies.²¹³ In 2014, the Global Compact and UNWomen released a corporate "Call to Action: Investing in Women's Right to Health" to give more attention to the WEPS' health principle.²¹⁴

These initiatives from outside the human rights framework indicate a growing consensus outside the rights world that businesses should not only respect a comprehensive vision of the right to health for their workers—including women and migrant workers—but also assume an active role, if not responsibility, for actualizing this vision. They underscore that the division between occupational health and general health no longer has a clear rationale and may do harm.

Under international human rights and labor law, women workers in global supply chains already have a right to health as *human beings* and to occupational health as *workers*. When economic, legal, cultural, social, or structural, restrictions in the workplace prevent women workers from exercising their health rights or enjoying reproductive autonomy, "they face inequalities in their health outcomes and in many other aspects of their lives."²¹⁵ Requirements regarding how States should operationalize the right to health, or the AAAQ Framework, could inform how corporate actors in global supply chains provide healthcare in their workplaces and better meet the needs of the changing labor force. At a minimum, States that have ratified certain international conventions must not impede access to health care and services on a discriminatory basis. States must also ensure that health care services, goods, and facilities are not only accessible, but also affordable, of quality, and culturally and linguistically appropriate.²¹⁶ The evolution of health rights over the last sixty years was accompanied by increasing protections for gender equality. Health rights, including those pertaining to occupational safety, need to be better aligned to best protect the health and well-being of women workers. To that end,

212. CALVERT INVESTMENTS, CALVERT WOMEN'S PRINCIPLES: 10TH ANNIVERSARY REPORT: PAST, PRESENT, AND FUTURE (2014), <http://www.calvert.com/NRC/Literature/Documents/BR10089.pdf>.

213. *Overview, WOMEN'S EMPOWERMENT PRINCIPLES*, <http://weprinciples.org/Site/PrincipleOverview/> (last visited on February 1, 2016).

214. UN WOMEN & UN GLOBAL COMPACT, CALL TO ACTION: INVESTING IN WOMEN'S RIGHT TO HEALTH, (2015), http://weprinciples.org/files/attachments/WEPS_Call_to_Action_Investing_in_Women's_Health.pdf.

215. CENTER FOR REPRODUCTIVE RIGHTS, SUBSTANTIVE EQUALITY AND REPRODUCTIVE RIGHTS: A BRIEFING PAPER ON ALIGNING DEVELOPMENT GOALS WITH HUMAN RIGHTS OBLIGATIONS (2014).

216. *Id.*

companies would do well to take a more expansive view of their risks when assessing worker health rights violations in their operations.

IV.

THE UN GUIDING PRINCIPLES, CORPORATE DUE DILIGENCE & WORKPLACE HEALTH

The UN Guiding Principles on Human Rights and Business represent the next stage in thinking about the responsibility of transnational corporations in human rights violations. The financial power of these business enterprises have expanded with the growth of the global economy in the second half of the twentieth century.²¹⁷ The Guiding Principles provide an opportunity to reassess, particularly through the due diligence process, what the right to health means for women workers and what corporations can do to respect this right. To identify the responsibilities of business enterprises, the former U.N. Secretary-General and Nobel Laureate Kofi Annan appointed Harvard University Professor John Ruggie in 2005 as a Special Representative with the task of recommending a framework, based on substantial input from stakeholders around the world, for State and business compliance with human rights norms.²¹⁸ In 2008, Ruggie issued the “Protect, Respect, and Remedy” Framework. Ruggie later introduced the Guiding Principles on Business and Human Rights to provide instructions on how to implement the framework. The Guiding Principles were subsequently unanimously endorsed by the Human Rights Council in 2011.²¹⁹

The Guiding Principles rest on three pillars. The first is the State’s duty to protect against human rights violations by businesses and other third parties.²²⁰ The second is the business responsibility to respect those rights by preventing, mitigating, and remedying human rights violations resulting from business activities.²²¹ The third is that victims of human rights abuse should have access to judicial and non-judicial remedies.²²²

Under the Guiding Principles, international businesses now have an independent duty to respect human rights that exists regardless of “States’ abilities and/or willingness to fulfil their own human rights obligations.”²²³ The language is best understood to mean that if a company is operating in a country where gender equality, for instance, is not upheld, the company still must adhere to this right. The Guiding Principles direct businesses to respect all human rights. These rights include, at a minimum, those recognized in the International Bill of Human Rights, which includes the ICCPR and ICESCR, and the

217. *Guiding Principles*, *supra* note 5, ¶ 1.

218. *Id.*

219. *Id.*

220. *Id.* ¶ 6.

221. *Id.* ¶ 6.

222. *Id.* ¶ 6.

223. *Id.* at annex ¶ 11.

principles found in the ILO's Declaration on Fundamental Principles and Rights at Work.²²⁴ The corporate duty to respect is not merely a passive responsibility to comply with domestic laws and regulations, but rather it requires businesses to proactively take steps to avoid infringing human rights and address adverse human rights impacts that result from their business activities.²²⁵ This includes addressing impacts when they occur and finding ways to prevent or ameliorate human rights impacts directly connected to an enterprise's operations, products, or services, including abuses caused by an enterprise's business relationships even if they have not contributed to an abuse.²²⁶ This duty applies to all enterprises regardless of size, sector, ownership, structure, and the context in which they are operating. Instead, how they meet this responsibility will depend on these factors and the scale of an enterprise's "adverse human rights impacts."²²⁷ In addition, when businesses have identified that they have caused or contributed to "adverse human rights impacts," they should actively engage in remediation by themselves or in cooperation with others.²²⁸

According to the Guiding Principles, the business duty to respect includes conducting human rights due diligence in order to better ensure that a business enterprise is able to avoid complicity in rights abuses.²²⁹ To satisfy the responsibility to respect, companies must: adopt a human rights policy statement at the most senior level of operations; conduct human rights impact assessments; integrate human rights policies throughout all divisions and at all levels of personnel; and track human rights impact and performance, including providing a confidential means for employees to report noncompliance.²³⁰ The due diligence process helps companies avoid engaging in abuses by assessing actual and potential human rights impacts, incorporating and acting upon the findings of these assessments; tracking their implementation; and communicating how they are addressing human rights impacts.²³¹ The enterprise must examine the environment of the State in which the business operates, identifying specific human rights challenges unique to the location.²³² The business should determine whether any of its activity, in context, impacts human rights.²³³ Additionally, the business should also determine if its relationships with third

224. *Id.* at annex ¶ 12.

225. *Id.* at annex ¶ 11.

226. *Id.* at annex ¶ 13.

227. *Id.* at annex ¶ 14.

228. *Id.* at annex ¶ 22.

229. *Id.* at annex ¶ 117.

230. John Ruggie, Special Rep. of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect, and Remedy: a Framework for Business and Human Rights*, ¶¶ 60-63, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect, and Remedy*].

231. *Guiding Principles*, *supra* note 5, at annex ¶ 17. For more discussion on how enterprises should engage in the due diligence process, see annex ¶ 18-21.

232. *Protect, Respect, and Remedy*, *supra* note 230, ¶ 57.

233. *Id.*

parties, such as vendors or suppliers, impact human rights.²³⁴ The due diligence process should be an ongoing commitment by the enterprise to respect human rights.²³⁵ In regards to complicity, the Guiding Principles strongly emphasize that companies can avoid complicity by employing the due diligence processes which apply to their own activities and to their business relationships.²³⁶

The Guiding Principles do not create or reinterpret rights law; they describe only the corporate responsibility to respect human rights and the due diligence and other processes used to meet this responsibility. Gender experts have argued that the Guiding Principles need to address gender directly.²³⁷ Under direction from the Human Rights Council, Ruggie held an expert consultation in 2009 on how he could incorporate a gender perspective into the framework.²³⁸ The Guiding Principles in their final form refer explicitly to gender. The Guiding Principles highlight that States should provide guidance to business enterprises on how to effectively consider issues of gender and the specific obstacles that women and migrant workers and their families face. States must also ensure their efforts address the possibility of business involvement in human rights abuses, including sexual and gender based violence, during times of conflict. Also, the Guiding Principles ask that business enterprises recognize the different risks to women and men by having companies collect gender-disaggregated data in their tracking efforts to determine whether they are effectively mitigating and preventing human rights impacts.²³⁹ Although an improvement, there is no

234. *Guiding Principles*, *supra* note 5, annex ¶ 17(a).

235. *Id.* at annex ¶ 17(c).

236. *Id.* at annex ¶ 17(c).

237. See Bonita Meyersfeld, *Business, human rights and gender: a legal approach to external and internal considerations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS 202 (Surya Deva & David Bilchitz eds., 2013) (“However, gender is not integrated throughout the GPs as a theme that recognises that generic principles may operate differently in practice for women and men. This position not only fails to reflect the reality that women are the majority of the population with specific group experiences but it is also out of sync with the rest of the UN system in developing specific principles regarding the eradication of gender specific harm throughout international human rights law.”); see also Kathryn Dovey, *Why Gender Matters for the Business and Human Rights Agenda in Southeast Asia*, in BUSINESS AND HUMAN RIGHTS IN SOUTHEAST ASIA: RISK AND REGULATORY RETURN 77 (Mahdev Mohan & Cynthia Morel eds., 2015) (“The UN Guiding Principles could have taken a stronger approach to gender issues and incorporated gender-sensitive language into various principles and commentary. . . the language incorporated into the final version is welcome and provides a foundation to build upon when considering the three pillars.”); Andrea Shemberg, *A Closer Look at the UNGPs*, BEYOND GOOD BUSINESS, <http://beyondgoodbusiness.org/andrea-shemberg-a-closer-look-at-the-ungps/> (last accessed on Mar. 2, 2016) (former legal advisor to John Ruggie stating the “UNGPs contain everything necessary to insure a gender-perspective implementation. The question is how that implementation is going to take place and how it’s going to work in practice.”).

238. MANDATE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, INTEGRATING A GENDER PERSPECTIVE INTO THE UN “PROTECT, RESPECT, AND REMEDY” FRAMEWORK (2009), <https://business-humanrights.org/sites/default/files/reports-and-materials/Gender-meeting-for-Ruggie-29-Jun-2009.pdf>.

239. That the Guiding Principles offer “[g]uidance to business enterprises on respecting human

specific guidance on how gender should be included within the due diligence systems that corporate actors will need to implement.

Without more guidance to corporations on how to address gender considerations, it is likely that due diligence will not begin to consider the myriad ways corporate operations and their supply chains may be violating the health rights of women workers. Scholar Stephanie Barrientos, an expert on gender, global value chains, and decent work, has noted that codes of conduct designed around ILO conventions and national labor legislation may only cover a few gender issues related to formal employment, but not gender issues that cross between the personal and workplace domains.²⁴⁰

Although the concept of due diligence under the Guiding Principles has been criticized,²⁴¹ due diligence is the essential entry point in bringing to light the health needs and possible violations women workers in global supply chains experience regarding their right to health, particularly their sexual and reproductive health. The due diligence requirements under the Guiding Principles require a defined gender approach if they are to serve the purposes they are intended to fulfill, namely to help corporations avoid complicity in violations of internationally recognized human rights, which include a strong foundation for the health and reproductive rights of women, whether employed or not, under existing legal and non-legal mechanisms. If the due diligence requirements in the Guiding Principles are thought of as a simple checklist for corporate actors that categorizes “health” as occupational health and safety, the violations of women workers’ right to health in global supply chains will remain obscured. Moreover, if the due diligence requirements do not take into account the comprehensive nature of the right to health for women workers, State actors will continue to fail them in enforcing these rights.

rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.” *Guiding Principles*, *supra* note 5, at annex ¶ 3.

240. Barrientos, *supra* note 79, at 1517.

241. See Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 *TEX INT’L L. J.* 33, 53 (2012) (describing the response of some civil society groups, such as Amnesty International, who criticized the Guiding Principles on several grounds, including failure to make due diligence a mandatory requirement); James Harrison, *Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment*, 31 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 107, 108 (2013) (stating that the human rights due diligence requirement under the Guiding Principles must address additional requirements of transparency, external participation and verification, and independent monitoring and review); Olga Martín-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary to Hard Law at Last?* 32 *NETH. Q. OF HUM. RTS.* 44, 56 (2013) (commenting that the human rights due diligence requirement under the Guiding Principles goes beyond a corporate governance standard of risk management but, given the Guiding Principles’ non-legal nature, does not impose consequences on corporate actors who do not conduct adequate due diligence).

The Guiding Principles provide leverage to improve the health and well-being of women workers in global supply chains as they have been incorporated into other frameworks by other international agencies, such as the OECD Guidelines for Multinational Enterprises,²⁴² the UN Global Compact,²⁴³ and the corporate performance standards of the International Finance Corporation.²⁴⁴ While the Guiding Principles are a recent development, a 2016 survey of 94 companies representing the largest firms in five sectors found that the most common actions taken in response were “the development of human rights policies, increased management capacity to address human rights issues and strengthened supply chain management.”²⁴⁵ The survey also found that companies are increasingly conducting human rights impact assessments. For instance, Coca Cola has committed to undertaking 28 country assessments on land rights and child and forced labor of its sugar supply chain by 2020.²⁴⁶

How health is addressed under the Guiding Principles can also influence the way a range of corporate accountability mechanisms—from fair trade to workplace monitoring, certification regimes, and social and environmental reporting—address workplace health.

V.

BUSINESS BENEFITS, HEALTH RIGHTS & RECOMMENDATIONS

It is time for rights advocates, corporate actors, and other interested parties to engage in a robust discussion on what the right to health entails for women workers—and all workers—in global supply chains. As we have argued, a more expansive approach is justified not only by the changes to the global economy, the gender makeup of the workforce, and the real life experiences of women workers, but also by the evolving understanding of health rights under international law and the recognition of the unjustifiable and gender-biased segregation of worker rights as occupational health.

The first place to start is with the Guiding Principles as these provide a framework for corporate responsibility for human rights and require a due diligence process to assess risk. Due diligence is about asking the right

242. See ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://dx.doi.org/10.1787/9789264115415-en/>.

243. See *The Ten Principles of the UN Global Compact*, UNGLOBALCOMPACT.ORG, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> (last visited November 6, 2016).

244. INT'L FIN. CORP., UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND IFC SUSTAINABILITY FRAMEWORK (2012), http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/learning+and+adapting/knowledge+products/publications/un_guidingprinciplesbusinesshumanrights.

245. BUS. & HUMAN RIGHTS RES. CTR., ACTION ON BUSINESS AND HUMAN RIGHTS: WHERE ARE WE NOW? 6 (2016).

246. *Id.*

questions. If due diligence under the Guiding Principles conforms only to a narrow occupational safety and health lens, then corporate risk assessments will not ask the kinds of questions that will identify potential violations of women workers' rights to access quality services—including reproductive health—and health education and information. The Human Rights Commission and supporting actors should develop corporate guidance, incorporating a needed gender perspective, on how to assess the full range of health rights. Any assessment that takes a thorough look at health rights should use the Availability, Accessibility, Acceptability and Quality (AAAQ) framework as the basis for its investigation. Workplaces that are aligned with the AAAQ framework for their health facilities will not only meet their legal obligations but also improve worker health by going beyond occupational safety needs. As Professor Lawrence O. Gostin, Director of the World Health Organization's Collaborating Center on Public Health Law and Human Rights, points out, when human rights are incorporated in policy-making processes, health facilities can provide services that are nondiscriminatory and of good quality.²⁴⁷ The use of the AAAQ Framework in these workplace health facilities can ensure that services are informed by and centered around the needs of workers.

Second, organizations and corporations that manage or promote what might be called soft, non-legal, regulatory mechanisms under corporate social responsibility can also provide leadership for advancing a more expansive notion of health rights at the workplace—and provide corporations testing grounds to learn what works and how best to achieve results. Nothing prevents corporate social responsibility-focused organizations from advancing a progressive agenda that recognizes the shortcomings to date in addressing gender equality as it relates to worker health. As is often noted, corporate social responsibility and other voluntary private-public partnerships cannot displace corporate obligations under the Guiding Principles²⁴⁸ nor legal obligations corporate actors have within the jurisdictions where they are operating. However, corporate social responsibility efforts may build the capacity of local and national governments not only to meet national labor standards, but also to meet international human rights and labor laws and norms.²⁴⁹ This is particularly true in regards to gender equality where national laws may still be retrogressive or maintain the status quo. In addition, corporate social responsibility efforts in regards to the right to health may further develop the infrastructure, resources,

247. See LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* (2014).

248. See generally *Guiding Principles*, *supra* note 5.

249. For instance, the rights in the ICESCR must be progressively realized by states, meaning that states must take steps to achieve these rights within a short time after the ICESCR has gained legal force for a specific state party, and states owe a minimum core of obligations that satisfy the minimum essential levels of each right. CESR illustrates this duty with the following: a state that has a significant number of persons deprived of foodstuffs, essential primary care, basic shelter or housing, or basic forms of education would be failing to discharge obligations under ICESCR. See ICESCR, *supra* note 105, at Art. 2(1) General Comment 3 ¶ 10.

and provider pools needed for States to ensure that healthcare is accessible, available, acceptable, and high quality.

Third, national governments and organizations involved in health policy at the country level can review public health and occupational health policy and regulations to see where these can be aligned. This review needs to consider not only what additional standards and practices should be asked of industry, but also how government resources for public health improvements can help protect worker health rights. For instance, public agencies in partnership with companies can make sure workplace nurses are fully linked into registration, licensing, and professional development programs and requirements, and ideally can develop a continuing medical education program to improve the skills of nurses to practice effectively in the workplace setting.

Unlike many rights issues, which can be contentious, addressing the health of women and men workers is not only important for the health and well-being of workers, but also benefits corporations and their suppliers' companies in ways that are currently yet to be realized. The goal of a more expansive approach to OSH standards is to ensure the health rights of women workers are respected and protected, not to turn workplaces into public health facilities. There is much evidence from high income as well as low and middle-income countries that shows businesses benefit from improved worker health.²⁵⁰ Workers are more productive and focused, have fewer injuries, and have higher morale.²⁵¹ Workplaces with a focus on women's health have lower absenteeism and turnover.²⁵² In fact, health is correlated with positive economic growth due to the increased participation of women in the workforce.²⁵³ Additionally, a narrower gender gap is associated with increased competitiveness and development.

The business case for better conduct must also recognize the fact that many supplier companies are already paying for infirmaries and health care staff on site, but are getting little actual return from their investment²⁵⁴ as the staff could be providing more and better services.²⁵⁵ Since most workplace managers see these resources as required costs necessary to meet compliance, they do not recognize that the infirmary and health staff can be strategic resources that

250. See Langer et al., *supra* note 2, at 19.

251. See Ron Goetzel, *Common Themes Underpinning Workplace Health Promotion Programs*, NAT'L ACAD. (Dec. 2015), <http://iom.nationalacademies.org/~media/Files/Activity%20Files/Global/PublicPrivatePartnerships/Shared%20Value%20Dec%202015/Presentations/Goetzel%20Final.pdf>; see also Larry S. Chapman, *Meta-Evaluation of Worksite Health Promotion Economic Return Studies: 2012 Update*, *The Art of Health Promotion Newsletter*, J. OF HEALTH PROMOTION, Mar.-Apr. 2012.

252. RACHEL YEAGER, *THE BUSINESS RETURNS FROM WOMEN'S HEALTH PROGRAMS* 9 (2011).

253. David E. Bloom et al., *The Effect of Health on Economic Growth: Theory and Evidence*, NAT'L BUREAU OF ECON. RES., 20 (Nov. 2001), <http://www.nber.org/papers/w8587/>.

254. BSR, *supra* note 36, at 9.

255. *Id.*

improve worker well-being, management relations, and productivity. Thus, focusing on health rights under the AAAQ framework and other measures is also a way to get a return on investment from money they have already spent. In this case, asking to focus on women's overall health rights is also asking managers to think like the business-people they already are. An active, trained, and supported nurse is able to promote healthy behaviors at work and at home, educate workers on important health issues, and ensure they get quality care at the workplace and in the community.

Finally, many transnational corporations have made public commitments to supporting the Sustainable Development Goals, women's empowerment, and gender equality. Corporations need to make explicit commitments to include the women's health component of the SDG's relating to their own operations. Providing onsite reproductive health services or medical coverage that includes these services impact maternal and newborn deaths that affect a State's economy. For instance, between 30–50% of Asia's economic growth from 1965 to 1990 was attributed to reproductive health improvements and the reduced rate of both fertility and infant and child mortality.²⁵⁶ Furthermore, 30% of Britain's GDP growth is attributable to improvements in health and nutrition between 1780 and 1979, and 11% of low- and middle-income countries' economic growth is related to reduced adult mortality between 1970 and 2000.²⁵⁷ The Lancet Commission describes this effect as a virtuous circle: "health contributes to economic growth and wellbeing, which results in improved health and leads to increased resources for better, widespread health care. Women's contributions to health care have a multiplier effect because health is an investment that drives productivity and economic and human development at individual and national levels. Healthy children are able to learn and become productive."²⁵⁸

VI. CONCLUSION

In 2002, shortly after Paul Hunt was named as the first UN Special Rapporteur on the right to health, he presented his vision for promoting the right to health as a fundamental human right, clarifying the content of this right and identifying good practices at the community, national, and international levels.²⁵⁹ He wrote:

Effectively promoting the right to health requires identifying and analyzing the complex ways in which discrimination and stigma have an impact on the enjoyment of the right to health of those affected, particularly women, children, and marginalized groups. . . Promoting the right to health also requires gathering and analyzing data to better understand how various forms of discrimination are

256. Bloom et al., *supra* note 253.

257. See UN WOMEN & UN GLOBAL COMPACT, *supra* note 214, at 2.

258. Langer et al., *supra* note 2, at 19.

259. *Id.*; see also Paul Hunt, *The UN Special Rapporteur on the Right to Health: Key Objectives, Themes, and Interventions*, 7 HEALTH AND HUM. RIGHTS (2002).

determinants of health, recognizing the compounding effects of multiple forms of discrimination, and documenting how discrimination and intolerance affect health and access to health care services.²⁶⁰

His vision remains true today for women's health at the workplace in global supply chains. In an era where women and families must often migrate to find work, leaving behind their homes and support networks, the workplace can be a site where they can access resources and information to actualize their right to health. But in global supply chains, the workplace becomes a place that frequently puts up barriers to their right to health, if not direct violations. For women workers in these labor markets the violations to their right to health remain unrecognized due to the narrow focus on occupational safety and health violations by advocates, corporations, and others. Moreover, gender inequality and gendered biases within global supply chains and the legal frameworks meant to protect these workers exclude women's experiences and ignore how the workplace impacts the personal lives of women workers.

The Guiding Principles could be used to explore how corporations can respect an expansive vision of the right to health for women workers in global supply chains given its charge for corporations to respect, at a minimum, the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work.²⁶¹ As discussed above, the right to health is part of the International Bill of Human Rights and includes not only occupational health and safety, but also sexual and reproductive health and protections for pregnant workers and external migrants.²⁶² In addition, non-legal declarations are calling for corporate actors to look beyond their occupational health and safety obligations and see how their workplaces can help actualize a comprehensive vision of health for their workers. The due diligence requirements in the Guiding Principles must include a gender lens and incorporate the comprehensiveness of the right to health as explained in multiple human rights and labor conventions. If the due diligence requirements in the Guiding Principles are approached as a simple checklist that categorizes "health" as solely occupational health and safety, the rights and violations of women workers in global supply chains will remain obscured. Moreover, little will improve if due diligence does not take into account the comprehensive nature of the right to health including the AAAQ framework as articulated in international instruments.

Businesses can be agents for change for the right to health of women workers by leveraging their resources and relationships with governments to collaborate in creating and implementing policies, infrastructure, and programs that ensure the right to health for workers and their communities. Such a "win-win" proposition will require a change of perspective. Recognizing the

260. *Id.* at 9.

261. Declaration on Fundamental Principles, *supra* note 69.

262. *See* discussion *infra* Part A

importance of aligning occupational safety and rights-based approaches can do much to advance the well-being of women workers around the world.

Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States

Jill I. Goldenziel*

ABSTRACT

This article proposes and sketches a new international agreement to address the crucial human rights and international security issues posed by mass migration. Currently, the human rights of people fleeing violence are largely unprotected by international law. The 1951 Refugee Convention protects only refugees: those fleeing across borders due to a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group. The world's other 46.3 million people displaced by violence have few international legal protections. I argue that an international agreement that creates an additional category of people who receive international protections, whom I call "Displaced Persons," is necessary to foster human rights, further state interests, and improve international security. A new Displaced Persons Convention would provide the strongest legal protections for individuals fleeing violence and states alike. If this proves impossible, second best would be a non-binding or partially binding international agreement, which could also shape state practices and international norms. An agreement to protect Displaced Persons would supplement, not supplant the 1951 Refugee Convention, which provides critical protections for minorities and political dissidents that must not be diluted. Policymakers should consider the provisions discussed in this article as they prepare the UN Global Compact on Migration and similar agreements.

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INTRODUCTION

Every day, desperate people risk their lives to flee horrific circumstances. As of this writing, an estimated 5 million people have fled the Syrian civil war,¹ which was only one of forty active armed conflicts as of 2014.² Many of those who flee believe that they will receive refugee status and resettlement elsewhere, if only they can reach their destination of choice.³ Instead, many face maltreatment and the threat of being returned to war zones.

Meanwhile, states are straining under the sheer numbers of migrants seeking assistance. A record 1.3 million migrants applied for asylum in Europe in 2015.⁴ States' resulting squabbles threatened to tear the Union apart, as exemplified in the success of the 2016 British referendum to leave the EU. In 2014, tens of thousands of unaccompanied minors fled violent conditions in Central America to seek asylum in the United States.⁵ Upon their arrival, the Department of Homeland Security struggled to find enough lawyers and aid workers to meet their needs, amidst highly politicized debate over whether they should be granted legal status as "refugees" or deported as illegal "migrants."⁶ Many migrants seek to obtain international refugee status or protection under domestic asylum regimes, overwhelming even the most developed legal systems.

Why these human rights and security catastrophes? Part of the problem is a mismatch between law and reality. International law provides few protections for most displaced people. Among people fleeing from violence across international borders, international law protects only refugees: those who have fled persecution on the basis of race, religion, national origin, political opinion or membership in a particular social group.⁷ The term "migrant," by contrast, is

1. Syria, INT'L ORG. FOR MIGRATION <https://www.iom.int/countries/syria> (last visited Feb. 28, 2017).

2. THERÉSE PETERSSON, ET. AL., ARMED CONFLICTS, 1946–2014 1 (2015), http://www.pcr.uu.se/digitalAssets/61/c_61533-1_1-k_journal-of-peace-research-2015-pettersson-536-50.pdf.

3. See, e.g., Luke Mogelson, *The Impossible Refugee Boat Lift to Christmas Island*, N.Y. TIMES, Nov. 15, 2013, <http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html?pagewanted=all> (discussing migrants who erroneously believe they will be resettled in Australia and so pay smugglers to bring them to Christmas Island).

4. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RESEARCH CENTER (Aug. 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>.

5. Marc R. Rosenblum, et. al., *Trends in Unaccompanied Child and Family Migration from Central America*, MIGRATION POL'Y INST. (Jan. 2016), <http://www.migrationpolicy.org/research/trends-unaccompanied-child-and-family-migration-central-america>.

6. See, e.g., Frances Robles, *Fleeting Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 9, 2014, <http://www.nytimes.com/2014/07/10/world/americas/fleeting-gangs-children-head-to-us-border.html>.

7. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606

undefined in international law.⁸ In common parlance, “migrant” is used to refer to anyone leaving his or her home to seek work, refuge, escape from war, or otherwise. Yet of these migrants, only people who can prove that they meet the criteria for “refugee” status are protected by international refugee law—which is mirrored in the asylum laws of most developed states.⁹ All other migrants may be legally sent back into the horrors from which they came.

States, scholars, and policymakers agree that the status quo needs to change. Lack of relevant binding international law—or any international legal agreement—to protect people fleeing violence¹⁰ has tremendous consequences for states and human rights. The need for the international community to develop a new international agreement to manage migration has been recognized by the United Nations. In September 2016, the UN General Assembly held a special high-level plenary meeting to address the refugee and migration crisis.¹¹ At this UN Summit on Refugees and Migrants, the General Assembly affirmed the New York Declaration for Refugees and Migrants.¹² The Declaration itself is not binding and largely reaffirmed existing international human rights law. However, it also began a process by UN member-states to create a Global Compact for Migration by 2018. This agreement, which will fall short of a binding treaty, aims to create an international framework for safe, orderly, and regular migration.

This article sketches such a framework for a new international agreement to address the human rights and security problems posed by large movements of refugees and migrants. I argue that the agreement ought to reflect a conceptual shift about which individuals should be offered protection by the international

U.N.T.S. 267 [hereinafter 1967 Protocol]. The Refugee Convention defines a refugee as one who, “. . . owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside his country of former habitual residence as a result of such events, is unable to, or owing to such fear, is unwilling to return to it.” (Article 1(2)).

8. “Migrant workers” who have jobs abroad, however, are defined and protected by The International Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N.G.A. 45/158 (1990). On the relationship between provision of transnational social protections and labor markets, see Ruxandra Paul, *Welfare Without Borders: Unpacking the Bases of Transnational Social Protection for International Migrants*, 45 OXFORD DEVELOPMENT STUD. 33 (2017).

9. In the U.S., the Immigration and Nationality Act was revised to mirror the language of the 1951 Refugee Convention and its 1967 Protocol. See 8 U.S.C. Chapter 12. In monist systems elsewhere in the world, the 1951 Refugee Convention became incorporated into domestic law upon ratification.

10. This article uses the term “violence” as shorthand for “violent conflict,” which may include war, armed conflict, civil war, or generalized violence that may fall short of any legal definition of war. A discussion of the relationship between other forms of violence, such as domestic violence, and protections for refugees or displaced people lies beyond the scope of this article.

11. See *Addressing Large Movements of Refugees and Migrants*, U.N. (2017) <http://refugeesmigrants.un.org/>.

12. New York Declaration for Refugees and Migrants, U.N.G.A., Sept. 19, 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1.

community. To be sure, the 1951 Refugee Convention, and the legal category of refugee that it defines, must be preserved because of the critical protections it provides for the rights of minorities and political dissidents.¹³ I argue that a new, additional international agreement is also necessary to supplement existing international refugee law and protect people fleeing violent conflict. A treaty, such as the Displaced Persons Convention I propose, would provide the strongest, most enforceable protections for displaced people and for international security. Short of a treaty, however, any international agreement designed to change state behavior should reflect a shift in protection standards that reflects the realities of modern population displacement.

The proposed 2018 UN Global Compact on migration provides one such opportunity to shape state behavior. The Global Compact aims to shape state behavior, which may later evolve into state practices and norms that may eventually become international law. Thus, it is crucial for those making the Global Compact to consider the legal import of their work, and for the Global Compact to shape state behavior in a way that augments—and does not undermine—existing human rights law and the 1951 Refugee Convention. Recognizing that the Global Compact process is now underway, and likely to materialize faster than any treaty, the article aims to establish a relevant framework for negotiation of either a non-binding agreement or international law to protect the human rights of displaced persons and improve international security.

The reforms proposed here would better serve all of those fleeing violence and persecution, as well as states, by clarifying which migrants are eligible for international legal protection. They would also buttress other major goals of international human rights law, such as religious freedom, freedom of expression, and protection against torture and racial discrimination.¹⁴ They would promote safe, orderly, and regular migration, which would align with states' goals of protecting their borders, upholding their human rights commitments, and streamlining large movements of refugees and migrants, which would improve international security.

I.

WHY REFUGEE LAW FAILS TO PROTECT DISPLACED PERSONS

The failings of International Refugee Law to protect people displaced by violence are easily highlighted by the stories of Iraqis I interviewed in Jordan in 2009. I soon discovered that many United Nations-registered refugees were not legally refugees at all. One former Iraqi army general, whom I will call Hamdan, fled to Jordan in 2005 after his sons' lives were threatened because of their

13. *See supra* note 7.

14. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S., 211; International Covenant on Civil and Political Rights, art. 18, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

Sabeen religion.¹⁵ Sabeans are an ancient religious sect whose presence in Iraq is now almost non-existent, due to rampant persecution and flight after the United States invasion and the ensuing civil war.¹⁶ Hamdan spent years waiting to register with the Office of the United Nations High Commissioner for Refugees (UNHCR), which did not have a program dedicated to assisting or resettling Iraqis in 2005.¹⁷ After registering, Hamdan spent more years waiting for UNHCR to process his resettlement claim until Australia finally agreed to resettle him. While his final approval was pending, his savings ran out, and he relied on charities for his daily bread. Hamdan could not venture out at night for fear of violent harassment. Although his was a clear-cut case for receiving refugee status under the 1951 Refugee Convention, and despite his vulnerable status in Jordan, he was stuck in a backlog in an overwhelmed resettlement system clogged with submissions of Iraqis who did not meet the Convention definition.

Another Iraqi school administrator, whom I will call Mohammed, fled for his life after militias accused him of helping American forces simply for trying to reopen schools in Baghdad.¹⁸ He registered with UNHCR in 2007 and applied for resettlement. After years of waiting, he learned that no country would resettle him because he did not meet the international legal criteria for refugee status—even though UNHCR had registered him as a “refugee.” He was a Sunni Muslim, and he could not prove the identity of the militias that threatened him, nor could he prove that they did so on the basis of his religion. His situation was not considered particularly vulnerable by UNHCR, since he was living in the Sunni-majority country of Jordan. He, too, lived in poverty, with no future in sight, and feared every day that the Jordanian security forces would send him back to Iraq.

The stories of these Iraqis illustrate how international refugee law has failed, and why new international law is needed to protect people fleeing violent conflict. Victims of religious persecution, like Hamdan, can claim refugee status under international law. However, they are denied the full protection to which they are legally entitled and wait years for resettlement, caught in a backlog caused by UNHCR’s efforts to process all those fleeing conflict. Meanwhile, all those who have fled war, like Mohammed, are called “refugees” by UNHCR. Nevertheless, Mohammed—and most others who have fled war zones like Iraq, Syria, and Afghanistan—stand no chance of being able to prove that they meet the strict criteria for “refugee” status mandated by the 1951 Refugee Convention. Most states with developed asylum systems have asylum laws that

15. Interview with Anonymous Iraqi Registered with UNHCR (Aug. 2009) (names and identifying details have been modified to protect the interviewees).

16. Zaid Sabah, *Sabian Sect Keeps the Faith*, USA TODAY (Sep. 2007), http://usatoday30.usatoday.com/news/world/iraq/2007-09-27-iraqweek_N.htm.

17. See generally Jill I. Goldenziel, *Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law*, 14 CHI. J. INT’L L. 453–702 (2014).

18. Interview with Anonymous Iraqi 2 Registered with UNHCR, (Aug. 2009) (names and identifying details have been modified to protect the interviewees).

mirror the 1951 Refugee Convention; therefore, those who do not meet the Convention's criteria are unlikely to receive asylum abroad. Those who do not meet the criteria—or who are unable to prove that they meet the criteria—often live in constant fear of sudden expulsion. And their fear is justified: mass deportations to war-torn Syria or Afghanistan might be inhumane, but could be perfectly legal.¹⁹

Like Mohammed, most people fleeing war and conflict do not legally qualify as refugees. People who are fleeing generalized violence may be in similar circumstances to those persecuted based on race, religion, nationality, political opinion, or membership in a particular social group, but they are not refugees under international law, and are not eligible for asylum in most states. Of the 60 million people of concern to the U.N. Refugee Agency (another name for the Office of the U.N. High Commissioner for Refugees, or UNHCR), the agency classified only 13.7 million as refugees in 2015. Most of the other 46.3 million people fleeing war and violent conflict—a number larger than the population of 85% of the countries in the world—have little to no protection under international law.

A. *Law Designed for a Different World*

International refugee law was simply not designed to deal with the endless civil war and state failures at the root of today's global displacement. It was made to protect discrete flows of persecuted minorities and dissidents who could be quickly absorbed by states. In modern times, states codified age-old commitments to protecting minority rights in the 1951 Refugee Convention. (I have detailed the history of the Convention, and the historical concept of refugee protection in international law more generally, in a companion article).²⁰

In brief, the 1951 Refugee Convention was created in the wake of World War II, when millions were displaced throughout Europe, a humanitarian disaster that threatened to cause further strife. The nascent U.N. needed solutions to protect, resettle, and guarantee the rights of displaced people who could not return to their countries of origin. The U.N. was simultaneously involved in a broader project of creating international human rights law as a way to entrench the world's collective cry of "never again" after the atrocities of the Holocaust.

The Convention that emerged was eventually signed by 143 of the U.N.'s 191 members. The Convention's core provision, that a refugee cannot be returned to a place where her life will be endangered (known as "non-refoulement"), is considered binding on every state, not just Convention

19. The Convention Against Torture, Article 3, would still prohibit deportation of anyone "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 UNTS 85 [hereinafter *Convention Against Torture*].

20. See generally Jill I. Goldenziel, *The Curse of the Nation-State: Refugees, Migration, and Security in International Law* 48 ARIZ. ST. L.J. 579 (2016).

signatories. The Convention also obligates states to provide an array of rights to refugees, including the right to work, to housing, and access to courts.²¹

B. Refugee Flows Are Not What They Used to Be

The end of the Cold War led to a rise in civil conflict that was unforeseen by the drafters of the 1951 Refugee Convention. Today's refugees are not primarily European, scattered throughout their own continent. They are not awaiting orderly processing in European camps, relatively peacefully, as they were after World War II. Nor are they trickling slowly across borders, as they have throughout much of history. Instead, it is now commonplace for thousands of people fleeing both war and persecution to spill over borders within hours or days. Refugees may flee not just to nearby countries, but find smugglers to carry them halfway around the world.²²

Changes in the nature of refugee flows became especially pronounced in the 1990s. In April 1991, fearing reprisals from Saddam Hussein's regime after a U.S.-encouraged Kurdish uprising after the First Gulf War, 1.3 million people fled Northern Iraq for Iran over a three-week period.²³ Simultaneously, 400,000 mostly Kurdish Iraqis fled Northern Iraq for Turkey, which promptly closed its borders.²⁴ 1 million Rwandans fled into Zaire in July 1994 alone.²⁵ On April 1, 1999, after Serbia rejected Kosovo's autonomy, 25,000 Kosovar Albanians took six trains to Macedonia.²⁶ In all of these places, economic migrants, finding their business prospects destroyed by war or seeking to flee poverty, could easily join the throngs.

The 1951 Refugee Convention is unequipped for such a massive change in forced migration. The Convention has no provisions for dealing with massive, mixed flows of refugees and migrants, and no provisions for states to share in the burden of assisting them. Under the Convention, a refugee has the right to seek asylum, but no state has the legal obligation to grant it. When mixed flows occur, states are required not to refool anyone who is seeking international protection while his claim is being processed. A host state thus has a legal obligation to protect members of a mass influx from refoulement, at least temporarily, while the international community has no obligation to share the burden.

21. See 1951 Convention, *supra* note 7.

22. Felicity Attard, *Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?*, 47 J. MAR. L. & COM. 219 (2016).

23. See KATY LONG, NO ENTRY! A REVIEW OF UNHCR'S RESPONSE TO BORDER CLOSURES IN SITUATIONS OF MASS REFUGEE INFLUX 72 (2010), <http://www.unhcr.org/en-us/research/evalreports/4c207bd59/entry-review-unhcrs-response-border-closures-situations-mass-refugee-influx.html?query=mass%20influx>.

24. See *Morbidity and Mortality Surveillance in Rwandan Refugees—Burundi and Zaire*, CDC (Sept. 19, 1998), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00040202.htm>.

25. Long, *supra* note 23, at 25.

26. *Id.* at 33.

Moreover, most people who have fled violence and persecution are hosted by some of the world's poorest states.²⁷ Most reside in the Middle East and Africa, where many states have not signed the 1951 Refugee Convention, where asylum systems may not exist, and where the rule of law is often weak.²⁸ For these and other reasons, most experts agree that the 1951 Refugee Convention has become irrelevant for the protection of most people fleeing persecution and violence today.²⁹

C. *The Politicization of Refugee Assistance*

Since the 1951 Refugee Convention has become less useful, refugee protections have been increasingly less legalized over time. UNHCR has largely become a humanitarian aid organization, far from its original function of administering international refugee law and providing legal protections to refugees.³⁰ Since the end of the Cold War, the agency has focused more of its budget and organizational priorities on operations and away from legal protection.³¹ The agency now strives to serve people displaced by war and conflict as well as 1951 Convention refugees, which has been quite controversial. One senior protection officer distilled the problem for me: “refugee protection means something specific” under international law, and that it is eroded each time UNHCR waters it down to aid new categories of people.³² However, others within the organization believe the shift in focus from legal protections of refugees to humanitarian aid enables them to assist more people. As a Senior Adviser to the High Commissioner explained to me in 2010, while international law underpins the agency’s work, it is often better to get things done rather than “banging the bible.”³³

The agency has extended its operations far beyond those specified in its Statute or the Convention. As need has arisen, the U.N. Secretary General, General Assembly, or Security Council has designated additional people to fall

27. See *UNHCR Global Trends Report 2015*, UNHCR (June 20, 2016), <http://www.unhcr.org/uk/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>.

28. *Id.*

29. See, e.g., Deborah Anker, et. al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); T. ALEXANDER ALEINIKOFF, *THE ARC OF PROTECTION* (forthcoming book manuscript). On the need for a new approach to international migration law, see also Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. (forthcoming 2017).

30. See GIL LOESCHER, *UNHCR AND WORLD POLITICS: A PERILOUS PATH* 80 (2001).

31. *Id.*

32. Interview with Petros Mastakis, Protection Officer, UNHCR-Syria, in Damascus, Syria, (Jan. 6, 2010).

33. Interview with Jose Riera, Senior Policy Adviser to the High Commissioner, UNHCR, in Geneva, Switz. (June 18, 2010).

within UNHCR's "persons of concern," including select groups of internally displaced people and victims of natural disasters.³⁴

Without relevant law to guide it, UNHCR's work has become increasingly politicized. After a number of budgetary crises, UNHCR has survived by making itself an agent of the world's major powers.³⁵ The agency's mandate must be regularly renewed by the U.N. Because the agency receives 98% of its budget from donors, with 86% from individual states and the EU, it is largely dependent on individual donor countries for its survival. The 2% of its budget that comes directly from the U.N. mostly pays for overhead.³⁶ To continue its existence, UNHCR must appear responsive and accountable to the whims of its donors.

UNHCR is especially dependent on the United States for funding. The United States has consistently been the UNHCR's single largest donor, typically funding about 30% of UNHCR's budget, and currently funding 39%.³⁷ The European Commission, its member states, and Japan typically account for most of the remainder of the budget. The United States and EC exclusively earmark their contributions to UNHCR to ensure that the agency serves their foreign policy goals. As of December 2016, only 14% of the agency's total contributions for the year were un-earmarked.³⁸ The agency's operations, then, are a function of the political interests of the major powers that fund it.

De-legalization of the refugee regime has meant increasing politicization of refugee assistance. UNHCR has increasingly acted at the behest of the wealthy states that provide its funding.³⁹ To give but a few examples: the agency expanded its mission for the first time to include internally displaced people in the early 1990s to assist nearly all of those displaced due to the disintegration of the former Yugoslavia.⁴⁰ This radical expansion of the agency's mission was done at the behest of European powers that wished to keep Muslim immigrants

34. See, e.g., S.C. Res. 1781, U.N. Doc. S/RES/1781 (Oct. 15, 2007) (calling on parties to conflict in Abkhazia, Georgia, to work with UNHCR to assist Internally Displaced People in returning home). For a general discussion of UNHCR's role assisting stateless people and IDPs, and additional examples of its authorization to do so, see *UNHCR's Mandate for Refugees, Stateless Persons, and IDP's*, UNHCR, <https://emergency.unhcr.org/entry/55601/unhcrs-mandate-for-refugees-stateless-persons-and-idps> (last visited Feb. 28, 2017).

35. On agency in international organizations, see generally DARREN G. HAWKINS ET AL., *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (2006).

36. *Figures at a Glance*, UNHCR, <http://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Feb 28, 2017).

37. *Id.*

38. *Financials*, UNHCR, <http://reporting.unhcr.org/financial#tabs-financial-contributions> (last visited Feb. 28, 2017).

39. On how the agency has expanded and contracted the definition of refugee to serve the interests of its donor states, particularly the U.S., see Jill Goldenziel, *supra* note 17 (documenting expansion of the term refugee to encompass most Iraqis fleeing after the U.S. invasion of 2003); JILL GOLDENZIEL, *DISPLACED: REFUGEES, INTERNATIONAL LAW, AND U.S. FOREIGN POLICY* (forthcoming).

40. *Information Note: UNHCR's Role with Internally Displaced Persons*, UNHCR (Nov., 20 1998), <http://www.refworld.org/docid/3ae6b31b87.html>.

from entering into Europe.⁴¹ After the United States invasion of Iraq in 2003, a “prima facie” refugee regime was adopted to term nearly all Iraqis who had fled to neighboring countries as “refugees.”⁴² This allowed them to receive legal and humanitarian assistance from UNHCR and its partners, regardless of whether they met the 1951 Convention definition of refugee. Backed by United States and EC funding, UNHCR then provided all displaced Iraqis with more assistance, in terms of dollars per refugee, than any of its other refugees throughout the globe.⁴³

D. *The World Closes Its Gates*

Meanwhile, increasingly restrictive domestic asylum regimes, particularly in the West, have narrowed the reach of the 1951 Refugee Convention. States have defined persecution narrowly, requiring refugees to prove a specific fear of persecution, or to return to dangerous conditions in their countries of origin to provide identity documents in order to be resettled. Elsewhere, states have refused to winnow refugees from “mixed flows” containing refugees and migrants, instead sending all would-be asylum-seekers back home.⁴⁴ In the 2000s, the European Union revamped its asylum regime with a series of laws designed to discourage migration by sending asylum-seekers back to their original country of entry within Europe, and building massive detention centers in Italy and Greece, the most frequent points of entry, to house them while they ostensibly awaited processing.⁴⁵ In 2004, the European Union also created a new and extensive border patrol agency called Frontex to patrol Europe’s borders.⁴⁶ Frontex’s interdiction of migrants at sea to send them back to their home countries has caused NGOs to accuse them of refoulement.⁴⁷ Increasingly, Western states have employed restrictive visa requirements, carrier sanctions, “safe third country” designations, “readmission agreements,” and internal “safe zones” inside conflict areas to prevent migrants and refugees from crossing

41. See LOESCHER, *supra* note 30.

42. See generally Jill I. Goldenziel, *supra* note 17, at 702 (explaining the “prima facie” refugee regime for Iraqis).

43. *Id.*

44. See generally UNHCR, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP (Feb. 7, 2014), <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx> (discussing China’s policy of summarily repatriating escapees from North Korea).

45. See 2013 O.J. (L 604/2013), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm (EU Dublin Agreement).

46. Frontex was authorized by (EC) 2007/2004. Frontex became operational on October 3, 2005.

47. See, e.g., “NGO Statement on International Protection: The High Comm’r’s Dialogue on Protection Challenges,” UNHCR ExCom Standing Committee, Rep. on its 41st Meeting, Mar. 4-6, 2008. On interdiction at sea and refoulement, see Jill Goldenziel, *When Law Migrates: Refugees in Comparative International Law*, in *COMPARATIVE INTERNATIONAL LAW* (forthcoming, Oxford University Press, 2017).

borders.⁴⁸ While UNHCR has protested many of these measures, they can do little to stop them.

Due to increased restrictions on migration, controversies involving the rights of refugees and migrants have reached the highest courts of several countries throughout the world, including the U.S. Supreme Court, the High Court of Australia, and the European Court of Human Rights (ECtHR).⁴⁹ These three courts have interpreted international refugee law differently in their jurisprudence, thus creating discrepancies in the interpretation and application of the principle of non-refoulement. The U.S. and Australian courts have determined that state practices of interdicting mixed groups of migrants and refugees at sea do not violate non-refoulement.⁵⁰ In 2011, the ECtHR determined that Italy's practices of interdiction at sea constituted non-refoulement, causing Italy and the EU to change their policies.⁵¹ Because these courts' decisions shape the refugee and asylum law of states who are major migrant-receiving countries, these courts' interpretations of international refugee law will play a major role in creating international norms of treatment of refugee and migrants with even wider effects.⁵² As courts develop disparate interpretations of international refugee law relating to mixed migration, desperate individuals and sovereign states alike need the clarity that a Displaced Persons Convention can provide.

Despite the intentions of the drafters to create a refugee convention with universal application,⁵³ international refugee law is hardly applied universally. While human rights were a paramount concern when the treaty was negotiated, power politics have intervened throughout the application and development of international refugee law.⁵⁴ Today, most of UNHCR's funding comes from wealthy states that earmark it so they can direct the agency to protect their own interests.⁵⁵ Meanwhile, many of these same wealthy states have increasingly restricted the entry of refugees through tactics that may violate the Convention.⁵⁶ New international law is thus needed to provide refugees with the

48. Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998).

49. See, e.g., *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993); *Ruddock v. Vadarlis* (2001) FCA 1329 (Federal Court) (Austl.); *Hirsi Jamaa and Others v. Italy*, 2012 Eur. Ct. H.R.; *M.S.S. v. Belgium and Greece*, 2011 Eur. Ct. H.R. For discussion of these cases, see Goldenziel, *When Law Migrates*, *supra* note 47.

50. See *Sale v. Haitian Centers Council*, *id.*; *Ruddock v. Vadarlis*, *id.*

51. See *Hirsi Jamaa*, 2012 Eur. Ct. H.R., *supra* note 49.

52. For discussion of this point, see generally Goldenziel, *When Law Migrates*, *supra* note 47.

53. See generally Goldenziel, *supra* note 20 (discussing the intentions of the drafters if the 1951 Refugee Convention).

54. *Id.*

55. UNHCR, *supra* note 36.

56. See Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998) (citing use of restrictive visa requirements, carrier sanctions, safe third country designations, readmission agreements, safe zones inside conflict areas, and interdiction at sea by Western states to curtail migration).

human rights protections that the Convention's drafters intended, to protect the human rights of migrants who are not refugees, and to protect the rights of sovereign states.

II.

REFUGEES, MIGRANTS, DISPLACEMENT AND LAW: A THEORETICAL FRAMEWORK

As James Hathaway has noted, refugee status has always taken on "different meanings as required by the nature and scope of the dilemma prompting involuntary migration."⁵⁷ But even as the scope of involuntary migration has radically changed over the past sixty years, the legal status of refugees under international law has remained stagnant. As noted above, scholars and policymakers have repeatedly argued that international refugee law is irrelevant to the world we now face.

Debate has raged over exactly how to reform international law protecting those fleeing violence and persecution. Roughly speaking, proposals to reform international refugee law have been either moral or economic in nature. Michael Walzer and Niraj Nathwani, for example, have argued that assistance to refugees should be based on need.⁵⁸ The moral obligation to assist people based on need rather than on persecution on the basis of particular categories, they argue, is equivalent, and therefore the category of "refugee" should expand beyond the narrow Convention definition to all people forced to migrate and in humanitarian need.

Other scholars have called for a broadening of the definition of the term refugee in a way that would entirely scrap existing international refugee law. Joseph Carens argues that, from a moral perspective, the Convention definition should be revised so that "the seriousness of the danger and the extent of the risk, not the source of the threat or the motivation behind it," matters most.⁵⁹ Selya Benhabib argues that Kant's "universal right to hospitality" imposes upon states a moral duty to assist anyone "whose life, limb, and well-being" are endangered, implying the need for a broader definition of the term "refugee."⁶⁰

Most broadly, liberal and utilitarian theorists argue that states are not only required not to refool those who would have their lives endangered, but that they are obligated to accept larger numbers of refugees and immigrants. These theorists often conflate these categories, since they usually do not use the term refugee in the legal sense. Joseph Carens and Anne Dummet, for example, argue

57. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L COMP. L. Q. 348, 380 (1984).

58. NIRAJ NATHWANI, *RETHINKING REFUGEE LAW* 7 (Anne F. Bayefsky ed. 2003); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

59. Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY* 25 (Brian Barry and Robert Goodin, eds., 1992).

60. SELYA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 37 (2004).

that liberalism requires that states recognize a right to freedom of movement that would require them to accept all those who wish to live there.⁶¹ Peter and Renata Singer argue that liberal democracies are obligated to accept refugees up until the point that tolerance in the society would break down, endangering peace and security.⁶²

Economic proposals to reform refugee protection focus on the burden shifting necessary to align state interests with greater international protection. While the details of these proposals vary significantly, most scholars agree that reforms must focus on burden sharing and outcome-based solutions that focus on refugee assistance as it exists, not on the Convention definition of refugee.⁶³ Two of the most prominent proposals, developed in the late 1990s by James Hathaway and Alexander Neve, and by Peter Schuck, argued for insurance-like schemes to incentivize Northern states to reduce the costs of processing migrants by shifting funds and transferring refugees to Southern states that would serve as host countries.⁶⁴

As Hathaway later acknowledged, these proposals attracted little attention from policymakers and were roundly criticized by scholars.⁶⁵ Among other flaws, scholars charged that the proposals accepted the current policies of Northern states to dodge the obligation of non-refoulement.⁶⁶ The proposals suggested that refugees primarily be hosted in the global South, with Northern states providing funding to assist them there. Without a binding commitment by Northern states, critics argued that Northern states would relinquish their promised assistance fail absent a pressing refugee emergency affecting their own interests.⁶⁷ Scholars also charged that the proposals failed to solve many flaws inherent to the current refugee regime, and that they promoted group-based rather than individualized processing for refugees, which would raise human rights concerns.⁶⁸ Scholars also expressed concern that an insurance scheme risked commodification of refugees.⁶⁹

61. Carens, *supra* note 59; Anne Dummett, *The Transnational Migration of People Seen from within a Natural Law Tradition*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY* 169 (Brian Barry and Robert Goodin, eds.1992).

62. See Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in *OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES* 111 (Mark Gibney, ed., 1988).

63. See HATHAWAY, *RECONCEIVING INTERNATIONAL REFUGEE LAW* (1997).

64. See, e.g., James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 *HARV. HUM. RTS. J.* 115 (1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 *YALE J. INT'L L.* 243 (1997).

65. James C. Hathaway, *Book Review: Rethinking Refugee Law, by Niraj Nathwani*, 98 *AM. J. INT'L L.* 616, 616 (2004).

66. For the most prominent and thorough critique, see Anker, et al., *supra* note 29.

67. *Id.*

68. *Id.*

69. *Id.*

Regional organizations have also taken steps to address the problem of population displacement that lies beyond the scope of the 1951 Refugee Convention. However, these efforts have been incomplete at best, and have faced significant problems in implementation, monitoring, and enforcement. The 1969 OAU Refugee Convention and 1984 Cartagena Declaration for Refugees in Latin America expand the definition of refugee to include people who have fled violent conditions or disturbances in public order.⁷⁰ However, the OAU Refugee Convention remains unenforced due to weak enforcement mechanisms, and the Cartagena Declaration is non-binding. Moreover, states have been slow to incorporate them into their domestic law, and they include no burden-sharing mechanisms. EU Directives related to asylum and migration, such as the 2011 Directive on Standards for the Qualification of Third-Country Nationals, and several directives in 2013, are largely focused on curbing migration, although they do allow for “subsidiary protection” for people fleeing generalized conditions of violence who do not qualify for refugee status.⁷¹ Even before the EU’s common asylum regime broke down, many states were not following the directives. The UK, Ireland, and Denmark opted out of the 2011 EU Directive from the outset.⁷² In 2015 and 2016, the European Commission brought at least 49 infringement proceedings against member-states for not following the 2011 and 2013 migration and asylum directives and/or failing to transpose them into domestic law.⁷³ Temporary Protection (TP) regimes have been adopted by some states in response to humanitarian emergencies.⁷⁴ However, TP regimes are applied haphazardly, sow confusion by differing from state to state, and arguably have been used by countries to avoid their obligations under the 1951 Refugee Convention.⁷⁵

70. See, e.g., Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984; Organization for African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

71. See, e.g., Council Directive 95, 2011 O.J. 377 (EU); 2013/32/EU (revised asylum procedures), 2013/33/EU (Reception Conditions Directive).

72. See EUROPEAN COUNCIL ON REFUGEES AND EXILES, ECRE INFORMATION NOTE ON THE DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 DECEMBER 2011 (2011),

http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf.

73. See Press Release, European Commission, More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work (Sept. 23, 2015),

http://europa.eu/rapid/press-release_IP-15-5699_en.htm; see also Press Release, European Commission, Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings (Feb. 10, 2016) http://europa.eu/rapid/press-release_IP-16-270_en.htm (bringing additional and new proceedings against states for noncompliance).

74. In the EU, regimes granting forms of temporary protection are called “subsidiary protection” or “humanitarian protection.” See *id.*

75. See, e.g., Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT’L L., 279, at 297-98 (2000); see also *Position of the European Council on*

None of these documents address the root causes of modern population displacement that has threatened international peace and security. The agreements are undermined because refugee emergencies often arise from conflicts between neighbors, complicating regional solutions.⁷⁶ Moreover, the protections associated with all of these documents are ambiguous because key terms are left undefined. Also, states often lack the will, capacity, or funding to implement the agreements. Last, such non-binding regional agreements may clash with the universal aims of the 1951 Refugee Convention, sowing still more confusion as to who is protected and how.

A. *Why International Law?*

What is the role of international refugee law in a modern migration environment at all? When proposing reforms for international law regarding people fleeing persecution and violence, this foundational question is necessary to consider. After all, the costs of compliance with treaty regimes or even non-binding international norms can be high, and not evenly distributed. As explained previously, most people flee persecution and violence into developing countries, where adherence to international law, and international human rights law in particular, may be weak.⁷⁷ Richer states generally find it cheaper and easier to make, ratify, and comply with international human rights law than poorer ones. Moreover, in some circumstances, refugees and displaced people have been treated comparatively well by host countries that are not 1951 Refugee Convention signatories. Senior officials in UNHCR, including the High Commissioner, have found that politically palatable solutions to displacement crises are often policy-based and not legal.⁷⁸ In states averse to international law, UNHCR often finds that pushing states to comply with international legal obligations does not work, and it needs to find other ways to assist refugees. As senior UNHCR officials explained to me, solutions are most easily found through bilateral negotiations for aid between donor and recipient states, or by emphasizing the humanitarian nature of a situation instead of legal commitments.⁷⁹

However, international law to protect refugees and people fleeing violent conflict is still ideal. International law solves collective action problems that are important for the protection of both human rights and state security. Binding,

Refugees and Exiles on Temporary Protection in the context of the Need for a Supplementary Refugee Definition, EUROPEAN COUNCIL REFUGEES & EXILES (Dec. 2002), http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Position-on-the-Integration-of-Refugees-in-Europe_December-2002.pdf.

76. For discussion of the complex dynamics of refugee flows in the Great Lakes Region of Africa in the 1990s, see SARAH KENYON LISCHER, *DANGEROUS SANCTUARIES* (2006).

77. See *supra* note 27.

78. Interview with Antonio Gutierrez, High Comm'r, UNHCR, in Geneva, Switz. (July 30, 2010).

79. *Id.*; Interview with Jose Riera, *supra* note 33; Interview with Dag Sigurdson, Deputy Head, Donor Relations & Resource Mobilization Unit, UNHCR, in Geneva, Switz. (Jul. 21, 2010).

enforceable international law is a highly effective means to keep states from adopting policies that collectively harm those displaced by persecution and violence, and from shirking their obligations to protect human rights and assist other states. While compliance with international law is obviously imperfect, issues involving treatment of refugees and migrants are increasingly coming before international courts for enforcement.⁸⁰ International refugee law provides a floor, de facto or de jure, for state migration policies. Eric Posner and Adam Cox have recognized, in their discussion on an optimal migration contract, that refugee rights require international cooperation to avoid a “race to the bottom,” in which states adopt increasingly restrictive refugee policies to deflect refugees to other states.⁸¹ Only international law can ensure that these refugees have somewhere to turn.

At the same time, it is important to preserve, not dilute, existing legal protection in the form of the 1951 Refugee Convention. For all of its limitations, the Convention has crucial value as binding law. It provides legal protection to many people in need. The Convention serves as the basis for asylum law in many states—an important step toward harmonizing global refugee protections.⁸² Many of these states grant refugees most of the protections delineated in the Convention. In states that have signed the Convention but have weaker legal systems or fewer resources, UNHCR uses the Convention as a basis for its operations, and as a starting point for negotiations on what it can do to protect people displaced by persecution and violence. As then-Deputy Representative in Egypt, Katharina Lumpp, explained to me, the Convention serves as a basis for negotiation on the treatment of refugees in state signatories.⁸³ In state parties to the treaty, international refugee law provides a floor for refugee protection, and a baseline for negotiation to improve it.

Non-binding international legal instruments also have value. International human rights law, including international refugee law, has always served an important aspirational purpose. Although most of the world’s states are signatories to either the International Covenant on Civil and Political Rights and/or the International Covenant on Economic and Social Rights—which are known, along with the Universal Declaration of Human Rights, as the International Bill of Rights—no signatory truly lives up to all of the commitments it has made in either document.⁸⁴ The rights that these documents

80. See generally Goldenziel, *When Law Migrates*, supra note 47; Goldenziel, *International Decisions: International Decision: Plaintiff M68/2015 v. Minister for Immigration and Border Protection*, [2016] HCA 1 (Austl)(discussing recent case involving Australia’s third-country resettlement program). (2016) (discussing recent court cases involving refugees and migrants).

81. Adam Cox & Eric Posner, *The Rights of Migrants: An Optimal Contract*, 84 N.Y.U. L. REV. 1403, 1462; see also Ryan Bubb, Michael Kremer & David I. Levine, *The Economics of International Refugee Law*, 40 J. LEG. STUD. 367-404 (2011) (describing a race to the bottom).

82. See supra note 9.

83. Interview with Katharina Lumpp, Deputy Rep., UNHCR-Cairo, in Cairo, Egypt (Dec. 10, 2009).

84. See generally ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014)(discussing

seek to entrench are so broad and vague that no signatory can possibly live up to the ideals they contain, and full realization of these rights would also be impossible due to inevitable clashes between the ideals they embody. Yet, these documents provide important aspirational norms for states, which commit to each other in an international forum that they will keep trying to live up to these utopian standards. Indeed, these documents contain clauses that commit developing states to continued improvement toward these ideals, even if they cannot currently comply with them. So long as states continue to aspire to these international norms, they will continue to seek justice and human rights for their citizens. Much like constitutional law at the domestic level, international human rights law serves to entrench certain pre-commitments that cannot be violated, regardless of majority will.⁸⁵ As states increasingly adopt international human rights law as a basis for their own constitutional instruments, enabling litigation and interpretation of these norms in domestic courts, their importance as foundations of law continue to increase.⁸⁶

International refugee law reinforces other normative goals of the international human rights system. The Genocide Convention, Convention on the Elimination of Racial Discrimination (CERD), and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all proscribe categories of behavior related to those in the 1951 Refugee Convention. For example, the Genocide Convention prohibited systematic state actions “committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”⁸⁷ The Genocide Convention was developed by many of the same drafters of the Refugee Convention and ratified in nearly the same historical moment.⁸⁸ It is no coincidence that the Genocide Convention and the Refugee Convention proscribes destruction of and persecution of nearly the same categories of people.⁸⁹ The Convention Against Torture prohibits refoulement or extradition of anyone to any other state if “there are substantial grounds for believing” that he could be tortured there.⁹⁰ The International Bill of Rights also contains provisions entrenching an international human right to freedom of expression, which includes the right to express political opinions without persecution.⁹¹ The existence of refugees is often a sign that serious

the impossibilities of complying with human rights law in its entirety).

85. On parallels between international and constitutional law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

86. See generally Goldenziel, *International Decisions*, *supra* note 80.

87. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

88. For discussion of the drafting of both Conventions and the relationship between them, see Goldenziel, *Curse of the Nation-State*, *supra* note 20.

89. *Id.*

90. Convention Against Torture, *supra* note 19, at art. 3 (“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

91. ICCPR, *supra* note 14, at art. 19.

human rights abuses are occurring within a state, such as genocide or ethnic cleansing. Multiple international human rights treaty commitments to non-refoulement and persecution of minority groups and political dissidents, like those specified above, support claims that these international commitments are *jus cogens* norms and therefore hold even higher legal authority than the treaty commitments themselves.⁹² These human rights treaties are mutually reinforcing and help ensure that states will be continually vigilant against human rights abuses.

B. Why the 1951 Convention Definition of “Refugee” Must be Preserved

The 1951 Refugee Convention, and the definition of “refugee” it contains, should not be modified. As an instrument of international human rights law, the core commitments entrenched in international refugee law remain as relevant and important as ever.⁹³ The historical record shows that members of racial, religious and ethnic minority groups have always been subject to persecution on the basis of these characteristics.⁹⁴ We need only look at the news to see that such persecution is still rampant. Protection of people on the basis of these categories is worth preserving, as states have repeatedly been incapable of providing protections for individual members of these groups. Persecution of minorities is often systematic and not easily solved. International refugee law provides that these people must be given basic human rights, especially when their countries of origin cannot provide them; and that a certain minimum level of human rights normatively exists outside the construct of states. International refugee law is truly international: law that extends beyond the traditional zone of state sovereignty. The 1951 Refugee Convention obligates states to provide legal protections for non-citizens who are de facto without the protections of their countries of origin, presenting a stark exception to a state’s sovereign right to control who enters and leaves its territory.

For anyone concerned with international human rights, international refugee law thus provides critical legal and moral functions for protecting the rights of those whom the international community has deemed the most vulnerable: members of religious, racial, and ethnic minorities, as well as members of particular social groups, such as homosexuals. Even as categories of those persecuted on the basis of political opinion have changed over time, the international community has, on a normative level, always been concerned with the protection of minority rights. As the protection of minority rights is

92. On non-refoulement see, for example, 1951 Convention, *supra* note 7; Convention Against Torture, *supra* note 19; European Convention on Human Rights, Sept. 3, 1953, ETS 5; 213 UNTS 221.

93. See generally Goldenziel, *supra* note 20 (discussing the relationship between international refugee law and international human rights law).

94. For discussion of the development of international refugee law in response to persecution of minorities and political dissidents, particularly religious minorities, see *id.*

fundamental to democratic systems, any international legal system seriously concerned with democratic values must protect them as well.

To understand why refugees are distinct from other groups of migrants and therefore merit different legal protections, we must consider how human rights operate under a general theory of state sovereignty. Any discussion of international legal theory based on sovereignty is, of course, neither perfect nor fully descriptive of the reality of international politics. My analysis will proceed given these caveats, while acknowledging that sovereignty remains the basis of most theories of international law and international relations, and the starting point for most doctrinal scholarship on international human rights law.

1. *Refugees Have Unique Legal Claims for Protection*

Refugees are distinct from most other migrants because they are unable to avail themselves of the protection of their states due to their fear of persecution. Assuming a system of sovereign states, pursuant to international human rights law, states have the legal and moral responsibility to protect the rights of their citizens. States and individuals can then rely on this social contract. States sever this contract with refugees when they are unable to protect their citizens from persecution or a well-founded fear of it.⁹⁵

Unlike refugees, other migrants do not have their ties to their states severed. Other migrants, such as those leaving their countries due to economic woes, generalized violence, or climate change, may have a government that is very much interested in providing them with legal protections.⁹⁶ Moreover, whether displaced inside or outside their country, migrants who are not refugees enjoy benefits of citizenship that refugees cannot. Migrants have freedom to travel and freedom of movement, which bona fide refugees do not have. Internally Displaced Persons (IDPs) may be able to migrate to other sections of their country, where they can enjoy these protections, without moving abroad.⁹⁷ Refugees are unlike other migrants precisely because of their inability to enjoy the benefits of citizenship due to their fear of persecution, and their individualized, specific needs demand a specific solution.

95. Refugees may also be stateless, citizens of no state. Statelessness gives rise to another host of international legal problems outside the scope of this article. Statelessness is addressed by another international instrument, the 1961 Convention on the Reduction of Statelessness.

96. On assisting climate change migrants, see Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167 (2013) (discussing three recent proposals for international legal and non-legal responses to climate change migration); see also Agnes Hurwitz, *Climate-Related Displacement: The Perilous Path Towards Normative Development*, in STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES 193 (Susan M. Akram & Tom Syring, eds., 1st ed. 2014).

97. The “Deng Principles” on internal displacement have been developed to provide an international framework for protecting IDPs. However, these principles are not binding and are left to individual states to adopt in their own policies and caselaw, and do not address the root causes of displacement that may cause both internal and external displacement. See *Guiding Principles on Internal Displacement*, U.N. OFF. FOR COORDINATION HUMANITARIAN AFF. (2004), <https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf>.

Refugees require legal complementarity: legal protections ordinarily provided by states because states are unavailable to provide these basic needs. Historically, a major function of international refugee law was to provide refugees with passports, travel documents, and certifications of personal status that their states were unable to provide. Although UNHCR today is more an international humanitarian agency than a legal one, these basic legal protections remain among its most critical functions. Refugees also need the rights to work and access justice required by international refugee law, because their states are unavailable to provide them with these basic needs. As mentioned above, other types of migrants can, at least theoretically, still avail themselves of the protections of their states.

Unlike most people fleeing war, poverty, or natural disasters, a refugee's status may never end.⁹⁸ For economic migrants, people fleeing violence and crises caused by climate change, resolution of conflict within the state, improved economic development, or recovery from a natural disaster may end their displacement. They will be able to repatriate if the circumstances causing their reasons for flight subside. For Convention refugees, by contrast, this may never happen. According to the Convention definition, the nature of the persecution that caused the flight depends on both the ability of the state to protect its citizens from persecution and the characteristics of the individuals involved. Resolution of conflict or disaster within the state will not be enough to ensure that these individuals will be protected from persecution on the basis of their characteristics as minorities or dissidents.

Reality, of course, is more complicated than this stylized example. Refugees and migrants may often have multiple, overlapping reasons for flight. Some Convention refugees may choose—and have chosen—to voluntarily repatriate. Individual asylum claims are difficult to adjudicate for precisely these reasons. However, the point remains that many migrants can repatriate to their home countries more easily than refugees, and that refugees may never be able to do so. To give but one example, it would have been ludicrous to expect all Jews to return to Germany after the end of World War II. Similarly, it would be abhorrent to expect all refugees who have fled persecution to return to their countries of origin.

2. Refugees Have Unique Moral Claims for Protection

Beyond the gruesome history and persistence of persecution in international law, because of their political and legal vulnerability, refugees have the strong moral claims for international assistance that other groups of migrants

98. Of course, a climate change migrant's plight may never be fully solved if her land disappears. However, as discussed herein, climate change migrants are likely to receive assistance and protection from their own governments, while refugees will not. In a sense, climate change migrants can receive restitution for the loss of their land from their states or the international community. Refugees can never receive compensation for their status that will similarly make them whole.

do not. Unlike refugees, economic migrants are likely to be protected by their states. Most states ideally wish to prevent economic migration. Assuming states are rational economic actors, even those who benefit from remittances fear brain drain and would prefer to create economic opportunities at home rather than having citizens live and work abroad. Moreover, economic migration is largely voluntary. For these reasons, economic migrants have less of a moral claim for international protections than other groups of migrants.

Migrants fleeing violent conflict or climate change have a stronger moral claim to international protection than economic migrants. However, their situation is still distinct from that of refugees. These groups of migrants have governments that can seek domestic solutions or request international aid to assist them. South Sudan, for example, is a fragile state from which many have fled, but its government has sought international assistance for its people.⁹⁹ The governments of climate change migrants, in particular, may be actively working toward a solution to protect their citizens. For example, The Marshall Islands is currently seeking financial assistance to help its many citizens who are affected by climate change.¹⁰⁰ While the plight of such people is morally wrenching, their situations do not demand the same type of protection that refugees require. For these types of migrants, international aid may be available and appropriate for migrants as groups, based on the circumstances that collectively affect them. While all migrants should be treated in a manner that respects their human rights, their situations may not demand the individualized processing and treatment that international refugee law demands as part of the international human rights regime.

Refugees present the most morally serious case of need because they face the world's most vulnerable legal and political circumstances. Persecution on the grounds enumerated in the 1951 Refugee Convention is among the most egregious of human rights abuses. Even if other groups of migrants have equivalent or greater material need to that of refugees, their situation could theoretically be solved by humanitarian aid alone. Morality does not require that law prioritize the needs of the most materially destitute migrants over the needs of refugees. Refugees require legal protections to meet their unique needs.

Changes in humanitarian needs over time also should not change the core definition of what constitutes a human right. The right of freedom from persecution on the basis of one's religious, racial, ethnic, or national status, or political opinion, is one that has been entrenched in international law before the advent of modern law itself.¹⁰¹ Expanding the category of "refugee" to include other groups of migrants would undermine the protections that states long ago determined to be in their moral and political interests, along with well-

99. See *Fragile States Index*, FUND FOR PEACE (2015), <http://fsi.fundforpeace.org/rankings-2015> (ranking South Sudan the highest among the world's most fragile states).

100. See Coral Davenport, *The Marshall Islands Are Disappearing*, N.Y. TIMES, Dec. 2, 2015.

101. See Goldenziel, *supra* note 20.

established law that has given legal protections to generations of people without anywhere else to turn.¹⁰²

While sovereign states legitimately have the right to restrict their borders, this does not mean that states have no moral obligation to admit as many or as few applicants who would like to live there. States need morally grounded legal principles for whom to prioritize for entry. International refugee law provides states with a universal rubric for whom to give precedence. People who are persecuted on the basis of religion, race, nationality, or membership in a particular social group should be prioritized in the international system, legally and morally, because of their unique needs as well as the international community's moral obligation to protect those fleeing persecution.

3. *The Expressive Importance of Preserving the Refugee Definition*

International refugee law, as it currently exists, provides a powerful expressive function. By categorizing victims of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group as needing international protection, the international community has effectively proscribed certain behaviors as beyond the pale of what it can accept. The term “refugee” holds tremendous rhetorical power. The term “migrant,” standing alone, has no meaning in international law.¹⁰³ It connotes mere movement of a person from one place to another due to any number of circumstances. “Refugee,” by contrast, is a term that defines a specific set of commitments that the international community has historically owed to a specific type of international migrant. “Refugee” also connotes humanitarian need worthy of international assistance. The strategic use of these terms by actors in the international community can support or detract from their own political aims. A country cannot produce large numbers of “refugees” unless conditions inside it are unstable; therefore, an official statement that a country is producing “refugees” can be tantamount to saying that a country is suffering from instability or is unable to protect its citizens. Countries may also suffer reputation losses from expelling “refugees,” or by failing to admit those who claim to be “refugees.” Conversely, asylum countries are likely to gain reputational benefits from hosting “refugees.” In 2015, for example, Germany was widely praised by the media and human rights groups for accepting large numbers of refugees and migrants, while Hungary has been condemned for closing its borders and detaining migrants.¹⁰⁴ Defining a group of migrants as

102. Joseph H. Carens, *Refugees and the Limits of Obligation*, PUBLIC AFF. Q. 31 (1992).

103. “Migrant workers” who have jobs abroad, however, are defined and protected by The International Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N.G.A. 45/158 (1990).

104. On Germany, see, for example, Martin Varsavsky, *Germany's attitude toward refugees is a refreshing change from that of America and the rest of Europe*, BUS. INSIDER, Aug. 31, 2015, <http://www.businessinsider.com/why-germany-is-generous-to-refugees-2015-8>. On Hungary, see for example, <https://www.hrw.org/news/2015/12/01/hungary-locked-seeking-asylum> (last visited Mar. 11, 2017).

“refugees” also affects how other political actors will treat population movement. As discussed above, states are bound by international law not to send refugees back to circumstances where they are likely to face persecution. Migrants can legally be sent home.

The existence of the refugee status, as it currently stands, plays another important expressive role by implicitly condemning certain state behaviors. Refugee status connotes the failure of states to protect their own citizens, or more particularly, the failure of governments to do so. Indeed, refugee status implies a human element that other types of forced migration do not. Refugees flee when states are involved in persecution or are unable or unwilling to protect individuals from persecution occurring within their borders. Other categories of migrants may be fleeing the vicissitudes of fortune, perhaps wrought by Mother Nature, but not necessarily due to state action. The existence of refugee law casts aspersion upon the behavior of states that fail to protect their own citizens, and more so in the case of states that are unwilling to do so. Such a basic failure of an integral government function calls the legitimacy of that state or government into question.

This expressive function is increasingly important in the context of recent international debates, regarding when protecting human rights makes it acceptable to violate sovereignty. Prominent examples include controversies over the Responsibility to Protect and appropriate uses of the International Criminal Court.¹⁰⁵ The Security Council has linked the prevention of refugee flows and population displacement, considered a threat to international security, as justification for recent international interventions in Haiti, Iraq, Kosovo, Liberia, Rwanda, and Somalia.¹⁰⁶ In the context of increased willingness by the international community to violate sovereignty to protect human rights, it is especially important not to back away from international refugee law, which has long guaranteed rights that individuals have independent of states. Having such a category in international law sends a message to states that the international community will not tolerate their persecution of religious and ethnic minorities and dissidents.

C. *The Need for a New International Agreement to Protect Displaced Persons*

Accepting that refugees deserve legal protection, should states also protect people fleeing violence? The answer is yes, for both moral and practical reasons.

105. See, e.g., U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009); Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT. SECUR. 43–71 (1996), 43.

106. See Guy Goodwin-Gill, *Editorial: Refugees and Security*, 11 INT’L J. REFUGEE L. 1,3 (1999); Burden-sharing has been a frequent theme of the High Commissioner’s annual dialogues. For recent discussions, see U.N. High Comm’r for Refugees, *International Cooperation to Share Burden and Responsibilities*, REF WORLD (June 2011), <http://www.refworld.org/docid/4e533bc02.html>.

The special obligation to protect refugees does not absolve states of a moral responsibility to legally protect or materially aid other people. On moral grounds, the philosophical principle of mutual aid requires that if a person is in dire need and a state is able to assist that person with little cost, a state has a moral duty to help them.¹⁰⁷ Moral concerns are heightened when neighboring states bear some responsibility for the circumstances of displacement. For example, many states are involved in proxy wars in so-called civil conflicts that cause population displacement. Saudi and Iranian involvement in the current so-called “civil war” in Yemen is but one example.

Even states that reject morality principles on sovereignty grounds may have a strong practical interest in mandated international assistance for people who fall outside of the 1951 Refugee Convention’s definition of refugee. States benefit from stability and predictability in the international system and suffer from having their borders flooded by those seeking to leave desperate circumstances elsewhere. States also suffer when vulnerable people compete over scarce resources, often causing conflict that can spill over state borders. In our globalized world, violent conflict has ramifications for population displacement throughout the globe. As of this writing, civil war has displaced at least 4.8 million Syrians in neighboring countries. Hundreds of thousands of other migrants have fled as far as to Europe, Australia, and the U.S.¹⁰⁸ Refugees and migrants have overwhelmed these legal systems and caused political controversies. EU ministers have met repeatedly to address the crisis and failed to reach solutions.¹⁰⁹ Australia has devised a highly controversial third-country processing system on Nauru.¹¹⁰ Global forced displacement has reached an all-time high.¹¹¹ Practicality demands international action to address the growing political and legal problems caused by migration, even when moral arguments to address humanitarian needs fail.

A new international agreement is needed to protect both the interests of states and people who have fled internationally from violent domestic conflict.

107. Walzer, *supra* note 58, at 49-50.

108. For regularly updated statistics on displacement in neighboring countries, see *Syrian Regional Refugee Response*, UNHCR, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Feb. 28, 2017). For statistics on European asylum claims, see *Eurostat*, EUROPEAN COMM., http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database?p_p_id=NavTreeportletprod_WAR_NavTreeportletprod_INSTANCE_sFp6GUtIbBHg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1; for statistics on migration from Syria, see <https://www.iom.int/countries/syria> (last visited Feb. 28, 2017).

109. On the EU’s failure to reach agreement on migration policy, see, for example, *Migrant crisis: EU meeting seeks to heal growing rifts*, BBC, Feb. 25, 2016, <http://www.bbc.com/news/world-europe-35657054>.

110. For discussion of legal and political issues involving the Australian processing system, see Goldenziel, *International Decisions*, *supra* note 80; see also Goldenziel, *When Law Migrates*, *supra* note 47. For discussion of the Central American migration crisis, see Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. TIMES, Nov. 12, 2016, <https://www.nytimes.com/2016/11/13/world/americas/fleeing-gangs-central-american-families-surge-toward-us.html>.

111. See generally *supra* note 35.

Binding international law would provide the strongest protections for these displaced people. International law also provides important guidance to the international community, even to non-signatory states, on how to manage population displacement. Currently, even in states that have not signed the 1951 Refugee Convention, UNHCR uses the Convention and state practice, along with states' other commitments to international human rights law, as leverage to pressure states to protect people fleeing violence and persecution.¹¹²

International law on how to categorize and protect people displaced by violence would make states less able to ignore these populations or to selectively aid them for political reasons. Enforcement in domestic and international courts would provide a check on politicization of assistance to Displaced Persons. The manner in which states should and do provide rights to displaced people is a subject of political disagreement in many states. In both EU states and in the U.S., for example, political parties have repeatedly threatened to roll back protections for refugees and migrants, making the rights of vulnerable people dependent on political pressures and electoral cycles.¹¹³ Law would clarify the rights of Displaced Persons and would be more likely to be followed and enforced than a non-binding agreement.

As a fallback, a non-binding agreement containing many of the same principles outlined in this article could still help improve state behavior and international security. Of course, it would lack the teeth and enforceability that law would have in domestic and international courts. Without binding law, states will be more likely to shirk their duties when international politics dictate that they do so, due to domestic political constraints or failure of their immigration systems. A non-binding agreement would also not have the same authority to shape state practice that law can provide.

It is important to acknowledge the skepticism that any international agreement, binding or otherwise, can solve a problem that so acutely implicates state sovereignty. Yet recent events involving climate change offer an instructive counterargument. Just twenty-five years ago, when the world was beginning to recognize signs of global warming, the idea of international cooperation to fix this global problem was nearly unthinkable. Nonetheless, with the 2015 Paris Agreement, delegates from the world's nations unanimously agreed to a framework to combat climate change. The Paris Agreement is considered a treaty, although it includes both binding and non-binding

112. See interview with Katherina Lumpp, *supra* note 83 (explaining that UNHCR is able to refer to Egypt's Refugee Convention commitments when seeking access to refugee prisoners, among other Convention obligations).

113. In the U.S., see, for example, Michelle Innis, *As Trump Nears Office, Australian Deal to Move Refugees to U.S. Is in Doubt*, N.Y. TIMES, Nov. 17, 2016, <http://www.nytimes.com/2016/11/18/world/australia/australia-us-refugee-deal.html>. On Germany and the EU, see, for example, Alison Smale, *Angela Merkel's Problems in Germany Could Challenge Europe, Too*, N.Y. TIMES, Sept. 11, 2016, <http://www.nytimes.com/2016/09/12/world/europe/angela-merkel-germany-european-union-migrants.html>.

provisions. For example the specific commitments to reduce greenhouse gas emissions are not legally binding, but parties are legally obligated to report on their progress in implementing the agreement, and these reports will be monitored and evaluated in turn.¹¹⁴ Many provisions were not made binding at the request of the U.S., since the Obama administration wanted to avoid the need to have the treaty ratified by Congress.¹¹⁵ However, the U.S. was willing to sign on to a partially binding agreement, and the Obama Administration subsequently attempted to implement even its non-binding commitments.¹¹⁶ The international community's willingness to negotiate an agreement on climate change suggests enthusiasm for international law, or at least an international agreement, to solve a common problem—even when it implicates their sovereignty.¹¹⁷

Like climate change, population displacement, is a problem of global scope and ramifications that demands an international solution. Persistent security and human rights concerns caused by population displacement may bring the world to commit to an international agreement, or even international law, to help displaced people. Urgency has already caused countries such as the E.U., Australia, and countries neighboring Syria, to seek atomized solutions that can be globalized, harmonized, and improved.¹¹⁸ Recent UN efforts on refugees and migrants suggest a wider desire to create an international agreement—whether binding, non-binding, or partially binding.

1. Recent UN Efforts to Address Refugees and Migration

The U.N. itself has recognized that new international solutions to the refugee and migration crisis are necessary. In September 2016, the UN General Assembly held a special Summit on Refugees and Migrants.¹¹⁹ At the Summit, member-states affirmed a Political Declaration supporting human rights

114. *United States Joins Consensus on Paris Climate Agreement*, 110 AM. J. INT'L L. 374, 374 (2016).

115. *See generally id.* (explaining reasoning behind non-binding provisions in Paris Agreement).

116. *See generally id.* (explaining Obama administration's implementation of Paris Agreement).

117. The Paris Agreement on climate change is considered to be international law and is often called a treaty. However, the fact that it is only partially binding makes its legal status weaker than other treaties that are binding as a whole. For a more complete discussion of the status of the Paris Agreement in international law, see Daniel Bodansky, *Legally Binding versus Non-Legally Binding International Instruments*, in *TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME* (Scott Barrett Carlo Carraro and Jaime de Melo, eds., 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649630.

118. On European and Australian solutions, see Goldenziel, *When Law Migrates*, *supra* note 47. Jordan and Lebanon are not signatories to the 1951 Refugee Convention. Turkey is a signatory but has kept the geographic restriction that limits its commitments only to European refugees. Responses to refugee crises in the region have been made on an ad hoc basis and vary widely from country to country. *See generally* <http://data.unhcr.org/syrianrefugees/regional.php> UNHCR, *supra* note 108 (providing data on individual country responses to Syrian displacement).

119. *Summit for Refugees and Migrants*, UN, <http://refugeemigrants.un.org/summit> (last visited Feb. 28, 2017)

commitments for refugees and migrants, known as the New York Declaration.¹²⁰ This declaration is not binding, and critics have noted that it falls far short of what is needed to address the scope of the crisis.¹²¹ Moreover, it largely affirms commitments already made by member-states in previous human rights treaties. A Leader's Summit on Refugees hosted by President Obama the following day brought awareness to the plight of refugees and produced more concrete funding commitments to assist them, but excluded migrants from its purview and did not result in legal commitments by states to assist either refugees or migrants.¹²²

Building on the Summit, the U.N. is now beginning the process to hold a second international conference and a "Global Compact on Safe, Orderly, and Regular Migration" in 2018.¹²³ The stated goal of this Global Compact is to be a "framework" and present "guidelines" for migration. This Compact will, therefore, not produce binding, international legal commitments. The Compact will certainly serve an important awareness-raising function. Since it will not bind states with the force of law, it is less likely to make the same difference in the lives of refugees and migrants or improve state security as a binding agreement would.¹²⁴ But it is a valuable start toward shaping state behavior in a positive direction.

The New York Declaration recognizes that refugees already have specific and important rights under the 1951 Refugee Convention, and that any Global Compact is meant to supplement this, not to undermine it. Indeed, civil society groups repeatedly emphasized this point in hearings leading up to the adoption of the New York Declaration.¹²⁵ The General Assembly has thus reaffirmed the distinct legal categories of refugees and other groups of migrants. In doing so, the UN implicitly has recognized that the concept of "refugee" in the Refugee Convention should not be diluted, but that new international agreements are needed to protect more displaced people.

The Global Compact process is already underway, and is far more likely to materialize than a treaty by its scheduled completion date of 2018. However, the Summit on Refugees and Migration and the Global Compact process have made

120. New York Declaration, G.A. Res. A/RES/71/1, U.N. GAOR, 71st Sess., U.N. Doc. A/71/L.1 (Sept. 13, 2016), <http://refugeesmigrants.un.org/declaration>. The author consulted on the draft declaration as part of the civil society consultations held before the meeting.

121. *World leaders at UN approve plan for refugee crisis*, CHI. TRIB., Sept. 19, 2016, <http://www.chicagotribune.com/news/nationworld/ct-refugee-crisis-united-nations-20160919-story.html>.

122. Joint Statement on Leaders' Summit on Refugees, United States Missions to the United Nations (Sep. 2016), <https://2009-2017-usun.state.gov/remarks/7507>

123. Faye Leone, *UN Prepares for Migration, Refugee Negotiations*, IISD: SDG KNOWLEDGE Hub (Nov. 2016), <http://sdg.iisd.org/news/un-prepares-for-migration-refugee-negotiations/>. The author spoke at an initial Modalities meeting on civil society participation in the Global Compact process.

124. For a differing view, see U.N. News Centre, *INTERVIEW: New global compact 'should make a difference' in lives of refugees and migrants – outgoing UN Special Adviser*, U.N. NEWS SERV. (Oct. 28, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55419>.

125. The author attended such a hearing on July 18, 2016.

the need for a Displaced Persons Convention to supplement the 1951 Refugee Convention even more clear. The international community has reaffirmed the unique rights of refugees under international law, but is still floundering when it comes to determining what protections to provide to other groups of migrants. A Displaced Persons Convention would provide protections to those displaced by violence that go far beyond the non-binding commitments currently being proposed by the UN. However, it would also protect the sovereign right of states to exclude economic migrants from their borders. International security would be improved by the development of a clear legal framework to determine how to prioritize the claims of refugees arriving en masse on state borders. The Global Compact may be more achievable than a treaty in the short term. However, as discussed below, the framers of the Global Compact should view the document as a step on the way to creating binding international law.

III.

WHAT AN INTERNATIONAL AGREEMENT TO PROTECT DISPLACED PERSONS WOULD LOOK LIKE

This section proposes suggestions for what an international agreement to protect Displaced Persons might look like. This section will not present a draft of a new treaty or international agreement. Ultimately, all international agreements must be negotiated and bargained-for by states and stakeholders so that they may succeed. This article's goal is, rather, to sketch some considerations for states as they negotiate new protections for people fleeing violent conflict, while preserving their own sovereign aims and protecting their borders.

As discussed above, international law is the best way to provide human rights protections to refugees and migrants while protecting international security. However, treaty-making is an arduous and lengthy process, and states are far more likely to come up with more informal agreement such as the Global Compact in the near term. If realized, this Global Compact or a similar agreement will shape state behavior, and therefore may create state practices and norms that may eventually become law. Thus, any international agreement on migration management must be drafted with the idea that its provisions may eventually become legally entrenched.

For this reason, a Displaced Persons Convention or a non-binding international agreement would contain similar provisions. This section will reference both a Displaced Persons Convention and a non-binding international agreement, making clear when suggested provisions would apply to only a binding agreement. The Paris Agreement on climate change, discussed above, presents a new paradigm of a "partially-binding" agreement with both binding and non-binding provisions. A partially binding agreement on Displaced Persons might also be possible. One could imagine the U.S., for example, accepting a definition of "Displaced Persons" as law without committing to specific financial burden-sharing mechanisms that would require Congressional

approval. For simplicity's sake, however, I will refer to "binding" and "non-binding" agreements in the discussion below. A full discussion of the full panoply of partially binding agreements lies beyond the scope of this article.¹²⁶ Instead, I aim to present reasonably realistic proposals and acknowledge their political limitations.

Also for the purposes of this section, I will refer to those people fleeing violence to whom the international community should expand protections as "Displaced Persons." Policymakers may choose another term or to define the category more broadly or narrowly than I propose. My point is that any new international agreement must reflect a conceptual shift as to which displaced people the international community will protect, under what circumstances, and how—and define a new category to enable their protection.

Any international agreement to protect Displaced Persons must involve provisions for defining the category of individuals who will be protected, how these protections would be triggered and monitored, what rights these individuals would receive, and state obligations. This article will discuss each of these in turn.

A. *Defining Displaced Persons*

Clearly delineating who qualifies as a "Displaced Person" will be critical to the success of a DPC or international agreement to protect Displaced Persons. States must know to whom they are bound to provide protections. Most critically, states must know which people they can legally send back home, and which people they must protect. While actual cases of individual people may not fall along such clear lines, questionable cases can and should continue to be adjudicated.

To that end, any agreement should distinguish three primary categories of people that are now commonly referred to as "migrants": refugees, economic migrants, and those fleeing violent conflict.¹²⁷ Refugees should continue to receive unique protections under international law. Those seeking economic opportunity alone should be directed to a state's regular immigration system. "Displaced Persons" would be the third category: those fleeing violence but not persecution. Climate change migrants present a fourth category, which, as discussed above, is already being addressed by other draft conventions and international commitments.¹²⁸

The definition of "Displaced Person" must be carefully circumscribed to avoid encompassing endless flows of people. I propose that the international community should protect only those Displaced Persons whose flight threatens

126. For more on binding versus non-binding international agreements, see Bodansky, *supra* note 117.

127. Most human rights treaties include clauses that explain that a new treaty is not meant to undermine commitments in previous treaties.

128. See *supra* note 56.

international peace and security, in accordance with the language of Article I of the U.N. Charter. States will be interested in providing protection if international stability is threatened. While this standard is less stringent than the “well-founded fear” criterion in the 1951 Refugee Convention, it also ensures that every individual cannot have a claim to be a Displaced Person.¹²⁹

Drafters might draw lessons from the definitions used by the Organization for African Unity and the European Commission in their attempts to provide protection to people who do not meet the 1951 Refugee Convention’s definition of refugee. The OAU Refugee Convention defines a “refugee” as:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹³⁰

The 2004 European Council (EC) directive and 2011 European Union (EU) Directive provide “subsidiary protection” to those who can show:

substantial grounds . . . for believing that,” if returned to his country of origin or former habitual residence, he “would face a real risk of suffering serious harm . . . [and] is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country.¹³¹

The Directive defines “serious harm” as:

“(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”¹³²

This language resembles the 1951 Convention definition of “refugee,” but is less stringent. To receive “subsidiary protection,” which usually provides lesser protections than asylum, one must show a belief in a substantial risk of “serious harm” rather than a “well founded fear” of persecution on the basis of specific categories.

Both definitions expand the category of persons who should receive international assistance in a way that would not create endless obligations for states. The OAU definition focuses on the causes of displacement, while the EC’s definition centers on the risk of harm that an individual will face if refouled. The OAU’s mention of “external” or “foreign” pressures implies that international involvement in a displacement logically is required for an international response to occur. The events must be “seriously disturbing public

129. See 1951 Refugee Convention, *supra* note 7.

130. Organization for African Unity, *supra* note 70.

131. European Council Directive 2004/83, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugee or as Persons who Otherwise need International Protection and the Content of the Protection Granted, 2004 O.J. (L304) 12 (EC), art. 2(e).

132. *Id.* at art. 15(a)-(c), 19.

order,” which is close to the level of threatening international peace and security. Moreover, Displaced Persons must be “compelled” to leave their place of habitual residence in order to seek refuge outside of their country. This standard, while less stringent than the specific fear of persecution required by the 1951 Refugee Convention,¹³³ still demands that people are forced to migrate for reasons other than personal convenience, and would exclude economic migrants. The OAU Convention’s use of “compelled” implies that protected people must find it necessary to flee their homes because their states cannot provide adequate protection in a particular instance. Combining this definition with the EU’s requirement of a specific, individualized risk of harm restricts the definition further. Including the EU’s criteria ensures that the focus of protection will be on individual Displaced Persons, rather than groups of displaced people, in accordance with the norms and goals of protecting individual human rights in international law.

The OAU and EU definitions, while imperfect, provide important guidance for protecting both individuals and states. No doubt, they will not satisfy those who seek to expand the category of refugee more broadly, as discussed above. However, combined, the OAU Convention and the EU Directive sketch out a definition of “Displaced Person” likely to be accepted by states. States are most likely to sign an agreement that would reduce threats to international peace and security. States will also be likely to sign an agreement that reflects a moral responsibility of states that participate in violent conflict to help Displaced Persons. At the core of both the OAU and EU definitions is the norm of non-refoulement, the idea that a person must not be sent back to a place where her life would be endangered. Together, both documents protect individuals fleeing for reasons beyond the stringent standards of the 1951 Refugee Convention while ensuring that the definition of Displaced Person will not become so broad as to be infeasible, by requiring international protection for anyone in need of humanitarian assistance. State practice, or at least the intent of states in Africa and Europe, lies behind these definitions as well. A broader commitment to a similar definition by states would not therefore result in a problematic rollback of international aid and legal protections from many people who currently receive them. Given quickly changing migration flows, any definition of Displaced Persons should be revisited by state parties every few years, which would allow states to respond to new migration challenges they face.

An international agreement to protect Displaced Persons must also make clear whom it would not protect. It must state that Displaced Persons are not refugees, and that the agreement will not conflict with the 1951 Refugee Convention. Economic migrants, climate change migrants, and IDPs should be excluded for reasons discussed above. “Exclusion clauses,” similar to the ones in the 1951 Refugee Convention, are necessary to ensure that states are not required to protect individuals who pose security threats.¹³⁴ The agreement must

133. See 1951 Refugee Convention, *supra* note 7, at art. 1.

134. 1951 Refugee Convention, *supra* note 7, at art. 1F.

also clarify that individuals will have the burden to prove that they meet the criteria set forth in the definition of “Displaced Person,” and lay out individual status determination procedures for this to occur.

To deter illegal entries, the agreement might also not protect those who enter a country illegally. Forbidding Displaced Person status to anyone who enters illegally could deter illegal migration, which would improve state security, thereby making the agreement more appealing to states. However, the 1951 Refugee Convention explicitly forbids denial of refugee status to people who meet the relevant criteria who enter a country illegally, because of human rights issues with doing so.¹³⁵ Exceptions in the agreement should be crafted to alleviate human rights concerns.

B. Triggering Convention Protections

A DPC or international agreement must specify how its protections would be triggered, and when these protections would end. Only members of the international community can decide when an international agreement will be triggered. Negotiating states may wish to consider one or several options, operating in tandem or individually. States must also decide whether the DPC may be triggered retroactively, with respect to populations who are already displaced, or if it will only apply going forward. When choosing a trigger mechanism, states should consider how quickly protections could be triggered, since large displacement flows may require a rapid response.

Agreement protections might be triggered when states are unable or unwilling to protect their own citizens. Such a requirement would bring an international agreement to protect refugees in line with the principle of complementarity that allies other instruments of international human rights law and international criminal law.¹³⁶ A declaration of state incapacity might come from a state itself in a formal plea for international assistance, or through designation by individuals, states, or a UN body. For example, a citizen of the state might petition the UN or a body monitoring the agreement to ask that his state be declared incapacitated due to large-scale displacement. Alternatively, the General Assembly, UNHCR, or another body might declare or resolve that a state itself is incapable of providing for its citizens in a particular instance. The reputational costs of such a declaration of state incapacity would deter states from requesting international assistance unless it is necessary, and would incentivize them to act to avoid displacement in the first place.

States might vote to determine whether a particular group of people meets the definition of Displaced Persons. A vote by signatories, the Security Council, or the General Assembly might trigger agreement protections. Votes by a UN

135. 1951 Refugee Convention, *supra* note 7, at art. 31.

136. Complementarity is a foundational concept in International Criminal Law; considering it when creating an international legal agreement involving human rights helps to harmonize the international legal regime.

body, however, should not be the sole trigger for agreement protections. Doing so would carry a high risk that the process will become politicized.

Sheer numbers of people displaced by violent events, such as a mass influx of 1,000 per day over a short time, might also play a role in determining whether protections should be triggered.¹³⁷ However, setting an objective threshold should be done with caution to avoid the risk of creating perverse push and pull factors. For example, a situation where an evil dictator purposely forces out 1,000 people per day to trigger international protections, or where a group of 1,000 people coordinates their flight from a country to improve their chances of receiving benefits, would not be desirable.

The actions and voices of Displaced Persons themselves, as well as NGOs and other stakeholders, should also be considered when deciding whether Convention protections will be triggered. Displaced individuals might petition an international body to trigger agreement protections. Protections for Displaced Persons might also be triggered by numbers of people from a given country who have registered for services from UNHCR or reputable international NGOs, such as those with UN observer status or which are registered with the UN Economic and Social Council (EcoSoc). UNHCR must be required to publicize numbers of people registering for its services at various field offices so that the international community can become easily aware of flows of Displaced Persons and act on them.

States must also negotiate a procedure for determining when the status of any group of Displaced Persons might end. When doing so, states should allow for flexibility for these decisions to be made on a case-by-case basis. They should also include provisions for the voices of Displaced Persons to be heard when making this decision. And finally, they should take extra precautions to ensure that these decisions—which could be a matter of life and death for vulnerable individuals—are not subject to politicization.

C. Supervision

States must decide who will supervise implementation of international protections once they have been triggered. A new agency, monitoring body, or ad hoc organization might supervise the agreement. UNHCR, however, is probably best positioned to supervise an international agreement to protect Displaced Persons. The agency has, de facto, been providing for the needs of much of this population for years, so it has the expertise and the capacity to expand its operations to provide aid and administer a new international agreement.¹³⁸ For example, in 2006-2007, during the Iraqi civil war, UNHCR

137. The term “mass influx” has never been legally defined or defined by UNHCR. *See* U.N. High Comm’r for Refugees, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, U.N. Doc. A/AC.96/1003 (Oct. 8, 2004).

138. UNHCR provides services to many “persons of concern” beyond Convention refugees. *See, e.g.*, 2015 UNHCR Global Report, <http://www.unhcr.org/gr15/index.xml>

treated all Iraqis in neighboring countries as *prima facie* “refugees,” regardless of whether they met Convention refugee criteria.¹³⁹

UNHCR is far from perfect, as discussed above. However, careful design of a DPC or international agreement to protect Displaced Persons could mitigate problems that have plagued the agency in the past. Providing UNHCR with core funding for humanitarian use, such as using a fund discussed below, would insulate the agency’s activities from some of the politicization inherent in past humanitarian actions to assist refugees.¹⁴⁰ With funding at the ready, the mandate to administer a new international agreement, and a reaffirmation of its protection functions, UNHCR could more expeditiously assist both refugees and Displaced Persons. It would no longer have to wait to act until it received U.N. authorization or funding from a politically interested donor state.

D. Rights of Displaced Persons

Because DPs are morally and politically distinct from refugees, the international community has a different set of obligations to them. According to UNHCR, refugee status terminates via one of three durable solutions: local integration, resettlement, or repatriation. Article 34 of the 1951 Refugee Convention encourages states to “facilitate the assimilation and naturalization of refugees,” although it stops short of requiring this.¹⁴¹ By contrast, protections for Displaced Persons under any international agreement should be geared toward eventual repatriation. As discussed above, Displaced Persons are distinct from refugees because their ties to their countries of origin are not severed by the circumstances of their displacement. As a practical matter, states are likely to be unwilling to commit to providing more than temporary protections to Displaced Persons, especially those states who are already involuntarily hosting large numbers of refugees and migrants.

Accordingly, Displaced Persons should only be granted temporary protection until sufficient arrangements can be made for them to return to their homes or to a safe zone within their country of origin. Displaced Persons should know that temporary protection could be revoked at any time, with reasonable notice. Unlike refugees, Displaced Persons should not have access to third-country resettlement, since their protection is designed to be temporary. Displaced Persons should be integrated locally only to the extent that they can easily be repatriated when the situation in their origin country stabilizes. Temporary work permits, for example, might be an appropriate mechanism to ensure that Displaced Persons do not remain in a host country indefinitely.

A Displaced Persons Convention or related international agreement must avoid the pitfalls of other human rights treaties. Many failures of international

139. See Goldenziel, *supra* note 18, at 477.

140. For a discussion of the politicization of the Iraqi refugee crisis after the 2003 U.S. invasion of Iraq, see generally Goldenziel, *supra* note 18.

141. 1951 Refugee Convention, *supra* note 7, at art. 34.

human rights law are due to poor enforcement mechanisms and long, unrealistic laundry lists of rights “commitments” that few, if any, states have the means to fulfill.¹⁴² For the sake of practicality, any international agreement to protect Displaced Persons should not include long lists of rights commitments that no state has yet matched. For an international agreement to protect Displaced Persons to work, it must include fewer commitments that are more concrete, while stressing in its text that nothing in it will undermine previous human rights commitments. Ideally, states would ensure that all Displaced Persons enjoy all of the inalienable human rights delineated in the body of international human rights law, and a DPC would become an instrument of international human rights law on par with the core human rights treaties. For now, this is politically unrealistic.

Instead, states must negotiate what they, as an international community, can realistically provide to Displaced Persons. Basic shelter, sustenance, security, access to healthcare and the legal system, and *jus cogens* human rights protections provide a floor for treatment of Displaced Persons. Beyond that, any agreement must recognize that no one-size-fits-all solution exists for all states, nor for all Displaced Persons. For example, requiring that all Displaced Persons be granted work permits may be infeasible in countries with nearly 25% unemployment, such as Greece.¹⁴³ For similar reasons, an international agreement to protect Displaced Persons might not include the “right to work” language listed in the 1951 Refugee Convention and other human rights instruments.¹⁴⁴ Instead, the agreement could require that signatory states convene to promote and fund creative solutions for Displaced Persons to have livelihoods when the agreement’s protections are triggered.

E. Enforcement

An international agreement to protect Displaced Persons should also have enforcement mechanisms. A DPC or similar treaty would have stronger enforcement provisions than a non-binding agreement. International law would be enforceable in international and many domestic courts. Countries also might agree to economic sanctions against those who violate a legal agreement, although in reality, economic sanctions for violations of a Displaced Persons Convention would be politically unlikely.

Non-binding agreements can also have enforcement mechanisms. While these likely will not be as strong as judicial enforcement or sanctions, they may still be powerful. Censure or punishment within the context of the agreement may be possible, such as withholding of development aid for violating the terms of the agreement. Censure within the UN might also be possible. Monitoring,

142. See generally POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW*, *supra* note 84 (discussing how most states do not fulfill their human rights commitments under international law).

143. *Greek Unemployment*, WORLD BANK, <http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=GR> (last visited Feb. 28, 2017).

144. See, e.g., 1951 Refugee Convention, *supra* note 7, at Chapter III.

reporting, and evaluation mechanisms will also be key. The international agreement should specify who would conduct the monitoring. This might be a new body such as the Committee for Displaced Persons, analogous to the Committee on the Rights of the Child that monitors the Convention on the Rights of the Child. Alternatively, UNHCR or an existing international entity might modify the agreement. Mechanisms for reliable and transparent reporting must also be established, such as censure for late or inaccurate reports, and external as well as self-reporting.

UNHCR, NGOs, and other civil society groups should also be involved in monitoring, reporting, and evaluation processes as stakeholders and watchdogs. With an on-the-ground presence, these non-governmental actors can provide a more accurate picture of human rights conditions and fairness of Displaced Persons determination processes than self-reporting or international monitoring alone. They can also provide an important monitoring and “naming and shaming” function by calling out those states that do not live up to their commitments under the agreement or DPC.

F. State Obligations

To treat Displaced Persons humanely, any international agreement must make clear what commitments states have to Displaced Persons, and must contain commitments that are realistic enough for states to meet. This would allow people to make informed choices about the rights and opportunities they will have if they flee their countries.

The success of an international agreement to protect Displaced Persons will hinge on provisions for burden sharing among states. As the term is used in humanitarian circles, burden sharing primarily refers to the financial and infrastructural burden of hosting Displaced Persons and paying for their humanitarian needs. In addition to the burdens of hosting and providing aid to Displaced Persons, states will have to pay for other obligations specified in any international agreement to protect Displaced Persons. Agreement signatories must also specify how states will share the costs of preventative mechanisms for the root causes of displacement. States must also determine who will ensure, and pay to ensure, the physical safety and human rights of Displaced Persons if and while repatriation occurs.

1. Burden Sharing

Burden sharing should be the goal of any international agreement, as most scholars and practitioners agree. However, the international community must decide how burden sharing of hosting and financial responsibilities should occur.

Hosting

One option might be to commit signatories to host proportionate numbers of Displaced Persons. Such an arrangement may not be desirable, however. Historically, most Displaced Persons have been displaced within the developing world, and transferring them may be costly. Providing temporary protection to Displaced Persons within their region of displacement will often be the most practical option. Supporting them within the developing world may be less expensive than transferring them elsewhere. Furthermore, linguistic and cultural similarities may help Displaced Persons integrate in their host communities, and regional economic cooperation may allow those displaced to engage in productive economic activities. Geographic proximity can also facilitate ties between Displaced Persons and their countries of origin, which will facilitate eventual repatriation.

It should be noted that Displaced Persons might not always fare best in their regions of origin. The experience of Palestinian refugees is instructive in this regard. Palestinians who fled the creation of Israel in 1948, for example, were not initially granted human rights or legal protections in most of the Arab world. To this day, of countries neighboring Israel, only Jordan has granted full citizenship and legal rights to Palestinians, although it has denied it to Gazans.¹⁴⁵ Any international agreement must be flexible enough to account for individual circumstances of displacement.

Negotiating states may arrange to distribute Displaced Persons elsewhere, regardless of where they initially flee. Wealthy states, like Germany in 2015, may be interested in taking large numbers of Displaced Persons in order to bolster their workforce. Poorer states may be willing to accept large numbers of Displaced Persons in return for development aid or other financial assistance. Some wealthier states may be happy to pay poorer states to host Displaced Persons. In the mid-2000s, for example, the U.S. gave Jordan development aid for hosting large numbers of displaced Iraqis.¹⁴⁶ States may also wish to transfer Displaced Persons to third countries for processing or eventual hosting, as has been considered by the EU in 2014 and 2015 in response to large migration flows.¹⁴⁷ Under existing international law, if Displaced Persons are transferred to third countries for processing or hosting, the transferring country will need to ensure that they will not be subject to torture or maltreatment there.¹⁴⁸ This standard should be reflected in any international agreement on Displaced Persons. If these and other basic human rights are guaranteed, both transfers of

145. See generally Sawsan Ramahi, *Palestinians and Jordanian Citizenship*, MIDDLE EAST MONITOR, Dec. 2015 (explaining the legal status of Gazans in Jordan).

146. See Goldenziel, *supra* note 18.

147. Australia, too, has a third country processing program, but it has come under fire for human rights abuses. See Goldenziel, *International Decisions*, *supra* note 80; Goldenziel, *When Law Migrates*, *supra* note 47.

148. Convention Against Torture, *supra* note 19.

refugees and financial transfers to pay for their hosting may be desirable outcomes.

2. Funding and Related Incentives

Any well-crafted international agreement must provide assurances to wealthier and poorer states that they will benefit from signing. A DPC that is legally enforceable would provide a more credible commitment than an international agreement in this regard. However, any agreement that makes flows of Displaced People safer and more orderly will benefit states. All states benefit from predictability and stability in the international system. States also have the natural incentive to coordinate to avoid the instability and potential for conflict spillover that accompanies massive flows of people fleeing violence.

Assurances of financial assistance will incentivize wealthier and poorer states alike to participate in a DPC. Minimum human rights standards require that host states ensure non-refoulement and provide Displaced Persons with basic needs, security, sustenance, and access to justice while they are present. Ensuring these human rights will be expensive and burden state infrastructure. Developing nations usually cannot bear these costs alone, and even wealthy European states have been saddled by the costs of hosting sheer numbers of Displaced Persons, as in the mid-2010s. An international agreement should therefore ensure that states hosting Displaced Persons can rely on financial and technical assistance from fellow signatories in a time of need. Financial assistance from wealthier states to poorer states likely will also be necessary to give teeth to the legal rights of Displaced Persons in the developing world. Poorer states would certainly benefit from the assurance that they will receive financial assistance to host large numbers of Displaced Persons, especially when they do so involuntarily.

States would also benefit from guarantees that co-signatories will assist them in times of acute need. All states could use assurance that increasing numbers of Displaced Persons will receive temporary protection elsewhere, if state infrastructure should become overwhelmed, or if repatriation remains impossible after a protracted period. States may also want to ensure that co-signatories will help them transfer Displaced Persons if a mass influx would exacerbate ethnic tensions or otherwise threaten domestic security, particularly in countries where ethnic tensions have led to past conflict. Both wealthier and poorer states would benefit from such burden-sharing provisions.

For some states, the costs of participating in a new international agreement may also be less than their current costs of managing migration. Mass migration flows are currently straining states' asylum programs, security, and welfare systems states. An agreement that may reduce those costs will be attractive. A new agreement may also be more sustainable than existing migration deterrence mechanisms by wealthier states, which are increasingly costly and not working

well.¹⁴⁹ Economic analysis is needed to determine whether such incentives exist, as well as what would constitute situation-specific, adequate financial compensation for countries hosting refugees.

As another major stakeholder in Displaced Persons crises, UNHCR would welcome any international agreement with funding provisions attached. If such an agreement is successful in deterring migration, it would also relieve the problematic backlog in UNHCR's resettlement programs, discussed in the case of Hamdan above. An agreement would also provide UNHCR grounds to negotiate with governments for greater international protections for Displaced Persons. International law would give them greater authority to pressure governments, and would also save the Agency from the need to undergo complicated legal and administrative contortions to protect large "mixed flows" containing people fleeing both violence and persecution. A non-binding international agreement would also provide them with leverage, although less.

3. Common Fund

Another cost-sharing mechanism might be a common pool of humanitarian aid money might be created and reserved for deployment in emergency situations. States could commit to contribute to an international fund for Displaced Persons, similar to the fund underlying the Global Counterterrorism Forum or funds for many international environmental protection initiatives.¹⁵⁰ Countries would be required to commit regularly, not just in times of emergencies, based on their funding commitments to the U.N., or other agreed-upon criteria. UNHCR, or another supervisory body could administer the fund, to provide protection and assistance for Displaced Persons. This commitment would help rectify the funding gap that has been identified as a weakness in other proposals to assist people displaced by violence.¹⁵¹

A DPC or other international agreement would not prevent states from pursuing their own foreign policy objectives, such as providing additional development aid to their allies. However, a common fund would provide baseline financial assistance, and a minimum commitment to burden sharing.

A more complete discussion of burden-sharing mechanisms lies beyond the scope of this paper. In short, states must negotiate how costs should be allocated, weighing tradeoffs between hosting and financial commitments. Enforcement of burden-sharing mechanisms will be critical to the success or failure of any DPC, as discussed below.

149. See Goldenziel, *When Law Migrates*, *supra* note 47.

150. See generally, GLOBAL COUNTERTERRORISM FORUM, <https://www.thegctf.org/> (last visited Feb. 28, 2017)(explaining the workings of the Global Counterterrorism Forum).

151. See Hathaway and Anker et al., *supra* note 29.

4. Preventative Measures

Population displacement will not end until its root causes are addressed. An international agreement to protect Displaced Persons, therefore, should require states to implement preventative measures, in order to receive a guarantee of future international assistance. States cannot predict that their countries will erupt in civil conflict. However, they can tell if they are situated in a bad neighborhood, where surrounding states are prone to instability and strife. Political science research consistently seeks to determine predictors of future conflict.¹⁵² While conclusions have varied as research has progressed, for the purposes of protecting Displaced Persons and refugees, an international monitoring body might continually review states to determine whether risk factors are present. States in the global North can often predict whether, and how such issues will affect their borders, on the basis of how past episodes of international violence have impacted their immigration and border controls.

An international agreement could pre-commit states to responding to these future needs. It could also commit states to allow the international community to establish safe zones for those who wish to flee, within their borders, in the event of civil conflict. Safe zones accessible for provision of legal and humanitarian assistance could help stem the flow of Displaced Persons elsewhere. An international agreement could also ensure that peace treaties, to which states are parties or help negotiate, will include provisions for the safe return of refugees and Displaced Persons. The agreement should also stipulate reporting mechanisms, to allow the international community to plan for displacement before it occurs.

To discourage displacement, the Convention should also commit states to allow an international body to implement an information campaign. This campaign would be designed to dispel misconceptions about who qualifies as a Displaced Person, and the assistance and protection that Displaced Persons will receive. In the late 1980s, as part of the Comprehensive Plan of Action to end the Indochinese boat people crisis, the UNHCR set up a televised information campaign in Vietnam for a similar purpose.¹⁵³ The advertisements showed scenes of adequate, but not deluxe, refugee camps in Hong Kong and elsewhere. It featured interviews with UNHCR personnel discussing the refugee status determination process, and explaining how those who did not qualify would be sent back to Vietnam. The advertisements were designed to present Vietnamese people with neutral facts that would enable them to make an informed decision about whether to leave their country. The ads are credited with widely reducing

152. See, e.g., PAUL COLLIER & ANKE HOEFFLER, GREED AND GRIEVANCE IN CIVIL WAR (2001); JAMES FEARON & DAVID LAITIN, ETHNICITY, INSURGENCY, AND CIVIL WAR (2003); *Atrocities Worldwide*, POL. INSTABILITY TASK FORCE, <http://eventdata.parusanalytics.com/data/dir/atrocities.html> (last updated Feb. 8, 2017).

153. ALEXANDER CASELLA, BREAKING THE RULES (2011); LUISE DRUKE, INNOVATIONS IN REFUGEE PROTECTION (1ST ED. 2014).

flows of “boat people” from both North and South Vietnam.¹⁵⁴ Similar information campaigns might be useful today in reducing flows of migrants to Europe and elsewhere. Migrants would be able to make more informed decisions about whether to flee. With better information, economic migrants and others who have little chance of qualifying as Displaced Persons or refugees would be less likely to flee their homes based on the misconception that they would be allowed to remain abroad. People would also know that Displaced Persons status would not entitle them to remain in a country permanently, and that failure to qualify for either refugee or DP status would mean that they would likely be sent home.

5. Supplementing Refugee Protections

All signatories to an international agreement to protect Displaced Persons should be encouraged to ratify the 1951 Refugee Convention and its basic norm of non-refoulement. This would bolster protection for refugees by nations in the world who have an interest in receiving hosting assistance, but who have previously been reluctant to sign the 1951 Refugee Convention. It would help ensure that an international agreement to protect Displaced Persons and the 1951 Refugee Convention are viewed as complementary, that the two separate and distinct categories are understood, and that countries do not lump Displaced Persons and refugees together into one larger category that would undermine the protections for both. Ideally, signing the 1951 Refugee Convention would be required for a state to receive the benefits of the international agreement to protect Displaced Persons. In reality, a requirement to sign the Refugee Convention might be an obstacle to achieving any international agreement for Displaced Persons.

CONCLUSION

If adopted, the reforms proposed here would improve protections for refugees, Displaced Persons, and states alike. A new international agreement clarifying the status of Displaced Persons would provide guidance to shape the behavior of states, individuals, U.N. Agencies, and NGOs within the international system. It would make clear that persecution on the basis of religion, race, nationality, or membership in a particular social group is still among the most heinous of international crimes. New international law would provide even stronger protections for refugees and Displaced Persons, while also providing much-needed support to the international legal framework for humanitarian aid.

Clarification that Convention refugees will receive priority in the international system for resettlement and assistance would reduce the administrative burden on states and on UNHCR by discouraging people who do

154. See Cassella, *supra* note 153.

not fit into these categories from applying. Those who still find it necessary to flee, but who do not meet 1951 Refugee Convention grounds, can be assured that they will receive temporary protection, and not summarily refouled to dire circumstances. States can be assured that they will have some control over who will reach their borders, and to whom they will have to provide humanitarian aid. A commitment to participate in an international agreement will also enable states to plan to mitigate future displacement issues.

No international agreement—legal or otherwise—can solve all of the problems faced by refugees, Displaced Persons, and the states to and from which they flee. Desperate people will always flee desperate circumstances. Hard and heart-wrenching cases will abound. Some politicization is inevitable; states providing oversight to a displacement regime may still decide to provide assistance to some people and not to others on political grounds. The analysis above is necessarily state-centric, and does not capture the complex role that non-state actors and stakeholders—violent humanitarian, and otherwise—play in creating and managing population displacement. The international community must carefully design an international agreement to protect Displaced Persons—or any international agreement to manage migration—to reduce push and pull factors and avoid creating an undue burden upon states. However, clarity will help circumscribe the burdens on states and also clarify which migrants will receive international assistance, and which might be better off seeking alternatives to flight abroad.

Many of the legal and policy solutions discussed here could help improve international protections for refugees as well as Displaced Persons. However, the two categories of people must not be lumped together for purposes of protection and assistance. The international community cannot roll back or water down existing legal protections for refugees by expanding the definition of “refugee,” because the core values that the refugee regime protects are too important and foundational to our very conception of what international human rights are. If every person fleeing violence were a refugee, as other commentators would have it, then protection of bona fide refugees, and minority protections that are fundamental to our human rights regime, would be lost. Put simply, if everyone is a refugee, then no one is.

Yet no longer can international law turn a blind eye to the plight of those displaced by war and other violent conflict. Both human rights and international security face dire harm from states’ erratic and inconsistent responses to population displacement. The international community, through the UN, is now embarking on a process to resolve the growing crisis. An agreement to protect a defined category of Displaced Persons would be one modest step toward a solution. A Displaced Persons Convention, which would bind states through enforcement in international and domestic courts, would be a better one.

Women And The Making Of The Tunisian Constitution

Rangita de Silva de Alwis*
Anware Mnasri**
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“The best nations are always those that accord women the greatest amount of liberty.”

(Charles Fourier, 1808)

“Just because we’ve overthrown the regime and managed to cobble together a constitution does not mean the transition is over. It is only the beginning. People need to remember that.”

(Issrar Chamekh, Student and Tunisian activist at i-Watch.)

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INTRODUCTION

The Jasmine Revolution of 2011 and the cascade of revolutions that followed created a crucial, albeit narrow, window of opportunity for political changes that could shape legal system reform across the Middle East and North African (MENA) region.¹ Revolutionaries in Tunisia, Egypt, Morocco, and Libya pushed for constitutional change as a necessary first step towards transitioning to a more democratic state.² Within this discourse, constitutional reform movements became platforms for addressing deep-seated gender inequalities.³ Women in Tunisia used their country's constitution-making

1. See generally Katerina Dalacoura, *The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications*, 88 INT'L AFFAIRS 63 (2012) (discussing the causes of the Arab Spring and its potential geopolitical implications).

2. John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219, 221-24 (2013); see also Issandr El Amrani, Op-Ed., *Egypt: A Constitution First*, GUARDIAN COMMENT NETWORK, Jun. 12 2011, <http://www.theguardian.com/commentisfree/2011/jun/12/egypt-a-constitution-first>. (describing a statement by Egyptian activists that recommends the Tunisian model of political transition).

3. See, e.g., RAINER GROTE ET AL., CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 628, 673 (2012). For a closer look at the popular debates around gender-related issues in North African countries between 2011 and 2013, see generally ANDREA KHALIL, *CROWDS AND POLITICS IN NORTH AFRICA: TUNISIA, ALGERIA, AND LIBYA* (2014).

process as a vehicle for mobilizing local efforts, connecting with gender rights advocates in other MENA countries, and participating in a transnational dialogue.⁴ As a result, women's participation became a key determinant of some of the final draft's constitutional guarantees on gender equality, religion-state relations, rights in the family, rights to political participation, and the employment of programmatic rights.

The constitution-making process in Tunisia built upon a long history of attempts in other countries to shift from a top-down model of constitution-making, also known as the Lancaster Model, to one based on popular participation.⁵ Over 200 new constitutions have been drafted since the post-colonial era.⁶ The earliest projects relied heavily on international experts outside the country who either copy-pasted model provisions from international texts or else borrowed from the country's former colonizers.⁷ Since the 1980s, however, countries have worked to adopt more autochthonous or hybrid processes that fit the local context.⁸ This is based on the premise that popular participation in constitution-making not only lends legitimacy to the text's provisions, but is in itself an exercise of democratic empowerment.⁹ In other words, constitutions can provide new beginnings for a country; in post-conflict scenarios, they give countries a forum for discussing the underlying tensions that gave rise to the initial conflict.¹⁰ The more open a constitution-making process is to the public and the institutions of civil society, the more likely the process will be more democratic and representative.¹¹

Based on these underlying principles, a nation's drafting process has been characterized generally by a greater degree of deliberation and is most often led either by the standing legislature or by a nationally elected constituent

4. Giulia Daniele, *Tunisian Women's Activism after the January 14 Revolution: Looking within and towards the Other Side of the Mediterranean*, 15 J. INT'L WOMEN'S STUD. 16, 26-27 (2014).

5. Uendra Dev Acharya, *Constitutionalism and Democracy in Nepal: What Went Wrong?* in CONSTITUTIONALISM AND DEMOCRATIC TRANSITIONS: LESSONS FROM SOUTH AFRICA 177, 188-91 (Veronica Federico & Carlo Fusaro eds., 2006). Alternative approaches to the Lancaster Model emerged in the late 1990s. Frameworks vary, but the general consensus is that popular participation is highly desirable, if not essential to successful constitution-making.

6. Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1523 (2008).

7. Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014).

8. Heinz Klug, *Postcolonial Collages: Distributions of Power and Constitutional Models*, 18 INT'L SOC. 114, 126-28 (2003).

9. VIVIEN HART, DEMOCRATIC CONSTITUTION-MAKING (2003), <http://www.usip.org/sites/default/files/sr107.pdf>.

10. Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 15 J. DEMOCRACY 81, 87 (2004).

11. See, e.g., Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201, 202-206 (2009) (providing a brief literature review on the waves of constitutionalism and a wider discussion of the dynamics between public participation and constitutional design).

assembly.¹² Although the emphasis is on creating a text that embodies a people's history and values, countries in transition will often draw on a "collage of constitutional mechanisms and principles" at the international level to "produce hybrid solutions tailored to" local imperatives."¹³ A more recent approach among legal scholars has been to look at the degree to which newly drafted constitutions are "intermestic" – drawing on both domestic and international influences.¹⁴ The hybridization of state reconstruction and the degree to which it occurs has been particularly informative in the area of women's rights. In many instances, women who have played an active role in advancing gender equality through constitutional reform have relied at least in part on a common core of international norms reflected in instruments such as the Convention for the Elimination of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant for Economic Social and Cultural Rights (ICESCR).¹⁵ They have used such texts to reinforce their assertion that participation in the drafting process is not just critical to the end result, rather it must be acknowledged as a normative claim in and of itself.¹⁶ The right to participate in the decision-making affecting women's lives is one of the most significant rights to be claimed by women. The United Nations Entity for Gender Equality and the Empowerment of Women has supported a women's right to engage in constitution-making, stating:

"[G]ender-sensitive processes (e.g., guaranteeing women's representation in constitutional drafting bodies) and decisions on substance (e.g., adoption of a constitutional guarantee of gender equality) set a precedent for women's participation in social, economic, and political life in the post-conflict period, as well as providing a legal base from which women's rights advocates can demand other types of gender-responsive reform that unfolds in transitional periods when laws and institutions are in flux."¹⁷

This is not to say that the women who participate in the drafting process should be characterized as a uniform force. Context will inevitably shape and diversify women's views of what warrants constitutional protection and whether

12. Widner, *supra* note 6 at 1532.

13. Klug, *supra* note 8 at 128.

14. Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667, 724 (2013).

15. Diane Elson & Jasmine Gideon, *Organising for Women's Economic and Social Rights: How Useful Is the International Covenant on Economic, Social, and Cultural Rights?* 8 J. INTERDISC. GENDER STUD. 133, 135-138 (2004).

16. See generally HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN* (2008) (reviewing various strategies and mechanisms to enhance women's participation in the constitution drafting process and the significance of such participation).

17. RANGITA DE SILVA DE ALWIS, *WOMEN'S HUMAN RIGHTS AND NATIONAL CONSTITUTIONS: LEADERSHIP AND POLITICAL PARTICIPATION* (2012), <http://www2.unwomen.org/~media/field%20office%20eseasia/docs/publications/2014/9/womens%20human%20rights%20and%20national%20constitutions%20guidance%20note.ashx?v=1&d=20141202T120321>.

international human rights standards comport with local belief systems or cultural practices. In Tunisia, women's participation consisted of a complex set of interactions influenced by stakeholders with varying and sometimes conflicting socio-political objectives. The inconsistencies that appear in the constitution's final text, as well as some of the challenges to passing implementing legislation, are a testament to this.¹⁸ Yet the ways in which participation unfolded, the forces at play, and their differing interests in drafting the country's gender rights provisions are issues that remain understudied. This article attempts to glean from field interviews and secondary sources some of the sociopolitical complexities that underlay women's engagement in Tunisia's constitution-making process. Elucidating such complexities can provide further insight into how women's engagement impacted the substance and enforceability of the constitution's final text. We argue that, in spite of longstanding roadblocks to implement and enforce constitutional guarantees, the greater involvement of Tunisian women in the constitution drafting process did make a difference in the final gender provisions of Tunisia's constitution. Although not all recommendations were adopted, Tunisian women were able to use an autochthonous process to edify the country and set the foundation for greater rights consciousness.

This article also seeks to define the degree and nature of external influence on national efforts to advance women's rights and on the drafting of Tunisia's gender provisions. Although our research suggests that international forces had less of an impact on the Tunisian constitution-making process than we had assumed initially, we also found that many Tunisian women still saw themselves as part of a transnational women's movement in which they were able to engage with a broad network of international women's groups and transnational stakeholders. Our conclusion, thus, is that the Tunisian constitutional project, at least in regards to its gender provisions, can be regarded as intermestic in the sense that it drew directly or indirectly from both local and transnational sources. This shows that even when drafters are able to create constitutions that fit local contexts, they are still deeply influenced by international human rights provisions and relevant structural frameworks.

Finally, this article summarizes some of the early efforts to translate constitutional guarantees into enforceable legislation. While we have deemed Tunisia's drafting process as a success in participatory constitution-making, the country has a considerable way to go to ensure that "equal opportunities for men and women" as guaranteed in its new constitution become a reality for Tunisians in their daily modes of existence.¹⁹

Applying Tunisia as a case study more generally, we argue that women's equal engagement can inform the constitutive and transformative nature of constitution drafting. Such engagement allows civil society to address challenges to the empowerment of women, create new narratives of nation

18. See *infra* Part II.

19. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

building, and ensure that constitutional provisions are drafted in a gender-sensitive manner. Women's engagement should be premised on a dialogic, human rights, analytical framework. While the primacy of rights must guide constitutional change, international human rights must be premised on an ongoing discourse that calls for simultaneous internal and cross-cultural dialogue involving a plurality of voices, including the equal representation of women. The emphasis here is on "ongoing." Constitutional guarantees are not guarantees until they are enforced without bias or exception. Participation in constitution-drafting projects should not end with the final text, but must continue with the formation of institutions that reflect and maintain the constitution's blue print for nation building.

This article proceeds in four parts. Part I provides a historical overview of Tunisia's constitution-making process and defines the major stakeholders involved, as well as the varying dynamics among them. It then introduces a comparative summary of how other countries have gradually shifted from the Lancaster Model to a more participatory process that embraces women's inclusion in drafting constitutional rights provisions. Part II begins our case study of Tunisia by detailing how some of the stakeholders mentioned in Part I shaped the drafting process for certain gender provisions, the proposed texts as well as subsequent revisions. Part II concludes by identifying some of the inconsistencies found within the constitution's final text, as well as preexisting laws that have complicated the enactment of implementing legislation. Part III moves on to consider the international forces involved in the drafting process, and the extent to which international texts and softer modes of influence determined the direction of Tunisia's internal dialogue. It also considers whether international organizations have played a part in resolving inconsistencies in the legal framework. Finally, Part IV makes recommendations to actualize the constitution's gender provisions. It looks at the beginnings of some of these efforts, as well as gives recommendations based on the experience of other countries in transition.

This paper engages not just in textual interpretation and secondary sources, but relies on in-depth interviews with some of the women stakeholders involved. Our hope is that by speaking with those who were present on the ground during the drafting process, we can provide greater insight into how provisions are drafted, to what extent the participatory process succeeded in creating new constitutional norms for a country in transition, and to what effect international sources had in driving the constitution to a particular end result.

PART I

A. A Summary of Women's Engagement in Tunisia's Constitution-making Process

Any consideration of women's participation in drafting a new constitution in Tunisia requires placing it in its historical context. The next section will

summarize the state of women's activism prior to the revolution, the sociopolitical complexities that challenged participation in the constitution making process, and how women were able to coalesce in spite of these challenges. Women's activism has a long history in Tunisia. The literary works of the author and reformer Tahar el-Haddad are hailed by many today as the genesis of progressive women's rights in Tunisia.²⁰ His book, *Our Women in Shari'a and in Society* (1930) inspired debate over the role of women in Tunisian society and laid the groundwork for future popular struggles.²¹ Haddad was also a pioneer of trade unionism in Tunisia, laying the groundwork for today's largest and most powerful labor union in Tunisia, the General Union of Tunisian Workers (UGTT).²² His scholarship on women's status in Tunisia was informed, at least in part, by his critique of capitalism and familiarity with European Marxism.²³ Interestingly, Haddad's works seemed to have influenced the reforms included in Tunisia's Personal Status Code (CSP), issued by the country's first president Habib Bourguiba in 1956.²⁴ The purpose behind the CSP, however, seems to have been less about feminism than about doing away with traditions that impeded Bourguiba's greater modernization program.²⁵ The Code abolished polygamy and the practice of repudiation, and granted women suffrage and the right to initiate divorce, but did not explicitly make men and women equal in all respects.²⁶ For example, the CSP adopted a male preference in inheritance law.²⁷ Though the CSP was hailed by Western observers as a marked improvement in the institutionalization of women's rights, it had the paradoxical effect of creating a Jacobin-like form of feminism that effectively silenced alternative feminist viewpoints.²⁸ State feminism thus became a strategy to silence opposition while gaining the affections of external allies.

This strategy evolved during the Ben Ali regime to include methods of co-optation and division for the purposes of creating a narrow spectrum of activism that allowed women's organizations to exist only within a limited, heavily monitored sphere.²⁹ Those who resisted the regime's tactics ultimately lost out

20. Lilia Labidi, *The Nature of Transnational Alliances in Women's Associations in the Maghreb: The Case of AFTURD and ATFD in Tunisia*, 3 J. MIDDLE EAST WOMEN'S STUD. 6, 9-12 (2007).

21. *Id.* For more information on the creation and development of women's organizations inspired by el-Haddad, see LAURIE A. BRAND, WOMEN, THE STATE, AND POLITICAL LIBERALIZATION 202-22 (1998).

22. JOEL BEININ, WORKERS AND THIEVES: LABOR MOVEMENTS AND POPULAR UPRISINGS IN TUNISIA AND EGYPT 13 (2016).

23. *Id.*

24. BRAND, *supra* note 21 at 178-79.

25. *Id.* at 180.

26. George N. Sfeir, *The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah)*, 11 MIDDLE EAST J. 309, 310 (1957).

27. *Id.* at 313-14.

28. Daniele, *supra* note 4 at 18-19.

29. Emma C. Murphy, *Women in Tunisia: Between State Feminism and Economic Reform*, in WOMEN AND GLOBALIZATION IN THE ARAB MIDDLE EAST: GENDER, ECONOMY AND SOCIETY 169-

on political resources and influence but maintained an independent form of feminism that took hold after the regime's fall. For example, The Tunisian Association of Democratic Women (ATFD) and The Association of Tunisian Women for Research on Development (AFTURD), both established in 1989, successfully avoided "dictatorial drift"³⁰ to become powerful forces of post-regime activism, as we will see below.³¹ On the international front, Tunisia continued to hold itself as a progressive Arab state, ratifying CEDAW in 1985, albeit with numerous reservations related to Article 9(2) on equal rights with regard to nationality of children, Article 16 on equality in marriage and family life, and Article 29(1) relating to the administration of CEDAW provisions.³² Ben Ali became a vocal proponent of women's economic participation, touting state laws with regards to maternity leave and equal employment, but made little actual efforts towards placing women in positions of leadership or providing them with enforceable safeguards against substandard working conditions.³³

In light of Tunisia's complicated history, the 2011 revolution provided a critical opportunity to replace the old hegemonic framework for women's rights with a new bottom-up model based on popular discourse and civil society-led initiatives. Dr. Najet Limam-Tnani of the University of Tunis has commented that the constitutional process "created a new pulse" for the women's movement.³⁴ On October 23, 2011, over seven months after the fall of the regime, the interim government held nationwide elections to determine the composition of a 217-member, National Constituent Assembly (NCA) tasked with drafting a new constitution.³⁵ Women were well represented in most NCA decision-making bodies, though only a handful of women were appointed to significant positions of leadership.³⁶ Many more women deputies joined the six constituent committees in charge of drafting provisions under specific

70, 178-87 (Eleanor Abdella Doumato & Marsha Pripstein Posusney eds., 2003).

30. Guadalupe Martínez-Fuentes & Belhassen Ennouri, *Changes and Persistence in the Tunisian Organisational Network for the Promotion of Women*, in PROMOTING WOMEN'S RIGHTS & GENDER EQUALITY IN THE MIDDLE EAST AND NORTH AFRICA 139 (2014), http://www.feps-europe.eu/assets/bd3344d3-a0fc-4582-9842-e3b8ea4724a4/2014%2009%2003%20women's%20rights%20mena_final.pdf.

31. See *infra* Part II.

32. *Declarations, Reservations, and Objections to CEDAW*, U.N., <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last accessed Oct. 25, 2016).

33. Louisa Dris-Ait-Hamadouche, *Women in the Maghreb*, in NORTH AFRICA: POLITICS, REGION, AND THE LIMITS OF TRANSFORMATION 202, 219 (Yahia H Zoubir & Haizam Amirah-Fernandez, eds., 2008).

34. Najet Limam-Tnani, "Quelle Révolution Pour les Femmes Tunisiennes: Printemps Féministe our Hiver Islamiste?" Upholding Gendered Peace at a Time of War Conference, in Beirut, Lebanon (June 9, 2015).

35. Lizzy Davis, *Tunisian Elections: Polling Day as it Happened*, THE GUARDIAN, Oct. 23, 2011, <http://www.theguardian.com/world/middle-east-live/2011/oct/23/tunisian-elections-2011-arab-and-middle-east-protests>.

36. NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, ASSEMBLEE NATIONALE CONSTITUANTE DE LA TUNISIE, <https://www.ndi.org/files/Tunisia-Gender-Assessment-National-Constituent-Assembly-FRE.pdf>.

constitutional themes. Notably, the only committee headed by a woman was the Committee on Human Rights and Liberties, which was responsible for most issues related to women's rights.³⁷

The NCA held its inaugural session on November 22, 2011 and drafting began shortly thereafter, on February 13, 2012.³⁸ The entire project resulted in four drafts of the Constitution and took a little under two years to complete. The final draft was passed by an article-by-article vote on January 26, 2014. From the beginning there was consensus among women NCA members that the new constitution must uphold and advance women's rights. To that end, women took steps to form a caucus that would promote a unified women's rights agenda. However, diverging conceptions of what such an agenda should look like or what the role of women in Tunisian society should be impeded the caucus' capacity to hold together as a unifying force. Though women deputies expressed in interviews a broad range of perspectives on women's rights in Tunisia, most gravitated towards either a moderate Islamist position espoused by the majority party, Ennahda, or the modern secularist position of Ennahda's biggest rival, Nidaa-Tounis. Even when women's views aligned, these political parties were less than eager for their members to be drawn off to an issue-based coalition that crossed party lines. While Nidaa-Tounis feared that Ennahda was not as 'moderate'³⁹ as it held itself out to be and thus might undermine safeguards set by the Bourguiba regime in the country's 1959 Personal Status Code, Nidaa-Tounis was repeatedly accused of fraternizing with crony capitalists and political elites under the prior regime. Though Ennahda, and in particular Ennahda's women members, insisted on demonstrating good intentions in both maintaining and furthering women's rights guarantees, anti-Islamist rhetoric exacerbated tensions between the two parties and inevitably created an atmosphere of mutual suspicion that often led to serious blockages during constitutional debate. In short, the caucus initiative never fully formalized, though women members did re-coalesce at crucial moments to push through certain rights provisions, most notably Article 46 requiring the state to take steps towards eliminating violence against women.

37. THE CARTER CENTER, THE CONSTITUTION-MAKING PROCESS IN TUNISIA: FINAL REPORT 2011-2014, 32 (2014).

38. *NCA to Hold Inaugural Session on November 22*, TUNIS AFRIQUE PRESSE (Nov. 12, 2011), <http://www.pm.gov.tn/pm/actualites/actualite.php?lang=en&id=5058>; see also Al-Bawsala, *Drafting the Constitution of the Tunisian Republic* (in Arabic), (Sep. 2012), http://www.albawsala.com/uploads/documents/Projet_Brouillon_Constit.pdf.

39. Since its foray into the political scene, Ennahda has held itself out as the latest reincarnation of a moderate Islamist movement led by activists and Islamic intellectuals from the early 1980s onwards. Ben Ali used an aggressive form of secularism to suppress the movement's growth and bar its presence in associative spaces. By contrast, Nidaa-Tounis became a loose conglomeration of leftists, progressivists, and secularists, some of whom were suspected to be a part of the "old guard." Divisions between the two parties, thus, were not purely ideological, but also driven by historical circumstances. Interview with Salsabil Klibi, Professor at La Faculté des Sciences Juridiques (May 27, 2015).

Similar divides created challenges for building a united women's rights movement outside of the NCA. Rapid liberalization of the associative space after the revolution resulted in a flourishing of women's interest groups, representing a wide variety of perspectives.⁴⁰ This explosion of civic action was positive in many ways, but it also created difficulties in finding common ground. The most visible debate largely mapped onto what was unfolding in the NCA. Older progressivists, popularly referred to as the "Daughters of Bourguiba," often were at loggerheads with younger Islamists who championed themselves as the "Daughters of Khadija."⁴¹ Supporters in both camps engaged in several competing demonstrations or marches that resulted in competing discourses over various women's rights issues. On the sidelines, however, groups without political representation in the NCA were asserting their own views of the constitution and its role in furthering women's rights. For example, proponents of political Salafism, a more extreme form of Islam that requires Shari'a law as the sole source for legislation, did not win any seats in the NCA but has gained traction since 2011, particularly among the urban poor and youth.⁴² Many Tunisian men and women who have felt their country has lost a sense of self have been drawn to Salafism because of its anti-establishment discourse and adherence to traditional values.⁴³ Many Salafis reject the campaign for women's rights as an imported Western construct unrepresentative of Tunisia's own religious norms and values. The divisions between Salafis and other civil society groups resulted in several clashes with security forces and a wave of reported attacks against unveiled women and secular women's associations.⁴⁴

Tunisian youth also expressed feelings of social and political marginalization during the drafting process. Though young Tunisians were critical stakeholders in the 2011 revolution and have remained vocal during the transition process, many have struggled post-revolution to find a political space in which they can push forward their interests. This is troubling, given that over 54% of Tunisia is under the age of thirty and that youth have been one of the

40. Some of the organizations mentioned in interviews include: Front of Women for Equality, Nawaas, Women and Dignity, Forum of Tunisian Women, Tunisian Association of Progressive Women, Voices of Women, Equality and Parity, Beity, League of Tunisian Women Voters. Moderate Islamist organizations such as Women and Complementarity, and the Tounissiet Association for Women and Development unified under a common banner to counter anti-Islamist discourse issued by modern secularists.

41. Lamia Ben Youssef, Lecture at Oxford University (Oct. 27, 2014), (audio recording at <https://podcasts.ox.ac.uk/daughters-bourguiba-daughters-khadija-mythical-genealogy-and-future-secular-and-islamic>).

42. See Monica Marks, *Youth Politics and Tunisian Salafism: Understanding the Jihadi Current*, 18 *MEDITERRANEAN POL.* 104, 110-111 (2013).

43. See, e.g., *id.* ("Young women in the movement – for there are many female jihadi Salafis, though their activism is often self-segregated by sex – often appear to revel in expressions of gender performance, such as wearing niqab or refusing to shake hands and mix socially with young men. Such practices set them apart and seem to reinforce feelings of difference and, sometimes, superiority.")

44. Daveed Gartenstein-Ross, *Springtime for Salafists*, *FOREIGN POLICY*, Mar. 26, 2013.

social categories most vulnerable to urgent issues, such as prolonged unemployment and domestic and economic violence.⁴⁵ During the constitution-making process, youth criticized the NCA as primarily representing an older generation that could not relate to young Tunisians' experiences or share in a common set of values.⁴⁶ This gave rise to a growing mistrust on the part of young people towards establishment organizations that appear to draw too close to political and business elites who benefitted under Ben Ali.⁴⁷ Such criticism was reserved in particular for the UGTT and its fellow Quartet members.⁴⁸ While the UGTT proved crucial during the interim government as a moderator for brokering interests and held itself out during the drafting process as a representative of working-class interests, some felt that over time, it succumbed to internal fracturing and subsequent disenchantment among its youth chapters. Some even accused UGTT leadership as subservient to moneyed interests rather than to its core members.⁴⁹ Disgruntled revolutionaries in their determination to stay relevant began assembling their own civil society initiatives including NGOs like Jamaity,⁵⁰ media outlets like Nawaat,⁵¹ and watchdog groups like Al-Bawsala.⁵² These new programs were intended to provide an alternative perspective to what was happening on the ground. NGOs and grassroots initiatives, lacking in domestic resources, often allied with foreign organizations for funding and outreach purposes.⁵³

These shifting alliances and mounting tensions in both the NCA and civil society is hardly surprising given Tunisia's lengthy authoritarian history and sudden transition to a more democratic state. Yet it is remarkable that, in spite of these challenges, Tunisian women were still able to unite at critical junctures for

45. See Graham Usher, *The Reawakening of Nahda in Tunisia*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT (Apr. 30, 2011), <http://www.merip.org/mero/mero043011>.

46. See Emily Parker, *Tunisian Youth: Between Political Exclusion and Civic Engagement*, TUNISIA LIVE (June 24, 2013), <http://www.tunisia-live.net/2013/06/14/tunisian-youth-between-political-exclusion-and-civic-engagement/>.

47. Kate McCabe, *Dreams of January*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/dreams-january-tunisia/> (last accessed Oct. 25 2016).

48. Anouar Boukhars, *The Reckoning: Tunisia's Perilous Path to Democratic Stability*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 2, 2015), <http://carnegieendowment.org/2015/04/02/reckoning-tunisia-s-perilous-path-to-democratic-stability/i5cj>. The Tunisian National Dialogue Quartet includes UGTT along with three other civil society organizations. The group was instrumental in the drafting process and won the Nobel Peace Prize for its efforts in 2015.

49. *Id.*

50. Interview with Souhayel Hedfi, via Skype (June 9, 2015); see also Amel Boubekeur, *Islamists, Secularists and Old Regime Elites in Tunisia: Bargained Competition*, 21 MEDITERRANEAN POL. 107, 111-15 (2016).

51. NAWAAT EN FRANCAIS, <http://nawaat.org/portail/fr/> (last visited Oct. 25, 2016).

52. *Infra* notes 147-48.

53. See Daniele, *supra* note 4, at 27.

the purpose of furthering women's constitutional rights.⁵⁴ While some women's associations that pre-dated the revolution were discarded as "holdouts" of the Ben Ali era, others rose to become powerful forums of activism, maintaining political independence in order to build broad coalitions covering an array of organizations and corresponding interests. The ATFD and AFTURD were particularly effective in creating inter-organizational activities that centered on common—usually left-leaning—civic campaigns.⁵⁵ One example of this was the LamEchaml network consisting of sixty organizations tied together by principles such as gender equality and separation of religion and state.⁵⁶ There was also a concerted effort to repeal all existing reservations under CEDAW and incorporate its provisions in the constitutional text.⁵⁷ ATFD and AFTURD thus became champions for causes that both radical grassroots organizations and conservative, politically-connected organizations could rally behind.

The greatest coalescing moment for women's groups came immediately after the NCA published its first draft on August 8, 2012.⁵⁸ The draft text referred to the "complementarity" of women and men, a term that many women activists felt backslid away from protections under the CSP and threatened the campaign for greater gender parity.⁵⁹ A mass sit-in was organized that same day in front of the NCA building and on August 13, Tunisian Women's Day, thousands gathered across the country to support the equal protection of men and women under the constitution.⁶⁰

Women's organizations were also effective as poll-watchers, rigorously monitoring the NCA while identifying inadequacies in the drafting process. Though many have applauded the NCA in its efforts to include civil society, as we will see in Part II, others felt the Assembly could have gone further. For example, the NCA only permitted one multi-day period during which civil society organizations were invited to come and engage in open dialogue with NCA members.⁶¹ Some organizations, including ATFD, LTDH, and International Federation of Human Rights (FIDH) boycotted this event, sensing that the discussion could not be productive if draft guarantees had not been set.⁶²

54. See *Tunisian Women and their Role in the Success of "The Jasmine Revolution"*, DW News (Mar. 8 2011), <http://www.dw.com/ar/الاياسمين-ا-ثورة-انجاح-في-ودوره-التونسي-ة-المرأة>-14896373 (translated by the author).

55. Anna Antonakis-Nashif, *Contested Transformation: Mobilized Publics in Tunisia between Compliance and Protest*, 21 MEDITERRANEAN POL. 128, 135-36 (2016).

56. Martínez-Fuentes, *supra* note 30, at 144.

57. *Id.* at 139-40.

58. Interview with Anware Mnasri (June 2, 2015).

59. *Id.*

60. THE CARTER CENTER, *supra* note 37, at 35.

61. JASON GLUCK & MICHELE BRANDT, PARTICIPATORY AND INCLUSIVE CONSTITUTION MAKING: GIVING VOICE TO THE DEMANDS OF CITIZENS IN THE WAKE OF THE ARAB SPRING 9 (2015).

62. *Des Associations et Organisations Boycottent le Dialogue Sur le Project de Constitution*, TUNIS AFRIQUE PRESSE, Sept. 18, 2012.

Similarly, the NCA held only one national consultation process. Monitoring organizations expressed concern that the process was too rushed to be effective: the NCA held public sessions from December through January 2013 in all of Tunisia's 24 governorates at a rate of six governorates per weekend.⁶³ The first round of sessions commenced merely two days after the second draft's publication on December 14, 2012, which resulted in low turnout and hardly gave citizens adequate time to review. Monitoring organizations also noted feelings of exclusion among youth—over 45% of individuals ages 15-29 felt like they were not involved in the drafting process and 56% indicated complete unawareness as to the substance of the draft provisions.⁶⁴

By spring of 2013, the situation seemed to be spiraling out of control. Growing resentment towards the NCA resulted in fallouts between political parties and their constituents. Deadlock during revision meetings and the inadvertent release of a third draft on April 22, 2013, did not increase confidence in the NCA's ability to reach a satisfactory final draft. The assassination of opposition politician, Mohamed Brahmi triggered massive protests in July 2013 calling for the government to resign.⁶⁵ Over sixty opposition members walked out of the NCA shortly thereafter.⁶⁶ When a final draft was finally passed by an assembly vote on January 26, 2014, it came amidst much political unrest and uncertainty of the constitution's future implementation.⁶⁷

The surrounding turmoil did not stop women deputies, with the support of civil society groups, from coming together in the final moments to pass critical provisions guaranteeing the equality of women, as well as state requirements to protect women against violence and abusive working conditions. Such notable steps in the advancement and protection of women's rights should not be forgotten. We should applaud the efforts of women's organizations in Tunisia to rally around common objectives, in spite of the divisions that seemed to permeate among them and the rest of society.

B. Countries in Transition: Building a Public Participatory Framework for Gender Rights

Stepping back from the constitution-making process in Tunisia and the role of women in enacting gender rights provisions, it is first helpful to look at what

63. THE CARTER CENTER, *supra*, note 37, at 70.

64. U.N. DEV. PROGRAMME, ENQUETE NATIONALE SUR LES ATTENTES DES JEUNES À L'ÉGARD DU PROCESSUS CONSTITUTIONNEL ET DE LA TRANSITION DÉMOCRATIQUE EN TUNISIE: RAPPORT DE SYNTHÈSE 11 (2013).

65. *Suspect Arrested in Murder of Tunisian Opposition MP*, AL-ARABIYA (Feb. 9, 2011), <http://english.alarabiya.net/en/News/middle-east/2014/02/09/Suspect-arrested-in-murder-of-Tunisian-opposition-MP.html>.

66. *Tunisia Mourns Slain Soldiers*, JORDAN TIMES, July 9, 2013.

67. LA FACULTE DE SCIENCES JURIDIQUES DE TUNIS, PROCESSUS DE REDACTION DE LA CONSTITUTION [The Drafting Process of the Constitution] (January 2015).

other countries have done as a common reference point. National constitutions are recognized today as the supreme law of the land and, as the source of their power, they define both the citizenship rights and the responsibilities that then serve to regulate institutions and government and hold decision makers of the state accountable to those rights. The specific way in which a country's constitution shapes each aspect of state power will either facilitate or limit the opportunities for advancing gender equality. Over the last four decades, over 200 new constitutions have been drafted, including many in post-conflict countries. These constitutions have been written in the Balkans, Cambodia, Lebanon, East Timor, Rwanda, Chad, Mozambique, Bougainville-Papua New Guinea, Nepal, and the Comoros, to name a few. They include countries emerging from colonization from French and British colonial empires and countries in Eastern and Central Europe after the collapse of Soviet Communist rule in 1991.⁶⁸

The Lancaster House Constitution, a top-down model of constitution making developed as part of the negotiations that led to Zimbabwe's independence from the United Kingdom in 1980, is no longer considered a tenable model.⁶⁹ The Lancaster House model relied on international experts outside the country to draft provisions without the participation of the people.⁷⁰ Constitutions following this method, primarily those during the period of decolonization after the Second World War, tended simply to copy the basic constitutional rules of their former colonial masters.⁷¹ Over the past few decades, however, constitution making has transformed from mimicking the constitutions of colonial rulers to either autochthonous constitution-making or hybrid processes that fit the local context.⁷² Even when peace accords were internationally forged or constitutions were informed by foreign experts, there is a general perception that constitutions from the 1980s onward have been shaped by a more participatory process, characterized by a greater degree of deliberation and most often led by a national constituent assembly.⁷³

Though the constitution-making process differs from country to country, it usually involves the following stages: (1) assessment of the need for a new constitution; (2) agreement on the rules concerning how to proceed with constitution-building; (3) establishment of a representative body to prepare a

68. See generally Widner, *supra* note 6 (providing an overview of the constitution-writing process in countries following independence from Britain, France, and the Soviet Union).

69. Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 130-31 (1997).

70. *Id.*

71. Stacy R. Sandusky, *Women's Political Participation in Developing and Democratizing Countries: Focus on Zimbabwe*, 5 BUFF. HUM. RTS. L. REV. 253, 256-57 (1999); see also Robert P. Wasson Jr., *The AIDS Crisis as an Impetus to Law Reform in the United States and Kenya*, 17 SUFFOLK TRANSNAT'L L. REV. 1, 31 (1994) (noting that the extension of "colonial" rights has frustrated the development of a political culture that respects individual rights).

72. See Klug, *supra* note 8, at 126-28.

73. Selassie, *supra* note 69, at 131-32.

draft of the new constitution that includes a public consultation process; (4) consideration and debate of the draft; (5) referendum; (6) adoption of the new constitution; and (7) implementation.⁷⁴ The country overviews below focus primarily on stages three, four, and seven. Our effort here is to show that constitution-making is an exercise in democratic empowerment and can help shape nation-building; that the constitution and democratic governance may lose legitimacy if people feel disenfranchised by the process. Public participation allows women and others who have been marginalized from democratic processes to claim a constitution as their own. National dialogue and civic education can address underlying causes of conflict and help citizens to define a national identity and a shared vision for the future. Although international law does not spell out rules for drafting constitutions, most of the constitution-making processes of the past two decades have attempted this in different ways. Preparatory civic education, teaching both large constitutional principles and the finer details of the drafting and adoption processes has become a cornerstone of constitution-making.⁷⁵

The electoral rules and procedures that determine which interest groups are represented on constitution-building bodies are critical for guaranteeing the role of women in the process of drafting, revising, and adopting a constitution. The goal should be to design rules that promote a broad representation of women and overcome traditional gender biases that have led to women's comparative social, economic, or educational disadvantage. For example, South Africa was the first country in which men and women sat in equal numbers in the constitution-making body.⁷⁶ Its constitution-making process is regarded as a good example of a participatory constitution-making process.⁷⁷ Similarly, Nepal's Interim Constitution established the Constituent Assembly to draft the new constitution on the basis of a mix of first-past-the-post elections, proportional representation, and appointments (with approximately 55% of candidates to be elected through proportional representation), and ensured women's inclusion by requiring that: "political parties... take into account the principle of inclusiveness" while selecting candidates for first-past-the-post elections, and that "political parties... ensure proportional representation of the women, Dalit, oppressed communities/indigenous peoples, backward regions, Madhesi, and other Classes."⁷⁸ In addition, the Interim Constitution required that "at least one-third of such total number of candidates nominated... be women."⁷⁹

Once the drafting process has begun, some countries have successfully used women's charters as instruments for consolidating women's rights

74. DE SILVA DE ALWIS, *supra* note 17, at 1.

75. Benomar, *supra* note 10, at 88.

76. Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L. & COMP. L. 49, 90 (2007).

77. *Id.* at 56-58.

78. INTERIM CONSTITUTION OF NEPAL 2007, January 15, 2007, art. 63 §4.

79. *Id.* at art. 63 §5.

demands. Turning back to South Africa, this technique proved crucial for unifying the women's movement where no unification had previously existed. In 1992, the South African Women's National Coalition began raising public awareness and promoting considerable debate on women's issues. During this process it identified several major concerns: inclusivity in decision-making, promotion of women's awareness and rights, gender equality and women's unity.⁸⁰ When the drafting of a new constitution began in April 1994, the South African Constituent Assembly began an expansive participatory process built on three major pillars of inclusivity, accessibility and transparency.⁸¹ The first building block was an educational campaign (using newspapers, billboards, radio, TV and a hotline) to educate the public about cardinal constitutional issues and their right to participate in the constitution-making process.⁸² More than 1,000 educational workshops were held over a period of a year.⁸³ Public consultations gave members of the Constituent Assembly the opportunity to meet with members of the community and all recommendations were transcribed and collated.⁸⁴ Public consultations were also held on specific subjects, such as the bill of rights, the judiciary and the administration.

The South African Constituent Assembly held two years of transparent deliberations with ample public input. All constitutional debates were published and broadcast, citizens could tune in to educational radio programs, and parties carried out consultations at the provincial level.⁸⁵ Citizens at large submitted two to three million proposals and suggestions to the Assembly.⁸⁶ As a result, the constitution of South Africa has enjoyed remarkably high legitimacy,

80. Ronalda Murphy, *Constitutional Rights Discourse: Canadian and South African Feminist Engagements*, in *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* 20, 21-32 (Alexandra Dobrowolsky & Vivien Hart eds., 2003).

81. Catherine Albertyn, *Towards Substantive Representation: Women and Politics in South Africa*, in *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* 20, 99-102 (Alexandra Dobrowolsky & Vivien Hart eds., 2003); *see also* Rangita de Silva de Alwis, *Implementing the Constitution: The Way Forward* (working paper) (2014), <http://www.50x50movement.org/sites/default/files/inline-files/Tunisia-Working-Papers.pdf>.

82. MICHAEL BRANDT ET AL., *CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS* 93 (2011), <http://constitutionmakingforpeace.org/wp-content/themes/cmp/assets/handbooks/Constitution-Making-Handbook-English.pdf>.

83. DEMOCRACY REPORTING INTERNATIONAL, *LESSONS LEARNED FROM CONSTITUTION-MAKING: PROCESSES WITH BROAD BASED PUBLIC PARTICIPATION* 6 (2011)

84. Catherine Barnes & Eldred De Klerk, *South Africa's Multi-Party Constitutional Negotiation Process*, in *OWNING THE PROCESS: PUBLIC PARTICIPATION IN PEACEMAKING* (2002). For more information on the public consultation process, *see* HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* 32-33 (1998).

85. Brandt, *supra* note 82, at 94; *cf.* Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 *AM. J. COMP. L.* 67, 70-71 (1999) (questioning the extent to which public participation impacted the final text and notes some level of skepticism that political party dynamics may have overshadowed citizens' input).

86. Albie Sachs, *The Creation of South Africa's Constitution*, 41 *N. Y. L. SCH. L. REV.* 669, 675 (1996).

particularly in regards to women's rights and programmatic rights affecting the status of women in South African society.

Efforts to foster long-term public participation through adequate transparency have also been effective in other African countries, such as Namibia and Eritrea. In Namibia, the public was well-informed about constitutional issues through the election campaigns of political parties, and the national radio network helped educate the public on key issues. The Eritrean process's initial public-education phase included four-day training seminars for around four-hundred Eritreans.⁸⁷ These trainees would then conduct public consultations at the village level regarding the constitutional commission's proposals. Comments were considered during the revision process. The third phase included the recordation and collection of opinions expressed at public debates in various localities around the revised version of those proposals.⁸⁸

In contrast, the Cambodian public never got to participate closely with the constitution drafting sessions and had little input in the text of its constitution.⁸⁹ Structural barriers excluded Cambodia's human rights organizations from consultation and limited their role to lobbying the Constituent Assembly for stronger women's rights provisions. With assistance from the UN mission, human rights organizations were able to promote civic education and raise public awareness of the constitution's importance for human rights.⁹⁰ Buddhist clergy were especially helpful at reaching people in remote areas. NGOs hosted members of the constituent assembly at public meetings.⁹¹ Villages were reached indirectly through leaflets, brochures, stickers, posters, and broadcasts.⁹² It is unclear however, how this impacted the final version of the constitutional text and its implementation.

Sometimes non-governmental organizations with deep networks into civil society can influence the content and direction of the constitution-making process. For example, in Nicaragua, the influential Luisa Amanda Espinoza Association of Nicaraguan Women (AMNLAE), a Sandinista mass organization, helped women participate in the open forums organized to evaluate the different drafts of the Constitution. AMNLAE helped women to understand the intricacies of writing a constitution and helped to explain technicalities by describing the constitution as the mother law and statutes as its progeny.⁹³ Seven forays were held specifically for women. Women's participation helped to change both the content of the Constitution and the discourse that followed its

87. Selassie, *supra* note 69, at 132-33.

88. *Id.* at 134-37.

89. Stephen P. Marks, *The Process of Creating a New Constitution in Cambodia*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 207, 219-24 (Laurel E. Miller ed., 2010).

90. *Id.* at 220-21.

91. *Id.* at 218.

92. *Id.*

93. *Id.* at 217.

promulgation. In calling for a more inclusive definition of family, the women's groups challenged discrimination against children born out of wedlock. Women also advocated for equal pay for equal work and equality in the military. Even when they failed to reach their goals, such as establishing a right to divorce, women's participation helped ignite a debate on issues that were hitherto considered taboo.⁹⁴

Facilitating public participation through a policy of transparency appears easier in an age of social media. Novel mechanisms that utilize social media platforms might be particularly successful in small states. In Iceland, a mass social media campaign was deployed as a key impetus for drafting the country's constitution.⁹⁵ Through media advertisements and social media, the drafters solicited the public at large to send messages and submit comments online.⁹⁶ These messages were posted after review and clearance by the council's staff.⁹⁷ Daily posts by the council's staff included interviews with council members on social media, and live broadcasts of the council's weekly meetings appeared on the council's website and on Facebook.⁹⁸

Transparency efforts, however, require a sense of security for effectiveness. A lack of security can inhibit true participation during the drafting process, even when there is a participatory framework in place. For example, in Afghanistan, official reports asserted that "the Ministry of Women's Affairs collected ideas from women, which were forwarded to the Constitutional Commission."⁹⁹ The Ministry also held women's community meetings in groups of 30-60 to have them prepare statements on their ideas to submit to the Constitutional Commission.¹⁰⁰ Finally, the Ministry established community radio broadcasts and went to villages raising awareness of women about the Constitution. In spite of these efforts, the drafting process has been described as only a tepid step in the right direction with mixed end results. A number of organizations involved in the constitution-making process expressed that a pervading lack of security hampered women's ability to participate in the formal process, though the opportunity to participate was present in theory.¹⁰¹

94. See Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U.L. REV. 1, 19 (1990).

95. Katrín Oddsdóttir, *Iceland: The Birth of the World's First Crowd-Sourced Constitution*, 3 CAMBRIDGE J. INT'L. & COMP. L. 1207, 1213-16 (2014).

96. *Id.* at 1215-16.

97. *Id.*

98. *Id.* at 1215; see also Pere Simon Castellano, *The Rule of e-law*, in PROCEEDINGS OF THE 12TH EUROPEAN CONFERENCE ON E-GOVERNMENT 128, 131-32 (2012).

99. *Women's Participation in the Constitution-Making Process in Afghanistan: Fact Sheet*, U.S.-AFGHAN WOMEN'S COUNCIL (Sep. 15, 2003), <http://2002-2009-usawc.state.gov/news/24277.htm>.

100. *Id.*

101. Elizabeth Katz, *Women's Involvement in International Constitution-Making*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 204, 205-07 (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012).

Once provisions of the text have been adopted, stakeholders in the constitution-making process must continue efforts to ensure that constitutional guarantees are implemented in legislation to push new norms. The promise of a participatory constitution-making is fulfilled only when constitutional guarantees are enforceable. Unfortunately, few countries have created institutional arrangements and accountability frameworks that are successful. A part of enforceability is dependent on the precision of the text itself. In other words, some of the constitutional provisions go beyond the normative guarantees to enshrine institutional frameworks for the application of those norms. For example, the Rwandan Constitution in its preamble states that it is “committed to ensuring equal rights between Rwandans and between women and men without prejudice to the principles of gender equality and complementarity in national development.”¹⁰² However, it does not stop at the preamble—Chapter 2 of the Rwandan Constitution, which outlines the fundamental principle of the state, commits to “equality of all Rwandans . . . by ensuring that women are granted at least thirty percent of posts in decision-making organs.”¹⁰³

Several constitutions recognize the multiple grounds of discrimination based on gender and require state action against such discrimination. For example, the South African Constitution prohibits discrimination based on sex, pregnancy, marital status and sexual orientation and binds both private and public actors to this guarantee. Section 9 of the South African Constitution calls for “legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.”¹⁰⁴ The Ugandan Constitution also calls upon parliament to make relevant laws, including laws for “the establishment of an equal opportunities commission.”¹⁰⁵ Article 48 of the Constitution of Paraguay was amended in 2011 to read: “Men and women have equal civil, political, social, economic and cultural rights. The State will promote the conditions and will create the adequate mechanisms for, making equality real and effective, by leveling [allanando] the obstacles that prevent or hinder its exercise and facilitating the participation of women in all areas [ámbitos] of the national life.”¹⁰⁶ Though there is reason for skepticism as to the effectiveness in implementation, such provisions at the very least place a *constitutional* obligation on the state to establish mechanisms protecting against gender discrimination in its various forms.

Finally, some countries have placed certain guarantees, such as equality in employment and the right to affirmative action, directly in the constitutional

102. CONSTITUTION OF THE REPUBLIC OF RWANDA MAY 26, 2003, preamble §10.

103. *Id.* at art. 9 §4; *see generally* ELIZABETH POWLEY, RWANDA: THE IMPACT OF WOMEN LEGISLATORS ON POLICY OUTCOMES AFFECTING CHILDREN AND FAMILIES 2, (2007) (debating the significance and impact of gender equality provisions in Rwanda’s gender equality provisions).

104. S. AFR. CONST., 1996, §9(2).

105. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995, art. 32 §2.

106. CONSTITUTION OF THE REPUBLIC OF PARAGUAY, 1992, art. 48.

text. At a minimum, where a constitution contains provisions governing employment, such provisions should comprise a general guarantee of the right to work alongside a guarantee of equality or non-discrimination, such as stating that “The right to work is recognized and is equal for all” (Burkina Faso, see below) or requiring equal pay for equal work. Another set of more protective constitutional provisions are those which would explicitly prohibit employment discrimination on the basis of sex and/or gender, including specific aspects of labor rights such as access to employment and remuneration. For example, Article 35 of the Ethiopian Constitution provides that “[w]omen shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.”¹⁰⁷ Such specific rights guarantees can become important tools for advancing gender equality in a society, provided the protections for these guarantees are contained elsewhere and also apply to women. For example, Article 116(2) of the Greek Constitution guarantees affirmative action as a way to address a legacy of discrimination against women: “Adoption of positive measures for promoting equality between men and women does not constitute discrimination on the basis of sex. The State shall attend to the elimination of inequalities actually existing, especially to the detriment of women.”¹⁰⁸

Despite the importance of comparative practices, the most important aspect of designing a strategy for national reconstruction is the critical role played by context.¹⁰⁹ Strategies for creating and enforcing rights guarantees do not always migrate very effectively between countries.¹¹⁰ A plan that produces good results in one country cannot simply transfer itself wholesale to another. Too many of the enabling conditions will be different, and the opportunities and limits for promoting gender equality will vary depending on whether constitutional reform is post-conflict or an effort to revise an existing constitution.

One kind of enabler that is often overlooked is the constitutional provisions defining the structure and mechanisms of government. Key structural issues that may impact gender equality relate to: whether government is decentralized (e.g., through federalism); the electoral system and its design (e.g., whether it includes gender quotas); and the relationship between the branches of government, including the role and composition of the judiciary and the extent to which gender is mainstreamed in legislative and administrative processes. The impact of decentralization on women’s rights will again vary depending on local conditions. On the one hand, women may have greater access to local decision-making entities than at the national level, and may be able to achieve change that is more immediate and responsive to gender realities than that which comes from centralized governments. Local governments are also often mandated to implement laws that have particular relevance to women, such as family law,

107. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 35, §8.

108. 1975 SYNTAGMA [SYN.] [CONSTITUTION] ART. 19.

109. DE SILVA DE ALWIS, *supra* note 17, at 1-2.

110. *Id.*

meaning that women may have a greater opportunity to participate more directly in government decisions that significantly impact their lives. However, at the same time, there may be resource constraints in local government centers, and traditional or religious authorities are more likely to dominate at local levels; both of these factors may limit the capacity of local government centers to fully advance women's rights and gender equality. Moreover, devolution of power tends to benefit groups that are regionally or territorially defined (e.g. indigenous or other minority groups); because women are not a homogenous group, decentralization will not strengthen their autonomy but instead mean that their rights will vary from region to region.

C. The Role of International Actors in Drafting Gender Sensitive Provisions

The international arena has given unprecedented visibility to the plight of women globally. As a group of scholars have commented, “[w]omen’s rights as humans rights’ has become a familiar slogan, bandied about by even the most unlikely international bureaucrat.”¹¹¹ There have been a slew of international efforts to tackle a range of issues related to the inequality of women, from domestic violence, to political representation, to freedom of choice in cases of abortion and reproductive health, as well as a right to decent working conditions, including maternity leave and the creation of safe spaces. Many of the constitutional provisions cited above are deeply influenced by international actors seeking to diffuse gender norms reflected in international law. The creation and application of treaties has been the most common and arguably most powerful tool for legitimizing calls for greater women’s rights and gender equality. Women’s rights activists on both the international and national level have pointed to provisions in widely ratified treaties and accepted interpretations of those provisions as the basis for incorporating such provisions at the national and subnational level.

The Universal Declaration of Human Rights (UDHR) refers to the rights, freedoms, and equal protection for men and women in Articles 2, 7, 16, and 25.¹¹² Drawing on the UDHR, the International Covenant on Civil and Political Rights (ICCPR) requires that “[e]ach State Party. . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹¹³ Further, “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of

111. Doris Buss et al., *Introduction to ‘Sexual Movements and Gendered Boundaries: Legal Negotiations of the Global and the Local’*, 14 SOC. & LEGAL STUD. 5, 5 (2005).

112. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

113. G. A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, Art. 2 (Dec. 16, 1966) [hereinafter ICCPR]; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

public affairs, directly or through freely chosen representatives.”¹¹⁴ General Comment 25, paragraph 6 of the United Nations Human Rights Committee (UNHRC), the body responsible for protecting and promoting provisions of the ICCPR, further defines the conduct of public affairs to encompass constitution-making processes.¹¹⁵ The UNHRC has likewise recommended that countries, particularly countries in transition, “should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis.”¹¹⁶

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), often referred to as the international bill of rights for women, more adequately defines discrimination on the basis of sex,¹¹⁷ and in Article 7 calls for states to ensure women’s equal rights to participate in political and public life and to have equal access to all aspects of civil society.¹¹⁸ It has been ratified by 189 countries, and the convention’s committee oversees ongoing efforts to incorporate its text and general principles at the national as well as local level.¹¹⁹ Beyond formal incorporation, however, the CEDAW General Recommendation No. 23 further clarifies Article 7 by stating that: “While removal of de jure barriers is necessary, it is not sufficient. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented. . . .”¹²⁰ The General Recommendation goes on to reiterate the Beijing Platform of Action and the need to close the gap between de jure and de facto rights of women in political participation.¹²¹ The General Recommendation states that only “if women’s participation reaches 30 to 35 percent (generally termed a “critical mass”) is there a real impact on political [life].”¹²²

Finally, United Nation Security Council (UNSC) Resolution 1325, passed in 2000, “[u]rges Member States to ensure increased representation of women

114. ICCPR, *supra* note 113, at art. 25.

115. U.N. Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶6, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

116. U.N. Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding observations of the Human Rights Committee: Bosnia and Herzegovina*, ¶8, U.N. Doc. CCPR/C/BIH/CO/1 (Nov. 22, 2006).

117. G. A. Res. 34/180 Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979).

118. *Id.* at art. 7.

119. *See Convention on the Elimination of All Forms of Discrimination against Women: Country Reports*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited Oct. 26, 2016).

120. Commission Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23, Women in Political and Public Life*, U.N. Doc. A/52/38, 16th Sess. [hereinafter “General Recommendation”] (1997).

121. *Id.*

122. *Id.*

at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.”¹²³ This policy is further broadened in subsequent UNSC resolutions addressed in the Women, Peace, and Security Agenda, which calls for the increased participation of women in the processes and institutions of peace building and security.¹²⁴

There is little empirical evidence revealing to what extent international texts affirming women’s rights are incorporated and enforced as constitutional guarantees at the national level. Lack of clarity in this realm may be incidental to divisions in the literature on constitution-making more generally. Legal scholars on constitution-making have largely gravitated towards one of two poles: those who deem written constitutions as local creatures driven by the interests and values of national actors on the one hand, and those who see constitutions as amalgamations of external, transnational or international constructs on the other.¹²⁵ The former, sometimes referred to as national-identity constitutionalism, views constitutions as texts that adopt unique identities reflective of a nation’s past experiences.¹²⁶ Constitution-making should thus be primarily driven by locally-inspired political aspirations and commitments.¹²⁷ From this perspective, the framing of certain rights provisions and the way they interact with other substantive or structural/procedural provisions may differ depending on the social, political, and geographic contexts in which they emerged.¹²⁸ While national identity and interests have historically been defined by a country’s political elites,¹²⁹ scholars have moreover raised the normative claim that broad public participation stands as a barometer for the constitution-making process’s overall legitimacy, as well as a harbinger for the constitution’s future effectiveness.¹³⁰ Implicit within this claim is the idea that efforts to include a cross-section of the population from various geographic, socioeconomic, and ideological backgrounds reduces the risk of a top-down imposition of constitutional norms.

123. S.C. Res. 1325, ¶ 1 (Oct 31, 2000).

124. See generally *Women, Peace and Security*, U. N., <http://www.un.org/en/peacekeeping/issues/women/wps.shtml> (last visited Oct. 26, 2016) (providing a list of all United Nations Security Council resolutions on gender and peacekeeping work).

125. Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 3, 8-16 (Denis J. Galligan & Mila Versteeg eds., 2015).

126. See, e.g. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY*, 70, 133 (2010) (suggesting that constitutions are a reflection of norms, values and principles of a nation, and that the constitutional identity should evolve with and emerge from changes in national identity).

127. Fredrick Schauer, *On the Migration of Constitutional Ideas*, 37 *Conn. L. Rev.* 907, 912 (2005).

128. See Galligan, *supra* note 125, at 11.

129. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 *U. ILL. L. REV.* 201 (2008).

130. Noah Feldman, *Imposed Constitutionalism*, 37 *CONN. L. REV.* 857, 858-60 (2005).

Alternatively, others describe constitution-making as an ongoing exercise in constitutional diffusion.¹³¹ Countries either borrow from foreign constitutions or draw from international templates intended to mainstream human rights language and propel a transnational movement of human rights norms.¹³² Countries may choose to incorporate international human rights provisions as a way to gain clout and reputational benefits at the international level. Others see incorporation through the lens of soft coercion: a state's more powerful allies may try to condition the terms of their relations or the provision of foreign aid on the enactment of certain provisions.¹³³ Ideational theory argues that ideas are intrinsically influential,¹³⁴ that their acceptance at the international level changes state behavior over time through modes of persuasion.¹³⁵ Observing constitution-making processes can provide insights into how and to what degree transnational norms are infused in the final text. For example, the involvement of international nongovernmental organizations (INGOs), foreign NGOs and development or rule of law consultants may be evidence of diffusion.¹³⁶

Our research in Tunisia showcases the value of using both domestic and international texts to fortify constitutional rights guarantees. There has been a recent call to adopt a dualistic approach that observes both national and international influences at once.¹³⁷ In "intermestic constitutionalism," one would recognize both transnational and local processes.¹³⁸ For example, South Africa's 1996 constitution, often touted as a model constitution for post-conflict countries, is a product of both international and national influences. South African scholar Heinz Klug has asserted that "a thin, yet significant international political culture" propelled the country towards a Western constitutional model in spite of its history of imperialism and apartheid, and that this resulted in the incorporation of treaty texts such as CEDAW, primarily in order to acquire international esteem.¹³⁹ Yet South Africa's preamble, which drives the object and purpose of the rest of the text, implicitly recognizes apartheid by noting the

131. See, e.g., Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009) (describing how aspects of local law, like the separation of powers, will have to accommodate the increasing globalization of constitutional processes).

132. GROTE, *supra* note 3, at 672-73; see also David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (exploring the potential harms of the international human rights movement).

133. Goderis, *supra* note 7, at 4.

134. Ran Hirschl, *The Strategic Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 158, 158-61 (Denis J. Galligan & Mila Versteeg eds., 2015).

135. Beth A. Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781, 795-99 (2006).

136. Cope, *supra* note 14, at 678 (noting that the efficacy of such consultants is largely unknown, though organizations "often make a point of publicly trumpeting their efforts and successes, sometimes claiming partial credit for the adoption of certain rights").

137. GROTE, *supra* note 3, at 683.

138. *Id.*

139. HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 7 (2000).

“injustices of our past” and honoring “those who suffered for justice and freedom in our land.”¹⁴⁰ Likewise, a recent case study by Cope on constitution-making in Sudan suggests that rights provisions are largely driven by international actors, while structural/institutional elements of the constitution are more tightly controlled by local actors.¹⁴¹ Whether this exact combination of transnational and local elements is the most effective for guaranteeing gender rights for countries in transition is debatable.

Nevertheless, there is value in recognizing that constitution-making processes may result in a confluence of local and international influences. The legitimacy of the final text may depend on striking an appropriate balance between the two and recognizing the ways in which they emerge. We see benefit in incorporating international human rights standards for women in rights provisions. We also encourage drawing on international or foreign law to guide administrative and judicial interpretations of the gender rights provisions when there are conflicts between them and other constitutional guarantees. External examples can also guide legislatures in adopting laws that integrate women’s rights standards with local context. The comprehensive guarantees of women’s human rights set out in international and regional law only become real when they are embraced—and made actionable—at the national level. This may only occur if international law is adapted to a people’s values, histories, memories, and blueprints for nation building.

Tunisia’s constitution, while hailed as a product of national interests and broad grassroots engagement, still garnered much international attention and received the benefits of much international expertise. The degree to which both domestic and international influences played a role in drafting in constitutional guarantees for women’s rights is rather unclear. The next section thus will dive deeper into Tunisia’s process, looking at the stakeholders involved in constitution-making and the specific gender-specific provisions at issue.

PART II

A. *A Participatory Constitutional Process*

Tunisia’s National Constituent Assembly was elected on October 23, 2011 and was dissolved on January 26, 2014 when the new Constitution was promulgated.¹⁴² It took two years, three months and three days for the NCA to complete and pass a new constitution, though three draft texts were issued along the way. Drafting began on January 14, 2012, and a first draft of the Constitution was made available on August 13, 2012. The second draft was released on December 14, 2012. On April 22, 2013, a third draft of the constitution was introduced. The fourth draft followed shortly after, on June 1,

140. S. AFR. CONST., 1996, preamble.

141. Cope, *supra* note 14, at 723-24.

142. THE CARTER CENTER, *supra* note 37, at 34-42.

2013.¹⁴³ After an intense period of debate and subsequent amendment, the final text was passed by an assembly vote on January 27, 2014.¹⁴⁴

Although some have criticized the process as unnecessarily prolonged,¹⁴⁵ NCA members have justified the span of time in terms of the process that it followed.¹⁴⁶ The Assembly took significant steps to introduce each draft to stakeholders in civil society for their input. In the beginning, the constitution-making process was the all-consuming interest of the Tunisian people. One young activist noted, “Before the revolution, café conversations centered around TV shows and football. For months after the revolution it was all politics—you couldn’t escape it. But the excitement didn’t last—of course there was a lot of discussion, but the process took so long that it inevitably led to a degree of apathy if not exasperation.”¹⁴⁷

As much as possible, debates were also carried out in full transparency. The plenary sessions were formally open to the public,¹⁴⁸ and each constitutional draft was subject to public consultation and over two thousand town hall meetings.¹⁴⁹ While drafting committees invited local experts to contribute to each issue of discussion, each discussion was followed by a release of compiled notes and proposed amendments and made available to the public on the assembly’s website.¹⁵⁰ Individual members of the assembly coordinated tours of cities and universities around Tunisia to discuss the process and obtain feedback.¹⁵¹ Professor Salsabil Klibi, professor at La Faculté des Sciences Juridiques stated: “Overall people put a lot of thought into the drafting process. Though there were some problems, it was overall very complete.”¹⁵² One academic at La Faculté de Sciences Juridiques was impressed with the constant transfer of information, updates on the drafting process, and the ease of navigation of the assembly’s website. The level of accessibility, however, seemed to differ between the capital and more remote areas: “We weren’t able to get a lot of participation from people in the southwest and the interior. There

143. *Id.*

144. *Id.*

145. *Tunisia Assembly Passes New Constitution*, BBC NEWS (Jan. 27, 2014), <http://www.bbc.com/news/world-africa-25908340>.

146. Interview with Hela Hammi, Ennahda party member (May 27, 2015).

147. Interview with Issrar Chamekh, Student and Tunisian activist (June 2, 2015).

148. THE CARTER CENTER, *supra* note 37, at 59.

149. Klibi, *supra* note 39.

150. *Arshif Ashghal Almajlis Alwatani Alttasisi*, MAJLIS NUWWAB ALSHAEB [ASSEMBLY OF THE REPRESENTATIVES OF THE PEOPLE], http://www.anc.tn/site/main/AR/docs/archive_anc.jsp (last visited, Oct. 26, 2016).

151. *Altaqirir Aleamm hawl Mashruaa Aldustur*, ALMAJLIS ALWATANI ALTTASISI [GENERAL REPORT ON THE DRAFT CONSTITUTION] (June 14, 2013), http://www.anc.tn/site/main/AR/docs/anc/rapport_general_const.pdf; see also THE U.N. CONSTITUTIONAL, A NEWSLETTER ON UNITED NATIONS CONSTITUTIONAL SUPPORT, Issue 2 Spring/Summer 2014, at 16.

152. Klibi, *supra* note 39.

were efforts to engage with them, but it was for obvious reasons more difficult.”¹⁵³

The extent to which women in Tunisia proactively engaged in the constitution-making process was unprecedented. Drafting safeguards for gender equality in all circumstances became the rallying point for women on both ends of the political spectrum.¹⁵⁴ According to Hela Hammi, a deputy in Ennahda, “there [were] a lot of political tensions among members of Parliament, but the women worked more or less in tandem.”¹⁵⁵ At the early stages of constitution drafting, one of the members of Parliament organized a lunchtime meeting for all of the female members to sit down and discuss what they perceived as primary issues.¹⁵⁶ Follow up discussions resulted, during which women deputies wrote down their common concerns and proposals, which they then presented to the greater assembly.¹⁵⁷ A part of this process included transnational experts from other countries, such as South Africa, who spoke to them about the role of women in their own countries’ drafting process.¹⁵⁸

Outside the political sphere, women were likewise eager to form broad rights-based coalitions, particularly those who were already members of a larger associational networks. For example, UGTT women leaders at the local and regional level provided significant support to other newer women’s rights efforts.¹⁵⁹ These leaders leveraged the UGTT’s broad membership network to push forward initiatives favorable to working class women and their social and economic interests.¹⁶⁰ Similarly, the ATFD was instrumental in bringing together a cross-section of women’s organizations to push through revisions for certain provisions including Article 21 on gender equality¹⁶¹, Article 34 on political representation¹⁶², and Article 46¹⁶³ on protections for women against all forms of violence.¹⁶⁴ The association’s galvanizing efforts during the drafting

153. Interview with masters candidate (names withheld by request of interviewee), La Faculté de Sciences Juridiques de Tunis, in Tunis, Tunisia (May 26, 2015).

154. *Id.*

155. Hammi, *supra* note 146.

156. *Id.*

157. *Id.*

158. *Id.*

159. Interview with Habiba Mizoumi, National Secretary General for Dentists & Nurses for the General Union of Tunisian Workers (UGTT) (May 29, 2015); William Rogers, *Tunisian Union Nominated for Nobel Peace Prize*, LEFT LABOR REPORTER (Apr. 21 2014), <https://leftlaborreporter.wordpress.com/tag/ugtt/>. For more information on Mizoumi’s role in UGTT, see Part III, *infra*.

160. Mizoumi, *supra* note 159.

161. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21 (“All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination.”).

162. *Id.* at art. 34 (“The rights to election, voting, and candidacy are guaranteed, in accordance with the law. The state seeks to guarantee women’s representation in elected bodies.”).

163. *Id.* at art. 46 (“The state commits to protect women’s accrued rights and work to strengthen and develop those rights.”).

164. Interview with Saida Rached, President of The Tunisian Association of Democratic

process has allowed it to continue as a key actor in creating implementing legislation to turn these guarantees into a reality.¹⁶⁵ “We rely heavily on the advice of experts and academics,” says ATFD’s current president Saida Rached, emphasizing the importance of the association’s network in carrying out its work. Having a pulse on all gender-related matters is also critical: “Our current focus has been on political participation and gathering information about women and rural labor, but we try to focus on all issues related to gender equality.”¹⁶⁶

Yet coalitions by their very nature are prone to ideological and political divides. In spite of the UGTT’s efforts to remain neutral, its continuous involvement in politics at the national level inevitably made it susceptible to political influences. Despite laudable movements early on, internal divisions eventually emerged between local members and their national leadership over the role UGTT should play moving forward.¹⁶⁷ Some feared that the national board, based in Tunis, had spent too much time accommodating political elites and their business allies at the expense of advocating for greater employee’s rights.¹⁶⁸ There were also rumors of conflict between UGTT and other well-established organizations such as LTDH and the Bar Association. Although ATFD’s internal divisions have not been as public, it too has received criticism for being either too unwieldy or else too tied up in tackling certain ‘elite feminist’ issues at the expense of issues facing the rural poor and middle class.¹⁶⁹ Such divides within and among civil society groups inevitably hurt the ability of women’s rights coalitions to achieve the aims they seek.

The UGTT and AFTD are among a handful of nationally recognized civil society organizations in Tunisia that existed long before the revolution started. While these groups were perhaps the most visible during the early stages of the drafting process, a number of newer, youth-led organizations joined the associative landscape to become effective mobilizers in their own right. These organizations largely emerged as civil society watchdogs over the country’s transition to a democratic state. Most notably, Al-Bawsala, a monitoring body made up of young Tunisian activists and journalists, was one of the first organizations to receive significant attention early on as a key player in monitoring Tunisia’s constitution-making process and thereafter movements in the national assembly regarding new policies and budget allocation.¹⁷⁰ Al-Bawsala, which means “compass,” has become a distributor of information that

Women (ATFD) (May 29, 2015).

165. *Id.*

166. *Id.*

167. Hanane Zbiss, *Tunisian Labor Union Faces Internal Rifts*, AL-MONITOR (Mar. 31, 2014), <http://www.al-monitor.com/pulse/politics/2014/03/tunisia-labor-union-internal-rifts-jomaa.html#>.

168. Chamekh, *supra* note 147. This is a reflection of the larger generational divide noted in Parker, *supra* note 46.

169. KHALIL, *supra* note 3, at 54.

170. MONICA L. MARKS, BROOKINGS INST., *CONVINCE, COERCE OR COMPROMISE: ENNAHDA’S APPROACH TO TUNISIA’S CONSTITUTION* 5 (2014); Chamekh, *supra* note 147.

other civil society groups and grassroots movements have used to launch parallel advocacy efforts.¹⁷¹

Civil society's overall ability to influence the drafting process still largely hinged on the strength of the relationships between the various demographics within civil society and those in Tunisia's inner political sphere. Though the NCA was diligent about setting up websites with recordings of the debates, and some deputies went so far as to organize village discussions, the effects of these efforts varied. Many individuals, particularly youth, were disenchanted by the process.¹⁷² One student from Thala¹⁷³ felt that watching the debates only contributed to his discontent and apathy: "It was too much politicking. It was often frustrating to watch."¹⁷⁴ Others have noted that the effort to create transparency through online streaming spurred conversation. "There are nightly debates among commentators now," noted one civil society volunteer from Sidi Bouzid. "Newspapers still have their own political affiliations, but the discussion on social media now is much more open and nuanced. Before there was one paper and one TV show. It is so diverse now."¹⁷⁵ Even those frustrated by the way in which the NCA structured the constitution-making process cannot deny the role social media played in introducing a wide representation of views on what the constitution's rights provisions should be and how they should be enforced. Online chat forums provide young women and men, especially those outside the capital, with a means for indirect participating in definitions of "equality" and the role of women in society.¹⁷⁶

Despite a relatively participatory process, the sentiment among Tunisians regarding the final text is mixed – many approve of the 2014 constitution but are concerned about its implementation.¹⁷⁷ A broad constituency of political activists and civil society organizations (CSOs) supported by technical advisors is necessary to help keep gender equality at the center of the new constitution,

171. AL-BAWSALA, <http://www.albawsala.com> (last visited Oct. 26, 2016); *see also* Sarah Mersch, *Tunisian NGO Fights for Political Transparency*, DW NEWS (Dec 9, 2012), <http://www.dw.com/en/tunisian-ngo-fights-for-political-transparency/a-16235400> (explaining the work that Al Bawsala does to monitor the Tunisian Government).

172. TUNIS AFRIQUE PRESSE, *supra* note 62.

173. Thala is a small rural municipality in Tunisia's interior, not far from Sidi Bouzid, where the revolution started, and Al-Kasserine, which has seen a spike in extremist activity in recent years. Like Sidi Bouzid and Al-Kasserine, Thala was heavily suppressed under the Ben Ali regime and saw high levels of unemployment, particularly among youth. For a brief summary of Thala and other interior municipalities, see Rosa Moussaoui & Hassane Zerrouky, *Tunisie La Source de la Révolution*, L'HUMANITE (Oct. 24 2011).

174. Interview with Thala Solidaire, Student and community organizer (May 24, 2015).

175. Interview with student and activist, Association Tunisienne pour l'Intégrité et la Démocratie des Elections (June 2, 2015).

176. *Id.*

177. Margaret Williams & Youssef Mahmoud, *The New Tunisian Constitution: Triumphs and Potential Pitfalls*, GLOBAL OBSERVATORY (Feb. 27, 2014), <https://theglobalobservatory.org/2014/02/the-new-tunisian-constitution-triumphs-and-potential-pitfalls/>.

through a policy framework and an agenda for action. Neila Chabaâne, the former Minister of Women's Affairs, has said that young Tunisian women, in particular, seem at a loss as to how to apply the constitution's ideological provisions to realities on the ground.¹⁷⁸ Though participation was relatively high during the drafting process, civil society's ability to participate in implementing constitutional provisions remains an open question. Further, there is a fear that certain groups, particularly reintegrated old regime elites, will dominate the discussion to the exclusion of others.¹⁷⁹

B. *Drafting Gender Sensitive Provisions in the Constitution*

Although the NCA conceived of the drafting of gender rights provisions as an organized, transparent, dialogical process between assembly members and civil society, the process became one much less formal and direct than designed. The NCA tasked the Committee of Human Rights and Liberties, one of six drafting committees, with shaping all rights provisions based on civil society and foreign recommendations. As such, the committee was responsible for all provisions that directly *and* indirectly touched on gender rights. Express guarantees for women are included in Article 21 on gender equality, Article 34 on political guarantees for women, and Article 46 protecting women against all forms of violence.¹⁸⁰ Article 39 on the right to public education, Article 44 on the right to water, and Article 40 on the right to work, are programmatic rights that indirectly address a woman's right to accessing basic human services.¹⁸¹ The express women's rights provisions will be considered in this section and the next, and a discussion of the Constitution's programmatic rights as they relate to women will follow.

Throughout the drafting process, the Committee of Human Rights and Liberties sought input from civil society representatives and relevant experts, as well as women deputies within the NCA.¹⁸² Women deputies gathered together early in the process for discussion lunches, where they would also invite those from outside the political sphere.¹⁸³ Despite this engagement, Salsabil Klibi notes, "There could have been more time for collaboration. There were a few 'open days' where civil society organizations were invited to meet with drafters at the assembly building, but the time was narrow."¹⁸⁴ There was in fact only one

178. Interview with Neila Chabaâne, former Minister of Women's Affairs (May 27, 2015).

179. See generally Boubekeur, *supra* note 50 (analyzing the ways in which new and old elites 'bargain' for dominance in Tunisia's new institutional framework).

180. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 21, 34, 46.

181. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 39, 44, 40.

182. NCA COMMITTEE ON HUMAN RIGHTS AND LIBERTIES REPORT, NOTES AND PROPOSALS OF THE SHARED ORGANIZATION FOR COORDINATING AND DRAFTING TO THE COMMITTEE ON HUMAN RIGHTS AND LIBERTIES (in Arabic), http://www.anc.tn/site/main/AR/docs/rapport_final/rapport_final_5_2.pdf.

183. Hammi, *supra* note 146.

184. Klibi, *supra* note 39.

open day for CSOs to speak directly with NCA members, held before the release of the second draft.¹⁸⁵ Some have suggested that invitations were limited to CSOs already involved in the process and that, further, the assembly did not have a channel for individuals or informal groups to submit draft proposals. A number of those invited boycotted the open day in protest of its timing and exclusivity.¹⁸⁶

Regardless of whether the NCA took sufficient steps to *formally* include civil society, many Tunisians *informally* engaged with the constitution-making process through social media, the press, and local politics.¹⁸⁷ The extent to which Tunisia's constitution would guarantee women's rights was one of the most widely debated issues outside the political sphere. One journalist described the early drafting stages as a "national hunger" to participate in a popular debate that had been silenced under Ben Ali.¹⁸⁸ State feminism starting with Bourguiba through Ben Ali had succeeded in suppressing popular debates over the appropriate role of women in Tunisian society and relevant legal protections.¹⁸⁹ Dictated policies of progressive feminism had created the false narrative that women in Tunisia enjoyed equal rights with men and that the country had made important advances compared to women in other parts of the Arab and Muslim world.¹⁹⁰ The 2011 Revolution unveiled a complex reality incongruent with rights formally recognized by the prior regime.¹⁹¹ This disconnect, exacerbated by deep ideological divides in the Tunisian political scene, complicated discussions over whether the new constitution's proper role should be to push for universal gender norms or norms that reflect a competing type of feminism "emphasizing religious freedoms and rights."¹⁹² Unfortunately, the final draft does not necessarily bring this debate to a clear resolution. Article 21 champions gender equality in broad and general terms: men and women have "equal rights and duties" and are "equal before the law" but the text fails to reach greater specificity.¹⁹³

The generality of the language in Article 21 is a product, first, of the lack of transparency between the NCA and civil society stakeholders, and second, of the prolonged popular disputes that came to define much of the constitution-making process for provisions related to women's rights. When the NCA released its first draft on August 8, 2012, the article (then Article 28) included

185. *Id.*

186. Interview with Hiba, Law Student, in Thala, Tunisia (May 24, 2015).

187. *Id.*

188. Interview with Myriam Ben Ghazi, in Tunis, Tunisia (May 29, 2015).

189. BRAND, *supra* note 21, at 176.

190. Loes Debuysere, *Antagonism and Agonism between Secular and Islamist Women's Rights Movements in Tunisia*, 21 MEDITERRANEAN POLITICS 2, 226, 235 (2016).

191. *Id.* at 226-27.

192. Jeremy Farrell, *Tunisian Constitution: Text and Context*, JADALIYYA, (Aug. 23, 2012), http://www.jadaliyya.com/pages/index/6991/tunisian-constitution_text-and-context.

193. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21.

complementarity (*mutakamila*) language as opposed to the equality (*musawa*) language proposed by Nidaa-Tounis and left-leaning CSOs. Those internal to the process described the insertion of complementarity as a soft proposal by one of the members of Ennahda.¹⁹⁴ Some deputies insisted that the language issued in the first draft was either a “naïve misstep”¹⁹⁵ resulting from a rushed drafting process or a mistranslation taken out of context.¹⁹⁶ The opposition nevertheless contended that even the suggestion of complementary status posed a threat to freedoms formally secured in the CSP and joined hands with CSOs to change the language to equality (*musawa*).¹⁹⁷ As a part of their campaign, activists upheld the CSP as precedent that could not be reversed. The march onto Bourguiba Street on Tunisian Women’s Day was in fact a nod to Bourguiba himself, who established the holiday to commemorate the CSP and its advancements.¹⁹⁸ Although his efforts were influenced primarily by his desire to gain international favor among Western powers, women’s rights activists have nevertheless heralded the CSP for both its significance and ongoing influence.¹⁹⁹

The selective referencing of Tunisia’s past in order to legitimize certain values over others became part of a larger popular struggle to control not only the language of the constitution, but also the political narrative surrounding it.²⁰⁰ Pro-Bourguiba rhetoric was perhaps more a reflection of popular conceptions of women’s rights during the drafting process than an accurate understanding of women’s rights as applied under the Bourguiba regime. Many individuals who participated in the August 13 march on Bourguiba Street did not in fact champion Bourguiba or his policies, but rather represented a mix of political and religious viewpoints. As Hadia Bilhadj, CAWTAR Director stated, “[i]t wasn’t one strand of civil society or one opposition party. There were men and women, a diverse range of NGOs and other civil society organizations – not just secular groups pushing a certain narrative of women’s rights.”²⁰¹ Likewise, though the complementary language proposal came from members of Ennahda, not all Ennahda members were in support. Regarding the initial proposal, Hela Hammi member of the Ennahda party, commented: “We knew from the beginning that complementarity language would be abused in Tunisia. France has complementarity language but the text in its constitution implies that there is submission on both sides – there was a valid fear that men in Tunisia would

194. Hammi, *supra* note 146.

195. MARKS, *supra* note 170, at 23.

196. Monica Marks, “Complementary” Status for Tunisian Women, FOREIGN POLICY, (Aug. 20, 2012), <http://foreignpolicy.com/2012/08/20/complementary-status-for-tunisian-women/>.

197. See discussion *supra* Part I, Overview of Women’s Engagement in Tunisia’s Constitution Making Process.

198. *Tunisian Women Rally to Preserve Gender Equality*, AL-ARABIYA, (Aug. 13, 2011), <https://www.alarabiya.net/articles/2011/08/13/162169.html>.

199. See discussion *supra* Part I.

200. Debuysere, *supra* note 190, at 229-33.

201. Interview with Hadia Bilhaji, in Tunis, Tunis. (June 3, 2015).

interpret complementarity to mean only the submission of women.”²⁰² Nevertheless, some secularist feminist discourses sought to paint Ennahda with one brush as a misogynist party with patriarchal motivations.²⁰³ To that effect, these groups released speculative and unofficial versions of the drafted provision before the August 13 march to garner greater opposition to Ennahda control.²⁰⁴ Ennahda then responded by launching a counter campaign and march on August 13, also on Bourguiba Street, that highlighted positive statements made by the then President Rachid Ghannouchi. Though activists eventually succeeded in removing complementary language from the final draft, it is evident that control over the text’s “legislative history” became as important to the debate as the text itself.

Similar to its efforts surrounding Article 21, elements of civil society pushed for more actionable language under Article 46. The Article states that “[t]he State shall commit to protecting women’s achieved rights and seek to support and develop them.”²⁰⁵ In addition, it reaffirms equal opportunity between men and women in “all various responsibilities in all fields,” and guarantees that the state “will take necessary measures to eliminate violence against women.”²⁰⁶ Secular groups feared that without this provision and its enforcement clause, Islamists would alter, if not remove the CSP as source of law. However, Ennahda’s ultimate support for the addition during the final vote in January 2014 seems to convey the party leadership’s intent to at least maintain protections provided under the CSP.

Ennahda’s leadership in bringing about the final versions of Articles 21 and 46 should not go without mention. Achieving a guarantee of gender equality, without exceptions, was among the most heralded accomplishments of the final text. A large part of the battle for Ennahda as the controlling party was to overcome disagreements and possible misunderstandings to reach a general spirit of collaboration. The multiplication of civil society interests in 2011 and onward meant that consensus on all sides would be crucial to passing a women’s rights provision championing equality and parity. “Under the Ennahda government, Islamists opened a new path for women’s rights,” says Dr. Khedija Arfaoui from University of Tunis.²⁰⁷

While Dr. Arfaoui’s statement is put to question in the next section, Ennahda, for all of its faults, led a constitution-making process marked by greater consensus and public input than that of other transition states in the region. Egypt’s drafting process in 2012 offers the most relevant comparison.

202. *Id.*

203. MARKS, *supra* note 170, at 22-23; see also Monica Marks, *Can Islamism and Feminism Mix?*, N.Y. TIMES, Oct. 26, 2011, http://www.nytimes.com/2011/10/27/opinion/can-islamism-and-feminism-mix.html?_r=0.

204. Hammi, *supra* note 146.

205. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

²⁰⁶ *Id.*

207. Interview with Khedija Arfaoui, in Beirut, Leb. (June 10, 2015).

While both Ennahda and its ruling counterpart in Egypt, the Muslim Brotherhood, had to reconcile Islamist interests and the interests of secular or left-leaning parties, the process in Egypt suffered from relative lack of public participation and input.²⁰⁸ Egypt's 2012 Constitution reflected more of a political compromise among parties than a response to calls from women's rights advocates. While the text outlawed violence against women, including the practice of Female Genital Mutilation (FGM), it provided only tepid support for other forms of women's rights.²⁰⁹ It has in effect taken a step back from some of the gender rights embedded in the 1971 text. As noted by former Egyptian Minister Moushira Khattab, the new Egyptian Constitution places "women under the constitutional chapter on moral foundations instead of rights and freedoms."²¹⁰ In terms of political participation rights, the 2014 Constitution does not include the 64-seat quota established in 1971 and merely promises to take measures to guarantee women "appropriate representation" in elected councils.²¹¹

Analysts have considered several theories as to why the drafting processes in Egypt and Tunisia brought forth such divergent results, particularly given that both constitutions were produced by an elected constituent assembly that made room for some level of public participation. Some suggest that while Islamists in both countries held the most seats in their constituent assemblies, the Muslim Brotherhood-affiliated Freedom and Justice Party (FJP) was ultimately much less willing to compromise on the gender rights provisions than Tunisia's Ennahda party during drafting negotiations.²¹² Conversely, Ennahda espoused a platform of moderate Islamism that lent itself to concessions early on. There is some reason to believe that a simple majority win for the FJP allowed for its intransigence, while the Ennahda's plurality win, though significant, exposed the party to strong counter-coalitions.²¹³ Others suggest that the difference was in starting points: while Tunisia opted for a blank slate, Egypt worked off of its

208. Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007, 1055 (2015).

²⁰⁹ For example, Article 33 in the 2012 Constitution does not affirmatively recognize gender equality, but rather pledges equality for all citizens. Such broad wording leaves the definition and scope of 'equality' unclear. See David Lunde, *If You Want to Know Whether Islam & Democracy Are Compatible, Look to Egypt & Tunisia*, MUFTAH, May 1, 2015, <http://muftah.org/islam-democracy-egypt-tunisia/>.

210. Moushira Khattab, *EGYPT'S POST-REVOLUTION CONSTITUTIONS: RELIGION VERSUS HUMAN RIGHTS* 5 (March 14, 2014) (unpublished).

211. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *as amended*, Jan. 18, 2014, art.11, pg. 7-8. ("The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women's right of holding public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination.").

212. Zaid Al-Ali & Donia Ben Romdhane, *Tunisia's New Constitution: Progress and Challenges to Come*, OPENDEMOCRACY, (Feb. 16, 2014), <https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia-s-new-constitution-progress-and-challenges-to->.

213. Hammi, *supra* note 146.

1971 constitution's text.²¹⁴ One factor that deserves greater consideration, however, is how Tunisia's constitution-making framework incorporated mechanisms for ongoing public engagement and further, public accountability. Participation from outside the political sphere was not restricted to online comments or a final up-down referendum vote²¹⁵—rather, input from watchdog organizations and grassroots coalitions became an integral part of the drafting process.

In summary, the drafting process became less about the text itself than about surrounding discourses and the competing narratives that shaped women's rights in Tunisia post-revolution. Constitution-making became an opportunity for political and civil society stakeholders to address deep-seated issues long suppressed under Bourguiba and Ben Ali. Starting with a tabula rasa as opposed to an older constitutional text encouraged individuals to assert their personal conceptions of women's rights more vigorously, resulting in greater transparency on every side of the debate. Ennahda, though not without its weaknesses and challenges, should be commended for its willingness to foster such debate and compromise with its more progressive counterparts early on. An inability to reach greater consensus, however, has led to a text that supports gender equality in broad terms but leaves room for gaps in both enforcement and implementation.

C. *Reconciling Islam and Human Rights in the Constitution*

As noted in the previous section, Article 21 guarantees men and women "equal rights and duties" and equality "before the law" but fails to reach greater specificity or include clear enforcement provisions.²¹⁶ Critics of Ennahda suggest that the ruling party permitted such ambiguity to erode women's rights.²¹⁷ Others argue that ambiguity was not so much an intentional result as a reflection of Ennahda's internal struggle to place moderate Islamist principles within a historically secular framework.²¹⁸ Regardless of its intended purpose, however, an ambiguous provision on gender equality would have perpetuated

214. COMPARATIVE ANALYSIS BETWEEN THE CONSTITUTIONAL PROCESSES IN EGYPT AND TUNISIA – LESSONS LEARNT – OVERVIEW OF THE CONSTITUTIONAL SITUATION IN LIBYA. EUROP. PARL. REP. PE 433.840 (2014), [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT\(2014\)433840_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT(2014)433840_EN.pdf).

215. Tamir Moustafa, *Drafting Egypt's Constitution: Can a New Legal Framework Revive A Flawed Transition?*, BROOKINGS DOHA CENTER-STANFORD PAPER 1, 11 (2012), <http://www.brookings.edu/~media/research/files/papers/2012/3/12-egypt-constitution-moustafa/new1-drafting-egypts-new-constitutionenr03.pdf>.

216. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 21.

217. Student and activist, *supra* note 175.

218. Edward Cody, *Tunisia Faces Political Struggle over Islam*, WASH. POST, Jun. 16, 2013, https://www.washingtonpost.com/world/tunisia-faces-political-struggle-over-islam/2013/06/16/1000670a-cdef-11e2-8845-d970ccb04497_story.html; see also Shadi Hamid, *Tunisia Field Report: The Islamist Balancing Act*, MARKAZ (Feb. 12, 2015), <http://www.brookings.edu/blogs/markaz/posts/2015/02/12-tunisia-islamists-ennahda-hamid>.

the struggle to constitutionally define the role of women in Tunisia, as well as conflicting de jure and de facto realities.

This tension between what is law and what is practiced is particularly visible with the hijab. Prior to the revolution, women were banned from wearing the hijab or headscarves in all state institutions including universities, hospitals, and public administrations. Thus, many women after the revolution asserted their right to independent expression by wearing the hijab or niqab. Some Ennahda members went so far as to endorse student protests at Manouba University, among others,²¹⁹ that called for the right to wear a hijab or niqab in all public settings. Conversely, women who did not cover their face or hair feared that though Ennahda's leadership championed women's rights and freedom of expression in broad terms, its policy while in power would be to shift towards enforcing such freedoms selectively.²²⁰ Indeed, Arfaoui notes that the revolution sparked for the first time in Tunisia's history "a wave of abuses of women without a covering" that then fueled not only a general sense of insecurity, but also a greater concern that if Ennahda did not impose its religious preferences by law, it would find opportunities to permit imposition by popular might.²²¹

A journalist and young Tunisian women's rights activist notes that inconsistencies between what is law and what is practiced will persist if rights are only acknowledged in the text and not more: "Tunisia fascinates people because it is a paradox when it comes to gender equality. And it has always been this way."²²² Some attribute this to ambiguities in Tunisia's constitution citing to Islam and its role in Tunisia's political system and culture. One scholar has noted that when Bourguiba gave credence to women's rights under the CSP, he was "careful to locate these changes . . . within the framework, not of dismissing religion, but of a modernist reading of Islam."²²³ By contrast, the constitution of 1959 recognizes Islam as the official religion of Tunisia, but does not constrict Islam to any one practice or interpretation.²²⁴ Neither text, in effect, fully reconciles Islam with more 'modern' societal values. Hadia Bilhadj emphasizes the importance of acknowledging Tunisia's Islamic heritage as significant, while also acknowledging the tension it creates with modernist notions of human rights: "Tunisia, like its neighbors Algeria and Morocco, must work in contradictions. It is an Arab, Islamic state subject to a long period of colonial occupation. Some think this has to be a decision between secularism and

219. See Loic de Pape, *Peut-on convertir un épave? Le cas des mobilisations 'salafistes' à l'université de La Manouba (Tunis)*, CAHIERS D'ÉTUDES DU RELIGIUX, 16-23 (2014) <https://cerri.revues.org/1397>; see also Fatime El-Issawi, *Islamists of Tunisia Reconciling National Contradiction*, LSE BLOG, (Apr. 13, 2012), <http://blogs.lse.ac.uk/ideas/2012/04/islamists-of-tunisia-reconciling-national-contradictions/>.

220. Arfaoui, *supra* note 207.

221. *Id.*

222. Ben Ghazi, *supra* note 188.

223. BRAND, *supra* note 21, at 178.

²²⁴ THE TUNISIAN CONSTITUTION OF 1959, art. 1.

Islamism, but our situation is much more complex than that.”²²⁵ A tendency to oversimplify views of Islam and women’s rights in Tunisia is perhaps a product of top-down policies under Bourguiba that then carried over to Ben Ali: “[Ben Ali] manipulated women’s rights as a tool to accrue international favor, with little if any internal application,” says Hadia Bilhaji, “All women’s associations at that time were headed by Ben Ali’s wife, who propped up Tunisia as a false paragon of women’s rights.”²²⁶ Such obvious statism created some semblance of a women’s national machinery that formally aligned with UN mandates and acquired praise from the international community but had little impact on the actual status of Tunisian women. To ensure a uniformly progressive image of women’s rights, alternative viewpoints were either watered down or heavily suppressed.

The constitution-making process was thus driven by a desire to replace a state-defined culture of rights with a text reflecting broad consensus between “values of Islam and values of modernity.”²²⁷ NCA members sought to create a constitution that would satisfy and respect all visions of women’s rights in Tunisian society. What resulted, however, was a patchwork of provisions that fail to fully reconcile all stakeholders’ interests. Most notably, the Tunisian constitution’s preamble expresses both a “commitment to teachings of Islam” and to “the principals of universal human rights,” without clarifying the nature of the relationship between these two sources.²²⁸ Although these commitments are not necessarily mutually exclusive, there is significant confusion over how they should be considered, independently and collectively, during the early phases of implementation. Similar confusion emerges when we look at Article 1 and its assertion that “Tunisia is a free. . .sovereign state” and “Islam is its religion,” compared to the assertion in Article 2 that the state is based on “the will of the people, and the supremacy of law.”²²⁹ In regards to “Islam is its religion,” it is not clear to what “it” refers. Is “it” Tunisia as a society, or the political nature of its government? If the intent is the latter, then Article 2 declaring Tunisia as a “civil state” creates a contradiction that the constitutional court, once established, must address. This contradiction is exacerbated by the last sentence in Article 1 stating, “this article cannot be amended,” and Article 146, which requires that “the Constitution’s provisions shall be interpreted as a harmonious whole.”²³⁰

Even within Ennahda there was much debate during the drafting process over the interpretation of Islamic texts and their various applications to Tunisian

225. Bilhaji, *supra* note 201.

226. *Id.*

227. Robert Joyce, *Leader Says Ennahda to Steer Clear of Presidential Race*, TUNISALIVE, (Feb. 27, 2014) <http://www.tunisia-live.net/2014/02/27/leader-says-ennahdha-to-steer-clear-of-presidential-race/>.

228. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, Preamble.

229. *Id.* at arts. 1-2.

230. *Id.* at arts. 1, 146

law. One of the party's greatest challenges was—and still is—to define women's rights within an Islamic framework.²³¹ While Ennahda held itself out as a moderate Islamist coalition resting on a unified platform, its members and supporters represented a broad spectrum of perspectives on the rights of women.²³² This led to disagreements around what the scope and definition of the rights of women should be at the constitutional level. Conservative streams pushed for clear, separated gender roles in line with individual interpretations of *sharia* law, in some cases including a return to polygamy or a repeal of national abortion laws.²³³ Hela Hammi, a deputy of Ennahda in the current government, remarked that her “feminist beliefs” are not universally encouraged by her colleagues, and that differences stem from cultural, not religious stigmas: “There is a societal norm in Tunisia that men come home and read the paper and women cook, clean, and take care of the home – there is nothing in the Qur’an or in the Sunna delegating these roles.”²³⁴ During the drafting process she pushed conservative members to scrutinize Tunisia's patriarchal structures as independent from values of Islam and not to be tolerated, let alone validated, by the country's future legal system.

In the discourse over women's rights and Islam there is no single, uniform perspective.²³⁵ The revolution, its aftermath, and the constitution-making process reveal divergent views extant within Tunisia's Muslim community about the role of women in Tunisian society. A cross-cultural dialogue between the Islamic community and the international human rights community is important for a shared basis for human rights and towards advancing the legitimacy of universal human rights norms to local communities that are defined by religious affiliation. Religious communities in Tunisia are internally contested, heterogeneous, and constantly evolving through internal debate and interaction, and women are demanding change within their religious communities in order to bring their faith in line with democratic norms and practices.²³⁶ Cross-cultural, cross-gender, and cross-class dialogue is critical to resolving conflicts within Islam as well as between Islam and human rights. Such dialogue also triggers discussions on controversial issues implicating Islamic values and human rights norms and dispels notions that there is one absolute or final notion of Islam or that any one person can claim to have the one true teaching. This allows women activists to articulate a Muslim feminist jurisprudential basis that is consistent with gender equality.

231. Moataz El-Fegiery, *A Tyranny of the Majority? Islamists' Ambivalence About Human Rights* 7 (Fride, Working Paper No. 113, 2012), http://fride.org/download/WP_113_Islamists_Ambivalence_about_Human_Rights.pdf.

232. Hammi, *supra* note 146; see also Christopher Alexander, *Tunisia's Islamists I: Ennahda Withdraws*, WOODROW WILSON CTR. (Dec. 18, 2013), <https://www.wilsoncenter.org/article/tunisi-as-islamists-i-ennahda-withdraws>.

233. Hammi, *supra* note 146.

234. *Id.*

235. Boubekeur, *supra* note 50, at 107.

236. Debuysere, *supra*, note 190, at 229.

Ennahda, within the political sphere, has appropriated a modern face of Islam but continues to struggle internally in defining what this stance will entail.²³⁷ Apart from Ennahda is the rise of Salafist groups, both quietist—those who do not participate in politics or warfare—and activist, with each faction holding to a different vision of gender roles in Tunisian society.²³⁸ Men and women alike vigorously defend these groups. In fact, there are indications in recent years that women, particularly those who come from impoverished circumstances or have been underserved by the state, have been drawn to these groups' ideologies and practices as an alternate form of security.²³⁹ Going forward, the role of Salafism in Tunisian society cannot be ignored and requires further attention.

D. Freedom from Violence as a Constitutional Right

The remainder of this section will take a look at how a guarantee of gender equality in the constitution applies to other guarantees for women, namely, protection against violence, political guarantees, and programmatic rights. The Tunisian Constitution under Article 46 outlaws violence against women and assures that “the State shall take the necessary measures to eradicate violence against women.”²⁴⁰ Although Article 46 recognizes national security not just in the context of border security and armed forces, but also as security at home and in the streets, inconsistencies in the law prevent the state from further considering the latter.

Several existing national laws are in indirect conflict with the new constitution's commitment to end violence against women in all its forms. For example, men are legally recognized as the head of the household, which as one Tunisian analyst noted “only works to reinforce economic and social patriarchal structures.”²⁴¹ Civil society groups are also urging for changes to the penal code, which, similar to laws in other Arab countries, does not explicitly acknowledge marital rape and grants a man convicted with rape the option to marry his victim with the benefit of dropping charges.²⁴² In terms of economic violence, labor

237. Francesco Cavatorta & Fabio Merone, *Post-Islamism, Ideological Evolution and 'La Tunisianité' of the Tunisian Islamist Party al-Nahda*, 20 J. POLITICAL IDEOLOGIES, 27, 28 (Apr. 17, 2015).

238. Elham Alkasimi, *Tunisian Identity & Fears of Salafism*, MUFTAH (June 20, 2013), <http://muftah.org/tunisian-identity-fears-of-salafism/#.Vc8phVNViko>.

239. *Tunisia: Violence and the Salafi Challenge*, INT'L CRISIS GROUP (Feb. 13, 2013), <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/Tunisia/137-tunisia-violence-and-the-salafi-challenge.pdf>; see also Dorthe Engelcke, *Lecture, Party Identification in Post-revolutionary Tunis: Nida Tunis and Ennahda Compared*, U. OXFORD (Oct. 27, 2014), <https://podcasts.ox.ac.uk/party-identification-post-revolutionary-tunisia-nida-tunis-and-ennahda-compared>.

240. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 46.

241. Interview with Jeunesse Tunisie, Unité EUROMED conference participant, in Tunis, Tunis. (May 29, 2015).

242. *Id.*

laws make room for gender wage disparity and have historically failed to protect female agricultural workers from substandard working conditions and abusive contractual relationships.²⁴³ The Secretary of State for Women Affairs is collaborating with NGOs to harmonize the existing legal framework with constitutional provisions, but such efforts will need cross-sector and horizontal support across ministries to be effective.

To date the law on violence against women remains a draft law. Though still in draft form, many seem hopeful that the law will pass. “Civil society efforts and support from international organizations are strong,” says Neila Chaâbane, one of the key drafters of the law during her time as Minister of Women.²⁴⁴ A national survey conducted in 2010 showed that 47 percent of women in Tunisia had faced at least one form of violence, a daunting number given that women make up 52 percent of the population.²⁴⁵ Yet, increasing extremist violence, such as the attack on the Badaro Museum, the resort attack in Sousse, and the bus bombing in central Tunis, has turned the focus away from social forms of violence towards greater security in the militaristic or police force sense.²⁴⁶ A greater police presence to “fight terrorism” does not in any way guarantee a decrease in sexual or physical violence against women. Unearthed accounts of police violence against women under Ben Ali as well as numerous cases of rape by police during the protests in 2011 are further evidence of this.²⁴⁷

Efforts to draft an anti-violence against women law were present even before the revolution. “It was one of the issues that the Ben Ali regime selectively chose to support.”²⁴⁸ The draft law, however, is an effort to create a legal framework that is comprehensive.²⁴⁹ It addresses all forms of violence, including physical, psychological, economic, and inter-family.²⁵⁰ Some of its provisions include a formalized framework for victims to prosecute perpetrators and state protection for those who seek justice.²⁵¹ Efforts such as the

243. *Infra* note 273, at 40, 64.

244. Chabaâne, *supra* note 178.

245. Press Release, Fédération Internationale des Ligues des Droits de l’Homme, Sexual Violence in Tunisia: From Denial to Dawning Recognition (June 2, 2014), <https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/tunisia/15425-sexual-violence-in-tunisia-from-denial-to-dawning-recognition>.

246. Sara Hashash, *Deadly Attacks Risk Casting a Shadow on Human Rights in Tunisia*, AMNESTY INT’L, (Nov. 25, 2015), <https://www.amnesty.org/en/latest/news/2015/11/deadly-attacks-risk-casting-a-shadow-over-human-rights-in-tunisia/>.

247. Eileen Byrne, *Tunisians Protest Over Charges Against Woman Allegedly Raped by Police*, THE GUARDIAN, Oct. 3, 2012, <http://www.theguardian.com/world/2012/oct/03/tunisians-protest-charges-woman-police>; Carlotta Gall, *Women in Tunisia Tell of Decades of Police Cruelty, Violence and Rape*, N.Y. TIMES, May 28, 2015, <http://www.nytimes.com/2015/05/29/world/africa/women-in-tunisia-tell-of-decades-of-police-cruelty-violence-and-rape.html>.

248. Mnasri, *supra* note 58.

249. *Id.*

250. *Id.*

251. *Id.*

establishment of victim shelters and a stable, advertised hotline will be expanded and supported by the state.²⁵² “The biggest challenge has been to convince certain members of society, of the assembly, that this issue is relevant,” notes Chaâbane. “Unfortunately, public officials at the top are removed and thus create a lot of push back. But judges in penal courts recognize this law as necessary.”²⁵³

Lobbying efforts have sought to reframe violence against women as an economic cost in order to appeal to parties who would normally not lend support.²⁵⁴ Studies guided by the Ministry of Women have quantified the negative impact of violence in terms of a woman’s ability to enter the labor force and be an active participant in family and society.²⁵⁵ Groups actively involved in the passage of the law are concerned, however, that civil society initiatives are fractured and not unified.²⁵⁶ Some feel that while the law provides access to justice for survivors of violence and free access to medical care for victims, it does not go far enough in providing shelters and legal aid.²⁵⁷ On the other hand, Tunisia’s willingness to define domestic violence as a public crime and enshrine it in the supreme law of the land sends an important message both nationally and globally. Moreover, the Tunisian provision defines domestic violence against a woman as a crime against the personal security of the woman.²⁵⁸

E. Political Rights

Another focus has been on fixing parliamentary and election laws, with a particular emphasis on increasing women’s participation at the local level. Well-established civil society groups are involved in reforming the electoral law to mandate horizontal as well as vertical parity. The ATFD and groups like League of Tunisian Women Voters (LET) are particularly concerned with how parity laws steer political elections, arguing that what is currently in place is either ineffective or does not go far enough.²⁵⁹ Both Articles 34 and 46 in the constitution provide certain political guarantees for women, including quotas in government offices.²⁶⁰ While Article 34 upholds a general commitment to

252. *Id.*

253. Chaâbane, *supra* note 178.

254. *Id.*

255. *Id.*

256. *Id.*

257. Nessryne Jelalia, *Still a Long Way to Equality for Tunisian Women*, AL-ARABY (Jan. 14, 2015), <http://www.alaraby.co.uk/english/comment/2015/1/14/still-a-long-way-to-equality-for-tunisian-women>.

258. It is interesting to contrast Tunisia’s individualistic conception of protection against domestic violence from the conception conveyed in relevant provision in the Colombian Constitution, which frames domestic violence as a crime destructive of the “harmony” and “unity” of the family. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42.

259. Interview with Kelthoum Kennou, President of LET, in Thala, Tunis. (May 24, 2015).

260. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 34 (“The State seeks to guarantee

guarantee women representation in elected councils, Article 46 specifically creates a state obligation to achieve gender parity, creating a strong constitutional foundation for legislation to increase women's political participation at the national, regional and local levels.²⁶¹

In an attempt to embody political gender equality in principle, elections lists during the 2011 election of the constituent assembly were “vertically zippered” such that every second candidate on each list was supposed to be a woman.²⁶² Some hailed this rule as a good first step: women composed over 25 percent (57 out of 217 seats) of the national assembly post-2011 and in the 2014 elections, which mandated similar rules, women voter turnout was marginally higher than that in 2011, even while the youth turnout took a significant dive.²⁶³ Yet, some women's activists argue these rules do not fully embrace the guarantees provided in the constitution, noting that many of the women elected were already plugged into the political system or else used as spot-fillers with little opportunity to contribute as representatives of their electors.²⁶⁴ Furthermore, male candidates headed the vast majority of the lists submitted. Critics of the current election rules have thus made a push for horizontal zippering on top of vertical zippering in the next election.²⁶⁵ Critics also believe that in order to increase public support given to women who seek political office, there must be greater solidarity among women in local municipalities and heightened political awareness among young women nationally.²⁶⁶

F. Programmatic Rights in the Tunisian Constitution:

The Tunisian Constitution enshrines both negative and positive rights, or civil and political and economic and social rights. Economic and social rights, or programmatic rights, are sometimes referred to as second-generation rights that demand additional resources for the fulfillment of these rights. Constitutions are no longer limited to restraining the exercise of power; they deal with the

women's representation in elected councils”); art. 36 (“The State shall seek equal representation for women and men in elected councils.”)

261. *Id.*

262. PROJECT ON MIDDLE EAST DEMOCRACY, *TUNISIA'S PARLIAMENTARY & GENERAL ELECTIONS GUIDE* 25-26 (Oct. 2014), <http://pomed.org/wp-content/uploads/2014/10/Tunisia-Election-Guide-2014.pdf>.

263. *Id.*

264. Interview with Alia Alyouta Benkefi, in Thala, Tunis. (May 24, 2015).

265. *Id.*

266. It is instructive to examine other laws in light of the Tunisian Constitution. The Canadian Charter of Rights and Freedoms includes several women's rights clauses including affirmative action programs designed to ameliorate a legacy of discrimination against women. The Colombian Constitution of 1991 also “grants a broad array of rights to women—articles 13 (equality), 40 (political participation), 42 (women's status in the family), 43 (equal rights, non-discrimination, protection of pregnant women, and special support to female heads of households), 53 (workplace protection for women and mothers), 96 (citizenship based on mothers), and 323 (women as alderwomen).” See Laura E. Lucas, *Does Gender Specificity in Constitutions Matter?* 20 *DUKE J. COMP. & INT'L L.* 133, 143 (2009).

redistribution of power. While negative rights curtail the power of government, prohibiting or limiting the exercise of governmental power, positive or programmatic rights call upon the government to provide resources, services, and programs for their fulfillment. Substantive rights encompass positive programs to fulfill those rights and address inequality. However, without mechanisms and procedures for the actualization of these rights, they remain largely limited to the realm of rhetoric. In 2004, when National Women Outreach on Constitutional Reform in Nigeria made a set of recommendations to make the constitution more women-friendly, it called for the justiciability of current constitutional socio-economic rights.

Tunisia is a party to the ICESCR, and the Tunisian Constitution has included social and economic rights in the Constitution.²⁶⁷ These rights include the right to health, right to water, and right to education.²⁶⁸ These programmatic rights, although inextricably linked to civil and political rights, are not directly enforceable in the way civil and political rights are, but must await implementation through legislative or executive action and through budgetary appropriations.

Social guarantees with respect to matters such as education can be defined as women's rights. Article 44(1) of the Sudanese Constitution asserts that "[e]ducation is a right for every citizen and that the State shall provide access to education without discrimination as to . . . gender . . ." Alternatively, Article 39 of the Tunisian Constitution mandates education until the age of sixteen and makes free public education a right "at all stages," but does not specify gender.²⁶⁹ This provision, if implemented properly, can have a powerful impact on young women and can help combat early marriage. Mandating education for all children, including the girl child, can be a powerful vaccine against early marriage and is a cardinal and non-negotiable human right for girls and women.

Article 44 of Tunisia's constitution similarly guarantees the right to water and is one of the first constitutions in the world to do so.²⁷⁰ Article 44 further requires the state to implement government policies that promote conservation and rational use in order to protect this right.²⁷¹ This is especially important for marginalized women in rural areas or women laborers in the agricultural sector. Recent water shortages have sparked debate over exactly how this right can be implemented, such that rational use also results in equal distribution.²⁷² Proposals include convertible energy initiatives, alternative methods of farming,

267. See Part III: Supremacy of International Law.

268. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, arts. 38, 39, 44.

269. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 39.

270. South Africa was the first country to include water rights within its constitution in 2004. See John Scanlon, Angela Cassar & Noemi Nemes, *Water as a Human Right?* 9 (IUCN Environmental Policy and Law Working Paper No. 51, 2004) (stating that, at the time, only the South African Bill of Rights "enshrines [in a constitution] an explicit right of access to sufficient water").

271. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 44.

272. Interview with Jaouahar Ben Mubarak, in Tunis, Tunisia. (May 29, 2015).

and new irrigation techniques, but their relation to matters such as labor conditions for women is unclear.²⁷³

Article 40 in Tunisia's constitution stipulates that "[w]ork is a right for every citizen, male and female alike" and gives all citizens "the right to adequate working conditions and a fair wage," but does not go further.²⁷⁴ Yet, the political discourse on rights implementation does not, as of yet, incorporate a gendered perspective. One reporter and human rights activist notes that outside of political forums, "[P]eople do not even discuss economic issues in terms of the *constitution*, at least not how to connect women's rights with economic rights. It is merely aspirational at this point."²⁷⁵ For example, while the UGTT has been a major supporter for raising the overall minimum wage, it has not placed much emphasis on wage gender disparity.²⁷⁶

PART III

The extent to which the constitution-making process in Tunisia drew on international influences is unclear. Unlike in countries like South Africa or Sudan, the NCA in Tunisia never clearly manifested its intent to incorporate aspects of international law into its constitutional text.²⁷⁷ Inconsistencies between state practices at the international level verses national and subnational levels further question the relevance of international law in Tunisia's transition efforts moving forward. Transnational entities did work closely with local CSOs as advisors, monitors, and co-coordinators and provided significant funding to various CSO initiatives. This first section of Part III will take a brief look at some of the discrepancies between relevant international agreements and the priority given to international law in relation to Tunisia's new constitution and national legislation. The section thereafter will look at the interaction between Tunisian civil society and visible international actors. Our conclusion is that while the rights provisions in Tunisia's constitution do not fully incorporate standards of international law, those provisions can be seen as "intermestic" in the sense that they are the product of softer modes of international influence, predominantly the role of international actors in promoting liberal notions of human rights within Tunisia's civil society.

273. For more information on proposals and the conditions of Tunisian women in agriculture more generally, see ENQUETE SUR LES CONDITIONS DE TRAVAIL DES FEMMES EN MILIEU RURAL, ASSOCIATION TUNISIENNE DES FEMMES DEMOCRATES. (2015), <http://femmesdemocrates.org.tn/bibliotheque-atfd/livre-pdf/livre%20français.pdf>.

274. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 40.

275. Interview with Oumayma Ben Abdallah, in Tunis, Tunis. (May 29, 2015).

276. *Id.*

277. See Part I: Countries in Transition: Building a Public Participatory Framework for Gender Rights.

A. Supremacy of International Law

Tunisia has signed and ratified human rights treaties CEDAW (1985),²⁷⁸ ICCPR (1969),²⁷⁹ and ICESCR (1969).²⁸⁰ It officially removed reservations “not in conflict with provisions in Chapter I of the Tunisian Constitution” in 2014.²⁸¹ While Tunisia’s new constitution does not expressly incorporate provisions from these texts, international observers have recognized a general incorporation of international standards for women’s rights under customary international law.²⁸² There is some ambiguity, however, regarding the relationship between international law and national law, particularly in the context of judicial interpretation. Article 20 of the Tunisian Constitution gives primacy to “international agreements approved and ratified by the Chamber of the People’s Deputies” over national laws but will remain “inferior to the Constitution.”²⁸³ International observers as well as organizations like the International Court of Justice (ICJ) have questioned this ordering of laws, pointing to other models that maintain international law as supreme.²⁸⁴ Members of the constitutive committee responsible for drafting Article 20 explain, however, that the intent was not to undermine Tunisia’s international obligations, but to allow for the use of international laws as interpretive tools in clarifying ambiguities in the national laws, especially in relation to women’s rights.²⁸⁵

The constitutionalization of international agreements as supreme over Tunisia’s national laws is significant. However, there are ways the state can limit, if not make obsolete, the relevance of international law at the national level. Tunisia’s repeal of all reservations under CEDAW is a good example of this. In April 2014 Tunisia released a general statement committing itself to the elimination of all forms of discrimination against women and withdrew all reservations it submitted when it signed the CEDAW.²⁸⁶ Though lauded as a move toward greater international accountability for gender equality, Tunisia

278. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

279. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967).

280. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.; S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

281. See General declaration under “Tunisia” or footnote 79. Chapter I of the Tunisian Constitution is comprised of Articles 1-20 affirming the general principles upon which the constitution is based.

282. Joint Statement by Al Bawsala, Amnesty International, and Human Rights Watch, *Tunisia: Let constitution Herald Human Rights Era – Judges should base interpretation on international standards* (Jan. 31, 2014).

283. TUNISIAN CONSTITUTION OF 2014, Jan. 26, 2014, art. 20.

284. *The Tunisian Constitution in Light of International Law and Standards*, INT’L COMM. OF JURISTS (Jan. 31, 2014), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/ICJ-Tunisian-Constitution-Position-Paper-31-01-14.pdf>.

285. Ben Mubarak, *supra* note 272.

286. *Tunisia: Landmark Action on Women’s Rights*, HUMAN RIGHTS WATCH, (Apr. 30, 2014), <https://www.hrw.org/news/2014/04/30/tunisia-landmark-action-womens-rights>.

maintains that it will not make legislative decisions that contradict Chapter I of the Constitution.²⁸⁷ This leaves open the question of how Tunisia will balance cultural practices with international standards.

B. The Role of International Actors in Constitution-Making

“International organizations have been working with us closely – it is a good dynamic and we like that they are wanting to be involved,” says Saida Rached.²⁸⁸ Notable international supporters included UN agencies like UN Development Programme (UNDP), which helped bring politicians and representatives from other countries to speak to the assembly.²⁸⁹ The British Embassy was likewise supportive by inviting members to hear from and consult with foreign analysis.²⁹⁰ The Venice Commission also coordinated international experts with Tunisian politicians to present “foundational best practices” and facilitated brainstorming among local NGOs.²⁹¹

Countries that sent democracy experts included the US, France, Canada, Belgium, Spain, and Poland.²⁹² Interviewees also noted significant participation of former Soviet and Sub-Saharan states. Both regions seemed eager to share insights, given their recent drafting experiences and ongoing transition efforts. Many echoed a sentiment that there was at most “influential pressure- we felt their opinions were important, and they let us know when we were on the ‘right track’, or how we could make the drafting process more effective. There was no sense that they were imposing their ideas on us.”²⁹³ A healthy level of skepticism seems to color remarks towards the international presence in Tunisia, but no one has yet expressed frustration that ideas were imposed or entirely irrelevant.²⁹⁴

Others have suggested that some international organizations were less imposing than others. Salsabil Klibi argues that, “Yes there were and are concerns about an international takeover, direct or indirect. But I would say that final decisions, the final document was left to Tunisians.”²⁹⁵ On the other hand, there are several reports that frame the process as a period of excitement followed by disillusionment, spurred in part by a “deluge” of international interests that did not translate into true expertise.²⁹⁶ International organizations, rather, came with a set of pre-packaged provisions not molded to the social or

287. *Declarations Reservations and Objections to CEDAW*, *supra* note 32.

288. Rached, *supra* note 164.

289. *Id.*

290. *Id.*

291. *Id.*

292. Klibi, *supra* note 39.

293. *Id.*

294. Bilhaji, *supra* note 201.

295. *Id.*

296. *Inside the Transition Bubble: International Expert Assistance in Tunisia* 18, INST. FOR INTEGRATED TRANSITIONS (Apr. 2013), <http://www.ifit-transitions.org/publications/inside-the-transition-bubble-international-expert-assistance-in-tunisia>.

political context. Some interviewees suggested that the priorities of international organizations were misaligned with priorities of Tunisians.²⁹⁷ Foreign development groups such as USAID overemphasized the fostering of ideological values such as democratic awareness and gender equality at the expense of substantive, arguably more critical issues related to youth unemployment, openness in the media, and economic stability.²⁹⁸ There was concurrently a tendency to generalize Tunisia's situation with that of Egypt and Libya: "Tunisians do not universally align themselves with other North-African states," remarked one activist. "Some are more francophonized, others connect with countries like Morocco and Algeria, and still others just see our country as unique unto itself."²⁹⁹

"International support is very important, but what is more important is developing a power structure that connects regions within Tunisia. UGTT is less involved with what is happening internationally and more engaged with local interests," said Habiba Mizoumi, National Secretary General for Dentists & Nurses for the UGTT.³⁰⁰ Indeed, decades of political and economic repression of Tunisia's southern interior under both the Bourguiba and Ben Ali regimes created high disparity between this region and Tunisia's coastal regions.³⁰¹ Thus, other individuals, like Habiba, have felt that establishing local autonomy and strengthening channels of interregional communication will be of greater significance in determining Tunisia's future than in establishing relationships with international forces.

Young civil society organizations (CSOs) in particular have been willing to work with international funders as a way to jump-start their initiatives. Hadia Bilhajj, director at CAWTAR stated, "we can't shut the door on the international community. It plays a necessary role in financing and investing in our broken economy. But Tunisians are certainly skeptical of whether the interests of the international community are truly aligned with their own. So we take a risk, out of necessity."³⁰² Souhayel Hedfi from Jam3ity—a civil society organization aggregator and networking platform—sees his relationship with foreign funders as more of a mutually beneficial learning experience:

"Some funders still want to contribute to human rights and democratization exclusively. We wanted that in the beginning, but now the situation is different. Many NGOs in the southern interior for example are now focused on environmental or infrastructural issues. The funders are slow to catch on but they're receptive to feedback when we

297. Interview with Student and Activist, NGO workshop, in Bizerte, Tunis. (June 4, 2015).

298. Inst. for Integrated Transitions, *supra* note 296, at 10.

299. Student and Activist, *supra* note 175.

300. Mizoumi, *supra* note 159.

301. Issandr El Amrani, *Tunisia Moves to the Next Stage*, MIDDLE EAST RES. & INFO. PROJECT (Nov. 8 2011), <http://www.merip.org/mero/mero110811>.

302. Bilhaji, *supra* note 201.

tell them the requirements for funding don't match our interests or what we see as priority in our country."³⁰³

Many international democracy and rule of law organizations limit or narrow the reform process to a fight against corruption and the formalization of liberalism through free and fair elections, while overlooking the need for structural reforms. "Transparency" and "good governance" metrics nested within a market model are prioritized over the public protection of individual human rights. The key, thus, will be to see if international entities moving forward will view their efforts as a collaborative rather than delegated process. International support in implementing the rights enshrined in Tunisia's constitution will largely depend on reception of and adaptability to local interests.

PART IV

A. The Way Ahead: Challenges and Opportunities

A constitution is both fundamental, and authoritative, but it is also dependent on robust institutions for implementation and enforcement, as well as legal and political will and a culture of constitutionalism. A critical question before the Tunisian framers of the constitution is the question of a normative hierarchy in rights. Tunisian civil society is defined by its heterogeneity and its goal of translating the constitution into national laws. The passage of the constitution from the transitional into the permanent phase requires the collaboration of efforts of inter-governmental agencies and the constant vigilance of civil society.

Tunisia can learn from other countries, from both those countries' successes and failures. But there must be a fine balance in place to reach out for international assistance where needed without letting international actors hijack the reform process altogether. Hailed as a success, the text accomplishes this goal. It will be important in this next phase for local processes to continue to drive implementation initiatives, albeit with ample access to international resources and support. International and foreign actors must likewise support local actors in facilitating transparency and open society while maintaining respect for local interests.

In the context of enforcement, quite often gender equality and women's rights can be jettisoned at the altar of competing rights. The courts must enforce gender equality as a non-derogable right that cannot be subordinated by culture or religion. Taking into account these concerns among others, this section examines the way forward for women in Tunisia and the next steps in the Tunisian constitution reform process.

303. Hedfi, *supra* note 50.

B. Advancing a Culture of Constitutional Rights

Strengthening a culture of constitutional rights involves ensuring that institutions are governed according to the constitution and that the independence of the judiciary is safeguarded to adjudicate constitutional rights claims and to hold state and non-state actors compliant with the constitution. This involves providing access to justice and strengthening the rule of law so that all persons, including women, can access courts and other adjudicatory mechanisms to enforce the constitution and the laws made to implement it.³⁰⁴ Protecting the integrity of the constitution involves limiting the erosion of constitutional guarantees, and in particular preventing a narrow interpretation of the constitution in a way that undermines human rights and women's human rights guarantees.

While the adoption of the rights and freedoms in the Constitution is important, it may be equally important to educate citizens about these rights and ways to safeguard them, including how citizens can vindicate their rights in courts.³⁰⁵ As set out in Article 102 of the Tunisian Constitution, "The judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the Constitution, the sovereignty of law, and the protection of rights and freedoms."³⁰⁶ This Article emphasizes that the independence of the judiciary from legislative and executive interference is a bedrock principle of the rule of law. That is why the constitution-making process does not end at the promulgation of the constitution but is a continuing process that sparks the development of rights and establishing mechanisms to protect constitutional guarantees.

A culture of constitutionalism must also help to build a strong, integrated civil society that has the capacity and motivation to monitor governmental institutions. Political transparency during the drafting process must become the norm, such that civil society can act as a watchdog and impose accountability on state actors without fear of repression. Activists outside the political sphere are in the best position to ensure that there is a balance of powers among governmental institutions and that those powers are being used in the best interests of the people. In Tunisia, many of the youth who participated in the 2011 protests have turned to civil society groups as a way to stay active in their country's transition towards democracy. Disillusionment with the current government is widespread among youth, as exhibited by low voter turnout during the last national elections in 2014. Yet, many believe there is still space and opportunity to build a civil society platform upon which youth can communicate with local politicians and have their voices heard.³⁰⁷ Alia, a young

304. Kathleen E. Mahoney, *International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts*, 1 AUSTL. FEMINIST L.J. 115, 118-28 (1993).

305. *Id.*

306. TUNISIAN CONSTITUTION OF 2014, Jan. 27, 2014, art. 102.

307. Benkefi, *supra* note 264.

graduate from Thala stated, “many youth have never visited places outside of their own region. Civil society organizations have included workshops where people from all over Tunisia can meet together and network. It’s a great aspect of the education process and only helps our own activism locally.”³⁰⁸

Similar comments were made during a civil society workshop in the northern coastal town of Bizerte. Participants were young activists from various municipalities across the country, all of whom were involved and committed to building small NGOs in their own communities. Hatem ben Romdhane, the leader of an association called *Irada* (meaning “will” or “desire”) in Djerba acquiesced, “there are a lot of internal challenges, but we’re doing our best.”³⁰⁹ Workshop activities thus centered on networking and lobbying strategies, as well as understanding the new government’s constitutional structure.

Under Ben Ali, all civil society groups were subject to co-optation, monitoring, and outright repression.³¹⁰ Thus, most civil society groups, like *Irada*, are young. Educational opportunities for those involved in such groups are frequent. “[It] seems like every month we’re sending at least one representative to an event like this,” remarked Hatem.³¹¹

Although many civil society groups acknowledge that the Constitution contains strong rights provisions, they are concerned about the gap between reality and the text of the document. Many felt driven to civil society because of a lack of youth representation in government. “Low youth voter turnout in 2014 was a reflection of both economic and political frustrations,” commented one participant. “For some of my friends it was a decision between going to the polling station and going to a football match. And they chose the football match!”³¹² Another participant noted that while the last elections had significantly more international observers than in 2011 and a healthy number of youth monitors, the problem was less process and more lack of trust: “We are all scared of a slide back to tyranny. We are skeptical of whether our government is truly democratic but we must continue to push for democratic elections.”³¹³

It is again instructive to look at other countries to see how constitutional provisions can guarantee their own enforcement and implementation. For example, the Colombian Constitution of 1991 created a Constitutional Court and the tutela, which empowered individuals to bring suits when their constitutional

308. *Id.*

309. Interview with Hatem ben Romdhane, in Bizerte, Tunis. (June 5, 2015).

310. Christopher Alexander, *Authoritarianism and Civil Society in Tunisia: Back from the Democratic Brink*, MIDDLE EAST RES. & INFO. PROJECT (Winter 1997), <http://www.merip.org/mer/mer205/authoritarianism-civil-society-tunisia>.

311. *Id.*

312. Interview with NGO workshop participant and community organizer, in Bizerte, Tunis. (June 5, 2015).

313. Interview with NGO workshop participant and law student, interviewed by author, in Bizerte, Tunis. (June 5, 2015).

rights have been abridged.³¹⁴ Litigants have used the new women's protection clauses with success in many cases. Without the tutela and the new Constitutional Court, the women's protection clauses may have been meaningless.

The Tunisian state has institutional responsibility to implement the Constitution through enabling legislation and institutions. Implementation of a constitution can be predicated upon strengthening or setting up new institutions provided for by the constitution, allocating powers and responsibilities, jurisdiction, resources (including finances and staff), and monitoring mechanisms. At the same time, the state must also stay accountable to civil society. The constitution created three ministries of civil society, one under each branch of government— executive, parliamentary, and judiciary.³¹⁵ The strength of these ministries relative to others, however, remains to be seen.³¹⁶

C. *Developing Enabling Legislation*

There continues to be a push to create laws that are not just nominally supportive of gender equality, but contain technical safeguards ensuring equality in various spheres. Yet, it is too early to predict how the Tunisian National Assembly will formulate enabling legislation. There is also uncertainty around how the judiciary will go about constitutionality review. The Supreme Judicial Council, which is tasked with the responsibility of assembling a constitutional court, has been the subject of much controversy. Tension surrounding the selection of members delayed its formation, which has inevitably delayed its appointment of a new constitutional court, the deadline for which was initially set for October 2015.³¹⁷ The administrative tribunal has been designated as a constitutional court and will hold that role until a separate court is formed.

There is general certainty among judges and legal scholars that before assessing constitutionality of laws, the court will have to deal with contradictions internal to the constitution itself. "It is too early to project how these contradictions will be reconciled, let alone how the constitution will be

314. Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in BEVERLEY BAINES & RUTH RUBIO-MARIN, *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 75, 76 (2005).

315. *5 years after the Arab Spring: What's Next for Women in the MENA Region?*, WOODROW WILSON CTR. (Mar. 8 2016) (quoting from remarks by Rangita de Silva de Alwis).

316. *Id.*

317. Election for the Council took place on October 23, 2016. It has yet to appoint the constitutional court. For more information, see Rahma Guettari, *Members of Supreme Judicial Council Announced After Historic Vote*, TUNISIA-LIVE, Oct. 25, 2016, <http://www.tunisia-live.net/2016/10/25/members-of-supreme-judicial-council-announced-after-historic-vote/>; Rebecca Chaouch, *Tunisie: Trois Ans Après la Constitution Toujours dans L'Attente de ses Garde-Fous*, JEUNE AFRIQUE, Jan. 27, 2017, <http://www.jeuneafrique.com/398018/politique/tunisie-trois-ans-apres-constitution-toujours-lattente-de-garde-fous/>.

applied to forthcoming legislation,” noted Jaouahar ben Mubarak, a scholar of constitutional law and president of the network *Destourna* (Our Constitution).³¹⁸

President of LET Kelthoum Kennou insists that the Tunisian civil society has played a critical role in shaping the constitution and continues to play a pivotal role in its enforcement. This was best illustrated, she notes, in the allocation of a communication channel by initiating the position of coordinator with the civil society not only in the parliament but also in government and in the presidency. This channel was particularly effective concerning the promulgation of the law of the supreme judicial council:

Some specialized associations have worked on presenting recommendations to the parliament. Some of them also took part in a technical committee within the ministry of justice that is granted the power to suggest legislations. Other associations not only made suggestions but also presented proposal provisions to deputies for adoption in the parliamentary committee. This was an initiative of the League of Tunisian Women Voters (LET), which, as a part of its mission, focuses its project on the presence of women judges as decision makers in this council.³¹⁹

One of the major impediments to implementing the constitutional guarantees is budgetary constraints. Our interview with Hadia Bilhadj revealed that there are currently no funds for women’s empowerment efforts, and that even if there is in the short-term, it will likely come in the form of conditional international aid. Resolving Tunisia’s debt and revamping the economy has taken precedent, though this does not seem unique to women’s rights: “We aren’t able to deal with things in parallel. We focus on one issue and ignore the others.”³²⁰ One assembly member has noted that the strategy thus far has been not so much to fight for a percentage of the budget, but to show how improving the status of women will have positive economic ramifications, as described above, regarding the draft law to combat violence against women.³²¹

Enabling legislation plays a crucial role in securing legal equality. A constitution on paper is hardly a constitution at all, however progressive its contents and however careful its design. Though there is consensus that enabling legislation is crucial to securing legal equality, such a task requires the reform of old laws as well as the passage of new laws providing assistance to pressing public concerns. The state, for all of its aspirations, has struggled to tackle both simultaneously, while in the background sort itself out internally. Laws out of sync with the constitution but not deemed critical have thus been placed on the backburner. Government efforts under the current ruling coalition *Nidaa Tounes* have more or less been dictated by realities on the ground, a game of whack-a-mole with a central focus on fighting terrorism, weeding out corruption, resolving bad debt, and increasing employment.

318. Ben Mubarak, *supra* note 272.

319. Kennou, *supra* note 259.

320. Bilhaji, *supra* note 201.

321. Interview with Mehrezia Labidi, *Ennahda* party member (May 27, 2015).

Hela Hammi, one of the most vocal proponents of women's rights in the assembly, commented that "for right now, we are leaving women's rights efforts in the hands of civil society, with government encouragement and support of course. This is partly because of prioritization, but partly because civil society organizations are tapped in."³²²

Some gender issues, carried over from the Ben Ali era, continue to hold some political weight. The draft law against violence³²³ and new efforts add vertical parity to election laws,³²⁴ both discussed in Part I, and have gained relevance as an issue tied to universal security concerns. Other issues such as the *mirath*, or inheritance laws, wage disparities, and benefits for mothers in the workplace, such as maternity leave, are discussed but have not been fully addressed in legislation thus far.³²⁵ Administrative judge and women's activist Anware Mnasri argues that the *mirath* laws are not a widely debated issue among Tunisians – they are considered problematic for poor families, but that the bigger issue is giving women an equal opportunity in the labor market and improving the economy so that people do not have to rely on *mirath*.³²⁶

Some have pushed for increasing maternity leave as a part of reform in public services law.³²⁷ At 30 days, currently Tunisia has the shortest maternity leave of all countries in the MENA region.³²⁸ Civil servants are allowed 60 days leave and can extend for another 60 days with a 50 percent reduction of their wages.³²⁹ Policies that permit institutionalized forms of gender discrimination are the most important policies for women's rights activists to overcome. Yet, because they are not as visible as political discrimination or as shocking as cases of sexual violence, they may also be the most difficult issues to tackle.

There is some acknowledgment that Tunisia's new era of gender rights rides on guarantees under the old regime: "We don't like to admit it, but some laws from the Ben Ali years have benefitted women. Ben Ali was selective with which laws he chose to support, enacting laws to further his own political interests, but the effect of these laws has been positive."³³⁰ Examples include a

322. Hammi, *supra* note 146.

323. The bill was set to become law by the end of 2016, but as of February 2017, it has not been put to vote. See Harriet Sherwood, *Tunisian Coalition Party Fights for Women's Rights with Gender Violence Bill*, THE GUARDIAN, Oct. 26, 2016, <https://www.theguardian.com/global-development/2016/oct/24/tunisia-gender-violence-bill-substance-progressive-image>.

324. See, e.g., *La Parité Horizontale et Verticale lors de Municipales, Cheval de Bataille d'un Collectif d'Associations*, HUFFPOST MAGHREB, May 5, 2016, http://www.huffpostmaghreb.com/2016/05/10/parite-elections-tunisie_n_9886734.html (announcing the launch of a new civil society campaign urging vertical and horizontal parity in municipal elections along with other amendments to the country's electoral law).

325. Interview with Anware Mnasri, in Tunis, Tunisia. (May 21, 2015).

326. *Id.*

327. Mnasri, *supra* note 325.

328. § 64(a) of the Labour Code 1966, last amended in 2011, <http://www.ilo.org/dyn/travail/docs/778/Labour%20Code%20Tunisia.pdf>.

329. § 48 of the Act No. 83-112.

330. *Id.*

law requiring a minimum standard of pediatric health for newborns, a law allowing women to travel without her husband or father, and a set of policies that opened up educational opportunities to women.³³¹

Given the plethora of concerns and reformist initiatives in the pipeline, it is important to mandate a specific time period for the promulgation of institutions and policies. Independent bodies for the enforcement and oversight of constitutional rights, such as commissions and ombudsperson bodies, should be passed in a timely manner. For example, the 1992 Constitution of Ghana called for laws establishing nine institutions within six months of the first meeting of the parliament after its constitution came into effect.³³² The 2010 Constitution of Kenya included a time schedule from six months to three years within which laws on more than sixty subjects were to be passed, and it provided a cause of action if a law listed in the schedule was not promulgated within the time specified.³³³

Additionally, there must be a constitutional review of the legal system to ensure that all laws are in compliance with constitutional guarantees and if necessary the repeal of laws that are inconsistent with the Constitution.

Finally, steps should be taken to monitor the implementation of the constitution. It is important to carry out a regular evaluation of institutions established under the constitutions to ensure that they have the resources, including financial and human resources, to implement the constitutional guarantees. For example, Section 5 of the sixth schedule of the 2010 Kenyan Constitution calls for a commission on the implementation of the constitution to “monitor, facilitate and oversee the development of legislation and administrative procedures as required to implement the Constitution.”³³⁴

Remedies for inaction on the part of the government in meeting constitutional guarantees create a remedy for non-enforcement of rights. Constitutional courts can be moved through a writ petition or, as in India, where Article 32 (1) provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights is guaranteed.³³⁵

D. A Focus on Gender and Economic Rights

Tunisian women’s rights activists are concerned that the debates on constitutional guarantees have not focused sufficiently on economic

331. *Id.*

332. The Constitution calls for the establishment of at least 14 different positions or offices within the first six months after the first meeting of parliament. *See, e.g.* CONSTITUTION, art. 9, art. 231, art. 269 (1992) (Ghana).

333. CONSTITUTION, FIFTH SCHEDULE-LEGISLATION TO BE ENACTED BY PARLIAMENT (2010) (Kenya).

334. CONSTITUTION, art. 262 (2010) (Kenya).

335. INDIA CONST. art. 32(1).

development and its corresponding impact on women.³³⁶ Development initiatives ranging from the expansion of global trade, to structural readjustment programs, to a diversion of public spending from social to military programs, all have a disproportionate impact on women and the burdens they carry. While the discourse on women's rights often centers on a narrow range of 'genderized' issues such as sexual violence, women's political participation, and discriminatory rape laws, there is a need to acknowledge that gender-neutral policies can have equally negative implications. All issues, be it social, economic, political, or legal, have wider, gender-based implications that must be assessed within their specific local contexts.

The question of how to pair economic development with women's rights ties in to concerns around social stability and security. A Pew poll showed that 69 percent of women in Tunisia (compared to 55 percent of men) prefer stability to democracy, although their conceptions of stability and security are different from that of men – for example, women see security as the ability to go out alone, to be free from harassment on the street, at work, and on the part of police.³³⁷ Men see security as more the presence of a police force and a reduced threat of terrorism.³³⁸ This did not, however, correlate with waning support for equal rights for women (66 percent), a fair judiciary, and competitive elections.³³⁹ Nevertheless, a preference for stability over democracy leaves open the possibility for women to forgo ideological agendas that require long-term foresight in exchange for practical, short-term solutions.³⁴⁰

Preference for stability is increasing in light of Tunisia's economy, which has stagnated if not receded since the revolution. High unemployment rates among young women, reaching 50 percent in some areas, have created increasing dependence on male figures in their household as the primary breadwinners.³⁴¹ The situation is particularly volatile for women in Tunisia's historically underserved and economically repressed interior regions. Agricultural work – mainly on small plots or family farms – provides employment for the vast majority of women laborers in this region. Women activists in rural areas and in the capital are grappling with how to undo decades of state-intervention that has led to price distortion, inequitable profit distributions, and substandard working conditions for women in this sector.³⁴²

336. Ben Abdallah, *supra* note 275.

337. *Tunisian Confidence in Democracy Wanes*, PEW RESEARCH CTR. (Oct. 15, 2014), <http://www.pewglobal.org/2014/10/15/tunisian-confidence-in-democracy-wanes/>.

338. *Id.*

339. *Id.*

340. *Id.*

341. THE WORLD BANK, DEVELOPMENT POLICY REVIEW: THE UNFINISHED REVOLUTION BRINGING OPPORTUNITY, GOOD JOBS AND GREATER WEALTH TO ALL TUNISIANS 27-36, REPORT NO. 86179-TN (May 2014).

342. ASSOCIATION TUNISIENNE DES FEMMES DEMOCRATES, ENQUETE SUR LES CONDITIONS DE TRAVAIL DES FEMMES EN MILIEU RURAL 25-30 (Sept. 2014).

Habiba Mizoumi, National Secretary General for Dentists & Nurses for the UGTT, has also felt that gender equality must be approached holistically and has worked within her role to weave health and other welfare services into economic development proposals. “You can’t rid society of gender based violence and expand rights for women without improving the economy and a woman’s ability to participate within it. So we have to think about all of these aims at once.”³⁴³ She says the key to UGTT’s strength has been its vast network that allows even those at the national level to interact with laborers in remote areas at the “bottom rung” of Tunisia’s economy. “I work with midwives, nurses, and other wage laborers in hospitals across the country. It is eye opening to hear their concerns, hear about their working conditions, and identify what their interests are.”

Nevertheless, the approach to infusing gender initiatives within economic development is not systematic. As noted by Hammi, the government has not tackled gender as a cross-sector issue, but rather as a separate item to be dealt with after more pressing issues have been addressed.³⁴⁴

This fear that gender equality and security takes second place to other issues that are considered more pressing is concerning and haunts many communities in post conflict and transitional justice. However, unless gender equality is treated as an imperative to democracy building and the rule of law, security cannot be sustained.

E. The Need for Accelerated Civil Society Engagement

Women are often mobilized during revolutions and nationalist struggles, but afterwards they are re-marginalized. Common themes emerge from research into women’s participation in revolutionary struggles: men may be reluctant to embrace women’s participation in the struggle, but do so in order to reach the desired and common goal.³⁴⁵ The re-emergence of male prerogative follows the achievement of the goal and any attempt to deal with women’s subordination is viewed as a distraction from the struggle, and revolutionary rhetoric fails to translate into post-conflict policy changes.³⁴⁶ However, women who participated in revolutionary struggles often develop a political awareness that changes the construction of the political community.

Women who feel marginalized by the transitional process have turned to civil society activism. Efforts in Tunisia seem to focus on increasing youth voter turnout in the next elections, pushing for horizontal parity layered on top of vertical parity to increase women political representation, and passing laws against violence against women.

343. Mizoumi, *supra* note 159.

344. Hammi, *supra* note 146.

345. Sita Ronchod-Nilsson, *Gender Politics and Gender Backlash in Zimbabwe*, 4(4) *POL. & GENDER* 642, 643-44 (2008) (referencing a number of scholars who have looked at this phenomenon in particular contexts).

346. *Id.*

F. Building Institutions

The promise of the Tunisian Constitution can only be attained through institutional design. For example, in Scotland, the Standing Orders of the Parliament mandate that all bills are accompanied by a statement of their potential impact on equal opportunities, including gender equality.³⁴⁷ Similarly, Section 187 of the South African Constitution called for the setting up of a Commission for Gender Equality and its role is to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.³⁴⁸

Tunisia's transition has largely centered on its Law on Establishing and Organizing Transitional Justice, passed during the last days of the Ennahda government on December 24, 2013. One of its most critical provisions allows for criminal accountability for past human rights violations.³⁴⁹ Chambers in the civil court system will have the jurisdiction to adjudicate past violations and abuses by military and security forces. The law also includes provisions for victim reparation,³⁵⁰ institutional reform, vetting of civil servants,³⁵¹ and national reconciliation.³⁵²

The Truth Commission was intended to be one of the primary mechanisms established under the new law to dismantle the old regime and pave the way for transition. Its task is to uncover past abuses committed from independence in July 1955 to 2013. It is composed of a 15-member panel of human rights activists, representatives of opposition associations under the Ben Ali regime, and independent jurists.³⁵³ The powers of the commission are broad, including the ability to subpoena witnesses, access state archives, summon public hearings, provide protections for testifiers, and even reopen past cases, though some challenge this as unconstitutional.³⁵⁴ Finally, the commission can refer gross violations to specialized chambers, which have yet to be formed.³⁵⁵ The

347. Standing Order of the Scottish Parliament, R. 9.3 (Scot.), <http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>.

348. S. AFR. CONST., 1996 §187.

349. *Organic Law on Establishing and Organizing Transitional Justice*, Republic of Tunisia, Ministry of Human Rights and Transitional Justice, art. 42, <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>

350. *Id.* at arts. 1, 11, 12, 43.

351. *Id.* at arts. 40, 43.

352. *Id.* at art. 43.

353. Rim El Gantri, *Tunisia in Transition*, INT. CTR. TRANSITIONAL JUST., at 3 (Sep. 2015), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Tunisia-TJLaw-2015.pdf>

354. Carlotta Gall, *Torture Claims in Tunisia Await Truth Commission*, N.Y. TIMES, May 19, 2015, <http://www.nytimes.com/2015/05/20/world/africa/torture-claims-in-tunisia-await-truth-commission.html>.

355. Law No. 2013-53 of 2013 (Organic Law on Establishing and Organizing Transitional Justice), 24 Dec. 2013, Art. 8 (Tunisia) <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> (or also <https://www.ilo.org/dyn/natlex/docs/SERIAL/95319/112171/F-313159060/TUN-95319.pdf>). *But see* Louise Bonhour, *Truth and Dignity Commission Opening Ceremony Tomorrow*, TUNISIALIVE (Dec. 9, 2014), <http://www.tunisia-live.net/2014/12/09/truth-and-dignity-commission-opening-ceremony->

deadline was last set for the end of 2015.³⁵⁶ The law mandates that judges for such chambers cannot have “participated in trials of a political nature,” but it does not specify further.³⁵⁷

The commission’s formation and validity, however, have been subject to strict scrutiny. Individuals who participated in the Ben Ali regime and continue to hold positions in government expressed concern that they would be unfairly targeted. Many critics who later formed part of the Nidaa Tounes coalition pushed to amend the commission rules and replace its members. “There was a lot of drama between Essebsi and the commission’s president Sihem Ben Sedrine. He accused her of conspiring with Marzouki [the former president], being too radical, too driven by her own vendettas, and on and on,”³⁵⁸ commented one journalist following the commission’s developments. Others question her ability to guide the commission with adequate insight, given her prolonged absence outside of Tunisia prior to 2011.³⁵⁹ There is some acknowledgment that the media in Tunisia has been particularly hostile towards the Commission, fueling further public skepticism.³⁶⁰ Juan E. Mendez, UN Special Rapporteur on Torture expressed his concerns in 2014 and called for a need for “impartial, thorough investigations,” noting that “[t]orture and ill treatment continues to take place in Tunisia” and that in spite of this reality he remained hopeful that the commission would bring “access to justice and redress for victims.”³⁶¹

To smooth over tensions, on May 25, 2015 the Minister of Justice released a statement on the state’s ongoing efforts in the realm of transitional justice, including its commitment to bring expert judges on transitional justice into the process and to create spaces for civil society groups to access information and give feedback on judiciary reform and the dignity and rehabilitation fund.³⁶²

Closed-door testimonies began in May 2015, with public hearings following in June. Since hearings began, over 20,000 victims have come forward as testament of the state’s systematic use of sexual violence to silence women members of the opposition.³⁶³ Although the details of these hearings is

tomorrow/.

356. *Tunisia*, INT’L COMM. ON MISSING PERSONS, <http://www.icmp.int/the-missing/where-are-the-missing/tunisia/> (last visited Feb. 6, 2017).

357. Organic Law, *supra* note 355, art. 8.

358. Interview with journalist at Upholding Gendered Peace at a Time of War Conference, in Beirut, Leb. (June 10, 2015).

359. *Id.*

³⁶⁰ Carlotta Gall, *Silenced for Decades, ‘Victims of Despotism’ Air Torture Claims in Tunisia*, N.Y. TIMES, Nov. 18, 2016, <https://www.nytimes.com/2016/11/19/world/africa/silenced-for-decades-victims-of-despotism-air-torture-claims-in-tunisia.html>.

361. United Nations Human Rights, Office of the High Commissioner for Human Rights, *Tunisia: More than Political Will is Needed to Eradicate Torture*, OHCHR (June 6, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14671&LangID=E>.

362. Tawfiq al-Masoudi, *Tunis- During an academic symposium attended by the Ministry of Justice: Transitional Justice is . . . in Danger*, AL-CHOUROUK (May 25, 2015), <http://bit.ly/1TFtFHO>.

363. Hind Ahmen Zaki, *Tunisia Uncovered a History of State Sexual Violence. Can it do*

beyond the scope of this Article, the establishment of the commission and its work, though politically polarizing, logistically incoherent, and as of yet incomplete, has been noted as a “rare opportunity to push forward new rights claims for Tunisian women that move beyond the secular/Islamic division.”³⁶⁴

CONCLUSION

The historic exclusion of women from official peace processes and constitutional reform processes brings into question the validity of the model upon which constitutional processes rest. A review of fourteen peace negotiations since 1992 shows that less than 8 percent of the negotiating teams were women and less than 3 percent of the signatories were women. It is then not surprising that “of the 585 peace agreements signed since 1990, only 92 mention women.”³⁶⁵

Tunisia’s constitutional process provided the terrain for the coalescence of women as a critical presence. It was a moving, diverse, and electrifying terrain upon which women gathered across political divides to build common cause. The constitution-making process provided a landscape for women to move their concerns from the margin to the center of the constitutional debates and to articulate a visionary and detailed agenda for action. The official constitution has laid the groundwork for future work, but much more must be done to ensure that women’s rights that exist in theory come to exist in reality.

What the Tunisian constitution-drafting project shows is that women’s participation in constitution-making is critical to ensuring women’s rights and priorities are included in a nationwide dialogue. The very legitimacy of a constitution hinges on whether women are engaged in the creation, adoption and implementation of their constitutions. Nevertheless, we should resist characterizing the nature of women’s participation in constitution-making uniformly. Women were present on both sides of the debate. Perhaps their greatest contribution was in ensuring that everyone’s voice was heard and one narrative did not wholly drown out the other.

Similarly, international actors can aid constitution-making processes by protecting and promoting processes that are both democratic and transparent. International women’s groups can also provide needed resources and technical support. Of course, while transnational groups are helpful in building transnational coalitions, they in no way stand as a proxy to national and local civil society groups. National and local NGOs should lead efforts to galvanize existing women’s groups and form broad-based coalitions. Transnational groups

Anything?, WASH. POST, Apr. 11, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/11/tunisia-uncovered-a-history-of-state-sexual-violence-can-it-do-anything/?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2AMideast%20Brief.

364. *Id.*

365. Tony Lavers, *Aggression, Intervention and Powerful States: Missed Lessons from Feminist Methodologies on Peace and Security Issues*, 5 AMSTERDAM L.F. 122, 134 (2013).

should only step in as second-fiddle supporters who can further assist or facilitate such grassroots efforts. This will be important to note with the growing number of local participants in Tunisia's women's rights discourse and the emergence of transnational solidarity links.

Meaningful participation of women in the Constitution drafting in Tunisia involved two singular aspects: (1) women in the constituent assembly and (2) an active and organized coalition of women's groups. Although women in the constituent assembly symbolized the state's commitment to gender equality, the mere appointment of women to the body was insufficient. The most vital aspect in this project was an effective coalition of women's groups. The open forums are an educational opportunity for the entire country and they allowed for debate and discussion on issues that were considered outside the public realm. As founding mothers of a landmark constitution, the involvement of women energized and empowered women like never before and had significant influence on raising constitutive and transformative aspects of constitution drafting. However, if the process is to be truly transformative, women must continue to participate beyond the initial promulgation of the constitution.

Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir

Saher Valiani*

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INTRODUCTION

From the outset of the twenty-first century, over 300,000 civilians have died and 3 million have been displaced in Darfur, Sudan, at the hands of the Sudanese government.¹ Under President Omar Hassan Ahmad al-Bashir's supervision, the Janjaweed militia and the government of Sudan carefully orchestrated a scheme for political dominance against insurgent forces in Darfur, under the guise of racial conflict between the nation's Arab and African populations.² Pre-Trial Chamber I of the International Criminal Court (ICC)

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1. *Sudan Backgrounder*, UNITED TO END GENOCIDE, <http://endgenocide.org/conflict-areas/sudan-backgrounder/> (last visited Nov. 4, 2016).

2. *Prosecutor v. Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a

issued a warrant of arrest for Bashir on March 4, 2009 charging him as an indirect perpetrator or indirect co-perpetrator of two counts of war crimes and five counts of crimes against humanity.³ The ICC issued a second warrant of arrest for Bashir for three counts of genocide on July 12, 2010 after Prosecutor Luis Moreno-Ocampo's successful appeal.⁴ Despite the ICC's recognition of his culpability, Bashir has evaded arrest and remained at large in 2016.⁵

Controversy surrounded Moreno-Ocampo's insistence on adding the label of genocide to the situation in Darfur, which was contrary to the International Commission of Inquiry on Darfur's (ICID) findings.⁶ While clear evidence of widespread, violent acts against civilian populations supported the war crimes and crimes against humanity allegations against Bashir, the majority within Pre-Trial Chamber I initially felt that the Fur, Masalit, and Zaghawa populations did not share any distinctive features for which they were being targeted with genocidal intent.⁷ The majority also questioned why the prosecutor chose not to bring charges of genocide in his earlier cases against Ahmed Harun, Darfur's State Minister for Humanitarian Affairs, and Ali Kushayb, a military commander, for the same situation.⁸ Upon appeal, however, Pre-Trial Chamber I issued the second warrant finding reasonable grounds to try Bashir for genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.⁹

Despite a second arrest warrant alleging Bashir's liability for three counts of genocide, the ICC has been unable to detain Bashir; its efforts frustrated by a

Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 148 (Mar. 4, 2009), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-3> [hereinafter Decision on Warrant of Arrest].

3. Prosecutor v. Bashir, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 7–8 (Mar. 4, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> [hereinafter Warrant of Arrest]. Judge Anita Ušacka partly dissented and would have issued an arrest warrant only on the basis of indirect perpetration. See Prosecutor v. Bashir, ICC-02/05-01/09-3, Separate and Partly Dissenting Opinion of Judge Anita Ušacka on Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 105 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [hereinafter Partly Dissenting Opinion].

4. Prosecutor v. Bashir, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-95> [hereinafter Second Warrant of Arrest].

5. Meetings Coverage, Security Council, International Criminal Court's Chief Prosecutor, Briefing Security Council, Criticizes Failure to Address Sudan's 'Persistent Failure' on Darfur, U.N. Meetings Coverage SC/12393 (June 9, 2016), <http://www.un.org/press/en/2016/sc12393.doc.htm> [hereinafter Meetings Coverage].

6. See Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶ 640 (Jan. 25, 2005), https://www.un.org/news/dh/sudan/com_inq_darfur.pdf [hereinafter ICID Report].

7. See Decision on Warrant of Arrest, *supra* note 2, ¶ 136 (stating that the majority found "no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups" due to their shared racial features and religion).

8. ICC judges were divided over genocide charges against Sudan president, SUDAN TRIB. (Mar. 4, 2009), http://www.sudantribune.com/spip.php?page=imprimable&id_article=30385.

9. Second Warrant of Arrest, *supra* note 4, at 8.

lack of action by the United Nations Security Council (UNSC). Though the UNSC launched an investigation through the creation of the ICID and ultimately referred the situation to the ICC, two notable UNSC permanent member states—China and the United States—abstained from the vote, instead expressing a desire for the matter to be handled under the sovereignty of Sudan’s own government.¹⁰ Furthermore, the UNSC has not stepped in with enforcement actions such as economic sanctions or travel bans, likely pressured by the mounting tension the arrest warrant has caused between the ICC and the African Union (AU), which feels the matter should be handled internally.¹¹ Though U.S. Secretary of State Colin Powell declared the situation in Darfur a genocide in 2004,¹² the ICC continues to experience a widespread lack of support for enforcing the arrest warrants against Bashir, primarily from the UNSC.¹³

A successful arrest depends on the cooperation of ICC member states in apprehending the subject of the warrant.¹⁴ In addition to Sudan’s unwillingness to recognize the authority of the ICC as a non-member state, several member states have refused to cooperate despite their affirmation of the Rome Statute—perhaps out of loyalty to the AU—and have allowed Bashir to travel freely in and out of their borders.¹⁵ Though the AU suggests that an internal resolution to the situation would bring greater peace and stability to the region, the continued reign of Bashir in the Republic of Sudan sends the message that impunity exists for African heads of state.

The severity of the crimes Bashir committed begs the question: why is the UNSC not taking further action to detain Bashir? The Bashir case holds significant implications for defining both the charge of genocide under the ICC and the ICC’s continuing relationship with the AU, as Bashir’s warrant for arrest marks the Court’s first for genocide and the first for a sitting head of state.¹⁶

10. See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <http://www.un.org/press/en/2005/sc8351.doc.htm> [hereinafter Darfur Press Release]. China and the United States constitute two of five permanent, veto-wielding members of the Security Council, both of which suggested that the situation should be handled internally under Sudan’s own sovereignty. Brazil and Algeria also abstained from the UNSC referral. *Id.*

11. See Assembly of the African Union, 13th Sess., July 1-3, 2009, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/13(XIII) [hereinafter Meeting of African State Parties].

12. Rebecca Hamilton, *Inside Colin Powell’s Decision to Declare Genocide in Darfur*, ATLANTIC (Aug. 17, 2011), <http://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/>.

13. See Meetings Coverage *supra* note 5.

14. See Meeting of African State Parties, *supra* note 11.

15. See Prosecutor v. Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶ 20 (Apr. 9, 2014), <https://www.icc-cpi.int/pages/record.aspx?uri=1759849> (stating that Bashir traveled freely to the Democratic Republic of Congo, Chad, Djibouti, Kenya, and Nigeria in conflict with their duties as state parties to the ICC) [hereinafter Decision on Cooperation].

16. See Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court’s Limitations*, N.Y. TIMES, June 15, 2015, <http://www.nytimes.com/2015/06/16/world/africa/sudan->

This essay will examine the history of the conflict in Darfur, the international community's involvement in bringing criminal charges against Bashir, and the implications of the Darfur conflict on the international charge of genocide, in conjunction with the prevailing difficulties the ICC has faced in capturing Bashir.

I.

BACKGROUND ON THE SITUATION IN DARFUR

A. *History of Conflict*

Though the war in Darfur began in 2003, the region has experienced marginalization since 1916 when British forces first integrated Darfur into Sudan.¹⁷ Sudan gained independence from Britain in 1956, yet civil war waged between the northern and southern regions of Sudan for decades afterward, as the "Arab" north and its political regime in Khartoum attempted to assimilate the "African" south and control its resources.¹⁸ In the west, Darfur faced similar sentiments as the south years later under the regime of Omar al-Bashir, who led a military coup in 1989 and became President of Sudan in 1993.¹⁹ Economic disparity, compounded with mistreatment in Darfur under Bashir's regime, further inflamed regional differences.²⁰ In 2003, the tensions culminated in the Sudan Liberation Movement/Army and the Justice and Equality Movement coordinating an attack on the El Fasher airport as part of a rebel movement against the Sudanese government.²¹ The attack spurred the government to carry out a counter-insurgency campaign through the Sudan People's Armed Forces and the Janjaweed militia, along with other state bodies including the Sudanese Police Forces and the Humanitarian Aid Commission.²² Witnessing the violence unfolding, the President of Chad attempted to mediate the conflict, resulting in the Humanitarian Ceasefire Agreement on April 8, 2004 between the Sudan Liberation Movement/Army, Justice and Equality Movement, and the Sudanese

[bashir-international-criminal-court.html](#); see also *Sudan: ICC Warrant for Al-Bashir on Genocide*, HUMAN RIGHTS WATCH (July 13, 2010), <https://www.hrw.org/news/2010/07/13/sudan-icc-warrant-al-bashir-genocide> (stating that Bashir's arrest warrant marks the ICC's first for genocide).

17. See DALE C. TATUM, *GENOCIDE AT THE DAWN OF THE 21ST CENTURY: RWANDA, BOSNIA, KOSOVO, AND DARFUR* 139–145 (2010) (describing how the British colonial administration enforced cultural divides, perceiving certain indigenous populations as "Arab," synonymous with advanced and civilized, and others as "African," who were despised).

18. See *id.* at 143.

19. *Id.* at 145; see also M.W. DALY, *DARFUR'S SORROW: THE FORGOTTEN HISTORY OF A HUMANITARIAN DISASTER* 247–49, 261–62 (2d ed. 2010) (explaining that the marginalization of Darfur and its tribes continued under Bashir, who in 1994 divided Darfur into three states, making the Fur tribe minorities in each state, then in 1995 supported a reform altering the majority of the West Darfur "emirs," or electoral college members, from Masalits to non-Masalits. This reform provided non-Masalit tribes more opportunities to raid and exert power over Masalit land).

20. See DALY, *supra* note 19, at 280–81.

21. *Id.*

22. See Decision on Warrant of Arrest, *supra* note 2, ¶¶ 209, 214.

government.²³ However, armed conflict continued despite the agreement, resulting in further intervention on an international scale.²⁴

The calculated attacks on civilians carried out by the Janjaweed and the Sudanese government amounted to far more than a counter-insurgency campaign, entering the territory of war crimes, crimes against humanity, and even genocide.²⁵ Under Bashir's direction, the Janjaweed bombed, pillaged, and destroyed villages consisting of Fur, Masalit, and Zaghawa tribe members due to their association with the Sudan Liberation Movement/Army and Justice and Equality Movement.²⁶ The militia not only acted to eliminate the means of survival of the targeted groups, but also to "kill the will, the spirit, and life itself" through the coordination of mass rape, among other abuses.²⁷ Of those who survived, millions of Darfuris have been internally displaced to camps or neighboring countries.²⁸ Bashir supervised and encouraged these human rights violations, propagating the nonexistent differences between historically homogenous ethnic groups in order to control those who opposed the Sudanese government.²⁹

B. International Intervention

1. The ICC and the UNSC

To create the ICC, 120 member states endorsed the Rome Statute in 1998, granting the ICC the authority to prosecute the most serious crimes of international concern.³⁰ These most serious offenses consist of four core crimes: 1) the crime of genocide; 2) crimes against humanity; 3) war crimes; and 4) the

23. U.S. INST. PEACE, HUMANITARIAN CEASE FIRE AGREEMENT ON THE CONFLICT IN DARFUR (Apr. 8, 2004), http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sudan_cesefire_04082004.pdf.

24. See S.C. Res. 1564, ¶ 1 (Sept. 18, 2004) (citing that all parties committed ceasefire violations, evidenced by Janjaweed attacks in August 2004).

25. Statement from Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, 2 (July 14, 2008), <https://www.icc-cpi.int/NR/rdonlyres/A2BA9996-67C3-4A5F-9AD2-B20A7FD2D176/277757/ICCOTPST20080714ENG.pdf> [hereinafter Statement on Application for Arrest Warrant].

26. *Id.* at 2.

27. *Id.* at 4.

28. *Id.* at 3.

29. *Id.* at 2.

30. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force 1 July 2002). After the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the United Nations held a diplomatic conference to better address the prosecution of egregious international crimes through a permanent tribunal; see generally DAVID SCHEFFER, ALL THE MISSING SOULS 168 (2012) (describing the global conditions preceding the formation of the ICC).

crime of aggression.³¹ The ICC has jurisdiction when crimes are committed in a member state or by a national of a member state, provided the member state is not already prosecuting the matter.³² Additionally, non-member states may fall under the jurisdiction of the ICC via UNSC referral.³³ Article 13 of the Rome Statute establishes that conflicts may be referred to the ICC when such referral is made by the state in which the crime is committed, by the UNSC under Chapter VII of the Charter of the United Nations, or by the ICC prosecutor's self-initiated investigation.³⁴ Referrals from the UNSC, made possible by an agreement of cooperation between the UN and the ICC,³⁵ must be voted on by member states in accordance with Chapter VII of the UN Charter after the UNSC assesses the matter's threat to international peace.³⁶

Before making a referral for the conflict in Darfur, the UNSC created the International Commission of Inquiry on Darfur (ICID) to examine allegations of human rights abuses in Sudan.³⁷ Through an extensive independent investigation,³⁸ the ICID determined that the Sudanese government and the Janjaweed violated international humanitarian law in an internal armed conflict using systematic and widespread attacks that most likely amounted to crimes against humanity and war crimes.³⁹ Furthermore, in evaluating the jurisdictional requirements under Article 17 of the Rome Statute, the ICID determined that the Sudanese government had no measures in place to address the conflict, thus creating leeway for ICC jurisdiction.⁴⁰ Following the report, the UNSC adopted Resolution 1593 to refer the situation on Darfur to the ICC prosecutor.⁴¹ The Resolution was approved in 2005 with the support of eleven members of the

31. See Rome Statute, *supra* note 30, at art. 5. Though included in the Rome Statute, the crime of aggression will not fall under the ICC's jurisdiction until member states further define and set conditions on the crime, no sooner than January 1, 2017. See *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., <http://www.iccnw.org/?mod=aggression> (last visited Nov. 4, 2016).

32. See Rome Statute, *supra* note 30, at arts. 12, 17 (defining jurisdictional limitations of the Court).

33. *Id.*

34. *Id.* at arts. 1–16. Articles 14 through 16 of the Rome Statute further elaborate the requirements under which each type of referral may be made.

35. Relationship Agreement between the United Nations and the International Criminal Court, art. 17, U.N. Doc. A/58/874 (entered into force Oct. 4, 2004) [hereinafter U.N. ICC Agreement].

36. U.N. Charter art. 39.

37. S.C. Res. 1564, ¶ 12 (Sept. 18, 2004) (requesting the Secretary-General create an international commission of inquiry on the human rights violations in Darfur).

38. See ICID Report, *supra* note 6, ¶¶ 21–25 (detailing the commission's several on-site visits, interviews conducted, and reports analyzed, which spanned over 20,000 pages).

39. *Id.* ¶¶ 630–34 (referencing the devastation Darfuris faced as the Sudanese government tortured civilians, conducting mass killings, mass rape, and forced displacement among numerous inhumane acts calculated to disable all groups not sympathetic to the government).

40. *Id.* at 6 (“The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.”).

41. Darfur Press Release, *supra* note 10.

UNSC.⁴² Four UNSC members abstained from the vote, most notably permanent members China and the United States, objecting to the imposition of ICC jurisdiction over a state not party to the Rome Statute.⁴³

2. *The Decision to Issue Arrest Warrants*

Once the UNSC referral was made, Prosecutor Moreno-Ocampo conducted his own independent investigation in order to decide what charges to bring, if any, and against whom.⁴⁴ Upon review of the ICID report, Moreno-Ocampo first sought to prosecute the Minister for Humanitarian Affairs, Ahmad Harun, and Janjaweed Commander Ali Kushayb for their alleged involvement in several counts of crimes against humanity and war crimes.⁴⁵ For the ICC to issue an arrest warrant at the request of the prosecutor, the arrest must be necessary and there must be reasonable grounds to believe criminal responsibility exists for the commission of a crime under the jurisdiction of the Court.⁴⁶ In the Harun and Kushayb cases, the independent reports of ICID and the Office of the Prosecutor successfully demonstrated reasonable grounds to believe in the existence of crimes against humanity and war crimes.⁴⁷

With regard to President Bashir, Prosecutor Moreno-Ocampo found reasonable grounds to allege Bashir's responsibility for the following crimes:

42. *Id.*

43. *Id.*

44. See Office of the Prosecutor, Int'l Crim. Ct, ICC-02/05, Public Redacted Version of the Prosecutor's Application under Article 58 (July 14, 2008), http://www.genocidewatch.org/images/Sudan_08_07_14_Public_Redacted_Version_of_the_Prosecutor_s_Application_under_Article_58.pdf.

45. See Prosecutor v. Harun, ICC-02/05-01/07, Case Information Sheet (Mar. 25, 2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/HarunKushaybEng.pdf> (stating that warrants of arrest for both occurred on April 27, 2007).

46. Decision on Warrant of Arrest, *supra* note 2, ¶ 25. Specifically, the Pre-Trial Chamber must be satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - i. To ensure the person's appearance at trial,
 - ii. To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - iii. Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court which arises out of the same circumstances.

See Rome Statute, *supra* note 30, at art. 58.

47. See ICID Report, *supra* note 6, at 4; see also Prosecutor v. Harun, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 6 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2007_02902.PDF (indicting Harun for crimes against humanity and war crimes); Prosecutor v. Kushayb, ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 6 (Apr. 27, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02907.PDF (indicting Kushayb for crimes against humanity and war crimes).

1. for genocide under Article 6 (a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
2. for crimes against humanity,⁴⁸ including acts of (a) murder, (b) extermination, (d) [*sic*] forcible transfer of the population, (f) torture and (g) rapes; and
3. for war crimes for intentionally directing attacks against the civilian population and pillaging.⁴⁹

Pre-Trial Chamber I, consisting of Presiding Judge Akua Kuenyehia, Judge Anita Ušacka, and Judge Sylvia Steiner, agreed with Moreno-Ocampo on each of the counts for crimes against humanity and war crimes and accordingly issued a warrant of arrest for Bashir.⁵⁰ Before addressing the Court's reluctance in endorsing the genocide charges against Bashir in the first arrest warrant, a brief overview of the other crimes is provided below.

a. War Crimes

Under the allegations of war crimes, the prosecutor asserted that the government of Sudan unlawfully attacked villages inhabited by Fur, Masalit, and Zaghawa populations through its complete control of the Sudan People's Armed Forces, the Janjaweed, the Sudanese Police Force, the National Intelligence and Security Service, and the Humanitarian Aid Commission of Sudan.⁵¹ As the situation involved an armed conflict not of international character, the charge fell under 2(e) of Article 8 of the Rome Statute and was analyzed accordingly.⁵²

To issue a warrant of arrest for war crimes, the Court had to find that the violence: 1) reached a degree of intensity so as to be defined as a war crime; and 2) was performed under the command of an organized armed group that exercised control over territory used to sustain military operations.⁵³ Under this framework, the Court recognized an organized armed conflict between the Sudan Liberation Movement/Army, Justice and Equality Movement, and the government of Sudan through the Janjaweed.⁵⁴ The Court accepted the

48. Defined by Article 7 of the Rome Statute. *See* Rome Statute, *supra* note 30, at art. 7.

49. Statement on Application for Arrest Warrant, *supra* note 25, at 2. The specific components of war crimes alleged under Article 8 of the Rome Statute were 2(e)(i), intentionally directing attacks against a civilian population and 2(e)(v), pillaging a town or place. *See* Decision on Warrant of Arrest, *supra* note 2, ¶ 55.

50. Decision on Warrant of Arrest, *supra* note 2, at 92.

51. *Id.* ¶¶ 55–56.

52. Rome Statute, *supra* note 30, at art. 8(2)(e).

53. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 57–60 (examining the analysis of the ICTY Appeals Chamber for armed conflict “not of an international character” and distinguishing a need for territorial control not stated there in order to carry out “sustained military operations”).

54. *Id.* ¶ 70.

prosecutor's charge of intentional attacks against unarmed civilian populations pursuant to Article 8 (2)(e)(i) of the Rome Statute, finding that between March 2003 and July 2008, Bashir "directed hundreds of attacks" against villages populated with Fur, Zaghawa, and Masalit civilians.⁵⁵ Further, the Court found a reasonable basis supporting the prosecutor's charge of pillaging under Article 8 (2)(e)(v), as part of the Sudanese government's counter-insurgency campaign included seizing attacked land for themselves.⁵⁶

b. Crimes Against Humanity

Applying the definition of crimes against humanity as laid out in Article 7(1) of the Rome Statute, the Court's analysis first focused on whether there were reasonable grounds to believe that the Sudanese government, under the direction of Bashir, knowingly performed widespread, systematic attacks against a civilian population.⁵⁷ Noting that attacks against civilian populations in Darfur occurred consistently over a five-year span and followed a distinctive pattern, in regard to both the targets chosen—Fur, Masalit, and Zaghawa villages—as well as in the coordination of attacks between the Janjaweed and other state military forces, the Court found reasonable grounds to believe that the attacks were systemic.⁵⁸

After finding sufficient evidence to meet the basic framework for all crimes against humanity, the Court examined the specific charges of murder, extermination, forcible transfer of the population, torture, and rape.⁵⁹ With thousands of Darfuris killed and millions displaced, the Court found reasonable grounds to suspect that murder and forcible transfer of the population had occurred.⁶⁰ Ample evidence supported the charges of torture and rape, as Sudanese governmental forces attacked not only targeted villages, but also the camps of those internally displaced, raping women who entered and left the camps to perform daily chores.⁶¹ In determining whether or not extermination

55. *Id.* ¶ 72 (recounting several instances of attacks on civilian populations spanning the five-year range).

56. *Id.* ¶ 77 (stating that the Sudanese government systematically pillaged towns after attacking and seizing them).

57. *See id.* ¶¶ 80–81 (stating that "widespread" and "systematic" are evaluated because these characteristics require acts to be continuous, large-scale and organized rather than isolated). The Court additionally analyzed under Article 7(2)(a) whether the attacks were made in furtherance of a State or organizational policy, to reemphasize the continuity and scale requirements of the crime. *Id.* ¶ 82.

58. Decision on Warrant of Arrest, *supra* note 2, ¶ 85. When attacking a targeted village, attackers circled the target in an orderly fashion prior to the attack and always arrived through the same mechanism (horseback for the Janjaweed, motor vehicles for the Sudanese Armed Forces), evincing organization and knowledge behind the attacks. *Id.*

59. *Id.* ¶¶ 38, 109.

60. *Id.* ¶¶ 94, 98 (stating that the counter-insurgency campaign knowingly murdered civilians associated with opposing parties, additionally displacing up to 2.7 million persons through forcible transfer via coordinated attacks).

61. *See id.* ¶¶ 102–07.

may have occurred, the Chamber looked to the Rome Statute's Article 6 Elements of Crimes and the interpretations used within the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) which require that the killings occur on a mass scale to members of a civilian population.⁶² Given that over 1,000 civilians were killed in one attack alone on March 9, 2004 in the town of Kailek, the Court was persuaded that reasonable grounds existed to believe that the Sudanese government committed acts of extermination.⁶³

c. Genocide

With regard to the allegation of genocide, the majority in Pre-Trial Chamber I disagreed with the arguments the prosecutor set forth, finding that reasonable grounds did not exist to support the belief that Bashir had committed genocide.⁶⁴ Looking to Article 6 of the Rome Statute, the Chamber analyzed whether any of the following acts occurred to constitute genocide:

- (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;
- (e) Forcibly transferring children of the group to another group⁶⁵

Additionally, the Court adopted the existing conventions under Article 6's Elements of Crime provision stating that in order to constitute genocide: 1) the victims must belong to a targeted group; 2) the killings, harm, or conditions that occur must manifest a pattern against that group, which in itself could lead to the group's destruction; and 3) the perpetrator's actions must occur with the intent to destroy the targeted group, in whole or in part.⁶⁶

One dilemma that the ICID faced when considering the charge of genocide in its initial investigation was the seeming homogeneity between the targeted African groups and the government-supported Arab groups.⁶⁷ Governing forces were primarily responsible for placing the two groups at odds for decades without regard to characteristic differences, thereby decreasing the likelihood that particular groups were being targeted with genocidal intent.⁶⁸ Moreover, the Chamber focused its attention on the elaboration provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention), stating that victims must have been targeted on the basis

62. *See id.* ¶ 96.

63. *Id.* ¶ 97.

64. *Id.* ¶¶ 204–06.

65. Rome Statute, *supra* note 30, at art. 6.

66. Decision on Warrant of Arrest, *supra* note 2, ¶ 113. The Elements of Crimes provided these further definitions to Article 6, creating three ways to demonstrate the existence of genocide under statute. *Id.*

67. *See* ICID Report, *supra* note 6, at 4.

68. *See id.*

of “positive” characteristics rather than a lack thereof.⁶⁹ Like the ICID, the majority emphasized that the allegedly targeted groups seemed to share a Sudanese nationality and the religion of Islam, but ultimately acknowledged that membership within the three tribal groups, Masalit, Zaghawa, and Fur, did create some affirmative characteristics through customary practices and shared languages.⁷⁰

However, when considering the question of whether it was possible that the government of Sudan committed genocide, the majority held that all other plausible inferences from the evidence must first be eliminated before affirming the possibility of genocide.⁷¹ The Chamber applied a contextual element requirement of a genocidal policy or plan in order to meet the charge, citing the Elements of Crimes and the prosecutor’s application.⁷² Additionally, the Chamber required that the genocidal policy present a “concrete and real” threat to destroy a group in whole or in part, rather than a latent threat alone.⁷³ The majority further examined the International Court of Justice, which instructs that genocide requires an intent to destroy rather than to deport or displace.⁷⁴ Consequently, the majority found that the significant occurrence of forcible transfer in Darfur established that genocide was only one of several reasonable

69. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 134–35 (describing positive characteristics as “national, ethnic, racial or religious”); *see also*, Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 1021 U.N.T.S. 278, <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> (defining the crime of genocide) [hereinafter 1948 Genocide Convention].

70. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 136–37.

71. *Id.* ¶ 154. The majority, holding to this heightened evidentiary standard, felt the Sudanese government may have possessed a persecutory rather than a genocidal intent. It distinguished between:

- i. the *dolus specialis*/specific intent required for the crime of genocide (genocidal intent consisting of the intent to destroy in whole or in part a national, ethnic, racial or religious group); and
- ii. the *dolus specialis*/specific intent required for the crime against humanity of persecution (persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, against the members of a group, by reason of the identity of the group).

Id. ¶ 141.

72. *Id.* ¶¶ 122–23 (citing the “pattern of similar conduct” inquiry provided for in the Elements of Crimes).

73. *Id.* ¶ 124. The majority felt that the 1948 Genocide Convention, read without a contextual element, recognized genocide upon the targeted killing of a single individual regardless of a threat to the greater group. The contextual element instead requires a more imminent threat to the existence of the group. *Id.* ¶¶ 119–20, 124.

74. *Id.* ¶ 140; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 190 (Feb. 26) (elaborating on the strict intent requirement for genocide).

inferences that could be drawn from the evidence, and accordingly declined to issue a warrant for the charge of genocide.⁷⁵

Judge Ušacka dissented in part from the majority, finding in favor of the charges of genocide raised by Prosecutor Moreno-Ocampo.⁷⁶ The partial dissent largely focused on the lower evidentiary threshold required for an arrest warrant proceeding compared to the threshold required for a judgment,⁷⁷ arguing that genocidal intent need not be the only reasonable explanation in order to file an arrest warrant for genocide.⁷⁸ Judge Ušacka opined that the evidence showed reasonable grounds to believe that the Sudanese government unitarily targeted the Fur, Masalit, and Zhagawa groups on the basis of their tribal membership,⁷⁹ and, as such, the military groups Bashir controlled possessed the necessary genocidal intent to clear the quantum of proof required to issue an arrest warrant.⁸⁰

Moreno-Ocampo subsequently appealed the majority's decision, echoing Judge Ušacka's dissent in arguing that the majority erroneously applied a higher evidentiary threshold to the genocide charge than the required "reasonable grounds to believe" standard.⁸¹ Moreno-Ocampo emphasized that detailed evidence strongly supported the proposition that Bashir possessed a genocidal intent extending beyond a counter-insurgency movement against the Darfuri tribes, which the prosecutor believed needed addressing.⁸²

One year following the appeal, the Pre-Trial Chamber applied the lower evidentiary threshold for an arrest warrant and granted a second warrant of arrest for Omar al-Bashir, finding that the attacks by the Sudanese government's forces on civilians in Darfur reasonably evinced a policy of genocidal intent.⁸³ The second warrant of arrest did not replace the first; rather it added the original three charges of genocide requested by Moreno-Ocampo, making Bashir the first person wanted for genocide at the ICC.⁸⁴

As of 2016, the government of Sudan continues to refuse to cooperate with the ICC, and Bashir, Ahmad Harun, and Ali Kushayb all remain at large and

75. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 158–59.

76. Partly Dissenting Opinion, *supra* note 3, ¶ 105.

77. *Id.* ¶ 8.

78. *Id.* ¶ 38.

79. *Id.* ¶ 25.

80. *Id.* ¶ 38 (detailing the accounts of witnesses recounting Bashir's statements to "leave no survivors," and reasoning that harmless civilians rather than rebel forces were targeted, going beyond the scope of balancing the power of insurgent forces).

81. See Prosecutor v. Bashir, ICC-02/05-01/09-25, Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ¶ 2 (July 6, 2009), <https://www.icc-cpi.int/pages/record.aspx?uri=706618>.

82. *Id.* ¶¶ 17–18.

83. Second Warrant of Arrest, *supra* note 4, at 8–9.

84. *Id.*; Sudan: ICC Warrant for Al-Bashir on Genocide, *supra* note 16.

unprosecuted.⁸⁵ Though the travel whereabouts of Bashir are being strictly monitored by the ICC and reported to the UNSC upon the failure of member states to apprehend him, a network of support through the AU is aiding Bashir's avoidance of justice and maintenance of power in Sudan.⁸⁶

II.

ANALYSIS

A. *The Significance of Bashir's Prosecution on the Development of Genocide in the ICC*

The 1948 Genocide Convention set out to define the crime of genocide in response to the atrocities of the Holocaust in World War II in order to prosecute such crimes and prevent them from occurring again in the future.⁸⁷ Interestingly, the 1948 Genocide Convention sought to prevent even the use of the political crime exemption to extradition, indicating the member states' eagerness to obtain and prosecute those who commit genocide.⁸⁸ Unfortunately, such safeguards have not improved the ability to apprehend persons reasonably suspected of genocide by the ICC, namely Omar al-Bashir.

Prior to the enactment of the Rome Statute, the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) incorporated the same definition of genocide into their statutes as the definition established in Article II of the 1948 Genocide Convention.⁸⁹ Though the 1948 definition of genocide was affirmed for contemporary use through its inclusion in the Rome Statute, the charge of genocide has been used infrequently in the international justice system.⁹⁰ International courts have applied heightened thresholds in assessing the charge, beyond those written into the statute.⁹¹ By accepting a lower evidentiary standard for inferring genocide in the second arrest warrant of Bashir, the ICC stepped away from the practice of international courts

85. See generally Office of the Prosecutor, Int'l Crim. Ct., Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593, ¶ 2 (Dec. 5, 2015), https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf (stating that Bashir remains at large, though the ICC maintains the upmost interest in detaining Bashir and calling on the support of member states to fulfill their duties to the ICC as well).

86. *Id.*

87. See 1948 Genocide Convention, *supra* note 69. The Genocide Convention took place after the General Assembly of the United Nations declared genocide a crime under international law in UN Resolution 96(I) in 1946. *Id.*

88. See *id.*

89. Decision on Warrant of Arrest, *supra* note 2, ¶ 118. In assessing the charges of genocide in the Darfur situation, the Pre-Trial Chamber assessed Article 4 of the ICTY and Article 2 of the ICTR statutes, finding their definitions the same as that created by the 1948 Genocide Convention.

90. See Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 29 (2007).

91. *Id.* (explaining that while Raphael Lemkin's definition of genocide in the 1948 Convention was quite broad, "the mainstream tradition of genocide scholarship . . . has sought a narrower definition, emphasizing both eliminationist ideology and totalitarian control").

narrowing the application of genocide to mass atrocities throughout the world⁹² and closer to the broader application and thresholds that the 1948 Genocide Convention likely desired for their deterrent effects.

In evaluating whether genocide reasonably could have been said to have occurred in Darfur, the Pre-Trial Chamber used the definition of genocide from the 1948 Genocide Convention, incorporated into Article 6 of the Rome Statute.⁹³ The Chamber relied on this definition, as had the ICTY and the ICTR before the implementation of the Rome Statute; however, the Chamber initially included an inquiry into whether or not there existed a contextual element to genocide not read into previous statutes.⁹⁴ It ultimately decided to include such an element and required the presence of a genocidal policy or intent, despite the element's propensity to restrict a finding of genocide.⁹⁵

The greater impact of the Chamber's interpretation of genocide in the first arrest warrant, however, lay in the majority's refusal to consider the crimes committed in Darfur as having a genocidal intent when alternative inferences were available, following the steps of the ICTY in its strict interpretation of genocide.⁹⁶ Though rhetoric attempting to limit the use of genocide for situations of complete ethnic cleansing may closely follow the intention of the 1948 Genocide Convention, Judge Ušacka in her partial dissent penned a persuasive opinion arguing against such a limitation. Not only were Fur, Masalit, and Zhagawa tribal members killed, raped, and forcibly displaced on the basis of their tribal affiliations, but their entire means of survival were cut off by the efforts of Bashir, the Janjaweed, and the Sudanese government forces.⁹⁷ Judge Ušacka reasoned that the threshold for intent entered the territory of genocidal when harmless civilians were targeted, first in their homes, then in internal displacement camps, going beyond persecution and instead heading toward eradication.⁹⁸ In rejecting the standard that all other inferences must be eliminated in order to find genocide and employing a broader application of

92. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 108 AM. J. INT'L L. 334, 344–57 (2013) (describing that fewer than 1% of cases charged in the ICTY and the ICC constituted genocide charges, while the ICTR experienced more genocide charges at 40%).

93. See Rome Statute, *supra* note 30; see also Decision on Warrant of Arrest, *supra* note 2, ¶ 112 (stating the Court's use of the Article 6 definition of genocide).

94. See Decision on Warrant of Arrest, *supra* note 2, ¶¶ 117–21. The 1948 Genocide Convention does not contain such an element, nor did the ICTY or ICTR apply a contextual element. Instead the statutes rely on an analysis of whether there exists an intent to destroy a targeted group, in whole or in part. *Id.*

95. *Id.*

96. See *id.* ¶¶ 142–43 (explaining the ICTY's position that genocide requires a heightened *mens rea* compared to other crimes against humanity, and that discriminatory intent alone does not amount to the "extreme and most inhuman form of persecution" of genocide) (quoting Prosecutor v. Jelisić, Case No. IT-95-10-T, Trial Judgment, ¶¶ 62, 66 (Int'l Crim. Tribunal for the Former Yugoslavia Dec. 14, 1999)).

97. *Id.* at 98–100 (taking into account Darfur's inhabitable terrain and the government's efforts in destroying all sources of food and water for those attacked).

98. See *id.*

genocide where an intent of ethnic cleansing is present, Judge Ušacka laid the foundation later followed by the Chamber in its second arrest warrant.⁹⁹

The ICTR provides a significantly more robust study for prosecuting the crime of genocide at the trial level, with *Prosecutor v. Akayesu* constituting the first genocide case to be tried in any of the international courts.¹⁰⁰ The court examined Jean-Paul Akayesu, the mayor of the city of Taba, as an organizational head, like Bashir, in the commission of atrocity crimes in Rwanda.¹⁰¹ In addition to finding Akayesu liable for genocide after he encouraged the murder of Tutsis in his community, the ICTR ushered in a broader acceptance for satisfying the charge of genocide by including rape as evidence of genocide, recognizing the crime's degrading, torturous nature as well as its use in controlling women and destroying communities.¹⁰² Unlike in Darfur, the situation in Rwanda indisputably constituted genocide, as the Hutu-controlled forces demonstrated clear intent to indiscriminately eliminate Rwanda's Tutsi population.¹⁰³ As such, the ICTR was not required to perform a deeper inquiry into other evidentiary inferences.¹⁰⁴ While fewer deaths and more displacements have occurred in Darfur, the facts of the situation are not as dissimilar as some scholars suggest,¹⁰⁵ as both situations occurred internally and included a diverse range of atrocity crimes calculated to destroy and torture the targeted populations. Mass rape is one of several mechanisms being implemented by the Sudanese government to control and destroy the tribal groups in Darfur, and the recognition of Bashir's crimes as genocide would uphold the broader application hinted at by the ICTR.

While the Pre-Trial Chamber's second arrest warrant for Omar al-Bashir could lead to a new opportunity to determine the standards for the crime of genocide on the international level, Bashir has yet to be apprehended and prosecuted. In order to shape the scope of genocide convictions in the ICC, the UNSC must further align with the ICC's goals and make greater efforts to enforce the mandates of the ICC.

99. *Id.*; see also Second Warrant of Arrest, *supra* note 4 (using less stringent scrutiny in determining genocide for an arrest warrant).

100. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>; *Historic judgment [sic] finds Akayesu guilty of genocide*, U.N. MECHANISM FOR INT'L CRIM. TRIBUNALS (Sept. 2, 1998), <http://unictr.unmict.org/en/news/historic-judgement-finds-akayesu-guilty-genocide>. As the first indictment of genocide since the 1948 Genocide Convention, *Akayesu* sent a clear signal that the 1948 Genocide Convention would be upheld after a long period of dormancy; see TATUM, *supra* note 17, at 47.

101. *When Rape Becomes Genocide*, N.Y. TIMES, Sept. 5, 1998, <http://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html>.

102. *Akayesu*, *supra* note 100, ¶¶ 597–98.

103. See *id.* ¶¶ 125–26.

104. *Id.*

105. See de Waal, *supra* note 90, at 29.

B. Obstacles to ICC Enforcement

The African Union (AU) presents a challenge to the ICC's goal of obtaining Omar al-Bashir, as many of its member states have taken the position that the situation in Darfur should be handled internally.¹⁰⁶ While tensions between the AU and ICC have arisen in part because African leaders feel targeted by the many cases brought forth involving the continent,¹⁰⁷ the root of the conflict began when the African Peace and Security Architecture and UNSC requested that Bashir's referral to the ICC be deferred for twelve months pursuant to Article 16 of the Rome Statute, in hopes of resolving the matter internally.¹⁰⁸ The UNSC denied the request, triggering the AU's lack of cooperation with both arrest warrants, despite the membership status of many African states.¹⁰⁹

As to the allegations that the ICC is targeting Africa, the Office of the Prosecutor has decried such a notion, asserting that the Court's "choice of cases is based on the relative gravity of abuses, and that crimes committed in Africa are among the world's most serious."¹¹⁰ Former UN Secretary-General Kofi Annan has reiterated that the ICC is a court of last resort, and that it is a culture of impunity within Africa that is being targeted rather than the continent itself.¹¹¹ Further, many of the allegations of animus come from the African leaders who have found themselves under the Court's scrutiny;¹¹² African victims, however, stand to gain from the Court's interest in enforcing justice and protecting them from further harm.¹¹³ Far from holding water, the accusations of ICC bias merely serve as a political tactic employed by certain African leaders in an attempt to diminish the power of the ICC and distract from their own crimes.

106. See Meeting of African State Parties, *supra* note 11, ¶¶ 2–4.

107. See GERHARD WERLE ET AL., AFRICA AND THE INTERNATIONAL CRIMINAL COURT 182–84 (2014) (discussing sentiment that the cases chosen are not based on “universal demands on justice” but rather on the concerns of financial supporters of the ICC, to the disadvantage of the African continent).

108. See Meeting of African State Parties, *supra* note 11, ¶¶ 2–4.

109. WERLE ET AL., *supra* note 107, at 182–184 (stating that the African Union came to question the authority of the Rome Statute in overriding the immunity of state officials of non-member states, creating diverging opinion on the ICC in the AU).

110. CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 26 (2011) (quoting a CRS interview with an Office of the Prosecutor official on Sept. 3, 2008).

111. *Id.* at 28.

112. See Abdul Tejan-Cole, *Is Africa on Trial?*, B.B.C. (Mar. 27, 2012), <http://www.bbc.com/news/world-africa-17513065> (stating that Rwandan President Paul Kagame has “dismissed the Court saying it was made for Africans and poor countries” while African Union Chair Jean Ping accused the ICC of unfairly targeting African leaders).

113. See *id.* Tejan-Cole, the former prosecutor at the Special Court for Sierra Leone, notes that the victims of mass atrocities in the Democratic Republic of Congo celebrated the verdict against Lubanga, and dismisses allegations of bias, explaining that the Court only intervenes where a nation is unwilling or unable to prosecute.

Bashir has taken advantage of the tensions that seemingly exist between the ICC and the AU by exerting his power as the sitting head of Sudan and traveling to member states without repercussion.¹¹⁴ Though several African states have acted contrary to their duties as parties to the Rome Statute, the ICC lacks a mechanism for enforcement and can implement few tangible repercussions against non-compliant member states.¹¹⁵ The ICC alerts the UNSC when a member state has acted in breach by playing host to Bashir, yet the UNSC has done little with its ability to impose sanctions.¹¹⁶ Despite the persistent efforts of the ICC, the UNSC has not acted to bring justice to African victims.¹¹⁷

This raises the question of whether the UNSC has a bias against Africa. The UNSC has acted in the past in situations that threatened international peace on the level of terrorism.¹¹⁸ In response to the 1988 Lockerbie bombing of Pan Am Flight 103, the UNSC imposed an air and arms embargo on Libya in 1992 in order to pressure the surrender of two Libyan suspects of the bombing.¹¹⁹ Similarly, the UNSC threatened sanctions and demanded Sudan extradite suspects in connection with an assassination attempt on Egyptian President Hosni Mubarak in 1995.¹²⁰ However, outside of instances of terrorism, the UNSC has been reluctant to act.¹²¹ In the Bashir proceedings, the UNSC has remained largely influenced by the politics of its permanent members, including the major abstentions of the United States and China in investigating the issue.¹²² China in particular has strong economic interests in Sudan through the sale of arms and purchase of oil during the Darfur conflict.¹²³ While the U.S.

114. See Decision on Cooperation, *supra* note 15, ¶ 20.

115. See U.N. ICC Agreement, *supra* note 35 (requiring that the ICC refer breaches to the UNSC on matters referred by the UNSC).

116. See Meetings Coverage, *supra* note 5.

117. *Id.*

118. See generally Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203 (2007) (describing the UNSC's role in counter-terrorism on behalf of the UN).

119. *Timeline: Libya Sanctions*, B.B.C. (Oct. 15, 2004), <http://news.bbc.co.uk/2/hi/africa/3336423.stm> (stating that sanctions remained in place until 2003 and were successful in pressuring Libya to ultimately surrender the suspects).

120. S.C. Res. 1044, ¶ 4 (Jan. 31, 1996); Press Release, Security Council, Security Council Demands Sudan Act to Extradite Suspects in Assassination Attempt of Egyptian President by 10 May, or Face Limited Sanctions, U.N. Press Release SC/6214 (Apr. 26, 1996).

121. See John Prendergast & David Sullivan, *IRRESOLUTION: The U.N. Security Council on Darfur*, ENOUGH PROJECT, (July 24, 2008), <http://www.enoughproject.org/publications/irresolution-un-security-council-darfur> (describing that subsidiary bodies within the UNSC, including sanctions committees, are made up of Council members, consequently requiring the political will of members to accomplish committee goals. Counter-terrorism, therefore, is acted upon, while "crimes against humanity often simply die in committee").

122. Darfur Press Release, *supra* note 10; see Prendergast & Sullivan, *supra* note 121 (discussing the interconnectivity between international politics and UNSC activity on the Darfur conflict).

123. See David H. Shinn, *China and the Conflict in Darfur*, 16 BROWN J. WORLD AFF. 85, 88–94 (2009) (outlining the historical relationship between China and Sudan and the former's economic involvement in the Darfur conflict).

does not share an underlying economic interest, the country abstained from the vote due to a fundamental objection to the ICC's jurisdiction over states not party to the Rome Statute.¹²⁴ These two abstentions likely aided the Sudanese government in remaining unchallenged while ignoring the ICC's wishes.¹²⁵ Though the UNSC ultimately investigated Darfur and may not be biased wholly against the issues facing Sudan and Africa, the UNSC is overly susceptible to the politics of its member states, undermining its global enforcement duties including the implementation of sanctions.¹²⁶ To gain further support from the UNSC, the ICC may need to appeal directly to China and the United States to support its efforts to achieve international peace, or risk Bashir remaining at large for years to come.

Though the prospect of capturing Bashir seems bleak without greater support from the UNSC, the ICC does still hold some power. More countries are requesting that Bashir not come to events to which he was invited under the threat of arrest.¹²⁷ The weakening of his authority resembles that of other world leaders who unsuccessfully attempted to evade international arrest warrants. For example, in the ICTY's case against former Serbian President Slobodan Milošević, his termination as a head of state in 2000 contributed to his eventual capture;¹²⁸ soon after an arrest warrant was issued in 1999, internal pressures mounted with citizens calling for his removal and he was ultimately arrested by Serbian law enforcement in 2001 despite promises of protection by his successor.¹²⁹ Bosnian Serb leader Radovan Karadžić also evaded the custody of the ICTY for twelve years, but as the European Union applied pressure in order to shift Serbia's political climate, he too was left vulnerable and ultimately arrested.¹³⁰ Similarly, former Liberian President Charles Taylor evaded the custody of the Special Court of Sierra Leone for three years by exiling himself to Nigeria after internal pressures forced him to step down. As Taylor's authority diminished from afar, Nigeria and Liberia faced increasing external pressure from the UN and the United States, leading to his ultimate arrest and

124. *Id.*

125. *Id.*

126. See Prendergast & Sullivan, *supra* note 121, at 6–7.

127. Julius Barigaba, *We'll Get Bashir, Kony Soon, Says ICC*, E. AFRICAN (June 14, 2010), <http://www.theeastafrican.co.ke/news/-/2558/937546/-/pdvbwoz/-/index.html>.

128. Tracey Gurd, *Arresting the "Big Fish": Lessons on State Cooperation for the International Criminal Court*, in *THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW* 27, 28–29 (Aegis Trust ed., 2009) http://reliefweb.int/sites/reliefweb.int/files/resources/603D8E48589F6DD1C12577E70039FB54-Aegis_Jan2009.pdf.

129. *Id.* at 29. When Milosevic refused to step down as head of state, citizens held mass protests until he conceded defeat. Six months later, Milosevic was arrested in Belgrade after a 36-hour standoff where Serbian law enforcement surrounded his villa.

130. *Id.* at 29–30 (suggesting that the conditions for Karadzic's arrest were influenced in part by the EU conditioning Serbia's membership to the Union on his surrender and full cooperation with the ITCY).

surrender for trial at the Hague.¹³¹ These cases illustrate the concerted internal and external pressures required to enforce contentious international arrest warrants.

Bashir's arrest warrants and resulting inability to travel may function to diminish his authority and pressure Sudan into appointing a new head of state, creating the environment necessary for his surrender. However, the external pressure needed to remove Bashir remains elusive. Bashir's freedom still implicates a greater conflict between the sovereignty of the AU and the ICC, affording him extra support throughout the continent along with the support of Sudan's international allies, including China and Russia.¹³² To apply external pressures, the UNSC must act in conjunction with the ICC to ensure the compliance of ICC member states throughout Africa and the world, whether through negotiations or sanctions. The ICC only stands to gain by pushing for the enforcement of Bashir's arrest warrants, as Bashir's eventual capture and trial may build enough momentum to garner greater respect for the ICC and aid in its struggle to ensure justice for African victims.

CONCLUSION

The second arrest warrant of Omar al-Bashir presents an indispensable breakthrough in the international enforcement of genocide, with the potential to carry over to future genocide charges and indictments. On its own, the arrest warrant sends the message that the 1948 Genocide Convention must be upheld as written and the charge of genocide prosecuted in its every manifestation, including mass rape, ethnic cleansing, and displacement. The potential prosecution of Omar al-Bashir therefore has significant implications for defining the crime of genocide and its international enforcement.

Bashir's case also holds in balance the global perception of the ICC's power to enforce international law and counter irremovable African heads of state. Despite the ICC's best efforts to protest impunity for heads of state committing mass atrocities, Bashir remains President of Sudan with the support of the AU, among other key allies. Though the UNSC remains susceptible to the influence of global powers and politics due to its reliance on member states, the UNSC must act further to support the ICC in order to uphold its mandate to ensure international peace and security. By failing to apprehend Bashir through every available means, the UNSC undermines its duties to the ICC, instead following the agendas of its most powerful member states. Greater enforcement action by the UNSC is the best hope the ICC has in apprehending Bashir, bringing justice to Sudanese victims, and validating its status as a global force.

131. *Id.* at 30–31 (describing that similar conditionality standards as those employed against Serbia were placed on Nigeria to surrender Taylor, including pressure by the United States).

132. See DANIEL LARGE, LUKE PATEY & S. AFRICA INST. OF INT'L AFFAIRS, *RIDING THE SUDANESE STORM: CHINA, INDIA, RUSSIA, BRAZIL, AND THE TWO SUDANS* 5–18 (2014) (discussing Russia, India, Brazil, and China's relationship with Sudan after 2005, including the continued purchase of Sudanese oil and support of Sudan's sovereignty against the ICC).

International Law and Stability in Cyberspace

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Thank you to Saira for that kind introduction, and thank you to the Miller Institute, the Human Rights Center, and the Berkeley Center for Law and Technology for inviting me to give this talk. I am honored to be back at Boalt Hall. I've had the chance to spend a few days in Berkeley meeting with students and feeling nostalgic. I also spent some time at the beginning of my trip at the Stanford campus, where I was an undergraduate. Please do not hold that against me as you listen to my remarks! From my short time back, it is clear that this city and this law school remain as vibrant and socially engaged today as they were when I was a student here nearly 20 years ago.

This is a fitting place to discuss the topic I am here to speak about today—the importance of international law and stability in cyberspace—just across the Bay from Silicon Valley, home to many of the world's largest and most innovative information technology companies. The remarkable reach of the Internet and the ever-growing number of connections between computers and other networked devices are delivering significant economic, social, and political benefits to individuals and societies around the world. In addition, an increasing number of States and non-State actors are developing the operational capability and capacity to pursue their objectives through cyberspace. Unfortunately, a number of those actors are employing their capabilities to conduct malicious cyber activities that cause effects in other States' territories. Significant cyber incidents—including many that are reportedly State-sponsored—frequently make headline news.

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In light of this, it is reasonable to ask: could we someday reach a tipping point where the risks of connectivity outweigh the benefits we reap from cyberspace? And how can we prevent cyberspace from becoming a source of instability that could lead to inter-State conflict?

I don't think we will reach such a tipping point, but how we maintain cyber stability in order to preserve the continued benefits of connectivity remains a critical question. And international law, I would submit, is an essential element of the answer.

Existing principles of international law form a cornerstone of the United States' strategic framework of international cyber stability during peacetime and during armed conflict. The U.S. strategic framework is designed to achieve and maintain a stable cyberspace environment where all States and individuals are able to realize its benefits fully, where there are advantages to cooperating against common threats and avoiding conflict, and where there is little incentive for States to engage in disruptive behavior or to attack one another.

There are three pillars to the U.S. strategic framework, each of which can help to ensure stability in cyberspace by reducing the risks of misperception and escalation. The first is global affirmation of the applicability of existing international law to State activity in cyberspace in both peacetime and during armed conflict. The second is the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace during peacetime, which is of course the predominant context in which States interact. And the third is the development and implementation of practical confidence-building measures to facilitate inter-State cooperation on cyber-related matters. I'll address two of these pillars—international law and voluntary, non-binding norms—in greater detail today.

I. INTERNATIONAL LAW

In September 2012, my predecessor, Harold Koh, delivered remarks on "International Law in Cyberspace" at U.S. Cyber Command's Legal Conference. It says a lot about where we were four years ago that the first two questions Koh addressed in his speech were as fundamental as: "Do established principles of international law apply to cyberspace?" and "Is cyberspace a law-free zone, where anything goes?" (So as not to leave you hanging, the answers to those questions are an emphatic "yes" and "no" respectively!)

We have made significant progress since then. One prominent forum in which these issues are discussed is the United Nations (UN) Group of Governmental Experts (GGE) that deals with cyber issues in the context of international security. The GGE is a body established by the UN Secretary-General with a mandate from the UN General Assembly to study, among other things, how international law applies to States' cyber activities, with a view to promoting common understandings. In 2013, the 15-State GGE recognized the applicability of existing international law to States' cyber activities. Just last

year, the subsequent UN GGE on the same topic, expanded to include 20 States, built on the 2013 report and took an additional step by recognizing the applicability in cyberspace of the inherent right of self-defense as recognized in Article 51 of the UN Charter. The 2015 GGE report also recognized the applicability of the law of armed conflict's fundamental principles of humanity, necessity, proportionality, and distinction to the conduct of hostilities in and through cyberspace. With other recent bilateral and multilateral statements, including that of the leaders of the Group of Twenty (G20) States in 2015, we have seen an emerging consensus that existing international law applies to States' cyber activities.

Recognizing the applicability of existing international law as a general matter, however, is the easy part, at least for most like-minded nations. Identifying how that law applies to specific cyber activities is more challenging, and States rarely articulate their views on this subject publicly. The United States already has made some efforts in this area, including by setting forth views on the application of international law to cyber activities in Koh's 2012 speech and also in the U.S. submission to the 2014–15 UN GGE, both of which are publicly available in the *Digest of U.S. Practice in International Law*. The U.S. Department of Defense also has presented its views on aspects of this topic in its publicly available Law of War Manual. But more work remains to be done.

Increased transparency is important for a number of reasons. Customary international law, of course, develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Faced with a relative vacuum of public State practice and *opinio juris* concerning cyber activities, others have sought to fill the void with their views on how international law applies in this area. The most prominent and comprehensive of these efforts is the Tallinn Manual project. Although this is an initiative of the NATO Cooperative Cyber Defence Centre of Excellence, it is neither State-led nor an official NATO project. Instead, the project is a non-governmental effort by international lawyers who first set out to identify the international legal rules applicable to cyber warfare, which led to the publication of "Tallinn Manual 1.0" in 2013. The group is now examining the international legal framework that applies to cyber activities below the threshold of the use of force and outside of the context of armed conflict, which will result in the publication of a "Tallinn Manual 2.0" by the end of this year.

I commend the Tallinn Manual project team on what has clearly been a tremendous and thoughtful effort. The United States has unequivocally been in accord with the underlying premise of this project, which is that existing international law applies to State behavior in cyberspace. In this respect, the Tallinn Manuals will make a valuable contribution to underscoring and demonstrating this point across a number of bodies of international law, even if we do not necessarily agree with every aspect of the Manuals.

States must also address these challenging issues. Interpretations or applications of international law proposed by non-governmental groups may not

reflect the practice or legal views of many or most States. States' relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other's views on the applicable legal framework. In the context of a specific cyber incident, this uncertainty could give rise to misperceptions and miscalculations by States, potentially leading to escalation and, in the worst case, conflict.

To mitigate these risks, States should publicly state their views on how existing international law applies to State conduct in cyberspace to the greatest extent possible in international and domestic forums. Specific cyber incidents provide States with opportunities to do this, but it is equally important—and often easier—for States to articulate public views outside of the context of specific cyber operations or incidents. Stating such views publicly will help give rise to more settled expectations of State behavior and thereby contribute to greater predictability and stability in cyberspace. This is true for the question of what legal rules apply to cyber activity that may constitute a use of force, or that may take place in a situation of armed conflict. It is equally true regarding the question of what legal rules apply to cyber activities that fall below the threshold of the use of force and take place outside of the context of armed conflict.

Although many States, including the United States, generally believe that the existing international legal framework is sufficient to regulate State behavior in cyberspace, States likely have divergent views on specific issues. Further discussion, clarification, and cooperation on these issues remains necessary. The present task is for States to begin to make public their views on how existing international law applies.

In this spirit, and building on Harold Koh's remarks in 2012 and the United States' 2014 and 2016 submissions to the UN GGE, I would like to offer some additional U.S. views on how certain rules of international law apply to States' behavior in cyberspace, beginning first with cyber operations during armed conflict, and then turning to the identification of voluntary, non-binding norms applicable to State behavior during peacetime.

A. Cyber Operations in the Context of Armed Conflict

Turning to cyber operations in armed conflict, I would like to start with the U.S. military's cyber operations in the context of the ongoing armed conflict with the Islamic State of Iraq and the Levant (ISIL). As U.S. Defense Secretary Ashton Carter informed Congress in April 2016, U.S. Cyber Command has been asked "to take on the war against ISIL as essentially [its] first major combat operation [. . .] The objectives there are to interrupt ISIL command-and-control, interrupt its ability to move money around, interrupt its ability to tyrannize and control population[s], [and] interrupt its ability to recruit externally."

The U.S. military must comply with the United States' obligations under the law of armed conflict and other applicable international law when conducting cyber operations against ISIL, just as it does when conducting other types of military operations during armed conflict. To the extent that such cyber

operations constitute “attacks” under the law of armed conflict, the rules on conducting attacks must be applied to those cyber operations. For example, such operations must only be directed against military objectives, such as computers, other networked devices, or possibly specific data that, by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Such operations also must comport with the requirements of the principles of distinction and proportionality. Feasible precautions must be taken to reduce the risk of incidental harm to civilian infrastructure and users. In the cyber context, this requires parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users.

Not all cyber operations, however, rise to the level of an “attack” as a legal matter under the law of armed conflict. When determining whether a cyber activity constitutes an “attack” for purposes of the law of armed conflict, States should consider, among other things, whether a cyber activity results in kinetic or non-kinetic effects, and the nature and scope of those effects, as well as the nature of the connection, if any, between the cyber activity and the particular armed conflict in question.

Even if they do not rise to the level of an “attack” under the law of armed conflict, cyber operations during armed conflict must nonetheless be consistent with the principle of military necessity. For example, a cyber operation that would not constitute an “attack,” but would nonetheless seize or destroy enemy property, would have to be imperatively demanded by the necessities of war. Additionally, even if a cyber operation does not rise to the level of an “attack” or does not cause injury or damage that would need to be considered under the principle of proportionality in conducting attacks, that cyber operation still should comport with the general principles of the law of war.

Other international legal principles beyond the rules and principles of the law of armed conflict that I just discussed are also relevant to U.S. cyber operations undertaken during armed conflict. As then-Assistant to the President for Homeland Security and Counterterrorism John Brennan said in his September 2011 remarks at Harvard Law School, “[i]nternational legal principles, including respect for a State’s sovereignty [. . .], impose important constraints on our ability to act unilaterally [. . .] in foreign territories.” It is to this topic—the role played by State sovereignty in the legal analysis of cyber operations—that I’d like to turn now.

B. Sovereignty and Cyberspace

In his remarks in 2012, Harold Koh stated that “States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict.” I would like to build on that statement and offer a few thoughts about the relevance of sovereignty principles to States’ cyber activities.

As an initial matter, remote cyber operations involving computers or other networked devices located on another State's territory do not constitute a *per se* violation of international law. In other words, there is no absolute prohibition on such operations as a matter of international law. This is perhaps most clear where such activities in another State's territory have no effects or *de minimis* effects.

Most States, including the United States, engage in intelligence collection abroad. As President Obama said, the collection of intelligence overseas is "not unique to America." As the President has also affirmed, the United States, like other nations, has gathered intelligence throughout its history to ensure that national security and foreign policy decisionmakers have access to timely, accurate, and insightful information. Indeed, the President issued a directive in 2014 to clarify the principles that would be followed by the United States in undertaking the collection of signals intelligence abroad.

Such widespread and perhaps nearly universal practice by States of intelligence collection abroad indicates that there is no *per se* prohibition on such activities under customary international law. I would caution, however, that because "intelligence collection" is not a defined term, the absence of a *per se* prohibition on these activities does not settle the question of whether a specific intelligence collection activity might nonetheless violate a provision of international law.

Although certain activities—including cyber operations—may violate another State's domestic law, that is a separate question from whether such activities violate international law. The United States is deeply respectful of other States' sovereign authority to prescribe laws governing activities in their territory. Disrespecting another State's domestic laws can have serious legal and foreign policy consequences. As a legal matter, such an action could result in the criminal prosecution and punishment of a State's agents in the United States or abroad, for example, for offenses such as espionage or for violations of foreign analogs to provisions such as the U.S. Computer Fraud and Abuse Act. From a foreign policy perspective, one can look to the consequences that flow from disclosures related to such programs. But such domestic law and foreign policy issues do not resolve the independent question of whether the activity violates international law.

In certain circumstances, one State's non-consensual cyber operation in another State's territory *could* violate international law, even if it falls below the threshold of a use of force. This is a challenging area of the law that raises difficult questions. The very design of the Internet may lead to some encroachment on other sovereign jurisdictions. Precisely when a non-consensual cyber operation violates the sovereignty of another State is a question lawyers within the U.S. government continue to study carefully, and it is one that ultimately will be resolved through the practice and *opinio juris* of States.

Relatedly, consider the challenges we face in clarifying the international law prohibition on unlawful intervention. As articulated by the International

Court of Justice (ICJ) in its judgment on the merits in the *Nicaragua Case*, this rule of customary international law forbids States from engaging in coercive action that bears on a matter that each State is entitled, by the principle of State sovereignty, to decide freely, such as the choice of a political, economic, social, and cultural system. This is generally viewed as a relatively narrow rule of customary international law, but States' cyber activities could run afoul of this prohibition. For example, a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention. For increased transparency, States need to do more work to clarify how the international law on non-intervention applies to States' activities in cyberspace.

Some may ask why it matters where the international community draws these legal lines. Put starkly, why does it matter whether an activity violates international law? It matters, of course, because the community of nations has committed to abide by international law, including with respect to activities in cyberspace. International law enables States to work together to meet common goals, including the pursuit of stability in cyberspace. And international law sets binding standards of State behavior that not only induce compliance by States but also provide compliant States with a stronger basis for criticizing—and rallying others to respond to—States that violate those standards. As Harold Koh stated in 2012, “[i]f we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the actions we *do* take will earn enhanced legitimacy worldwide for their adherence to the rule of law.” Working to clarify how international law applies to States' activities in cyberspace serves those ends, as it does in so many other critical areas of State activity.

Before leaving the topic of sovereignty, I'd like to address one additional related issue involving a State's control over cyber infrastructure and activities within, rather than outside, its territory. In his 2012 speech, Koh observed that “[t]he physical infrastructure that supports the Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State.” However, he went on to emphasize that “[t]he exercise of jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations.”

I want to underscore this important point. Some States invoke the concept of State sovereignty as a justification for excessive regulation of online content, including censorship and access restrictions, often undertaken in the name of counterterrorism or “countering violent extremism.” And sometimes, States also deploy the concept of State sovereignty in an attempt to shield themselves from outside criticism.

So let me repeat what Koh made clear: Any regulation by a State of matters within its territory, including use of and access to the Internet, must comply with that State's applicable obligations under international human rights law.

There is no doubt that terrorist groups have become dangerously adept at using the Internet and other communications technologies to propagate their hateful messages, recruit adherents, and urge followers to commit violent acts. This is why all governments must work together to target online criminal activities—such as illicit money transfers, terrorist attack planning and coordination, criminal solicitation, and the provision of material support to terrorist groups. U.S. efforts to prevent the Internet from being used for terrorist purposes also focus on criminal activities that facilitate terrorism, such as financing and recruitment, not on restricting expressive content, even if that content is repugnant or inimical to our core values.

Such efforts must not be conflated with broader calls to restrict public access to or censor the Internet, or even—as some have suggested—to effectively shut down entire portions of the Web. Such measures would not advance our security, and they would be inconsistent with our values. The Internet must remain open to the free flow of information and ideas. Restricting the flow of ideas also inhibits spreading the values of understanding and mutual respect that offer one of the most powerful antidotes to the hateful and violent narratives propagated by terrorist groups.

That is why the United States holds the view that use of the Internet, including social media, in furtherance of terrorism and other criminal activity must be addressed through lawful means that respect each State's international obligations and commitments regarding human rights, including the freedom of expression, and that serve the objectives of the free flow of information and a free and open Internet. To be sure, the incitement of imminent terrorist violence may be restricted. However, certain censorship and content control, including blocking websites simply because they contain content that criticizes a leader, a government policy, or an ideology, or because the content espouses particular religious beliefs, violates international human rights law and must not be engaged in by States.

C. State Responsibility and the “Problem of Attribution” in Cyberspace

I have been talking thus far about States' activities and operations in cyberspace. But as many of you know, it is often difficult to detect who or what is responsible for a given cyber incident. This leads me to the frequently raised and much debated “problem of attribution” in cyberspace.

States and commentators often express concerns about the challenge of attribution in a *technical* sense—that is, the challenge of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State's determinations about a particular cyber incident. Others have raised issues related to *political* decisions about attribution—that is, considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn that act as unacceptable. These technical and policy discussions about attribution,

however, should be distinguished from the legal questions about attribution. In my present remarks, I will focus on the issue of attribution in the legal sense.

From a legal perspective, the customary international law of state responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise governmental authority are attributable to that State, if such organs, persons, or entities are acting in that capacity.

Additionally, cyber operations conducted by non-State actors are attributable to a State under the law of state responsibility when such actors engage in operations pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own.

Thus, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies. When there is information—whether obtained through technical means or all-source intelligence—that permits a cyber act engaged in by a non-State actor to be attributed legally to a State under one of the standards set forth in the law of state responsibility, the victim State has all of the rights and remedies against the responsible State allowed under international law.

The law of state responsibility does *not* set forth explicit burdens or standards of proof for making a determination about legal attribution. In this context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not—and cannot be—required. Instead, international law generally requires that States act reasonably under the circumstances when they gather information and draw conclusions based on that information.

I also want to note that, despite the suggestion by some States to the contrary, there is *no* international legal obligation to reveal evidence on which attribution is based prior to taking appropriate action. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But that is a policy choice—it is not compelled by international law.

D. Countermeasures and Other “Defensive” Measures

I want to turn now to the question of what options a victim State might have to respond to malicious cyber activity that falls below the threshold of an armed attack. As an initial matter, a State can always undertake unfriendly acts that are not inconsistent with any of its international obligations in order to influence the behavior of other States. Such acts—which are known as acts of retorsion—may include, for example, the imposition of sanctions or the declaration that a diplomat is *persona non grata*.

In certain circumstances, a State may take action that would otherwise violate international law in response to malicious cyber activity. One example is

the use of force in self-defense in response to an actual or imminent armed attack. Another example is that, in exceptional circumstances, a State may be able to avail itself of the plea of necessity, which, subject to certain conditions, might preclude the wrongfulness of an act if the act is the only way for the State to safeguard an essential interest against a grave and imminent peril.

In the time that remains, however, I would like to talk about a type of State response that has received a lot of attention in discussions about cyberspace: countermeasures. The customary international law doctrine of countermeasures permits a State that is the victim of an internationally wrongful act of another State to take otherwise unlawful measures against the responsible State in order to cause that State to comply with its international obligations, for example, the obligation to cease its internationally wrongful act. Therefore, as a threshold matter, the availability of countermeasures to address malicious cyber activity requires a prior internationally wrongful act that is attributable to another State. As with all countermeasures, this puts the responding State in the position of potentially being held responsible for violating international law if it turns out that there wasn't actually an internationally wrongful act that triggered the right to take countermeasures, or if the responding State made an inaccurate attribution determination. That is one reason why countermeasures should not be engaged in lightly.

Additionally, under the law of countermeasures, measures undertaken in response to an internationally wrongful act performed in or through cyberspace that is attributable to a State must be directed only at the State responsible for the wrongful act and must meet the principles of necessity and proportionality, including the requirements that a countermeasure must be designed to cause the State to comply with its international obligations—for example, the obligation to cease its internationally wrongful act—and must cease as soon as the offending State begins complying with the obligations in question.

The doctrine of countermeasures also generally requires the injured State to call upon the responsible State to comply with its international obligations before a countermeasure may be taken—in other words, the doctrine generally requires what I will call a “prior demand.” The sufficiency of a prior demand should be evaluated on a case-by-case basis in light of the particular circumstances of the situation at hand and the purpose of the requirement, which is to give the responsible State notice of the injured State's claim and an opportunity to respond.

I also should note that countermeasures taken in response to internationally wrongful cyber activities attributable to a State generally may take the form of cyber-based countermeasures or non-cyber-based countermeasures. That is a decision typically within the discretion of the responding State and will depend on the circumstances.

II.
VOLUNTARY, NON-BINDING NORMS OF RESPONSIBLE STATE BEHAVIOR IN
PEACETIME

In the remainder of my remarks, I'd like to discuss very briefly another element of the United States' strategic framework for international cyber stability: the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace that apply during peacetime.

Internationally, the United States has identified and promoted four such norms:

First, a State should not conduct or knowingly support cyber-enabled theft of intellectual property, trade secrets, or other confidential business information with the intent of providing competitive advantages to its companies or commercial sectors.

Second, a State should not conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide service to the public.

Third, a State should not conduct or knowingly support activity intended to prevent national computer security incident response teams (CSIRTs) from responding to cyber incidents. A State also should not use CSIRTs to enable online activity that is intended to do harm.

Fourth, a State should cooperate, in a manner consistent with its domestic and international obligations, with requests for assistance from other States in investigating cyber crimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory.

These four U.S.-promoted norms seek to address specific areas of risk that are of national and/or economic security concern to all States. Although voluntary and non-binding in nature, these norms can serve to define an international standard of behavior to be observed by responsible, like-minded States with the goal of preventing bad actors from engaging in malicious cyber activity. If observed, these measures—which can include measures of self-restraint—can contribute substantially to conflict prevention and stability. Over time, these norms can potentially provide common standards for responsible States to use to identify and respond to behavior that deviates from these norms. As more States commit to observing these norms, they will be increasingly willing to condemn the malicious activities of bad actors and to join together to ensure that there are consequences for those activities.

It is important, however, to distinguish clearly between international law, on the one hand, and voluntary, non-binding norms on the other. These four norms identified by the United States, or the other peacetime cyber norms recommended in the 2015 UN GGE report, fall squarely in the voluntary, non-binding category. These voluntary, non-binding norms set out standards of expected State behavior that may, in certain circumstances, overlap with standards of behavior that are required as a matter of international law. Such

norms are intended to supplement existing international law. They are designed to address certain cyber activities by States that occur outside of the context of armed conflict that are potentially destabilizing. That said, it is possible that if States begin to accept the standards set out in such non-binding norms as legally required and act in conformity with them, such norms could, over time, crystallize into binding customary international law. As a result, States should approach the process of identifying and committing to such non-binding norms with care.

In closing, I wanted to highlight a few points. First, cyberspace may be a relatively new frontier, but State behavior in cyberspace, as in other areas, remains embedded in an existing framework of law, including international law. Second, States have the primary responsibility for identifying how existing legal frameworks apply in cyberspace. Third, States have a responsibility to publicly articulate applicable standards. This is critical to enable an accurate understanding of international law, in the area of cyberspace and beyond. I hope that these remarks have furthered this goal of transparency, and highlighted the important role of international law, and international lawyers, in this important and dynamic area.

Thank you for bearing with me, and I would be happy to field a few questions.