

HUMAN RIGHTS BRIEF

ARTICLES

- Exploring Barriers to the Right to Inclusive Education in Rural Nepal**
DEV DATTA JOSHI 1
- Examination of the Effects of Deportation as a Result of Revocation of Status Upon the Rights to Non-Discrimination, Family Unity, and the Best Interests of the Child: An Empirical Case from Norway**
CECILIA M. BAILLIET 13
- Social Services and Mutual Aid in Times of COVID-19 and Beyond: A Brief Critique**
DANA NEACSU 28

STUDENT COLUMNS

- Trump-Era Terrorism Designated Sanctions Violate International Human Rights Norms Protecting Life, Health, and Security**
SHANNON JACKENTHAL 48
- The Chemical War on Drugs: Why a U.S.-Backed Program to Fumigate Coca Fields in Colombia Would Violate the Right to Health**
LILY BARON 52
- Until the United States Regulates Tech Exports, It Will Continue to Enable China's Surveillance of the Uyghurs**
ALEXANDRA HARIS 58
- Knowingly Benefitting: Blocking Relief for DRC Child Cobalt Miners**
AUSTIN CLEMENTS 63

HUMAN RIGHTS BRIEF

REGIONAL SYSTEMS

- | | |
|---|----|
| Protecting Privacy or Enabling Invasion?: Safeguards for Mass Surveillance in Europe
HANNAH FRIEDRICH | 68 |
| The Compatibility of Vagrancy Laws with Human Rights Instruments in Africa
FABIAN KOPP | 70 |
| The Politics of Freedom of Expression in Turkey
DANYA HAMAD | 72 |

Copyright © 2022 Human Rights Brief

Acknowledgements:

We would like to thank the Center for Human Rights & Humanitarian Law for their support, namely, acting director Melissa del Aguila and the Board of faculty co-directors.

We are also grateful to the American University Washington College of Law for providing a legal education that empowers us to champion what matters.

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

Visit Us:
Human Rights Brief
www.hrbrief.org

HUMAN RIGHTS BRIEF

VOLUME 25

NORA ELMUBARAK
MADISON BINGLE
Co-Editors-in-Chief

MAYA MARTIN TSUKAZAKI
Managing Editor

CHRIS BAUMOHL
Executive Editor

LEX HARIS & SYDNEY HELSEL
Senior Column Editors

HAILEY FERGUSON & EMMA OFFIAH
Senior Articles & Partnerships Editors

THEA CABRERA MONTEJO
Symposium & Education Editor

LEILA HAMOUIE
Regional Systems Editor

VANESA MARTÍNEZ-CHACÓN
Communications & Media Editor

SIDNEY LARSEN & ABIGAIL ROSENTHAL
Podcast Editors

Deputy Editors

LILY BARON
SABRINA DAVIS
LAUREN KELLY

AUSTIN CLEMENTS
ANGEL GARDNER
KARLA MANZANARES
ISABELLA ZINK

JOHNNA COFFIN
SHANNON JACKENTHAL
TYLER NOLLEY

Staff

ARIELLE ABOULAFIA
VALERIE COOK
DANYA HAMAD
GRACIE KETH
KATHERINE PRATTY
ANDREA RODRIGUEZ-BURCKHARDT
ANDRE TAYLOR

ANGELA ALTIERI
ALEXANDRA CURBELO
KAFUMU KALYALYA
MARNIE LEONARD
MEHRAZ RAHMAN
LAUREN SAXE
KENNETH WEI
KAILEY WILK

KATHLEEN BURNS
HANNAH FRIEDRICH
FABIAN KOPP
AMY LYONS
VICTORIA RAMASSINI
MADISON SHARP
DESTINY STATEN

✧ ✧ ✧

HUMAN RIGHTS BRIEF

NORA ELMUBARAK
MADISON BINGLE
Co-Editors-in-Chief

MAYA MARTIN TSUKAZAKI
Managing Editor

CHRIS BAUMOHL
Executive Editor

LEX HARIS
SYDNEY HELSEL
Senior Column Editors

HAILEY FERGUSON
EMMA OFFIAH
*Senior Articles &
Partnerships Editor*

THEA CABRERA MONTEJO
Symposium & Education Editor

LEILA HAMOUIE
Regional Systems Editor

VANESA MARTÍNEZ-CHACÓN
*Communications & Media
Editor*

SYDNEY LARSEN
ABIGAIL ROSENTHAL
Podcast Editors

Dear Reader:

As the world continues to navigate a global pandemic, we have observed human rights issues manifest and evolve in a variety of ways. Solutions to these issues must consider and integrate the complexity and diversity reflected in the people who experience them. This issue of the *Human Rights Brief* offers nuanced and critical analyses of the ways in which states perpetuate systematic human rights abuses through politics, judicial systems, and foreign policies. Through this issue, we seek to highlight enduring and emergent human rights issues, while exploring solutions to end cycles of violence, abuse, and deprivation of rights and to empower affected persons.

The issue begins with articles written by practitioners and professors who offer in-depth analysis of human rights situations relating to the education rights of persons with disabilities in Nepal, the rights of refugees in Nordic countries, and the state of social welfare in the United States in light of the ongoing global pandemic. Our student columns section features articles that explore, among other issues, how U.S. sanctions in Cuba violate international health rights and how a U.S.-backed fumigation program in Colombia violates people's right to a healthy environment and health. Further, we examine the United States' obligations related to technological exports affecting human rights abuses in China, and the gaps in domestic legal frameworks for corporate supply chain use of child labor in the Democratic Republic of the Congo.

In our regional human rights systems section, we expand our targeted coverage beyond the Americas to examine developments in the African and European human rights courts for the first time in our institutional history. This section provides a review of recent developments in the African Court on Human and Peoples' Rights regarding the treatment of states' vagrancy laws, and an overview of recent privacy and freedom of expression rights cases in the European Court of Human Rights.

We want to thank our dedicated staff of writers, editors, podcast producers, communications specialists, and symposium producers for their incredible work on this issue. This diverse group of students allows us to curate culturally competent and creative legal arguments that aim to reimagine human rights both locally and globally. Finally, as our reader, we want to thank you for your continued support in our quest as a publication to provide insightful commentary and explore new solutions to global human rights issues.

Sincerely,

Madison Bingle & Nora Elmubarak
Co-Editors-in-Chief
Human Rights Brief

* * *

EXPLORING BARRIERS TO THE RIGHT TO INCLUSIVE EDUCATION IN RURAL NEPAL

by Dev Datta Joshi*

INTRODUCTION

Inclusive education centers aim to ensure they meet students' diverse needs by providing them with access to quality education, including access to education for persons with disabilities in a responsive, inclusive, and supportive environment.¹ To foster inclusivity, their education programs must be in a common learning environment with support to diminish and remove barriers and obstacles that may lead to exclusion.²

While Nepal is a signatory to several international human rights instruments, including the Convention

on the Rights of Persons with Disabilities (CRPD), the national implementation process is very slow.³ In Nepal, education policymakers are not fully aware of the ideological support for an inclusive education system on a global scale.⁴ The result is that the government fails to ensure an inclusive education system that is available, accessible, appropriate, and of good quality for children with all types of disabilities.⁵

Nepal's 2015 Constitution enshrines education as a fundamental right to all citizens, including persons with disabilities.⁶ It also envisages free education up to grade twelve and free and compulsory education up to grade eight.⁷ The Act Relating to the Rights of Persons with Disabilities provides for free education up to higher education for persons with disabilities.⁸ The Free and Compulsory Education Act provides for the equal right to access quality education for all without discrimination on any grounds.⁹ However, the Nepalese government is unable to implement these legal policy provisions to enable children with disabilities to realize their right to high-quality, inclusive education.¹⁰ This situation shows how Nepal is violating laws enshrined in its Constitution that aim to ensure the right to education for children with disabilities.¹¹

* Dev Datta Joshi, Executive Director, Equip for Equality Nepal (EEN), Hubert H. Humphrey Fellow, American University 2018-19. Mr. Dev Datta Joshi is a leading expert in the area of disability rights, and has published extensively in the area. His particular areas of interest are inclusive education, legal capacity, access to justice, and de-institutionalization of persons with disabilities. He brings over 20 years of rich work experience on advancing disability rights in Nepal and internationally. As the executive director with Equip for Equality Nepal (EEN), he leads a dynamic team responsible for the development, implementation, and replication of innovative projects such as "Ensure Voting Rights of Persons with Disabilities" to promote the human rights of people with disabilities in Nepal.

¹ INCLUSIVE EDUC. CAN., *What Is Inclusive Education?*, <https://inclusiveeducation.ca/about/what-is-ie/> (last visited Nov. 15, 2021).

² *Id.*

³ Dev Datta Joshi, *Inclusive education: A Must for the Disabled*, HIMALAYAN TIMES (May 25, 2017), <https://thehimalayantimes.com/opinion/inclusive-education-must-disabled>.

⁴ Dev Datta Joshi, *Mindset needs to change*, KATHMANDU POST (Dec. 7, 2016), <https://kathmandupost.com/opinion/2016/12/07/mindset-needs-to-change>.

⁵ *Id.*

⁶ Shak Bahadur Budhathoki, *Creating an inclusive school*, RISING NEPAL (Nov. 20, 2021), <https://risingnepaldaily.com/opinion/creating-an-inclusive-school>.

⁷ *Id.*

⁸ The Act Relating to Rights of Persons with Disabilities (Act No. 25 of 2074/2017) (Nepal).

⁹ Budhathoki, *supra* note 6.

¹⁰ *Id.*

¹¹ Dev Datta Joshi, *Inclusive education for the blind: It is their right*, HIMALAYAN TIMES (July 15, 2021), <https://thehimalayantimes.com/opinion/inclusive-education-for-the-blind-it-is-their-right>.

The right to education is categorized under economic, social, and cultural rights.¹² This right is contained in numerous international and regional human rights conventions and treaties, and requires that states must develop national legislation and policies in line with international law.¹³ If a state can provide its people with fundamental human rights, such as the freedom of expression, equality before the law, and the right to work, the State must commit to providing the right to education.¹⁴ Field research that I conducted found that in remote rural Nepal, children with disabilities, especially girls with disabilities, are deprived of enjoying even a minimum of their human rights. Such cases have affected not only parents' commitment to allow their children with disabilities to attend school but also demonstrate a violation of the laws enshrined under the Nepalese Constitution.¹⁵

Through the analysis of my field research with school officials, students, and policymakers in Nepal, this paper demonstrates that Nepal is violating its obligations under Article 24 of the CRPD.¹⁶ Using desk-based analysis and field research methods, I examined the legal understanding of inclusive education and the major barriers to the implementation of inclusive education for children in Far-West Nepal, one of Nepal's poorest areas.¹⁷ During this research, I mainly focused on the

barriers facing children with disabilities, especially girls from marginalized communities, such as Dalits (members of the lowest caste, also known as "untouchable"),¹⁸ ethnic minorities, and indigenous people.

I. BACKGROUND

A. International Law and Regional Adoption

As a signatory to the CRPD, Nepal needs to develop a comprehensive understanding of the Acts, laws, and policies framed for children with disabilities.¹⁹ On December 13, 2006, the UN General Assembly adopted the CRPD and an associated optional protocol.²⁰ The formation of CRPD has been hailed as a landmark decision in the struggle to reframe the needs and concerns of persons with disabilities in terms of human rights.²¹ The Convention spells out the right to education for children with disabilities in international law in much greater detail than had since existed.²² Article 24 requires States to ensure that children with disabilities "are not excluded from the general education system on the basis of disability" and that they have access to "inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live."²³ Further, the Convention requires governments to provide reasonable accommodation and the "individual support required within the

¹² Fons Coomans, *Identifying Violations of the Right to Education*, CTR. FOR HUM. RTS., MAASTRICHT UNIVERSITY (2007), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Coomans_Identifying_Violations_Right_to_Education_2007.pdf

¹³ DIPENDRA PANT & POSH ADHIKARI, HUMAN RIGHTS EDUCATION IN NEPAL'S CURRICULA AND TEXTBOOKS (INCLUSION AND IMPLEMENTATION STATUS) 2 (2013).

¹⁴ *Id.*

¹⁵ Dev Datta Joshi, *Examining Barriers to Implementation of Inclusive Education for Children with Disabilities* (2014) (unpublished L.L.M. thesis, National University of Ireland, Galway) (on file with author).

¹⁶ G.A. Res. 61/106 art. 24, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007).

¹⁷ Desk-based research is a type of research that can be performed over a desk. In desk-based research, a researcher finds, collects, and reviews the publicly available data about the research topic.

¹⁸ Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NAT'L GEOGRAPHIC (June 2, 2003), <https://www.nationalgeographic.com/pages/article/indias-untouchables-face-violence-discrimination>.

¹⁹ Dev Datta Joshi, *Behind the Curve*, MYREPUBLICA (June 10, 2017), <https://myrepublica.nagariknetwork.com/news/behind-the-curve/>.

²⁰ Rosemary Kayess & Phillip French, *Out of Darkness into Light—Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 1 (2008).

²¹ *Id.*

²² Bronagh Byrne, *Hidden Contradictions and Conditionality: Conceptualizations of Inclusive Education in International Human Rights Law*, DISABILITY & SOC. 232–234 (2013).

²³ G.A. Res. 61/106 art. 24, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007).

general education system, to facilitate their education . . . consistent with the goal of full inclusion.”²⁴

Once a State becomes a signatory to an international legal instrument, it then has an obligation to comply and implement the instrument’s provisions within its jurisdiction.²⁵ The State should abide by the ratified international treaties as per the norms of international law and diplomacy, which holds that international treaties, once entered into, should be upheld by all the signatories.²⁶

Nepal is a State Party to several international human rights instruments including, but not limited to, the International Covenant on Civil and Political Rights (ICCPR),²⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁹ and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).³⁰ However, contrary to the obligations enshrined in the agreement, Nepal did not review its laws and policies before ratifying the CRPD. As a result, the ratification of the CRPD by Nepal’s government in 2010 has not brought any significant practical change in the daily life of children with disabilities, especially girls with disabilities in rural Nepal.³¹

²⁴ *Id.*

²⁵ PANT & ADHIKARI, *supra* note 13.

²⁶ *Id.*

²⁷ International Covenant on Civil and Political Rights, May 14, 1991, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

²⁸ International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 30, 1971, 660 U.N.T.S. 195, 212.

²⁹ International Covenant on Economic, Social and Cultural Rights, May 14, 1991, 993 U.N.T.S. 3.

³⁰ Convention on the Rights of Persons with Disabilities, Jan. 3, 2008, A/RES/61/106, Annex I.

³¹ Dev Datta Joshi, Panel Speaker at NUI Galway’s Centre for Disability Law and Policy Student Conference: Article 24 UN-CRPD is this a Brown v. Board of Education moment? (Feb. 21, 2014) (speaking as a jurisdiction expert on Inclusive Education as Enshrined in the UNCRPD Article 24 for Children with Disabilities in Nepal), <http://www.conference.ie/conferences/menu.asp?menu=1493&Conference=356>.

By advocating for inclusion, voting, and rights for persons with disabilities, such as by bringing lawsuits, I am working to empower Nepal’s over 600,000 persons with disabilities, and especially the rights of these persons living in rural areas. Through my research, I visited schools in Ireland, Canada, and the United States, where I shared my expertise and knowledge and spoke at length with teachers about how to ensure quality education for students with disabilities.³² These countries provide reasonable accommodations to students with disabilities, such as support systems, flexible curricula, extra exam time, and disability allowances.³³ As a result, students with disabilities can often lead fully independent lives, have meaningful careers, and become productive members of their communities.³⁴ Despite the limited resources in African and Latin American countries, little gap exists between an inclusive education policy and its practical implementation.³⁵ Nepal has a long way to go before it meets its obligations under the CRPD.³⁶

B. The Development of the Right to Education for Persons with Disabilities in International Human Rights Law

In 2003, disability rights lawyers won a lawsuit at Nepal’s Supreme Court that held that Nepal’s 90,000 children with disabilities have the right to free and inclusive education.³⁷ To make its decision, Nepal’s Supreme Court referred Constitution of Nepal 1990 Article 11—Right to Equality.³⁸ The Court

³² Tom Robertson & Dev Datta Joshi, ‘Effective Writing Plays a Vital Role in Changing Society,’ RECORD (Sep. 9, 2021), <https://www.recordnepal.com/dev-datta-joshi-effective-writing-plays-a-vital-role-in-changing-society>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Subedi v. Gov’t of Nepal, (2003) S.C.N. writ no. 3586 (Nepal).

³⁸ नेपालको संविधान २०४७ [The Constitution of Nepal] (1990), art. 11.

also referred to the Protection and Welfare of the Disabled Persons Act 1982.³⁹ In response to the case, Nepal's Supreme Court ordered the State to provide free inclusive education with reasonable accommodations to all children with disabilities.⁴⁰ Moreover, the judgment made provisions that would allow children with disabilities to receive disability identity cards.⁴¹ The verdict also made it mandatory for each school, public and private, all around the country to manage trained inclusive education teachers who would know how to teach students with disabilities.⁴² Before the Court's decision, Nepalese schools routinely denied children with disabilities admission into schools, thus, effectively violating their right to access education.⁴³ However, notwithstanding this important legal achievement, much still remains to be done for the effective implementation of the Court's ruling. For example, private schools still refuse to admit children with disabilities.⁴⁴

The right to education has a clear basis in international human rights law.⁴⁵ Article 26 of the Universal Declaration of Human Rights (UDHR) emphasizes inclusive education.⁴⁶ It states:

Everyone has the right to education . . . and that education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding,

tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace.⁴⁷

Education is a fundamental human right and it is foundational for persons to exercise this right to access their other rights, such as the right to vote.⁴⁸ Disability and civil rights law expert Michael Waterstone argues that the right to vote is very important for persons with disabilities because their interests are usually not represented sufficiently at the governmental level.⁴⁹ Education is a vital instrument that can ensure that society's marginalized can lift themselves out of poverty.⁵⁰ It is universally accepted that education contributes to the development of human personality and encourages the maturation of society at large.⁵¹ It plays a vital role in empowering women, safeguarding children from exploitation (either through hazardous labor or sexual exploitation), and promoting human rights and democracy.⁵² Increasingly, education is considered one of the best financial investments that a government can make.⁵³

The Convention on the Rights of the Child declares that all children have a right to receive an education without any discrimination.⁵⁴ Article 23 states that "disabled children should enjoy a full and decent life, in conditions while ensure dignity, promote self-reliance, and facilitate the child's active participation in the community."⁵⁵ The United Nations Educational, Scientific and Cultural Organization

³⁹ Protection and Welfare of the Disabled Persons Act ¶¶ 5-6 (1982), <https://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/protection-and-welfare-of-the-disabled-persons-act-2039-1982.pdf>

⁴⁰ Subedi v. Gov't of Nepal, (2003) S.C.N. writ no. 3586 (Nepal).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Robertson & Joshi, *supra* note 32.

⁴⁴ *Infra* Part III (discussing field research that I conducted in Far-West Nepal in between February and April 2021).

⁴⁵ Fons Coomans, *Clarifying the Core Elements of the Right to Education* (2013).

⁴⁶ G.A. Res. 217 A (III), art. 26, Universal Declaration of Human Rights, (Dec. 10, 1948).

⁴⁷ *Id.*

⁴⁸ Joshi, *supra* note 31.

⁴⁹ Dev Datta Joshi, *Ensure Voting Rights Of Persons With Disabilities*, RISING NEPAL (Apr. 12, 2021), <https://risingnepaldaily.com/opinion/ensure-voting-rights-of-persons-with-disabilities>.

⁵⁰ DEITER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION in INTERNATIONAL LAW* 18 (2006).

⁵¹ *Id.* at 30.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S 3.

⁵⁵ *Id.* at art. 23.

(UNESCO) strongly suggests that “all children be accommodated in schools, regardless of their physical, intellectual, social, emotional, linguistic or other conditions.”⁵⁶ As per the framework, local and national policies should stipulate that children with disabilities attend the neighborhood school “that would be attended if the children did not have a disability.”⁵⁷ But my field research found that Nepal’s Supreme Court decision has been ineffective in changing the treatment of students with disabilities.⁵⁸ Also, this research found that international treaties, such as the CRPD of which Nepal is a party, have not influenced education policymakers’ behavior.⁵⁹

Scholars have taken many approaches to prioritizing different aspects of inclusivity in education. Inclusive education in relation to children with disabilities needs to be understood as presence, participation, and achievement.⁶⁰ Policies and programs should address children with disabilities’ educational needs through inclusive education and diversity.⁶¹ However, in my research, I did not see schools celebrating the voices of children with disabilities.⁶² Inclusive education is the creation of settings in which all students and teachers feel comfortable and confident and where inclusive methods accommodate and appreciate differences and special needs.⁶³ This philosophy aims to help all children in regular classrooms, where children with or without disabilities learn together and from each other.⁶⁴ Inclusive education should be a “flagship”

that is used to “transform cultures and practices . . . in celebration of diversity.”⁶⁵ All teachers should have the appropriate skills required to address the exact needs of the diverse students in their classrooms.⁶⁶

Inclusive education is one of the key strategies to address issues of marginalization and exclusion for vulnerable children, notably girls and children with disabilities.⁶⁷ Researchers have defined inclusion as the provision of appropriate high-quality education for pupils with special needs in non-special needs schools. The effectiveness of inclusive education depends upon the teachers who must facilitate the learning.⁶⁸ However, others have taken a more general view and believe that educational inclusion should include a radical restructuring of the education system to enable all children to participate and achieve within mainstream education.⁶⁹ However, inclusion may mean different things depending on the background of different groups of learners and the context in which they have received their education, if any.⁷⁰ For example, ethnic groups of minorities persons with disabilities and those from lower socio-economic groups will all be drawing from different prior experiences and will have different ideas of what inclusivity means.⁷¹

In sum, the Convention on the Rights of Persons with Disabilities (CRPD) obliges State Parties to advance inclusive education systems that allow

⁵⁶ UNESCO Res. ED-94/WS/18, The Salamanca Statement and Framework for Action on Special Needs Education, World Conference on Special Needs Education: Access and Quality (June 10, 1994), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Salamanca_Statement_1994.pdf.

⁵⁷ *Id.*

⁵⁸ Coomans, *supra* note 45.

⁵⁹ *Id.*

⁶⁰ PETER CLOUGH ET AL. *Introduction: What is Special about Inclusion?* in MANAGING INCLUSIVE EDUCATION 1, 4 (1998).

⁶¹ *Id.*

⁶² Coomans, *supra* note 45.

⁶³ *Id.* at 2-3.

⁶⁴ *Id.*

⁶⁵ SUSAN L. GABEL & SCOT DANFORTH, *DISABILITY AND THE POL. OF EDUCATION—AN INTERNAT’L READER* 1 (2008).

⁶⁶ CHRIS FORLIN, *CONFRONTING OBSTACLES TO INCLUSION—INTERNATIONAL RESPONSE TO DEVELOPING INCLUSIVE EDUCATION* 156 (2010).

⁶⁷ Susan Peters, *Inclusion As a Strategy for Achieving Education for All*, in THE SAGE HANDBOOK OF SPECIAL EDUCATION 117 (2007).

⁶⁸ Cor J. W. Meijer et al., *Inclusion Implementation and Approaches*, in INCLUSIVE EDUCATION 150 (Sip Jan Pijl ed., 1997).

⁶⁹ *Id.*

⁷⁰ SARAH HERBERT, *THE INCLUSION TOOLKIT* 2 (2011).

⁷¹ *Id.*

children with disabilities to learn alongside their peers in inclusive schools.⁷² In 2003, Nepal's Supreme Court ordered the State to provide free inclusive education to children with disabilities.⁷³ But unless the Nepal government takes the issue of inclusive education seriously, children's right to education, especially girls, is a far-fetched dream.⁷⁴

II. RESEARCH QUESTIONS AND METHODOLOGY

This research assesses the development of the concept of inclusive education and examines the extent to which Nepal has complied with its international obligations under the CRPD. The focus is on inclusive education as contained in Article 24 of the CRPD as it applies to school children aged between 5–16 years.

- a. What does inclusive education mean in the context of children with disabilities?
- b. What are the main barriers and solutions to the barriers to implementation of inclusive education in line with United Nations Convention on the Rights of Persons with Disabilities in Nepal?

To complete this research:

1. I conducted desk-based analysis and field research in Far-West Nepal. The first phase of the research was based largely on an evaluation and analysis of relevant documents to define inclusive education for children with disabilities.
2. I interviewed education policymakers, school heads, general teachers, children with disabilities, their peers, and the School Management Committee members in the region.

⁷² Dev Datta Joshi, *Barriers to Inclusive Education*, RECORD (Sep. 9, 2021), <https://www.recordnepal.com/barriers-to-inclusive-education>.

⁷³ Subedi v. Gov't of Nepal, (2003) S.C.N. writ no. 3586 (Nepal).

⁷⁴ Joshi, *supra* note 72.

Due to the limited scope of this study, the research focused more on the government-supported schools of Far-West Nepal. I selected twenty-five respondents from fifteen schools and a sample school that already included children with disabilities. Initially, I chose fifteen school heads, followed by general teachers, children with disabilities, and other students using the snowball sampling method.⁷⁵

III. EXPLORING BARRIERS TO THE RIGHT OF INCLUSIVE EDUCATION FOR CHILDREN WITH DISABILITIES IN REMOTE RURAL NEPAL

A. An Analysis of the Field Work and the Findings

Between February and April 2021, I carried out this research among respondents including: policymakers, school heads, general teachers, members of the School Management Committee, children with disabilities, and their peers. The research took place in three Far-West Nepal districts: Dadeldhura, Doti, and Baitadi. I developed a three-question questionnaire to explore various dimensions of inclusive education in Nepal.⁷⁶ The aim of the questionnaire was to reveal any obstacles to inclusive education that children with disabilities may be experiencing in remote rural Nepal.

In addition to analyzing the information gained through interviews, I compiled findings of fact to make conclusions and recommendations. I chose a diverse and inclusive set of respondents from various

⁷⁵ Snowball sampling or chain-referral sampling is defined as a non-probability sampling technique in which the samples have traits that are rare to find. This is a sampling technique, in which existing subjects provide referrals to recruit samples required for a research study.

⁷⁶ The questions on the Questionnaire asked to interviewees during research include:

- (1) What is your understanding of inclusive education?
- (2) What does the United Nations Convention on the Rights of Persons with Disabilities say about inclusive education?
- (3) What are the main barriers to inclusive education for children with disabilities in Nepal?

caste and ethnic backgrounds, such as Bramin/Chhetri,⁷⁷ Janjati,⁷⁸ Dalit,⁷⁹ and Madhesi.⁸⁰ I used these groups to provide for more inclusive research and to help guide the Nepalese government's education policymakers and to emphasize the core principles of equality—notably, an inclusive system for all persons without any discrimination.

B. Understanding of Inclusive Education

The study's first question assessed the understanding of inclusive education for children with disabilities in Nepal.⁸¹ The majority responded that inclusive education for all students (with or without disabilities, girl, Dalit, Janjati, Madhesi, and other marginalized groups) should be a right enshrined and codified through international human rights instruments, including the CRPD. Some teachers said that inclusive education is the refined form of special needs education where all students get quality free education in a non-discriminatory manner. Those on the school management committee had no knowledge about inclusive education as a concept or a legal term under the Convention.

Of the surveyed children with disabilities and their peers, only two were aware of the concept of inclusive education; this accounts for eighteen percent of the total children in the survey.⁸² In taking a closer look at the children who were aware of inclusive education, one of the students, a child with visual impairments, responded that inclusive education is an indispensable and powerful instrument that is vital to hearing the voice of students with disabilities like

him, and it is important for safeguarding the educational right of all children with disabilities.⁸³ The other student responded that inclusive education guarantees all students, with or without disabilities, the ability to learn some basic skills to a secure future.⁸⁴

The second question was: what does the United Nations Convention on the Rights of Persons with Disabilities (CRPD) say about inclusive education?⁸⁵ The respondents stated that the Convention is the first legal international human rights instrument to safeguard persons with disabilities right to inclusive education. Out of eleven respondents, including policymakers and heads of school, all stated they were aware of the Convention from the coverage in daily national newspapers within Nepal, but only five respondents understood the obligations of the CRPD. Other research demonstrated that those respondents that live in remote rural areas have no knowledge about CRPD or inclusive education's legal concept.⁸⁶

The third question asked: what are the main barriers to inclusive education for children with disabilities in Nepal?⁸⁷ In response to this question, my data demonstrates the following obstacles were most widely present to achieving inclusive education as mandated by the CRPD.

1. Lack of reasonable accommodation

The CRPD emphasizes reasonable accommodation to ensure the right to education, especially as a cornerstone to disability law and requires the provision of reasonable accommodation in all areas of life. Article 5(3) of the Convention reads: "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to

⁷⁷ Bramin and Chhetri are high-level Nepalese classes within the caste system.

⁷⁸ Janjati in Far-West Nepal have faced marginalization and lack representation and participation in state structures.

⁷⁹ Dalit are the Untouchable caste in rural Nepal.

⁸⁰ The Madhesi community is a marginalized ethnic minority group living in the southern region of Nepal.

⁸¹ Questionnaire, *supra* note 76.

⁸² Interviews with Nepalese students with disabilities in Far-West Nepal in February 2021.

⁸³ Interview with Nepalese students with disabilities in Far-West Nepal in February 2021.

⁸⁴ *Id.*

⁸⁵ Questionnaire, *supra* note 76.

⁸⁶ Based on field research that I conducted in Far-West Nepal between February and April 2021.

⁸⁷ Questionnaire, *supra* note 76.

ensure that reasonable accommodation is provided.”⁸⁸ CRPD Article 2 defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁸⁹

While going into the classroom, the researcher found that the desks and blackboards were not at the appropriate height. Almost all children with disabilities were not fully included in classwork and did not receive extra time for examinations or homework.⁹⁰ Also, the research found that Nepal’s rural schools did not provide Braille and large print textbooks for the students who are blind and visually impaired.⁹¹ Schools also did not provide sign language accommodations for children who are deaf or hard of hearing.⁹²

2. Lack of adequately trained teachers and rigid curriculum

UNICEF noted that Nepal’s school curriculum does not meet the learning needs of children with disabilities.⁹³ During the research, respondents reported that Nepal’s government has no policy to train teachers in Braille and sign language to address the educational needs of children with disabilities.⁹⁴

As a result, the rate of school dropout for children with disabilities in Nepal remains high.⁹⁵ Children

with disabilities, especially children who are blind, do not participate in technical subjects such as Science, Technology, Engineering, and Math (STEM). This is in part because school administrators think blind students cannot succeed in subjects like STEM and can only move forward in non-technical subjects like sociology, history, and law.⁹⁶

Moreover, in rural Nepal, many children with disabilities do not go to school at all.⁹⁷ The local governments have not provided many children with disability identity cards, and most teachers know very little about how to help children with disabilities.⁹⁸

3. Attitudinal barriers

Disabled children throughout the world are often marginalized and excluded from mainstream society.⁹⁹ In Nepal, children with intellectual disabilities are sent away to institutions where they receive no education and are isolated from society for their entire lives.¹⁰⁰ Other children with disabilities may be forced to attend separate schools instead of general schools in the community.¹⁰¹

The National Planning Commission has developed a comprehensive social protection policy, which included social protection mechanisms for children with disabilities.¹⁰² Nepal’s government introduced

⁸⁸ G.A. Res. 61/106 art. 5, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007).

⁸⁹ *Id.* at art. 2.

⁹⁰ Dev Datta Joshi, *Inclusive Education for Children with Disabilities in Nepal*, Lambert Academic Publishing, Germany (May 5, 2017), <https://www.amazon.com/Inclusive-Education-Children-Disabilities-Nepal/dp/3330080671>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ UNICEF, *Nepal: Education*, <https://www.unicef.org/nepal/education>.

⁹⁴ Interview with Nepalese teachers.

⁹⁵ Joshi, *supra* note 72.

⁹⁶ *Id.*

⁹⁷ Robertson & Joshi, *supra* note 32.

⁹⁸ Dev Datta Joshi, *Reasonable Accommodation: Great Landmark*, HIMALAYAN TIMES (July 4, 2017), <https://thehimalayan-times.com/opinion/reasonable-accommodation-great-landmark> (last visited Nov. 22, 2021).

⁹⁹ Allison de Franco, *The New World of Inclusive Education: A Review of Convention on the Rights of Persons with Disabilities and the American Experience*, http://www.stimson.org/images/uploads/research-pdfs/Complete_Iran_Report_PDF_w_Cover.pdf.

¹⁰⁰ HUM. RTS. WATCH, FUTURES STOLEN: BARRIERS TO EDUCATION FOR CHILDREN WITH DISABILITIES IN NEPAL 4–5 (2011), http://www.hrw.org/sites/default/files/reports/Nepal_0811_insert_LOW_WITH_COVER.pdf.

¹⁰¹ *Id.*

¹⁰² *Id.* at 14.

this policy to provide assistive devices such as wheelchairs, canes, and prosthetic limbs to children with disabilities.¹⁰³ But following discussions with teachers working in the schools, it is clear that children with disabilities living in Far-West Nepal are not receiving the adequate accommodations, such as assistive devices, which would promote inclusive education in the region.¹⁰⁴

In rural Nepal, disability is still attributed to past wrongdoing by parents or even by people with disabilities themselves.¹⁰⁵ Children with intellectual disabilities are barred from religious rites and cultural events like wedding ceremonies and other formal occasions, as their presence is thought to bring bad luck.¹⁰⁶ While conducting this research, I tried to learn the education level of the parents who hold these beliefs.¹⁰⁷ I found that all of the parents I surveyed on this question were illiterate.¹⁰⁸

4. Lack of appropriate legislative framework

In Nepal, education policymakers do not fully understand what inclusive education means.¹⁰⁹ Nepal's government is not aware of adopting appropriate legislation, developing effective policies, or national plans of action, which are considered an instrumental tool for inclusion for all.¹¹⁰ Nepal's government fails to implement resolutions from the Nepal Supreme Court case mentioned earlier.¹¹¹ The existing domestic laws cannot protect the right to education of children with disabilities.¹¹² Research found that schools do not give the parents of children with disabilities the opportunity to attend school

meetings, such as conferences with teachers and overall school meetings with other parents.¹¹³

However, Nepal's government vocally promotes inclusive education.¹¹⁴ For example, in 2017, the Nepalese government developed an inclusive education policy to ensure that no student is discriminated against in school based on their disabilities.¹¹⁵ The Nepalese government also supports segregated classes and separate schools for children with disabilities, with no plan to integrate these children into mainstream schools.¹¹⁶

5. Failure of education as a rewarding instrument

The societal norm in Nepal is that an individual must show evidence of having received a quality education in order to enter the workforce.¹¹⁷ Due to this barrier, even well-qualified persons with disabilities are unable to become employed and support themselves financially in Nepal because inclusive education is not a reality.¹¹⁸ A further stigma stemming from and perpetuating this reality is that employers tend to assume that persons with disabilities are not as productive as their able-bodied counterparts.¹¹⁹

In rural Nepal, girls with disabilities face more discrimination than their male counterparts.¹²⁰ Many parents do not invest in girls' education because they think they will leave home after marriage.¹²¹

¹⁰³ *Id.*

¹⁰⁴ Interview with Head Teacher in Doti district in February 2021.

¹⁰⁵ Based on field research.

¹⁰⁶ Joshi, *supra* note 19.

¹⁰⁷ Based on field research.

¹⁰⁸ *Id.*

¹⁰⁹ Joshi, *supra* note 4.

¹¹⁰ *Id.*

¹¹¹ Subedi v. Gov't of Nepal, (2003) S.C.N. writ no. 3586 (Nepal).

¹¹² Joshi, *supra* note 15.

¹¹³ Interview with children with intellectual and psychosocial disabilities in Baitadi, Sudurpashchim, Nepal.

¹¹⁴ Joshi, *supra* note 88.

¹¹⁵ *Access to inclusive education in Nepal*, Borgen Project (Dec. 5, 2020), <https://borgenproject.org/inclusive-education-in-nepal/>.

¹¹⁶ Interview with school heads and teachers in Nepal.

¹¹⁷ See generally Kamal Lamichhane & Tomoo Okubo, *The Nexus Between Disability, Education and Employment: Evidence From Nepal*, 42 OXFORD DEV. STUD. 3 (Jul. 2014).

¹¹⁸ *Id.*

¹¹⁹ Dev Datta Joshi, *It Could Work*, MYREPUBLICA (Aug. 21, 2017), <https://myrepublica.nagariknetwork.com/news/it-could-work/>.

¹²⁰ Dev Datta Joshi, *Forgotten Girls*, MYREPUBLICA (Dec. 17, 2017), <https://myrepublica.nagariknetwork.com/news/forgotten-girls/>.

¹²¹ *Id.*

But even for educated girls with disabilities, jobs are not available in the community.¹²² CRPD Article 27 states that State Parties should recognize the right to work on an equal basis with others, but Nepal has no policy to provide equal opportunities for people with disabilities in relation to employment in society.¹²³ During the research, one teacher stated that the current education system and curriculum in Nepal are theoretical, rather than job-oriented. If a child with disabilities passes their secondary education with great struggle, they would get nothing for their efforts in the long term.¹²⁴ The teacher added that the government should implement a policy to provide jobs to people with disabilities, prioritizing girls and marginalized groups. The result would be an increase in the enrollment rate in schools.¹²⁵

6. Poverty

Financial constraints are one of the most prominent barriers obstructing students from education in Nepal.¹²⁶ Disabled children are among the poorest and the most disadvantaged in their communities, thus they are systematically excluded from equal opportunity education.¹²⁷ In developing nations like Nepal, poverty and disability are intricately linked.¹²⁸ Poverty may lead to disability through starvation, the inaccessibility of health services, and poor sanitation.¹²⁹

¹²² AFKE DE GROOT, DEPRIVED CHILDREN AND EDUCATION: NEPAL 55 (Dec. 2007), http://www.crin.org/docs/Nepal_Education.pdf

¹²³ Interview with School Head in Nepal.

¹²⁴ *Id.*

¹²⁵ Interview with Teacher in Nepal.

¹²⁶ Lamichhane & Okubo, *supra* note 117.

¹²⁷ Bronagh Byrne, *Hidden Contradictions and Conditionality: Conceptualizations of Inclusive Education in International Human Rights Law*, 28 DISABILITY & SOCIETY 232 (2013).

¹²⁸ Dev Datta Joshi, *Written Off*, KATHMANDU POST (Dec. 29, 2017), <https://kathmandupost.com/opinion/2017/12/29/written-off>

¹²⁹ *Id.*

Far-West Nepal's low-income families are often obliged to send their children to work rather than to attend school.¹³⁰ A large proportion of Nepal's children suffer from severe malnutrition.¹³¹ As a result, according to the UN and World Health Organization 2020 report, in Nepal, illiteracy rates are high for children with disabilities (forty-five percent compared to eleven percent of children without disabilities), and children with disabilities have worse school attendance than children without disabilities.¹³²

While conducting this research, some students with disabilities and their peers stated that, even in government schools, families are required to pay fees for admission, exams, and school uniform. As a result, low-income families, especially Dalit, a marginalized group in Nepal at the bottom of the Hindu hierarchy, do not send their children to school.¹³³

7. Distance to schools

In remote rural Far-West Nepal, I found school-aged children with physical disabilities and visual impairments sitting on the ground with playing cards.¹³⁴ One blind child stated that the nearest primary school is approximately a ninety minute walk through very narrow foot trails. Furthermore, he added that he was interested in attending school, but he decided not to after learning that his blind friend lost her life while returning from school by falling from a cliff along the dangerous pathways.¹³⁵

One secondary school's headteacher stated that several children with disabilities stayed at home. They cannot attend school due to inaccessible foot trails.¹³⁶ The issue of distance from the school is of

¹³⁰ Interview with School Management Committee in Nepal.

¹³¹ Joshi, *supra* note 90.

¹³² Joshi, *supra* note 72.

¹³³ Interview with students with disabilities in Far-West Nepal.

¹³⁴ Based on field research in Far-West Nepal.

¹³⁵ Interview with 12-year-old blind child in Far-West Nepal.

¹³⁶ Interview with School Head in Nepal.

particular concern for girls with disabilities due to security and safety considerations on such trips.¹³⁷ Teachers in the region I researched also stated that girls, and especially girls with intellectual disabilities, are vulnerable to sexual violence and abuse while traveling, which has become an important underlying factor that stops girls from going to school.¹³⁸

8. Gender and disability-based discrimination

Education is still not realistic for girls with disabilities, especially in remote rural areas. They face multiple challenges, some associated with disability-related discrimination. However, some of the challenges they face occur solely because of their gender.¹³⁹

Dalit parents usually do not send girls with disabilities to schools to protect them from discrimination, since schools are not equipped to give the required support.¹⁴⁰ Also, Dalit girls with disabilities face multiple forms of discrimination and violence because of their caste, gender, and disability status.¹⁴¹ These three identities burden Dalit girls with intellectual disabilities, especially in rural Nepal. They are often subjected to inhuman treatment, such as untouchability,¹⁴² and, as persons with disabilities, they are often perceived as objects requiring charity, seemingly with no rights.¹⁴³ In remote Far-West Nepal, during menstruation,

¹³⁷ Interview with members of the School Management Committee in Nepal.

¹³⁸ Interview with Head Teacher and faculty in Nepal.

¹³⁹ Dev Datta Joshi, *Inclusive Education: A Tool for Social Change*, HIMALAYAN TIMES (Jan. 12, 2018), <https://thehimalayantimes.com/opinion/inclusive-education-tool-social-change>.

¹⁴⁰ *Id.*

¹⁴¹ Joshi, *supra* note 116.

¹⁴² In rural Nepal, Dalit persons with disabilities are often prevented from: entering inside temples, touching water taps, and attending cultural events such as wedding ceremonies. At best, people treat Dalits with disabilities as objects requiring charity, and with seemingly no rights. Sometimes they treat them much worse. Non-Dalit persons with disabilities do not face these challenges.

¹⁴³ Joshi, *supra* note 19.

women, and girls (including girls with disabilities) are kept in an isolated shed as it is feared that if a menstruating girl touches a man or animal, bad luck will befall the family or the village.¹⁴⁴

Thus, most practical barriers that block inclusive education in rural Nepal stem from limited financial resources, poor understanding of disability, and low prioritization of inclusive education.¹⁴⁵ These obstacles include:

1. lack of information about the right to education to include persons with disabilities and inadequate knowledge about existing possibilities;
2. inaccessible school facilities with poor reasonable accommodation;
3. segregated and inferior quality of education;
4. lack of adequately trained teachers;
5. inflexible curriculum and evaluation systems;
6. ineffective social support;
7. high school fees; and
8. stigma against children with disabilities and their families.¹⁴⁶

IV. CONCLUSION AND RECOMMENDATIONS

During my field research, I concluded that inclusive education welcomes diversity among all learners. This research shows that inclusive education helps children with disabilities and their families from falling into chronic poverty.¹⁴⁷ Education empowers all people, especially those society has routinely cast aside, such as those with disabilities.¹⁴⁸ Currently, Nepal is violating various laws, such as the Constitution of Nepal 2015 Article 18—Right to Equality¹⁴⁹ and prior rulings from Nepal's Supreme Court.¹⁵⁰ Also, in Nepal, education policymakers

¹⁴⁴ Joshi, *supra* note 11.

¹⁴⁵ Joshi, *supra* note 4.

¹⁴⁶ Joshi, *supra* note 3.

¹⁴⁷ Example from field research.

¹⁴⁸ Joshi, *supra* note 15.

¹⁴⁹ नेपालको संवैधान २०७२ [The Constitution of Nepal] art. 18 (2015).

¹⁵⁰ Subedi v. Gov't of Nepal, (2003) S.C.N. writ no. 3586 (Nepal).

do not understand the meaning of inclusive, integrated, or special needs education. Therefore, the government is failing to ensure an inclusive high-quality education system for children with disabilities, especially for girls with disabilities in rural Nepal. As a result, in rural Nepal, illiteracy remains high among women with disabilities.¹⁵¹

Additionally, there is limited expertise and physical presence of persons with disabilities and their advocates at the policy level. As a result, it is very difficult to effectively engage policymakers in addressing the exclusion of persons with disabilities.¹⁵² Further, policymakers are not ready to address disability issues because most of them still embrace stereotypes and changing such a mindset is challenging.¹⁵³

This research also concludes that the ratification of the CRPD by Nepal's government in 2010 has not brought any significant practical change to ensure high quality inclusive education for children with disabilities, especially girls with disabilities in remote rural Nepal.¹⁵⁴ Based on UN and World Health Organization estimates, Nepal has 60,000 to 180,000 children with disabilities, and accountability for their education is the government's responsibility—one it has not undertaken yet.¹⁵⁵

As a State Party to the several international human rights instruments, including the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Nepal must first draft enforceable legislation to promote the right to education for children with disabilities of all ages and provide equal educational opportunities at all levels of education. But Nepal currently lacks drafting enforceable education legislation that upholds the rights of children with disabilities. Second, it must advance inclusive education systems that

allow children with disabilities to learn alongside their peers in inclusive schools. Unfortunately, the Nepalese government encourages children with disabilities to attend segregated schools. Third, it must adopt specific measures to ensure that children with disabilities are not excluded from the general education system or from free and compulsory primary education. But from my field research, I found that schools asked students with disabilities to pay fees on various topics such as exams. Fourth, it must provide reasonable accommodation to children with disabilities to facilitate their ability to learn in general educational settings. But in remote rural Nepal, students with disabilities do not get accessible education materials, such as Braille and large print textbooks for the blind and visually impaired. Lastly, Nepal must employ teachers who are qualified to teach children with disabilities. Unfortunately, at the current moment in rural Nepal, teachers simply do not know where to begin in order to effectively educate students with disabilities.¹⁵⁶

¹⁵¹ Joshi, *supra* note 4.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Joshi, *supra* note 72.

¹⁵⁵ *Id.*

¹⁵⁶ Examples from field research.

EXAMINATION OF THE EFFECTS OF DEPORTATION AS A RESULT OF REVOCATION OF STATUS UPON THE RIGHTS TO NON-DISCRIMINATION, FAMILY UNITY, AND THE BEST INTERESTS OF THE CHILD: AN EMPIRICAL CASE FROM NORWAY

by Cecilia M. Bailliet*

INTRODUCTION

There is currently a European and Nordic trend emphasizing the return of non-European/Schengen nationals to their countries of origin or transit countries and implementing deportation as a principal mechanism of immigration control.¹ This article discusses the current framing of migration as a threat to the European region's security, which places pressure on the judiciary to serve as a resistant

* Professor, Department of Public & International Law, University of Oslo, Norway.

¹ See generally GRETE BROCHMANN & TOMAS HAMMAR, *MECHANISMS OF IMMIGRATION CONTROL: A COMPARATIVE ANALYSIS OF EUROPEAN REGULATION POLICIES* (2020); Ibrahim Soysüren & Mihaela Nedelcu, *European Instruments for the Deportation of Foreigners and Their Uses by France and Switzerland: The Application of the Dublin III Regulation and Eurodac*, J. ETHNIC & MIGRATION STUD. (2020); SERGIO CARRERA & MARCO STEFAN, *FUNDAMENTAL RIGHTS CHALLENGES IN BORDER CONTROLS AND EXPULSION OF IRREGULAR IMMIGRANTS IN THE EUROPEAN UNION* 1-21 (2020).

gatekeeper to fundamental international human rights.² Specifically, in the context of Norwegian domestic law and jurisprudence of the European Court of Human Rights (ECtHR), this article explores how deportation resulting from the revocation of a refugee's status affects human rights, and in particular, the human right of non-discrimination, the best interest of the child, and the right to family unity.

An empirical examination of a critical refugee revocation case brought before the Norwegian Supreme Court puts these findings into context, showing how a judiciary may engage in a restrictive contestation approach, and narrow the analysis of deportation to its effect on human rights.³ This article further suggests that the Norwegian Supreme Court's approach fails to curb the current revocation and deportation practices and policies which target specific nationalities in violation of the principle of non-discrimination. Finally, this article calls for the adoption of a human rights-based framework in refugee revocation and deportation cases in the Nordic region.

I. REVOCATION OF STATUS AND DEPORTATION AS REGIONAL AND NATIONAL POLICIES

The European Union (EU) and the Nordic region have recently pursued new "return" strategies in refugee and asylum policies, which emphasize improving the efficiency of the immigration system

² See e.g., Rafaella Kunz, *Judging International Judgments Anew? The Human Rights Courts before Domestic Courts*, 30 EUR. J. INT'L L. 1129, 1131 (2020) (discussing how judges act as gatekeepers).

³ See HANS PETER SCHMITZ & KATHRYN SIKKINK, *International Human Rights*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 827, 835 (2018) (on the perception of threats and the application of coercive measures by governments, as well as contestation techniques including: (1) claiming an exception based on imminent threat, (2) challenging the validity of human rights with a different set of norms, (3) or redefining behavior to fall outside the scope of a norm); Jessica Greenberg, *Counterpedagogy, Sovereignty, and Migration at the European Court of Human Rights*, 46 L. & SOC. INQUIRY 518-36 (2021).

through the use of restrictive practices and deportations.⁴ Nikolas F. Tan, the senior researcher at the Danish Institute for Human Rights, recognized that the trend of returning refugees is a “paradigm shift” in Danish refugee policy.⁵ Similarly, other researchers noted that the Nordic policy of revoking asylum based on particular nationalities has a negative signaling effect on maintaining restrictive immigration regimes throughout Europe.⁶ The broader Nordic policy shift mandates an examination of specific cases to understand how the return turn policy functions in practice.

Revocation and deportation are closely tied to the practice of cancellation of asylum status. Cancellation is a judicial decision that invalidates the recognition of a person’s refugee status, and it overturns the

original decision, which granted refugee status to a person.⁷ The policy affects decisions that have become final, meaning that they cannot be reexamined by a judicial body.⁸ In effect, cancellation entirely invalidates refugee statuses, despite the original decision. In response to this policy, the UN High Commissioner for Refugees commissioned a report on cancellation, which mandates that the EU prohibit the investigation of old asylum applications based on nationality. The report states that the EU and its Member States may revisit a refugee’s application only when “there is a clear incentive to do so ... [but] [a] review of cases based solely on nationality, religion, or political opinion is not considered appropriate.”⁹

Nevertheless, the policy of revocation and deportation gained strength throughout Europe and the Nordic region. In 2019, the Norwegian Directorate of Immigration (UDI) was instructed by the Ministry of Justice to examine 150 asylum cases from Eritrea to find grounds for revocation of legal status based on alleged participation in events supporting the Eritrean government.¹⁰ Norway deported fifty-six people to Ethiopia and 140 to

⁴ Ramses A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of ‘Soft’ International Agreements*, 44 WEST EUR. POLITICS 72, 80-81 (2021); Madalina Moraru, *The New Design of the EU’s Return System under the Pact on Asylum and Migration*, EU IMMIGRATION & ASYLUM L. & POL. (Jan. 14, 2021), <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/> (describing the EU adoption of a perverse interpretation of a solidarity approach to facilitate the return of third country nationals supported by the Asylum and Migration Pact); Cathryn Costello & Itamar Mann, *Border Control: Migration and Accountability for Human Rights Violations*, 21 GERMAN L. J. 311, 312 (2020) (noting that the EU and States in the Global North “have long-standing modes of sharing restrictive policies and practices, many of which are custom built to evade accountability”).

⁵ See Nikolas F. Tan, *The End of Protection: The Danish ‘Paradigm Shift’ and the Law of Cessation*, 90 NORDIC J. INT’L L. 60, 60-62 (2021) (noting that “[s]ince 2015, a self-described ‘paradigm shift’ enacted through legislative amendments to Denmark’s Aliens Act has shifted refugee policy away from permanent protection and integration towards temporary protection and return.”).

⁶ Jan-Paul Brekke et al., *Temporary Asylum and Cessation of Refugee Status in Scandinavia: Policies, Practices, and Dilemmas*, EUR. MIGRATION NETWORK (2020), https://www.udi.no/globalassets/global/european-migration-network_i/emn-norway-papers/emn-occasional-paper-temporary-asylum-and-cessation-of-refugee-status-in-scandinavia-2020.pdf; see also May-Len Skilbrei, *Taking on the Categories, Terms and World-views of the Powerful: The Pitfalls of Trying to Be Relevant*, 28 IDENTITIES 561, 568 (2020) (describing the pressure placed on academia within Norway to use the term “enforced returns” instead of deportation to mollify the immigration authorities).

⁷ Sibylle Kapferer, *Cancellation of Refugee Status*, LEGAL & PROT. POL’Y RSCH. SERIES ¶¶ 1-8 (2003).

⁸ *Id.* at ¶ 3.

⁹ *Id.* at ¶ 99.

¹⁰ Instruks om å gjennomgå asylsaker fra Eritrea og vurdere tilbakekall av oppholdstillatelse dersom det foreligger opplysninger om at en flyktning har fått opphold i Norge på uriktig grunnlag mv [Instructions to review asylum cases from Eritrea and consider revoking a residence permit if there is information that a refugee has been granted residence in Norway on incorrect grounds, etc.] (2019) GI-04/2019 (Nor.).

Somalia, which confirmed a systematic investigation based on select nationalities.¹¹ These revocations also raised the question of whether the policy is a disguise for the collective expulsion of certain nationals through a pre-determined administrative practice.¹²

Furthermore, the Norwegian Ministry of Justice's 2020 Award Letter to the Norwegian Directorate of Immigration (UDI) confirmed this policy, in which the Ministry noted that the UDI's purpose is to pursue revocation of legal resident status as a way to keep the nation free from crime and prevent the continued stay of illegal residents.¹³ Moreover, the overall goal of the UDI in 2020 was a forty percent increase in revocation of status decisions from the previous year.¹⁴ These revocations were made under

¹¹ *The Police Immigration Unit Report on Deportations in 2019 and 2020*, <https://www.politiet.no/globalassets/04-aktuelt-tall-og-fakta/uttransporteringer/arsstatistikker-2012-19/uttransporteringer-2019.pdf>; Police Immigration Unit, *Monthly statistics December, 2020: Forced Returns from Norway*, https://www.politiet.no/globalassets/04-aktuelt-tall-og-fakta/uttransporteringer/engelsk/yearly-figures-2012-20/forced-returns-from-norway-in-2020.pdf?_t_id=TEhKXp-2fH-4Op1Yep56_QQ%3d%3d&_t_uuid=vW9luWXWSVYf-F1UEZ1utJg&_t_q=forced+returns+december+2020&_t_tags=language%3aen%2csiteid%3ab78013b9-3a34-4dad-8a4f-cc70168f7f39%2candquerymatch&_t_hit.id=Politiet_Web_Models_Media_GenericMedia/_b9275c6a-44a4-49ec-bd36-d014f0363663&_t_hit.pos=3, (Nor.).

¹² *Georgia v. Russia (I)*, no. 13255/07, (Eur. Ct. H.R. Jul. 3, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145546&filename=001-145546.pdf> (finding a violation of Article 4 of Protocol 4 of the European Convention on Human Rights occurred and collective expulsion of aliens is prohibited, addressing the expulsion of Georgian nationals).

¹³ Norwegian Ministry of Justice, *2020 Award Letter to the Norwegian Directorate of Immigration* 9–10 (Dec. 18, 2020), <https://www.regjeringen.no/contentassets/c7a-16faa2e014a6ca48990e162c23778/tildelingsbrev-udi-2021-av-18.12.201431798.pdf> (“It is a prerequisite for controlled and sustainable immigration that as few people as possible stay illegally in Norway. Detecting cases where a temporary or permanent residence permit has been granted on the wrong basis, and considering the revocation of these permits, are important tools for achieving the goal.”) (Nor.).

¹⁴ ÅRSAPPOR, UTLENDINGS DIREKTORATET 37 [ANNUAL REPORT, THE NORWEGIAN DIRECTORATE OF IMMIGRATION] (2020), https://www.udi.no/globalassets/global/aarsrapporter_i/arsrapport-2020.pdf (Nor.).

Section 63 of the Immigration Act and based on cases where the applicant attained a protection status.¹⁵ The officials noted that the purpose of the process was to uphold the validity of the asylum system. More specifically, the UDI aimed to make decisions in 560 cases in 2020, and it nearly achieved the goal with 524 decisions.¹⁶ The immigration authorities' prioritization of revocation and deportation policies raises the issue of accountability for human rights violations. The push for a more efficient immigration system raises the risk that the application of exclusionary policies to people who have resided in EU and Nordic countries for over five years may be perceived as a means to rid the countries of ethnic, religious, and/or national minorities.”

II. NON-DISCRIMINATION PROHIBITS A SYSTEMATIC REVIEW OF REVOCATION ON THE BASIS OF NATIONALITY

This section will analyze how Norway's systemic review of cases for revocation of legal status based on nationality risks violating the principle of non-discrimination. Non-discrimination is a fundamental principle of human rights law that includes the prohibition of discrimination of a person because of their national origin.¹⁷ Article 14 of the European Convention on Human Rights (ECHR) guarantees

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.N. Human Rights Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights: General Comment No. 18, Non-Discrimination, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (Nov. 10, 1989) [hereinafter HRC].

this principle to those individuals within states that are members of the Council of Europe.¹⁸ The protection of the principle of non-discrimination can be combined with the right to equality before the law and equal protection of the law to provide more protection in the context of administrative processing.¹⁹ Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the UN Convention on the Rights of the Child (CRC) also guarantee protection from discrimination.²⁰ In particular, General Comment No. 15 of the ICCPR, entitled *Position of Aliens Under the Covenant*, calls for the recognition of the applicability of the Covenant to cases involving non-discrimination and protection of family life.²¹ Further, the Preamble and Article 3 of the 1951 Convention on the Status of Refugees also recognize the principle of non-discrimination.²² Leading scholars characterize non-discrimination as the coherent rationale of the 1951 Convention.²³ However, some still suggest that the ECtHR may be reluctant to scrutinize the State's justification for interference with family life in the context of

deportation cases and may fail to address the discriminatory impact of the rule's application.²⁴

There is a need to reincorporate a review of the relevance of discrimination based on nationality in revocation and deportation cases. The position that the Norwegian revocation/deportation policy does not violate the ECHR's non-discrimination principle in the ECHR is questionable because the systematic review of the Ethiopian, Eritrean, and Somali cases was based on the national origin of the parties and not on individual security risks identified by specific intelligence information.²⁵ The UN Committee on the Elimination of Racial Discrimination (CERD) issued a General Recommendation on Discrimination against Non-Citizens stating that States are obligated to ensure that their immigration policies do not have the effect of discriminating against persons because of their national origin.²⁶ As a result, states should ensure that their deportation and removal laws do not discriminate in purpose or effect based on national origin and that immigrants have equal access to effective remedies and are protected from collective expulsion.²⁷ In its Recommendation, CERD mandates that non-citizens, especially long-term residents, should be able to stay in the State if deportation will disproportionately interfere with their right to family life.²⁸

¹⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* art. 14, Nov. 4, 1950, E.T.S. 5; see generally 2012 O.J. (326/02) 21; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the First Protocol thereto art. 5, opened for signature Sep. 16, 1963, 46 E.T.S. 4; *Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*, Nov. 4, 2000, E.T.S. 177; G.A. Res. 2106 art. 2, (Dec. 21, 1965).

¹⁹ See HRC, *supra* note 17.

²⁰ *International Covenant on Civil and Political Rights* art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, 173; UN General Assembly, G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* art. 2, 7, (Dec. 10, 1948); G.A. Res. 44/25, *Convention on the Rights of the Child*, Nov. 20, 1989, 1557 U.N.T.S. 3.

²¹ U.N. Human Rights Comm., *CCPR General Comment No. 15: The Position of Aliens Under the Covenant* ¶ 5 (Apr. 11, 1986).

²² *Convention Relating to the Status of Refugees* art. 3, July 28, 1951, 189 U.N.T.S. 137, 156.

²³ David Cantor, *Non-Discrimination as a Rationale of the Refugee Convention* (June 10, 2021) (paper presented on panel at Refugee Law Initiative 5th Annual Conference, University of London) (unpublished manuscript) (on file with author).

²⁴ CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* 129–30 (2015) (noting that “The ECtHR tends to assume that States pursue a legitimate aim when refusing admission or deporting...migration control per se is assumed to amount to a legitimate aim...When the State is not required to articulate the aim of its actions clearly, the proportionality assessment is weakened. One of the difficulties is that deportation is sometimes viewed as the inevitable requirement for immigration laws to be meaningful...”).

²⁵ See Sibylle Kapferer, *Cancellation of Refugee Status*, LEGAL & PROT. POL'Y RSCH. SERIES ¶ 99 (2003) (citing the EU Commission's working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments).

²⁶ U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No XXX on Discrimination Against Non-Citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3, at ¶ 10 (2004).

²⁷ *Id.*

²⁸ *Id.*

Immigration and international human rights law scholars warn that immigration measures targeting particular nationalities are often grounded in unsubstantiated security concerns and disguise religious and/or racial discrimination.²⁹ The measures may be characterized as administrative extensions of ethnic profiling based on national origin.³⁰ The overly broad mandate renders the legitimacy of the review's aim questionable, as it may not meet the criteria of "objective and reasonable justification."³¹ Scholars also note the exclusionary aspects of transnational immigration law that call for "reflection of the legitimacy of a legal system in which discrimination on the basis of nationality, race, class, and gender plays a central role."³² The revocation policy can be compared to the practice of requiring visas from nationals from many African, South Asian, and East Asian countries, thereby limiting the entry of nationals from these states.³³

State governments have increasingly implemented exclusionary visa policies and consider them legitimate despite their use in pursuing discriminatory goals.³⁴ Article 1 of the International Convention on Racial Discrimination permits state

instituted restrictions between citizens and non-citizens.³⁵ One may also consider the Trump Administration's travel ban policy which barred access to persons from countries with a significant Muslim population.³⁶ First, it included Syria, Sudan, Somalia, Yemen, Libya, Iran, and Iraq and later added Nigeria, Myanmar, Eritrea, Kyrgyzstan, and Tanzania.³⁷ The Biden administration immediately revoked these bans, declaring them discriminatory and inconsistent with American values of freedom and tolerance.³⁸

Moreover, given that the systematic review could be extended back in time without a set time limit, there is a risk that the revocation of status may be a disproportional measure given its impact on the refugee and their family and their community ties within the host state. Unlike Norway, Germany set a four-to-five-year time limit for applying a test of revocation.³⁹ Refugees who have resided in host countries for over five years may start families and have children whose best interests become relevant to the analysis of the revocation cases. The Norwegian revocation policy measures should be subject to review to ensure that it is amended to achieve two goals. First, to terminate any procedures that target persons from specific nationalities. Second, to bring Norway's immigration practice in line with non-discrimination standards and other human rights, such as the principle of non-intervention with family life and the best interest of the child principle. The standard for the best

²⁹ Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 UNIV. ILL. L. REV. 563, 602 (2019).

³⁰ See UN Human Rights Committee, *Concluding Observations of the Human Rights Committee to Finland*, paras. 16, 17 U.N. Doc. CCPR/C/FIN/CO/7 (2021) (criticizing Finland for failing to remedy this problem among law enforcement); see also cited by Tendayi Achiume, *Race, Refugees, and International Law*, in OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Cathryn Costello, Michelle Foster, & Jane McAdam eds., 2021); *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55, U.K.: House of Lords (J. Comm.) (Dec. 9, 2004) (U.K.).

³¹ Dinah Shelton, *Prohibited Discrimination in International Law*, THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR LALLIOPI K. KOUFA, 261, 271 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

³² Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452, 469 (2018).

³³ *Who Needs and Who Doesn't Need a Schengen Visa to Travel to the EU?*, SCHENGEN VISA INFO, <https://www.schengenvisainfo.com/who-needs-schengen-visa/>.

³⁴ Maarten den Heijer, *Visas and Non-Discrimination*, 20 EUR. J. MIGRATION & L. 470, 472 (2018).

³⁵ International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 21, 1965, 660 U.N.T.S. 195.

³⁶ Exec. Order No. 13769, 82 Fed. Reg. 8977 (2017); see also Eunice Lee, *Non-Discrimination in Refugee and Asylum Law*, 31 GEO. IMMIGR. L. J. 459, 460 (2017).

³⁷ *Id.*

³⁸ Kristen E. Eichensehr, *Biden Administration Reverses Trump Administration Policies on Immigration and Asylum*, 115 AM. J. INT'L L. 340, 341 (2021) (citing Proclamation 10.141).

³⁹ Germany Country Report: Cessation and Review of Protection Status, *Informationsverbund Asyl und Migration*, Sec. 73(2a), (2020), <https://asylumineurope.org/reports/country/germany/content-international-protection/status-and-residence/cessation-and-review-protection-status/>.

interests of the child is addressed in Article 3(1) of the CRC. It states that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁴⁰

The principle of the best interest of the child includes the child’s well-being, the child’s wishes, the need for a safe environment, family and close relationships, and the child’s development and identity needs.⁴¹ There is a need to shift the orientation of immigration law towards balancing security concerns with human rights. It is necessary to consider the impact of revocation on the rights to family life and the best interests of the child, because its policies impact families with children. The right to and respect for one’s family life is recognized by Article 8 of the ECHR, Article 16 of the CRC, Article 23 of the ICCPR, and Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ensuring that “the family is the natural and fundamental unit of society that has the right to the protection of society and the state.”⁴²

A study conducted by Norwegian scholars called for the use of a proportionality assessment in deportation and revocation cases in Norway.⁴³ They

indicated concerns that the Norwegian immigration authorities conducted weak proportionality assessments.⁴⁴ A proportionality assessment weighs the state’s interest in upholding migration control against its impact on the rights of the person or child subject to expulsion. The relevant assessment factors should include: the nature and seriousness of the offense and how much time has elapsed since it was committed; the length of time the person has been in the country, and the solidity of their social, cultural, and family ties with the host country versus the solidity of the same ties with the country of destination; their bond with their spouse; and their bond and primary caregiving role in relation to the children (considering the children’s ages, best interests, and well-being). Moreover, the study conclusively recommended that the Norwegian Immigration Authorities study the impact of the revocation of the parents’ status on the best interests of the child standard within Article 104 of the Norwegian Constitution and Article 3 of the CRC.⁴⁵

In 2019, the Norwegian Board of Immigration Appeals (UNE) sought to legitimize the revocation policy by seeking approval of the Norwegian Supreme Court in a case involving a woman from Djibouti who is married to a Norwegian citizen and is the mother of four minor children.⁴⁶ The case is significant because the Court applied a contestational analysis that upheld the national government’s policy on immigration control through revocation and deportation.⁴⁷ The next section demonstrates how the court applies a restrictive contestational technique to invalidate recognition of violations of family life and the best interests of the child.

⁴⁰ Convention on the Rights of the Child art. 3 ¶ 1, Nov. 20, 1989, 1557 U.N.T.S. 3.

⁴¹ U.N. High Commissioner for Refugees, UNHCR GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 17 (2008).

⁴² Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, E.T.S. 5 (Nov. 4, 1950); Convention on the Rights of the Child art. 16, Nov. 20, 1989, 1557 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴³ JAN-PAUL BREKKE ET AL., *TILBAKEKALL: RETTSIKKERHET OG KONTROLL VED TILBAKEKALL AV TILLATELSER ETTER SØKNAD OM BESKYTTELSE* [REVOCATION: LEGAL CERTAINTY AND CONTROL UPON REVOCATION OF PERMITS UPON APPLICATION ON PROTECTION] 52 (2018), https://www.udi.no/globalassets/global/forskning-fou_i/beskyttelse/tilbakekall---rettssikkerhet-og-kontroll.pdf

⁴⁴ *Id.* at 56.

⁴⁵ *Id.* at 63.

⁴⁶ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET (Dec. 9, 2019) (Nor.).

⁴⁷ Greenberg, *supra* note 3, at 519 (describing the use of “[c]ounter-pedagogical techniques applied by “state actors to use international human rights courts to shore up the exercise of state power, even when courts find states in violation of human rights law . . . They use the formal limits of legal categories, evidence, admissibility criteria, and doctrine to innovate practices that are beyond the reach of court jurisdiction.”

III. NON-RECOGNITION OF VIOLATION OF FAMILY LIFE AND THE BEST INTERESTS OF THE CHILD: AN EXAMINATION OF CASE HR 2019 2286

This part will present an overview of the case, discuss the interpretation of the proportionality test, and analyze the application of a restrictive contestational approach by the Norwegian Supreme Court to disqualify the best interests of the child and the right to family life.

*A. Case Background*⁴⁸

A is a citizen of Djibouti; she applied for asylum in Norway in 2001 and presented false documents and false testimony indicating that she came from Somalia.⁴⁹ In 2002, A met a Norwegian man, B.⁵⁰ The following year, A's application was rejected by the UDI and the UNE, and A married B in 2004.⁵¹ A applied for a residence permit based on her marriage to B but continued to give incorrect information.⁵² A was granted a residence permit. Between 2005-2013 A and B had four children who are Norwegian citizens.⁵³ The children were six, ten, ten, and fourteen years old at the time of the case. In 2007, A became a Norwegian citizen.⁵⁴ In 2014, the police investigated old cases of Somali immigrants to identify grounds for revocation, and they invited A for an interview. During the interview, she did not recant any of the information she provided when she came to Norway.⁵⁵ A admitted her true identity and country of origin when the UDI sent her a notice of revocation of Norwegian citizenship and deportation. In 2015, the UDI revoked A's Norwegian

citizenship and issued an order of deportation with a two-year re-entry ban.⁵⁶ In 2016, UNE rejected her complaint and upheld the revocation order and a two-year entry ban because she provided false information, a serious breach of the immigration law.⁵⁷ In 2017, the Oslo District Court found that A's spouse and the couple's four children did not have independent standing to bring an action to block A's deportation.⁵⁸ In 2019, the Borgarting Court of Appeals declared the deportation order invalid, and the State appealed to the Norwegian Supreme Court.⁵⁹ It is noteworthy that the NGO, Save the Children, was not allowed to participate in the trial as an interested party and that the Court did not give any grounds for the rejection.⁶⁰ A filed the appeal based on the claim that the deportation order violated Articles 3 and 8 of the CRC, contradictory to the child's best interest.

B. The Proportionality Test

To determine whether the deportation is disproportionate to the interest of A's four children, it is important to understand the best interests of the child standard. Section 70 of the Norwegian Immigration Act presents the best interests of the child as a fundamental consideration:

An alien cannot be deported if, in view of the seriousness of the relationship and the alien's connection to the realm, it will be a disproportionate measure towards the alien himself or the immediate family members. In cases that affect children, the child's best interests must be a fundamental consideration.⁶¹

⁴⁸ "A" and "B" are used as pseudonyms throughout this section for the purpose of retaining privacy for the parties involved and to remain in accordance with the language used throughout the Judgement.

⁴⁹ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 3-4 (Dec. 9, 2019) (Nor.).

⁵⁰ *Id.* at ¶ 5.

⁵¹ *Id.* at ¶ 4.

⁵² *Id.* at ¶ 5.

⁵³ *Id.* at ¶ 6.

⁵⁴ *Id.* at ¶ 7.

⁵⁵ *Id.* at ¶ 8.

⁵⁶ *Id.* at ¶ 10.

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 14.

⁵⁹ *Id.* at ¶¶ 15-17.

⁶⁰ See Lov Om Mekling Og Rettergang i Sivile Tvister [Act on Mediation and Trial in Civil Disputes] § 15-7 (2005) (Nor.).

⁶¹ Norwegian Immigration Act § 70 (2008) (Nor.) (on the entry of foreign nationals into the kingdom of Norway and their stay in the realm).

Further, Article 102 of the Norwegian Constitution states that “each person has the right to respect for his private and family life” and that “[s]tate authorities should ensure the protection of personal integrity.”⁶² Deportation cases require discussion of the effect on family life and the integrity of the family. Additionally, Article 104 of the Constitution sets out a thorough structure for the protection of the child’s substantive and procedural rights:

Children are entitled to respect for their human dignity. They have the right to be heard in matters concerning themselves, and their opinion shall be given weight in accordance with their age and development. In actions and decisions that affect children, the best interests of the child shall be a fundamental consideration. Children have the right to protection of their personal integrity. The state authorities shall facilitate the conditions for the child’s development, including ensuring that the child receives the necessary financial, social and health security, preferably in his or her own family.⁶³

The Norwegian Supreme Court failed to mention that the courts did not give the children an opportunity to speak, nor did it analyze the need to guarantee children the right to healthy development and security within their families. In immigration cases, there is often a lack of assessment of the child’s best interests and there is a need to specifically assess their vulnerability.⁶⁴ Nevertheless, the Court identified the issue of disproportionality of the deportation order in relation to the children as the central question, stating that:

The decision on deportation has been made pursuant to the Immigration Act § 66 first paragraph letter a. According to this provision, an alien without a residence permit may be deported, among other things, when he has provided materially incorrect or manifestly misleading information in a case under the Act. A’s conditions undoubtedly fall under this. It is also not disputed. The question is whether the deportation is disproportionate to A’s four children. As mentioned, it has not been claimed that the decision is disproportionate to A herself or her spouse.⁶⁵

The State argued that deportation with a two-year entry ban was not a disproportionate measure.⁶⁶ The Court found that the societal interest in maintaining an effective immigration system outweighed the considerations of the family and children in the matter of deportation.⁶⁷ The Norwegian Immigration Appeals Board claimed that the family was not subjected to “an unusual burden” and that there were no “exceptional circumstances” to stop the revocation.⁶⁸ The lawyer representing the family, Arild Humlen, argued that the family had a justified expectation of staying together in Norway and called for the use of alternative measures.⁶⁹ He argued that the “unusually large burden” threshold narrows the scope of assessments and results in overlooked relevant factors. He called for consideration of using the alternative of in-country incarceration.⁷⁰ Humlen’s second argument was that the expulsion was disproportionate to the best interest of the children as it constituted an “unusually high burden” and that there were “exceptional circumstances” given the vulnerability of the young children.⁷¹ The State argued that the threshold of “unusually

⁶² KONGERIKET NORGES GRUNNLOV [GRUNNLOVEN] [The Constitution of the Kingdom of Norway] art. 102 (Nor.).

⁶³ *Id.* at art. 104.

⁶⁴ Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of Human Rights Courts*, 36 BOS. UNIV. INT’L L. J. 55, 74 (2018).

⁶⁵ Judgment HR 2019 2286 A at ¶¶ 35–36.

⁶⁶ *Id.* at ¶ 21.

⁶⁷ *Id.* at ¶ 22.

⁶⁸ *Id.*

⁶⁹ *Id.* at ¶ 28.

⁷⁰ *Id.*

⁷¹ *Id.* at ¶¶ 26–27, 30.

large burden” is the appropriate standard when considering the interests of the children, and it considered deportation and a two-year re-entry ban to be a proportionate measure in these types of cases.⁷²

C. Restrictive Contestational Analysis of the Best Interests of the Child and the Right to Family Life

The Norwegian Supreme Court appeared to support the “efficiency” interest of the immigration authorities when it upheld the use of deportation to signal to others the consequences of violating immigration law.⁷³ The Court cited the aims of the immigration system set by the Ministry of Justice within the proposal for the reform of the Norwegian Immigration Law, stating that:

The Ministry believes that it is important to be able to react with deportation in the event of repeated and/or gross violations of the Immigration Act Illegal entry, stay/work without the necessary permission or giving incorrect information violates this relationship of trust and makes it difficult for the authorities to enforce Norwegian immigration policy. It can undermine respect for the regulations and seem unfair to all those who obey the law, if gross or repeated violations of the Immigration Act cannot have consequences.⁷⁴

The Court further cited the Ministry of Justice’s reiterated aim of maintaining immigration control through framing deportation as both a preventive and reactive immigration policy.⁷⁵ Without giving

⁷² *Id.* at ¶ 22.

⁷³ *Id.* at ¶ 49.

⁷⁴ *Id.* (citing Om lov om utlendingers adgang til riket og deres opphold her (utlendingsloven) [About the law on foreigners’ access to the realm and their stay here], 289 Ot.prp.nr. 75 (2006–2007) (Nor.)).

⁷⁵ *Id.* at ¶ 50.

any analytical justification, the Court concluded that deportation does not violate Article 8 of the ECHR, the right to family life; instead, the Court cited the ECtHR as legitimizing such measure by recognizing the use of deportation as a legitimate remedy in *Kaplan v. Norway* in 2014.⁷⁶ The Court adopted a technique of distinguishing the case from the scope of application of the right, thereby enabling it to excuse its non-recognition of the limiting application of human rights.⁷⁷ The Norwegian Supreme Court explained that there are factual differences between the two cases decided by the ECtHR, stating that while there was a violation of Article 8 in *Nunez* and *Kaplan*, these decisions did not apply to the Norwegian Supreme Court case since the ECtHR “assessed the specific circumstantial facts differently from the [Norway].”⁷⁸

The Norwegian Supreme Court cited the ECtHR’s call for a holistic assessment in deportation cases focusing on “the particular circumstances of the person involved and general interest.”⁷⁹ Factors to be considered include: the extent to which the family may be ruptured, the family’s ties to the state they have settled in, and whether there are major obstacles standing in the way of the family returning to and living in their country of origin.⁸⁰ These considerations must also be weighed against societal interests, such as effective immigration control.⁸¹

⁷⁶ Norges Høyesteret [Supreme Court of Norway], April 8, 2019, HR 2019 2286 no. 19-083349SIV-HRET ¶ 54 (citing *Kaplan v. Norway*, App. No. 32504/11, Eur. Ct. H.R. (2014)).

⁷⁷ On resistance by national courts, see generally Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining The Forms and Patterns off Resistance to International Courts*, 14 INT’L J. L. IN CONTEXT 197 (2018); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMPAR. L. Q. 57 (2011).

⁷⁸ *Id.* at ¶ 55.

⁷⁹ *Jeunesse v. the Netherlands*, App. No. 12738/10 ¶ 107 (Eur. Ct. H.R. (2014)).

⁸⁰ *Id.*

⁸¹ Judgment HR 2019 2286 A at ¶¶ 67–68.

Further, the Court mentioned that the Parliament is considering amendment of penalties.⁸² The brief rumination within the Court's dicta indicates

that it was concerned about the consequences of using deportation. Nevertheless, the Norwegian Supreme Court noted that the penalties related to revocation and the economic, social, and emotional consequences of deportation were not disproportionate to the best interests of the child. The Court noted that:

If a deportation decision going to have an impact on children, it is necessary to carry out a thorough, concrete[,] and real individual assessment of the child's interests. Considerations of the best interests of the child should be fundamental and weigh heavily but are not necessarily decisive on their own. A starting point for this assessment is that where serious violations of the Immigration Act lead to the basis for residence falling away, deportation will generally only be disproportionate to the children if it entails unusually heavy or extraordinary burdens upon them. Interventions in family life that do not go beyond what must be assumed to be a general consequence of an expulsion decision—financially, socially and emotionally—are not in themselves sufficient for the intervention to be considered disproportionate.”⁸³

In *Nunez v. Norway*, the ECtHR set forth the need to analyze the specific elements relating to the deportation of a mother in order to assess whether the state was able to strike a fair balance between its public interest in ensuring effective immigration control, and the applicant's need to remain in Norway and maintain contact with her children for the children's best interests. The ECtHR also found that States gave insufficient weight to the best interest

of the child due to several reasons: the child's “long lasting and close bonds to their mother, the decision in custody proceedings, the disruption and stress that the child had already experienced, and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion.”⁸⁴

Dr. Mark Klaassen of the Institute for Immigration Law describes the criteria used by the ECtHR regarding the violation of Article 8(2), which includes the assessment of harsh effects of the deportation upon the best interest of the child and the family's social, cultural, and family ties.⁸⁵ He explains that the ECtHR's test places decisive weight on the principle of the best interest of the child, including the extent that the mother's deportation effectively destroys the family life.⁸⁶ The Norwegian Supreme Court, on the other hand, indicated that respect for family life is insufficient to block deportation if the person was not a legal resident in the country. The Court further noted that “if the foreigner from the outset does not have a legal basis for residence in the country, a subsequent establishment of a family life does not in itself provide protection against deportation” according to the ECtHR.⁸⁷

In contrast, Klaassen argues that the immigration authorities' reasoning that the refusal of residence for a foreign citizen cannot interfere with her right to respect for family life since she was never given the right to residence in the first place is not convincing.⁸⁸ This reasoning relates exclusively to

⁸² *Id.* at ¶ 103.

⁸³ *Id.* at ¶ 107.

⁸⁴ *Nunez v. Norway*, App. No. 55597/09 ¶ 84 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/eng?i=001-105415>.

⁸⁵ See generally Mark Klaassen, *Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases*, 37 NETH. Q. HUM. RTS. 157 (2019) (discussing the ECtHR's criteria for violations of Article 8(2) in deportation cases).

⁸⁶ *Id.* at 165-66.

⁸⁷ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 85-88 (Dec. 9, 2019) (Nor.); (first citing *Jeunesse v. the Netherlands*, App. No. 12738/10 ¶ 103 (Eur. Ct. H.R. (2014))), then citing *Antwi and Others v. Norway*, App. No. 26940/10 ¶ 93 (Eur. Ct. H.R. 2012)).

⁸⁸ Klaassen, *supra* note 83, at 175.

circumstances surrounding immigration status and not to family life itself.⁸⁹

However, others believe that European Convention Law “has no bearing on the way state immigration laws force many families to live in a state of dislocation.”⁹⁰ There is often pressure to “move the whole family to a place that the family would not have considered particularly suitable, were it not for the restrictions they experienced under immigration laws.”⁹¹ The ECtHR does not list immigration control as a legitimate measure of interference in the right to respect for family life.⁹² Hence, Klaassen proposes new guidelines in which the State must clearly define the legitimate goal of violating the right to respect for family life and why the violation is necessary to achieve this goal.⁹³ In comparison, the IACtHR issued an advisory opinion that set forth that:

In situations in which the child has a right to the nationality of the country from which one or both of her or his parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, States may not expel one or both parents for administrative immigration offenses, as the child’s right to family life is sacrificed in an unreasonable or excessive manner.⁹⁴

⁸⁹ *Id.* (“Although there may never have been a right to reside in the past, the refusal to live together in the host state can constitute a ‘colossal interference’ with the right to respect for family life.”) (quoting *Quila v. Sec. State for the Home Dep’t*, (2011) UKSC 45, [32], [43] (appeal taken from Eng.)).

⁹⁰ MARIE-BÉNÉDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT 97 (2015).

⁹¹ *Id.*

⁹² European Convention on Human Rights, art. 8 ¶ 2, Nov. 4, 1950, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, November 4, 1950, ETS 5.

⁹³ Klaassen, *supra* note 83, at 176.

⁹⁴ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, p. 112 (Aug. 19, 2014).

In the present case, most of the Norwegian Supreme Court’s conclusion places high importance on the State’s interest in ensuring respect for the law. The Court held that because A repeatedly provided false information about her identity, country of origin, and the need for asylum she is considered to have engaged in serious violations of immigration law that disqualify her from having a legitimate expectation to stay in Norway and enjoy a protected family life.⁹⁵ This decision focuses on the mother’s fraudulent acts, and it does not place the children at the center of its analysis. The UN Committee on the Protection of the Rights of All Migrant Workers (CMW) and the Committee on the Rights of the Child (CRC) issued a Joint General Comment stating that the best interest of the child assessment should be done by actors independent of the immigration authorities.⁹⁶ They also stressed that general migration control considerations could not override the best interest of the child standards.⁹⁷ Furthermore, Article 9 of the CRC underscores the primacy of the best interest of the child considerations in the context of separation of children from their parents. The CRC states that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and

⁹⁵ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 113-17 (Dec. 9, 2019) (Nor.).

⁹⁶ U.N. Comm. on the Prot. of the Rights of All Migrant Workers & Members of Their Families & U.N. Comm. on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 ¶ 32(c) (Nov. 16, 2017) [hereinafter Joint General Comment No. 3 (2017)]; see JASON M. POBJOY, *THE CHILD IN INTERNATIONAL REFUGEE LAW* 74, 236 (Cambridge 2017) (citing the U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005)).

⁹⁷ Joint General Comment No. 3 (2017), *supra* note 92, at ¶ 33.

procedures, that such separation is necessary for the best interests of the child.⁹⁸

The Norwegian Supreme Court gave a contradictory assessment of the vulnerability of children and characterizes the consequences of deportation as not amounting to exceptional harm. The Court noted that:

[T]he children are normally developed and mainly well-functioning. Prior to the deportation case, they have not been exposed to a break-up with any of the parents or exposed to other particularly stressful circumstances. However, the Court of Appeal assumes that the twins D and E were ‘somewhat vulnerable,’ in slightly different ways. But the development seems to be positive, and I understand the Court of Appeal so that at least part of this is due to the uncertainty and unrest that naturally follows from the deportation case. It is further assumed that especially the three youngest children will be “strongly emotionally affected” if the mother is expelled. But there is no information that this goes beyond what must be expected in such a situation.⁹⁹

Hence, the Norwegian Supreme Court utilized a contestational technique that seeks to define the case as not reaching the scope of application of human rights.¹⁰⁰ The Supreme Court acknowledged that the strong relationship between the mother and the children signal that there is a special bond that should be weighed against the revocation order:

The Court of Appeal assumes that the children are more strongly attached to the mother than the father. She has been responsible for a large part of the daily care of the children, which among other things seems to be related to the fact that the spouse works a lot and comes home late. The children have always lived with both parents.¹⁰¹

In the *Nunez* case, an exceptional circumstances factor was the children’s long-standing and close ties to their mother, but the Norwegian Supreme Court did not discuss this.¹⁰² Nor did the Court discuss the possibility that the father might have to work more to repay the €300.00 fine set by the Norwegian Department of Welfare for the benefits paid to A.¹⁰³ The Court concluded that the children’s father was a stable caregiver.¹⁰⁴ However, there was no discussion of how their father may potentially lose financial, psychological, or emotional stability after their mother’s expulsion. Nor is there a discussion of the impact of the deportation upon the father’s emotional well-being. The Norwegian Supreme Court gave another adversarial evaluation that acknowledged increased pressure on the father after deportation but described it as normal, thereby indicating that it did not meet the threshold needed to stop the revocation.¹⁰⁵

⁹⁸ Convention on the Rights of the Child art. 9, *opened for signature* Nov. 20, 1989, 1557 U.N.T.S. 3.

⁹⁹ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 121 (Dec. 9, 2019) (Nor.).

¹⁰⁰ Greenberg, *supra* note 3, at 518-36.

¹⁰¹ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 122 (Dec. 9, 2019) (Nor.).

¹⁰² *Nunez v. Norway*, App. No. 55597/09 ¶ 84 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/eng?i=001-105415>.

¹⁰³ Kari Yppestol Arntzen & Christina Cantero, *NAV krever at utvist firebarnsmor betaler tilbake nærmere 300.000 kroner*, NRK (Jan. 8, 2020), <https://www.nrk.no/sorlandet/nav-krever-at-utvist-firebarnsmor-betaler-tilbake-naermere-300.000-kroner-1.14851039> [*Nav Demands that the Expelled Mother of Four Pay Back Almost 300,000 Kroner*].

¹⁰⁴ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 123 (Dec. 9, 2019) (Nor.).

¹⁰⁵ *Id.* (“[t]he task of caring for the children’s father will be significant in the two years the entry ban lasts. It may also lead to changed finances for the family. But neither can this be characterized as unusual or extraordinary.”).

The Norwegian Supreme Court concluded that the children would live in an established and safe community. However, it failed to discuss the potential impact on the community after the expulsion of the mother. Also, the local community may distrust state institutions when they hear the news of the separation of a mother from her children by the state; this may create polarization between the society and the state.¹⁰⁶ Without explaining the difference, the Norwegian Supreme Court concluded that the children, in this case, were not exposed to “disruption and stress” like the children in *Nunez*.¹⁰⁷ However, the Court contradicted its previous statement on the effect of the deportation. Here, the Court cited the ECtHR to indicate that it is aware of its jurisprudence, but it distinguished the facts in the instant case, thereby avoiding the requirement to abide by the judgment. This distinction gave the illusion that the Court was abiding by the jurisprudence despite its contradictory decision. The Norwegian Supreme Court suggested that the children take holidays in Djibouti and speak to their mother via telephone and social media.¹⁰⁸

Nevertheless, the Court invited the immigration authorities to reverse their decision according to Section 71(2) of the Norwegian Immigration Act if the children experience psychological problems due to the expulsion of their mother.¹⁰⁹ In upholding the deportation order, the Court stated: “I cannot see that the children will be subjected to an unusually large burden, or the existence of extraordinary circumstances that would indicate that expulsion of A for two years would be a disproportionate measure in relation to the children.”¹¹⁰

¹⁰⁶ See Jan-Paul Brekke et al., *Losing the Right to Stay: Revocation of Refugee Permits in Norway*, 34 J. REFUGEE STUD. (2020), <https://doi.org/10.1093/jrs/feaa006.1637> (2021) (discussing the negative impact of revocation and deportation upon the local community). <https://doi.org/10.1093/jrs/feaa006>.

¹⁰⁷ Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 124 (Dec. 9, 2019) (Nor.).

¹⁰⁸ *Id.* at ¶ 125.

¹⁰⁹ *Id.* at ¶ 126.

¹¹⁰ *Id.* at ¶ 127.

The Norwegian Supreme Court’s decision can be characterized as misinterpreting the best interests of the child standard in the context of deportation because it failed to recognize the particular vulnerability of young children.¹¹¹ A holistic assessment of this case should include an analysis of the extent to which deportation potentially interferes with or affects the child’s family or private life. For example, the father may have to take a new job to pay the fines due to the Norwegian Welfare Department (NAV), and as a result, he may have increased levels of stress. This stress could affect his mood and may lead to a deterioration of his relationship with his children and work colleagues. Additionally, the 14-year-old child might have to undertake a supplementary “mother” role for his younger siblings. The deportation of his mother could lead to alienation from Norwegian identity, lost trust in the Norwegian authorities, poor school performance, exposure to aggressive behavior or communication, low self-esteem, or (in the worst case) possible recruitment to a violent, radicalized, or criminal environment.¹¹² Moreover, it would also be important to analyze the potential mental anguish the mother would suffer upon forcible separation from her children, given her right to family relations.¹¹³ The widely recognized consequences of separating parents from their children were not explored in this Norwegian Supreme Court decision, indicating a lack of a holistic, human rights-based

¹¹¹ See *Nunez v. Norway*, App. No. 55597/09, ¶ 18 (June 28, 2011), https://www.menschenrechte.at/orig/11_3/Nunez.pdf.

¹¹² See generally NORWEGIAN INSTITUTE OF PUBLIC HEALTH, *EFFEKT AV POLITIETS FOREBYGGENDE TILTAK RETTET MOT RADIKALISERING OG SEKSUALLOVBRUDD BLANT UNGDOM: EN SYSTEMATISK OVERSIKT* [EFFECT OF PREVENTION WORK BY THE POLICE TARGETING RADICALISATION AND SEXUAL OFFENCES AMONG YOUTH: A SYSTEMATIC REVIEW] (2021).

¹¹³ Convention on the Elimination of All Forms of Discrimination Against Women art. 16(d), Dec. 18, 1979, 1249 U.N.T.S. 13 (codifying that women and men have “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”).

evaluation of all relevant elements affecting children and their families.¹¹⁴

This case illuminated the challenges faced by NGOs regarding the policy of family status revocation and deportation. In 2020, the Norwegian Organization of Asylum Seekers (NOAS) published a report that revealed a real risk of extended separation of children from parents beyond the two years set by the law because of the practical difficulties faced by the deported parent in returning and/or the children in visiting the country of origin.¹¹⁵ The UN High Commissioner for Refugees (UNHCR) is in favor of states providing humanitarian status to persons who have a canceled/revoked legal status.¹¹⁶ Nevertheless, the current political climate supports the evolution of “crimmigration” policies, which criminalizes asylum seekers for their unlawful entry into the EU and Nordic countries and increases the use of deportation techniques within these countries

has facilitated the maintenance of the “return turn” within the Nordic Region and Europe.¹¹⁷

IV. CONCLUSION

As a case confirms the consequences of revocation and deportation while underscoring the judiciary’s position, which pursued a restrictive contestational approach that failed to recognize the violations of family life and the best interests of the children.¹¹⁸ Judge Cançado Trindade of the International Court of Justice suggested that states that pursue immigration policies that do not abide by human rights may be characterized as acting arbitrarily.¹¹⁹ There is a clear need to change the systematic review of older asylum cases based on national origin to a streamlined approach based on individual security risk assessment to avoid violating the principle of non-discrimination. Additionally, a possible consequence of the systematic revocation

¹¹⁴ See Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. CMTY. RSCH. 3, 5 (2018) (noting the negative psychosocial effects that deportation has on individuals and their families); see also BARNEOMBUDET, BARN MED UTVISTE FORELDRE [THE OMBUDSMAN FOR CHILDREN WITH DEPORTED PARENTS] (2012), https://www.barneombudet.no/uploads/documents/Publikasjoner/Fagrappporter/Barn_med_utviste_foreldre_es.pdf

¹¹⁵ BARNETS BESTE I UTVISNINGSSAKER, NORSK ORGANISASJON FOR ASYLSØKERE [THE BEST INTEREST OF THE CHILD IN DEPORTATION CASES, THE NORWEGIAN ORGANIZATION FOR ASYLUM SEEKERS] (2020), https://www.noas.no/wp-content/uploads/2020/03/NOAS_Barnets-beste_rapport_WEB.pdf (Nor.).

¹¹⁶ Kapferer, *supra* note 6, at 14.

¹¹⁷ KATJA FRANKO, *THE CRIMMIGRANT OTHER: MIGRATION AND PENAL POWER* (2019); see also Thomas McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum Seekers*, 51 COLUMBIA HUM. RTS. L. REV. 1, 5-6 (2019); Nancy Bazilchuk, *Non-citizens punished by deportation: Norwegian police use deportation and punishment interchangeably to avoid spending resources on foreigners in prisons*, SCIENCE NORWAY (Jan. 28, 2015), <https://sciencenorway.no/crime-forskning/no-immigration-policy/non-citizens-punished-by-deportation/1413426> (Indeed, although the UNCHR uses the term cancellation for cases involving misrepresentation, revocation implies application of the exclusion clauses however the Norwegian immigration authorities apply revocation to misrepresentation cases as well); see e.g., Jessica Schultz, *The End of Protection? Cessation and the ‘Return Turn’ in Refugee Law*, EU IMMIGRATION & ASYLUM L. POL’Y (Jan. 31, 2020), <https://eumigrationlawblog.eu/the-end-of-protection-cessation-and-the-return-turn-in-refugee-law/>; see also Vanessa Barker & Peter Scharff Smith, *This is Denmark: Prison Islands and the Detention of Immigrants*, 61 BRIT. J. OF CRIMINOLOGY 1540, 1553 (2021) (observing that the “extended use of penal institutions and penal harms to contain and remove unwanted populations. What happens to unwanted migrants—detention, isolation and removal—is not part of a separate system, a parallel track; it is part and parcel of the welfare state.”).

¹¹⁸ On the potential for a positive role of the judiciary in migration, See Mauro Zamboni, *Swedish Legislation & the Migration Crisis*, 7 THEORY & PRAC. OF LEGIS. 101, 125-29 (2019).

¹¹⁹ Application of the CERD Convention (Qatar v. U.A.E.), Order, 2018 I.C.J. 438, ¶ 31 (July 23) (separate opinion by Cançado Trindade, J.).

and deportation policy is the alienation of the immigrant communities within Norway and the potential increased risk of radicalization within this community, thereby raising the security risk.¹²⁰ Scholars have found that alienation could create a crisis of belonging.¹²¹ Judicial analysis should be grounded in the human principles confirming the dignity of both foreign and Norwegian family members and re-opening the door to a holistic interpretation of international law at the national level.¹²² Norway and other Nordic countries with similar deportation and revocation models should adopt a human rights-based approach to revocation and deportation that would balance the State's interest in maintaining efficiency within migration and the interests of long-term resident refugees to enjoy access to justice when the State is reviewing their precarious status.

¹²⁰ The deregulation policy has profound impact in decoupling the individuals from their community and adding to feelings of xenophobia and exclusion. See Brekke et al., *supra* note 91, at 1646.

¹²¹ Bridget Anderson et al., *Citizenship, Deportation and the Boundaries of Belonging*, 15 CITIZENSHIP STUD. 547, 561 (2011).

¹²² The risk of renewed separation of families is likely to continue, resulting in prolonging of Norway as a deportation leader within Europe. See Franko, *supra* note 113, at 87 (on Norway's increase of assignment of police to implement deportation and expanded use of detention); Sindre Bangstad, *Norway: The Forced Deportation Machine*, PUB. ANTHROPOLOGIST J. BLOG (June 27, 2019), <https://publicanthropologist.cmi.no/2019/06/27/norway-the-forced-deportation-machine/>; JEG HAR IKKE GJØRT NOE GALT, NORSK ORGANISASJON FOR ASYLSØKERE (2017), <https://flyktning.net/media/barn-og-foreldres-opplevelse-av-tvangsretur.pdf> [I Have Not Done Anything Wrong, Norwegian Organization for Asylum Seekers].

SOCIAL SERVICES AND MUTUAL AID IN TIMES OF COVID-19 AND BEYOND: A BRIEF CRITIQUE *by Dana Neacsu**

May 19, 2021, marked a crucial point in the United States' fight against the COVID-19 pandemic: sixty percent of U.S. adults had been vaccinated.¹ Since then, Americans have witnessed the beginning of the end of the COVID-19 pandemic, but its long-term effects are here to stay. Ironically, some are unexpectedly welcome. Among the lasting positive changes is an augmented sense of individual involvement in community well-being. This multifaceted phenomenon has given rise to #BLM

allyship² and heightened interest in mutual aid networks.³ In the legal realm, it has manifested with law students, their educators, lawyers, and the American Bar Association (ABA) proposing new educational standards: law schools ought to build a curriculum centered on social justice, equity, diversity, and inclusion rather than the traditional fixation of "thinking like a lawyer" law programs.⁴

On a larger, political, social, and legal plan, calling for social justice is a call for sustainable democratic capitalism.⁵ And a democracy is as vibrant as its welfare system is.⁶ Calling out social services for being unsatisfactory and inadequate is not and cannot be tantamount to suggesting that the answer was their cancelation.⁷ On the contrary, a

² See, e.g., Dana Neacsu, *George Floyd Protests and Black Lives Matter Roundtable (Pt. II)*, ARK REPUBLIC (June 14, 2020), <https://www.arkrepublic.com/2020/06/14/ark-republic-roundtable-pt-2/>.

³ See, e.g., Andy Newman, *Able to Save 8 Tons of Food in a Single Day: Here Come the Food Rescuers*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/21/nyregion/food-rescue-new-york-covid.html> (noting that an army of volunteers in New York tried to make the best of an inherently wasteful grocery system).

⁴ Proposed Changes to Standards 205 and 206, 303 and 508, and 507, May 7, 2021, ABA, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf; see also April M. Barton, *Teaching Lawyers to Think like Leaders: The Next Big Shift in Legal Education* 73 BAYLOR L. REV. 115, 117 (2021) (for Duquesne University Dean April M. Barton's teaching philosophy of leading with empathy: "Lawyers are taught to advocate, to persuade, to analyze, to parse, to spot issues, even to convince others that they are right. These skills, while admirable, do not always align with good leadership; in fact, if not balanced with emotional intelligence, self-awareness, and social awareness, these skills can defy good leadership." (emphasis added)).

⁵ In the introductory chapter of an upcoming co-authored book on SUSTAINABLE CAPITALISM: CONTRADICTION IN TERMS OR ESSENTIAL WORK FOR THE ANTHROPOCENE (INARA SCOTT, ed), I develop my ideas about how a functional relationship between a vibrant democracy and capitalism might save capitalism from a Κρόνος (Krónos)-like future.

⁶ Dana Neacsu, *A Brief Critique of the Emaciated State and Its Reliance on Non-Governmental Organizations to Provide Social Services*, 9 N.Y. CITY L. REV. 405–35 (2006).

⁷ *Id.*

* Dana Neacsu is an Associate Professor and Director of the Center for Legal Information at Duquesne University School of Law, and Political Science Lecturer at Columbia University. A version of this paper was presented to AFTER THE WELFARE STATE: RECONCEIVING MUTUAL AID, THE 2020 ANNUAL TELOS-PAUL PICONE INSTITUTE CONFERENCE, NYC, February 2020, <https://www.youtube.com/watch?v=vxDT9JFuVUY>. Dana would like to thank Human Rights Brief editors for their thoughtful editing. Izzie and ZouZou, always grateful to listen to your views. This is for you.

¹ Christina Maxouris & Holly Yan, *About 60% Of American Adults Have Had At Least One Dose Of Covid-19 Vaccine, Including More People of Color*, CNN (May 19, 2021), <https://www.cnn.com/2021/05/18/health/us-coronavirus-tuesday/index.html>.

true critique ought to call for their democratic re-evaluation and improvement so that they address intersectional and systemic ills. This article wants to dispel any lingering confusion, especially now that a “newer left” hurries to embrace mutual aid⁸ *in lieu of* the welfare state, which it describes as either cold, dead, or moribund.⁹ Such a simplistic attitude cannot be but a grave mistake when, globally and historically, the only safety network that has reliably provided for all economically vulnerable has been, and remains, state-sponsored social services.¹⁰ This article argues that the pandemic has only magnified the inadequacies of institutional aid to those in need, *not* its irrelevance. Faced with deepened levels of societal vulnerability, my argument remains the same as 15 years ago.¹¹ Today, our troubled American democracy needs pragmatic innovation of steady governmental services. As researchers from Columbia University showed, only the Coronavirus Aid, Relief, and Economic Security (CARES) Act—a

legislative act—lifted an estimated 18 million people out of poverty.¹² No pandemic-made trillionaire offered similar aid to the needy.¹³ No mutual aid network, to my knowledge, could or did match that level of resources.

Nevertheless, governmental services remain inadequate with millions of Americans still in poverty.¹⁴ In this environment, the pandemic has cleared the path for “tax-exempt” charity or neighborhood mutual aid networks as a welcome band-aid. Meanwhile, as a society, we ought to decide how to sustain our market-based, profit-driven democracy while complying with

⁸ A version of this paper was presented to AFTER THE WELFARE STATE: RECONCEIVING MUTUAL AID, THE 2020 ANNUAL TELOS-PAUL PICCONE INSTITUTE CONFERENCE, NYC, February 2020, <https://www.youtube.com/watch?v=vxDt9JFuVUY>.

⁹ See the call for papers for AFTER THE WELFARE STATE: RECONCEIVING MUTUAL AID, THE 2020 ANNUAL TELOS-PAUL PICCONE INSTITUTE CONFERENCE, NYC, February 2020.

¹⁰ See, e.g. FRANK LOEWENBERG, FROM CHARITY TO SOCIAL: THE EMERGENCE OF COMMUNAL INSTITUTIONS FOR THE SUPPORT OF THE POOR IN ANCIENT JUDAISM (2017) (noting a historical example where only institutional support promotes social justice at the level of policy, while non governmental support, often charity, perpetuates status quo and inequality).

¹¹ Neacsu, *supra* note 6, at 405–35.

¹² Pam Fessler, *U.S. Census Bureau Reports Poverty Rate Down, But Millions Still Poor*, NPR (September 10, 2019); Priyanka Boghani, *How COVID Has Impacted Poverty in America*, PBS (Dec. 8, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-poverty-america/> (The Census Bureau releases poverty figures on an annual basis with a one-year lag, so the September figures don’t capture COVID-19 realities. When the pandemic started, researchers at Columbia University’s Center on Poverty & Social Policy set out to fill that gap. They began estimating poverty in the U.S. on a monthly basis using the supplemental poverty measure, which takes into account families’ expenses and government assistance. The researchers put the poverty rate in America before the crisis began at around 15 percent. Even as COVID-19 prompted initial shutdowns in March and some sectors of the economy ground to a halt, income tax credits for eligible families helped offset losses, lowering the poverty rate to 12 percent for that month. In April, the impact of record high unemployment was blunted by a federal economic relief package. Individuals who qualified received stimulus checks of \$1,200; married couples received \$2,400; and those with children received an additional \$500 per child. People who successfully filed for unemployment received an additional \$600 per week from the federal government. Columbia researchers estimated that without the support provided by the CARES Act, poverty in April would have jumped to 19.4 percent. With the support, the month ended at 13.9 percent. Researchers estimated 18 million people were lifted out of poverty in April by the federal relief package.).

¹³ Juliana Kaplan, *Billionaires Made \$3.9 trillion during the Pandemic—Enough to Pay for Everyone’s Vaccine*, BUS. INSIDER (Jan. 21, 2021), <https://www.businessinsider.com/billionaires-made-39-trillion-during-the-pandemic-coronavirus-vaccines-2021-1>.

¹⁴ See Fessler, *supra* note 12 ([T]he Census Bureau found that 38.1 million people in 2018 were poor. This was 1.4 million fewer poor people than in 2017, but about one in eight Americans still lived below the poverty line—\$25,465 for a family with two adults and two children.).

international standards of access to basic human rights.¹⁵

I. THE PANDEMIC MUTUAL AID

In early 2020, the COVID-19 pandemic was an unfortunate event, still far away from the American shores. At that point, the pandemic had not impacted our American-made reality. And then, suddenly, within months, the COVID-19 pandemic reached the United States. Like Christopher Columbus' ships, cramped and filled with an unknown illness, which took over a vast continent and made it theirs, the pandemic also redefined our Americas and our way of life in ways unimaginable beforehand.¹⁶ The institutional support of vulnerable communities appeared inadequate.¹⁷ Globally, it is still hard to achieve it when international organizations rate human rights performance without poverty data.¹⁸ For instance, there are fifty countries on the developed countries list, including the Russian Federation and the United States, though none provides the percent of their population living in poverty.¹⁹ Mutual aid appears as the easy way out—below the radar. Indeed, it is the cheapest—it asks

for voluntary action—and also the fastest manner of assistance to use in times of crisis.²⁰

Unable to face and fight the invisible enemy, individuals, disoriented and scared, found that there were no sufficient resources and networks to catch the most vulnerable ones. Fear in a time of crisis is, at first, a source of collective paralysis. Then, it pushes people, if not governments, to organize and help each other.²¹ Not a moment too soon, because new needs, pandemic produced, demanded new and diverse resources. For instance, as workplace closures and self-isolation spread throughout the country, the ordinary ways to feed the hungry became inadequate. Thus, when informal networks organized to meet new, specific, pandemic-created

¹⁵ See, e.g., *International Human Rights Law*, United Nations Human Rights Office of the High Commissioner, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (for more on basic human rights); *Human Rights by Country: United States*, United Nations Human Rights Office of the High Commissioner, <https://www.ohchr.org/EN/Countries/LACRegion/Pages/USIndex.aspx> (for the United States adherence to those international instruments).

¹⁶ Dave Roos, *The Ships of Christopher Columbus Were Sleek, Fast—and Cramped*, HISTORY (Oct. 10, 2019), <https://www.history.com/news/christopher-columbus-ships-caravels>.

¹⁷ See *Disaster Financial Assistance with Food, Housing, and Bills*, USA.gov, <https://www.usa.gov/disaster-help-food-housing-bills> (noting that the eviction moratorium was temporary).

¹⁸ See UNITED NATIONS DEVELOPMENT PROGRAMME, GLOBAL HUMAN DEVELOPMENT INDICATORS, <http://hdr.undp.org/en/countries>.

¹⁹ *Id.*

²⁰ See generally NICHOLE GEORGE, NEOLIBERALISM, DEVELOPMENT, AND AID VOLUNTEERING 10 (2012) (“Crisis” is understood here as both a natural catastrophic event, such as a hurricane or the COVID-19 pandemic, but also as the result of centuries of institutional neglect of a social issue. Natural catastrophes bring out altruism and volunteerism, “within the realm of civil service: providing for the ‘needs of those in need.’”); Diane Pien, *Black Panther Party’s Free Breakfast Program (1969-1980)*, BLACKPAST (Feb. 11, 2010), <https://www.blackpast.org/african-american-history/black-panther-party-free-breakfast-program-1969-1980/> (Governmental neglect of issues, such as the hunger of black children, produced a more organized type of volunteerism. For instance, in 1966, the federal government initiated the School Lunch Program in response to wide-spread poverty. However it only provided reduced-price, and not free lunches for poor children from a few rural schools. Because hunger and poverty was affecting black communities in urban areas, and made it difficult for many poor black children to stay and learn in school, the Black Panthers started the Free Breakfast Program in Oakland, California, and it was open to all children enrolled.); THE DR. HUEY P. NEWTON FOUNDATION, THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS 30-34 (2008) (The Panthers’ Free Breakfast Program focused national attention on the urgent need to give poor children nutritious meals so they could be successful in school. In 1973, this attention helped lead to Congress’ dramatic increase in funding of the national School Lunch Program so poor children could get free lunches. The Panther’s Free Breakfast Program spotlighted the limited scope of the national School Breakfast Program and helped pressure Congress to authorize expansion of the program to all public schools in 1975.).

²¹ See generally Timothy Luke, *The Dawn of the COVID-19 Pandemic: The Administration of Fear and Fear of Administration in the United States*, 2020 TELOS 191 (2020).

wants, their success was nothing short of a miracle for those faced with the sudden shortage of services. For instance, in Aurora, Colorado, librarians assembled kits of essentials for the elderly and children who would not have access to meals,²² and in the San Francisco Bay Area, people organized assistance for one another.²³ Similarly, in Seattle, Washington, volunteers came together to help undocumented people in their communities.²⁴

The pandemic conquered the world in a few months, borders closed, and the international flow of goods, people, and services halted. Entire countries were under lockdown, and this brought the global economy to almost a standstill. The fundamental challenges of the pandemic shook the rules that govern our social, political, and economic lives, exposing their inadequacy. With each day, the pandemic challenged electoral, legislative, and judicial processes, all while disrupting lives beyond what was imaginable. Legal scholars shared knowledge and insights about how law shapes responses to—and is itself shaped by—the unfolding crisis.²⁵ Other scholars recorded the impromptu networks of mutual aid that have taken over the world.²⁶ The press, too, has continued to bring to life stories about this immediate outpouring of self-organized voluntarism in hopes to inspire more action.²⁷

²² Jia Tolentino, *Can I Help You?*, NEW YORKER 25 (May 18, 2020).

²³ See Neacsu, *supra* note 6.

²⁴ See Tolentino, *supra* note 22, at 25–26. In New York City, dozens of groups across all five boroughs signed up volunteers to provide childcare and pet care, deliver medicine and groceries, and raise money for food and rent. Relief funds were organized for movie-theatre employees, sex workers, and street vendors. *Id.* Shortly before the city's restaurants closed, on March 16th, leaving nearly a quarter of a million people out of work, three restaurant employees started the Service Workers Coalition, quickly raising more than twenty-five thousand dollars to distribute as weekly stipends.

²⁵ KATHARINA PISTOR, LAW IN THE TIME OF COVID-19 ix, (Columbia Law School, 2020).

²⁶ See generally REBECCA SOLNIT, PANDEMIC SOLIDARITY: MUTUAL AID DURING THE COVID-19 CRISIS (2020).

²⁷ See Neacsu, *supra* note 6.

Due to the pandemic, “mutual aid” entered the lexicon of the coronavirus era.²⁸ Alongside “social distancing” and “flattening the curve,” mutuality has encapsulated a social phenomenon, and legal narratives (like this one) brought it to center stage. During the pandemic, mutual aid has proved providential. But shall the question become, can mutual aid replace everyday welfare as a sustainable solution for the many ills of our market-based, profit-driven, American society? The answer needs to be a resounding no. Moreover, democratically speaking, is it a good idea to suggest something so akin and prone to *clientelism* in lieu of welfare services?²⁹ As insufficient and impersonal as welfare is, it doesn't come with that potential level of subordination and indignity: there are no one's whims to negotiate.

Mutual aid services have garnered so much praise recently as ad-hoc organizations of neighbors and do-gooders because they are personal, and do not threaten the dignity of those receiving them. Could that be, perhaps ironically, because they are temporary?³⁰ Consequently, recipients of such temporary services cannot and are not described with derogatory terms like “freeloaders.”³¹ Moreover, due to their contained scope, they effectively respond to the specific vulnerability of the people they help. They are construed to offer specific aid in times of crisis. They also do not depend on a bureaucracy, which runs the risks of creating delays between the appearance of needs and their satisfaction. Provided by ad-hoc networks of neighbors, for instance, these services can start where they are needed almost as soon as they are needed. They can quickly address specific needs that are usually ignored. They provide

²⁸ See generally SOLNIT, *supra* note 26.

²⁹ See, e.g., Philip Keefer & Răzvan Vlaicu, *Democracy, Credibility, and Clientelism*, 24 J. L., ECON., & ORG. 371–406 (2008) (describing political clientelism).

³⁰ DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 13–19 (2020).

³¹ Derek Thompson, *Busting the Myth of ‘Welfare Makes People Lazy’*, ATLANTIC (Mar. 8, 2008) (explaining the politics behind demoralizing identifiers about the poor on welfare), <https://www.theatlantic.com/business/archive/2018/03/welfare-childhood/555119/>.

amazing relief to victims of storms, earthquakes, and other catastrophic events.³² It could be such specific tasks as walking pets or rescuing victims, including helping undergraduates lost or merely abandoned in dormitories.³³

Mutual aid projects have been successful in times of crisis. Unfortunately, like cancer, economic vulnerability is a chronic condition in our capitalist democracy that requires systemic solutions to manage it and, possibly, eradicate it. Welfare is meant to help all individuals live with dignity, and it achieves this by catching those who need help in a safety net. Welfare rests on the assumption that all citizens have a social right to a minimum standard of living.³⁴

Months of various degrees of isolation forced U.S. citizens living at home and abroad to fall behind in their usual standards of living. Travel remains a risky prospect for many. We carry with us an invisible enemy, COVID-19, but also a contagious lack of leadership and a colossal lack of vision as a government of people.³⁵ Is it worth debating whether to offer daily support to our most vulnerable or whether we should charge their neighbors with that duty? The pandemic has exposed the cracks in our moral and social safety nets. Such services might prove as strong as a spider's web if we fill the safety nets with mutual aid alone, without building systemic support.³⁶

³² SPADE, *supra* note 30.

³³ *Id.*

³⁴ See generally JOHANNES KANANEN, *THE NORDIC WELFARE STATE IN THREE ERAS: FROM EMANCIPATION TO DISCIPLINE NEED* (2016).

³⁵ See Neacsu, *supra* note 6.

³⁶ E. B. WHITE, *CHARLOTTE'S WEB* (1952) (a children's novel which tells the story of a livestock pig named Wilbur and his friendship with a barn spider named Charlotte).

II. HISTORICAL AND COMPARATIVE CONTEXTUALIZATION OF WELFARE SERVICES AND MUTUAL AID

There is plenty of history for a comparative contextualization to prevent uncritically embracing mutuality. If we visualize history as pageantry and democracy as theater, there are some well-written scripts and strong characters.

A. A Brief View of Mutuality in American History through the Ages

Antiquity claimed to have birthed democracy, but it did it as a premature baby.³⁷ Athens limited the demos to the white male of means and thrust power at them.³⁸ That democracy brings to mind ours in its pre-American Civil War embodiment, much admired by Count de Tocqueville,³⁹ though, like in Athens, it ran alongside slavery and it ignored women and children.⁴⁰ It lacked welfare for all, but, as expected, charity and mutual aid existed if for

³⁷ See generally ARISTOTLE *POLITICS* (350), BOOK II (disparaging democracy), or NANCY EVANS, *CIVIC RITES: DEMOCRACY AND RELIGION IN ANCIENT ATHENS* (2010).

³⁸ *Id.*

³⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

⁴⁰ See, e.g., Aristotle, *THE ATHENIAN CONSTITUTION* (Sir Frederic G. Kenyon trans., 1903) (350 B.C.E) ("Not only was the constitution at this time oligarchical in every respect, but the poorer classes, men, women, and children, were the serfs of the rich. They were known as Pelatae and also as Hectemori, because they cultivated the lands of the rich at the rent thus indicated. The whole country was in the hands of a few persons, and if the tenants failed to pay their rent they were liable to be hauled into slavery, and their children with them. All loans secured upon the debtor's person, a custom which prevailed until the time of Solon, who was the first to appear as the champion of the people. But the hardest and bitterest part of the constitution in the eyes of the masses was their state of serfdom. Not but what they were also discontented with every other feature of their lot; for, to speak generally, they had no part nor share in anything.").

nothing else to welcome strangers, as Ovid reminds us in *Metamorphoses*.⁴¹

Democracy took center stage at the end of the eighteenth century, during the American and French Revolutions, with capitalism oiling its wheels.⁴² Whether Napoleon I crushed the budding French democracy at the very beginning of the nineteenth century, or put an end to the terror responsible for its demise, is unclear.⁴³ That temporary defeat showcased through both its potential and limits, whatever its version, capitalist liberal democracy aimed at aristocratic honors, but not at privilege as an organizing principle. The United States, too, abhorred aristocratic privilege, although not privileged positions in a hierarchical society.⁴⁴ Unequal from its beginning, our democracy had to embrace all types of services for the vulnerable. Social welfare was born from a complex private and public endeavor.⁴⁵

In a society where individuals were expected to be self-sufficient, welfare services were an anomaly.⁴⁶ As Tocqueville noted two centuries ago, each local community was supposed to take care of their “marginal” elements;⁴⁷ probably, a minor issue not worth institutionalizing. With their end effect—

rescuing the marginal elements, welfare services have never been an intrinsic part of the American democratic duty, whether at the federal or local level.⁴⁸ It is only to be expected that the earliest poor relief enacted by the American colonies and the states assisted the disabled, the widow, and the orphan.⁴⁹ The American Civil War occasioned an increased involvement with the federal government, which established the Freedmen’s Bureau and a significant expansion of voluntary effort.⁵⁰ In 1862, Congress enacted the *Pension Act*⁵¹ to provide benefits to Union veterans disabled during the conflict and their dependents.⁵² In 1890, the program covered all disabilities, except old age,⁵³ not only war-related injuries.⁵⁴

The U.S. Congress created the first federal social welfare agency, the Bureau of Refugees, Freedmen, and Abandoned Lands, in 1865⁵⁵, and periodically provided for its funding.⁵⁶ Though never adequately funded in its seven-year period of operation, the

⁴¹ See OVID, *METAMORPHOSES*, PART VIII (8 AD) (This book is telling the story of Jove and Mercury searching for hospitality as people in need. Baucis and Philemon, an elderly couple of no particular fame, with no wealth to speak of, welcome them, as a stranger and his son seeking help. Baucis and Philemon lay out all the food they have.).

⁴² See generally CHARLES LOYSEAU, *A TREATISE OF ORDERS AND PLAIN DIGNITIES* (1994) (on orders and dignities in monarchist France).

⁴³ See, e.g., JULES MICHELET, *HISTOIRE DE FRANCE* (1909) (for a discussion of the Napoleonic impact on the French democracy).

⁴⁴ See, e.g., DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 39.

⁴⁵ See, e.g., SOCIAL SECURITY ADMIN., *Historical Background and Development of Social Security*, <https://www.ssa.gov/history/briefhistory3.html>.

⁴⁶ See generally *Department of Veterans Affairs*, VA History in Brief, https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (regarding the vulnerable members of the society, especially war veterans).

⁴⁷ See, e.g., DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 39.

⁴⁸ See, e.g., STEPHEN NATHAN HAYMES, MARIA VIDAL DE HAYMES, & REUBEN JONATHAN MILLER, *THE ROUTLEDGE HANDBOOK OF POVERTY IN THE UNITED STATES* (2015).

⁴⁹ William P. Quigley, *The Earliest Years of Federal Social Welfare Legislation: Federal Poor Relief Prior to the Civil War*, 79 U. DET. MERCY L. REV. 157–88 (2002).

⁵⁰ See, e.g., John K. Bardes, *Redefining Vagrancy: Policing Freedom and Disorder in Reconstruction New Orleans, 1862–1868*, 84 J. OF SOUTHERN HIST. 69–112 (Feb. 2018) (for concrete examples of volunteerism).

⁵¹ AN ACT MAKING APPROPRIATIONS FOR THE PAYMENT OF INVALID AND OTHER PENSIONS OF THE UNITED STATES FOR THE YEAR ENDING THE THIRTIETH OF JUNE, EIGHTEEN HUNDRED AND SIXTY-THREE, 12 STAT. 331, Chap. VI (Jan. 8, 1862).

⁵² J. W. Oliver, *History of Civil War Military Pensions, 1861–1885*, 4 BULLETIN OF U. OF WISCONSIN, HIST. SERIES 1 (1917).

⁵³ Congress included pensions for old age a half-a century later. SOCIAL SECURITY ACT Pub. L. 74-271; 49 STAT. 620 (Aug. 14, 1935).

⁵⁴ *Id.*; AN ACT GRANTING PENSIONS TO SOLDIERS AND SAILORS WHO ARE INCAPACITATED FOR THE PERFORMANCE OF MANUAL LABOR, AND PROVIDING FOR PENSIONS TO WIDOWS, MINOR CHILDREN, AND DEPENDENT PARENTS, 26 STAT. 182, Chap. 634 (June 27, 1890).

⁵⁵ FREEDMEN’S BUREAU ACT, 13 STAT. 507, Chap. 90 (Mar. 3, 1865).

⁵⁶ COMMAND OF THE ARMY ACT OF 1867, 14 STAT. 485, Chap. 170.

Bureau provided direct relief to former slaves in their transition to freedom.⁵⁷ It also provided educational, medical, and legal services to the destitute.⁵⁸ In the aftermath of the American Civil War, the need for social services was so acute that in addition to government-sponsored services and numerous voluntary social welfare programs, a new type of organization appeared, combining public and private money.⁵⁹ The nation's first major public health organization—the U.S. Sanitary Commission was a public-private agency created by federal legislation in 1861 to support sick and wounded soldiers during the American Civil War, which enlisted thousands of volunteers.⁶⁰ Subsequently, much of its work would be provided by the American Red Cross, a charity founded by Clara Barton in 1881.⁶¹

During the late nineteenth and early twentieth centuries, mutual aid thrived alongside social welfare, and millions of Americans received benefits from their fraternal or “sororal” societies. In the late nineteenth century, the three main fraternal types were secret societies, sick and funeral benefit societies, and life insurance societies.⁶² By 1920, one in three adult males belonged to one of these societies. Furthermore, ethnic societies provided more assistance than other institutions, “public or private, [which] were only viewed as a last resort.”⁶³

⁵⁷ For a history of the Bureau's activity, see generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (2014).

⁵⁸ M.E. Titzel, *Building A Child Welfare Program In Wartime*, 24 AM. J. SOCIO. 411–22 (1919).

⁵⁹ CLARA BARTON, *THE RED CROSS IN PEACE AND WAR* (American Historical Press ed. 1906).

⁶⁰ See, e.g., *U.S. Sanitary Commission: 1861*, VCU LIBRARIES: SOCIAL WELFARE HIST. PROJECT (2013), <https://socialwelfare.library.vcu.edu/programs/health-nutrition/u-s-sanitary-commission-1861/>.

⁶¹ BARTON, *supra* note 59.

⁶² DAVID T. BEITO, *FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890–1967* (2000).

⁶³ *Id.* at 2.

In this very complex environment of inadequate services, to exclusively rely on mutuality at first appears ideological rather than practical. Postcolonial neoliberal solutions seem to unite as government institutions collapse and private corporatist alternatives are encouraged to flourish.⁶⁴ These solutions appear to be the antidote to the, by now, puny welfare bureaucrats⁶⁵ and blindly promoted mutual aid enters as the savior.⁶⁶ Uncritically endorsed, it might provide the capital to normalize the most wrongs in the most insidious and injurious way. Low-income families are expected to provide necessary assistance for each other without institutional help.⁶⁷ Poor countries, with riches depleted by colonial exploitation, are now left to organize, resolve the damage and heal from the exploitation. There is little infrastructure in place to help fix the inherited wrongs, while the rich and the haves are further insulated within their kinship networks.⁶⁸

Ideologically speaking, mutuality seems to fit our American society better. Whether liberal or neoliberal, our domestic policies have promoted a market-based economic development and growth strategy as the obvious solution to alleviating poverty, affecting approaches to the problem discursively, politically, economically, culturally, and experientially.⁶⁹ However, rather than alleviating poverty, this increased market-based approach has exacerbated poverty and pre-existing inequalities.⁷⁰ Deregulation and privatization of social welfare services align them closely to mutual aid funding and with the transformation of the liberal state from a benevolent one to a punitive police-watch state.⁷¹ Criminalizing poor women, racial and ethnic

⁶⁴ See, e.g., HAYMES ET AL., *supra* note 48.

⁶⁵ See, e.g., Neacsu, *supra* note 5, at 405–35.

⁶⁶ See, e.g., SPADE, *supra* note 30.

⁶⁷ See, e.g., *How the Poor Help Each Other*, 55 N.Y. EVANGELIST 6 (Jan. 17, 1884).

⁶⁸ See generally PRABHU KANDACHAR, *SUSTAINABILITY CHALLENGES AND SOLUTIONS AT THE BASE OF THE PYRAMID: BUSINESS, TECHNOLOGY AND THE POOR* (2008).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Neacsu, *supra* note 6, at 405–35.

minorities, and immigrants have been conducive to the increasing poverty levels.⁷² On the contrary, Canadian welfare originated from a different ideology: welfare services are a governmental duty, not an individual option.⁷³ For instance, when remuneration from employment is inadequate, including old age and disability pensions, state-based welfare steps in with unemployment insurance, paid employment leave for new parents, state-funded health insurance, and publicly funded education and job training.⁷⁴

Individualism extolled, it makes sense that people avoided government aid at all cost. Moreover, during the late nineteenth and early twentieth centuries, all the aid for the poor, whether it came from the government or organized charities, “was not only minimal but carried great a stigma.”⁷⁵ Americans seemed more comfortable relying first on fraternal societies.⁷⁶ These societies, smaller in scope, addressed their members’ cultural, psychological, and gender needs. They also addressed these needs holistically: “In contrast to the hierarchical methods of public and private charity, fraternal aid rested on an ethical principle of reciprocity. Donors and recipients often came from the same, or nearly the same, walks of life; today’s recipient could be tomorrow’s donor, and vice versa.”⁷⁷

Though in demand, these services were highly unstable because they depended on membership dues, and with the increase in joblessness in the Depression era, their effectiveness ebbed as demand increased.⁷⁸ For instance, some three in four families had to let some or all insurance policies and other membership benefits lapse. A lapsed member of a Black society in Mississippi summarized a recurrent

fraternal complaint: “People got no work. How are they [going to] pay dues when they [can’t] eat?”⁷⁹ Compounding on these issues, the U.S. Supreme Court also demonstrated its lack of empathy for the poor, by acknowledging only the “narrowest constitutional grounds for addressing their interests.”⁸⁰ While the nation was fighting the War on Poverty, the Supreme Court was making its 1970 contribution.⁸¹ In *Dandridge v. Williams*, the Court held that 250 U.S. dollars per month was an absolute public assistance grant limit, regardless of the size of the family and its actual need, and it did not violate the Equal Protection Clause of the Fourteenth Amendment.⁸² *Dandridge* is only one of many of these types of “corrective justice” cases.⁸³

B. A Brief Comparative View of Mutuality in the 20th Century

Ironically, in the aftermath of World War II (WWII), Western liberal democracies relied on American help to build their welfare states.⁸⁴ The United States engaged in that endeavor at the expense of walling off their eastern, more vulnerable neighbors in one police state after another. Subsequently described as paternalistic, the liberal welfare state soon became disparaged as such.⁸⁵

On June 5, 1947, Secretary of State George C. Marshall delivered a speech to the graduating class at Harvard University. In the speech, Marshall

⁷² See, e.g., HAYMES, ET. AL., *supra* note 48.

⁷³ See generally PAUL H. STUART ET AL., *ENCYCLOPEDIA OF SOCIAL WELFARE HISTORY IN NORTH AMERICA* (2005).

⁷⁴ *Id.*

⁷⁵ Quigley, *supra* note 49, at 233.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1509 (1991).

⁸¹ For various financial federal allocations for state administered projects, see, generally UNITED STATES. OFFICE OF ECONOMIC OPPORTUNITY, *WAR ON POVERTY PROJECTS* (1965).

⁸² *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

⁸³ See, e.g., Neacsu, *supra* note 6, at 420 (discussing *Bowen v. Gilliard*, 483 U.S. 587 (1987)).

⁸⁴ Scott Parrish, *The Marshall Plan, Soviet-American Relations, and the Division of Europe*, in *THE ESTABLISHMENT OF COMMUNIST REGIMES IN EASTERN EUROPE, 1944-1949* 267 (Norman Naimark and Leonid Gibianskii ed., 2018).

⁸⁵ See, e.g., JULIAN LE GRAND & BILL NEW, *GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND?* (2015) (for a history of welfare).

made a dramatic offer of large-scale American economic aid to help in the reconstruction of war-ravaged Europe. . . . Despite increasing tensions between the United States and the Soviet Union over the postwar European order, the offer of aid was not restricted to any particular set of countries; Marshall welcomed the participation of “any country that is willing to assist in the task of recovery.” After some initial hesitation, however, the Soviet Union rejected the American proposal, and coerced its Eastern European neighbors into following suit. [. . .] *The Marshall Plan thus seems to have been a watershed in the development of the Cold War.*⁸⁶

The division of Europe into two competing blocs, each led by one of the emergent superpowers, was likely the result of aid distribution.⁸⁷ Western liberalism broadened the specter of individual rights, enlivening the discourse about the haves and the have-nots and working on social safety-net structures.⁸⁸ The liberal welfare state made its first appearance, too.⁸⁹

In order to avoid being crushed by Soviet tanks and following the demands of the post-war

international order,⁹⁰ countries east of Berlin kneeled and kissed the hand of their Russian godfather.⁹¹ By 1947, the Eastern European states—Poland, Czechoslovakia, Hungary, Bulgaria, and Romania—were fully Sovietized.⁹² Their oligarchies were not monolithic, and neither were their identifiers: dictatorship of the proletariat, Socialist Republic, or People’s Republic.⁹³ In reality, as it turned out, both eastern and western democracies shared a similar prosperity goal: building a oligarchy⁹⁴ acceptable by their people. Both went too far—the Berlin Wall was toppled on November 9, 1989⁹⁵—though in the West, the top one percent seem to continue to enjoy some popularity from their economic stratosphere.⁹⁶ Without a doubt, the upper echelon of eastern nomenclature—the height of the Soviet bureaucracy—enjoyed much less than their western counterparts.⁹⁷ Perhaps, in hindsight, that explains the implosion of that system and the

⁸⁶ *Id.* (emphasis added).

⁸⁷ See, e.g., Donald Sassoon, *The Rise and Fall of West European Communism 1939-48*, 1 CONTEMP. EUROPEAN HIST. 139 (1992) (for more on the role of foreign aid in the history of Western Europe).

⁸⁸ See, e.g., Michael Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 U. MO.—KANSAS CITY L. REV. 733-90 (2001) (for an in-depth discussion about the impact of international liberalism on haves and have nots).

⁸⁹ See, e.g., DAVID G. MAYES & ANNA MICHALSKI, *THE CHANGING WELFARE STATE IN EUROPE: THE IMPLICATIONS FOR DEMOCRACY* (2013) (for an in-depth discussion about the impact of international liberalism on haves and have nots); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* (1974) (describing a brief history of welfare in America).

⁹⁰ See, e.g., ANTONY BEST, *INTERNATIONAL HISTORY OF THE TWENTIETH CENTURY* (2004).

⁹¹ *Id.*

⁹² Parrish, *supra* note 84.

⁹³ See Leonid Gibianskii, *The Soviet-Yugoslav Split and the Cominform*, in *THE ESTABLISHMENT OF COMMUNIST REGIMES IN EASTERN EUROPE, 1944-1949* 291 (Norman Naimark and Leonid Gibianskii ed., 2018) (There were clear differences of subordination and freedom in the Eastern Bloc, with Tito’s Yugoslavia occupying one of the highest ranks.).

⁹⁴ See generally ANDERS ÅSLUND, *HOW CAPITALISM WAS BUILT: THE TRANSFORMATION OF CENTRAL AND EASTERN EUROPE, RUSSIA, AND CENTRAL ASIA* (2007) (on Soviet and post-Soviet capitalism); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) (arguing that rising inequality has been the historical nor in each society).

⁹⁵ LIBRARY OF CONGRESS, *THE RISE AND FALL OF THE BERLIN WALL* (Nov. 1, 2019) <https://blogs.loc.gov/international-collections/2019/11/the-rise-and-fall-of-the-berlin-wall/>.

⁹⁶ Kerry A. Dolan et al., *Forbes World’s Billionaires List: The Richest in 2021*, FORBES, <https://www.forbes.com/billionaires/#549ef44e251c> (“Jeff Bezos and Elon Musk have reached the stratosphere—with each rocket man amassing more than \$150 billion. Here, a timeline of their journey to the top.”)

⁹⁷ See, e.g., Dana Neacsu, *Romania, Bulgaria, The United States and the European Union: The Rules of Empowerment at the Outskirts of Europe*, 30 BROOKLYN J. INT’L L. 185, 188 (2004).

willingness of their oligarchs to join the liberal, market-based system.⁹⁸

Behind the Iron Curtain, through time and tremendous individual sacrifice,⁹⁹ Soviet Russia and its acolytes (more accurately, hostages),¹⁰⁰ improved the level of collective socio-economic well-being. Through nationalization, planification, and cooperativization, all Soviet countries achieved various levels of socio-economic accomplishments.¹⁰¹ By the time of Stalin's death in 1953, the horrors of WWII had been contained, and every Russian enjoyed a minimum amount of consumer goods.¹⁰² The 1970s produced unparalleled social and economic progress in all developing (socialist) countries.¹⁰³ In parallel with this process, perhaps recognizing the minimal level of success of these policies, all these systems based on surveillance, falsehood, and propaganda encouraged a type of mutual aid patronage.¹⁰⁴ This proto-networking was based on loyalty, nepotism,¹⁰⁵ or strong connections akin to kinship.¹⁰⁶ Each social-economic stratum created its own ad-hoc cultural clubs, from neighbors sharing movies, books, or music tapes purchased

on the black market to the nomenclature's close-knit kinship networks.¹⁰⁷

Thirty years after the fall of the Iron Curtain, all of these horizontal networks and associations continue.¹⁰⁸ Some might say that the practice of clientelism—a type of mutual aid—encouraged corruption and constituted a major cause in the fall of the soviet system.¹⁰⁹ Consequently, this legacy of kinship-based corruption was seen as a major obstacle to the development of viable democratic and market institutions¹¹⁰ because systemic corruption undermines the rule of law, which is crucial for democracy and a market economy.¹¹¹ One might even speculate that the Iron Curtain had to fall to allow the rich of the West and East to enjoy the other's company openly.¹¹² For instance, the current dictator of the former Soviet Republic of Kazakhstan, is Nursultan Nazarbayev, a former high-level member of the politburo.¹¹³ Today, he is a billionaire.¹¹⁴ His privileges as a high level politician in a Soviet system could never compare with the opportunities presented by the free market.

Despite coups and televised revolutions, social networks have proven unshakeable in the former Soviet states.¹¹⁵ The poor have survived with family

⁹⁸ *Id.*

⁹⁹ See, e.g., Dana Neacsu, *History as Advocacy? That Takes the Prize (Gulag: A History)*, 54 SANTA CLARA L. REV. 213-31 (2004).

¹⁰⁰ See generally NORMAN NAIMARK & LEONID GIBIANSKII, *THE ESTABLISHMENT OF COMMUNIST REGIMES IN EASTERN EUROPE, 1944-1949* (2018).

¹⁰¹ *Id.*

¹⁰² Ernest Block, *The Soviet Welfare State*, 186 CONTEMP. REV. 44, 45 (Jul. 1, 1954).

¹⁰³ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *THE HISTORY OF UNCTAD 1964-1984* 7 (1985), https://unctad.org/system/files/official-document/osg286_en.pdf

¹⁰⁴ See generally DAVID L. HOFFMANN, *CULTIVATING THE MASSES: MODERN STATE PRACTICES AND SOVIET SOCIALISM, 1914-1939* (2011).

¹⁰⁵ TIMOTHY K. BLAUVELT, *CLIENTELISM AND NATIONALITY IN AN EARLY SOVIET FIEFDOM* (2011).

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Geoffrey Pridham, *STABILISING FRAGILE DEMOCRACIES: COMPARING NEW PARTY SYSTEMS IN SOUTHERN AND EASTERN EUROPE* 58-82 (1996) (for a review of how nomenclature became the upper class).

¹⁰⁸ See, e.g., CHRISTOPH H. STEFES, *UNDERSTANDING POST-SOVIET TRANSITIONS: CORRUPTION, COLLUSION AND CLIENTELISM* (2006).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See, e.g., Dana Neacsu, *Romania, Bulgaria, The United States and the European Union: The Rules of Empowerment at the Outskirts of Europe*, 30 BROOKLYN J. INT'L L. 185, 188 (2004).

¹¹³ Nursultan-Nazarbayev, *BRITANNICA*, <https://www.britannica.com/biography/Nursultan-Nazarbayev>.

¹¹⁴ *Id.*

¹¹⁵ Dana Mustata, *The Revolution Has Been Televised... Television as Historical Agent in the Romanian Revolution*, 10 J. MODERN EUROPEAN HIST. 76 (2012).

help: the young emigrate, work abroad, and send financial support to family members left behind.¹¹⁶ Also, those at the top of the social ladder have preserved and consolidated their positions, in part because of the built-in system of trust,¹¹⁷ but also because the European Union (EU) has recognized and promoted those soviet oligarchic structures of privilege.¹¹⁸ Thus, the top one percent of the ideologically despised dictatorships have successfully metamorphosized into the top one percent of the ideologically correct new EU state members' representatives. Internationally, we can talk about successful mutual aid among the equally situated.¹¹⁹

Mutuality is not a pandemic invention. As discussed here, it has existed across geopolitical borders, societies, and also throughout history, both as an expedient way to deal with social wrongs for those affected by them, and those supposed to manage them. Athens knew it.¹²⁰ Medieval Europe knew it as trade guilds, churches, and the kings' courts.¹²¹ In every historical period, mutual aid among kinship of sorts thrived.¹²² But, when successful, they seem to have encouraged

¹¹⁶ See, e.g., Anca Alexe, *Romania's emigrant population is the fifth largest in the world and growing*, OECD report finds, BUS. REV. (July 16, 2019), <https://business-review.eu/news/romania-emigrant-population-is-the-fifth-largest-in-the-world-and-growing-oecd-report-finds-203223>.

¹¹⁷ See generally Yuliy Nisnevich, *Regeneration of the nomenclature as a ruling social stratum in the post-soviet Russia*, 8 SOTSIOLOGICHESKIE ISSLEDOVANIYA 143 (2018).

¹¹⁸ See, e.g., Denica Yotova, *Bulgaria's anti-corruption protests explained – and why they matter for the EU*, EUR. COUNCIL ON FOREIGN REL. (July 28, 2020), https://www.ecfr.eu/article/commentary_bulgarias_anti_corruption_protests_explained_and_why_they_matter (For instance, European leaders have stood by as Bulgarians demand real reform on corruption. Such silence will only harm the EU in the long run.).

¹¹⁹ *Id.*

¹²⁰ See, e.g., T. D. ROBINSON, *ANCIENT POOR LAWS: AN INQUIRY AS TO THE PROVISIONS FOR THE POOR OF JUDEA, ATHENS, AND ROME* (1836).

¹²¹ See, e.g., Elmo Borges Koch et al., *The Guild Concept: From Feudalism to Community Ecology*, ACTA BIOLÓGICA COLOMBIANA 38 (2019).

¹²² *Id.*

some form of clientelism.¹²³ Far from a sign of progress, kinship, mutuality, and mutual aid are not signs of a vibrant liberal economy.¹²⁴ They often start as a genuine form of horizontal help at the very bottom of the social ladder, signaling a lack or failure of any institutional support. The higher we go, mutuality either resemble a quid-pro-quo network of like-minded, equally situated, individuals or a form of hierarchically organized patronage. Globally, indicative of a society in trouble and lacking leadership, these networks seem to create its new social stratification.¹²⁵

Mutuality, as a socio-economic and political phenomenon, has both preceded and co-existed with democratic governments.¹²⁶ That is because democracy, an imperfect political tool for Aristotle,¹²⁷ and often questioned by the American voter at the voting booth every two and four years, stands on many interests and struggles to represent them.¹²⁸ However, its main characteristic is its aim for a type of plurality, uniformity and normalcy, a minimum of decency for all. To that end, the welfare state has been its more reliable source. To the contrary, mutual aid signals a shift away from state-sponsorship, from bureaucratic to decentralized help, and given the raging inequality COVID-19 has produced, its result is far from predictable.¹²⁹ Such a societal retreat might further threaten the American liberal democracy, whose seeds were planted during the American Civil War

¹²³ See Luke, *supra* note 21.

¹²⁴ See, e.g., KELLY M. McMANN, *CORRUPTION AS A LAST RESORT: ADAPTING TO THE MARKET IN CENTRAL ASIA* (2014).

¹²⁵ See generally STEFES, *supra* note 81.

¹²⁶ See generally BENITO LI VIGNI *COSA NOSTRA, COSA DI STATO: STORIA DELLE COLLUSIONI TRA MAFIA E ISTITUZIONI DALLE ORIGINI AI GIORNI NOSTRI* (2015) (for a history of one of the most successful mutuality aid societies resulting from the democratic Italian government's catastrophic failure to deal with the systemic poverty of the South).

¹²⁷ Fred Miller, *Aristotle's Political Theory*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (1998), <https://plato.stanford.edu/entries/aristotle-politics/> (noting that "Aristotle classifies democracy as a deviant constitution").

¹²⁸ See *id.* (Aristotle preferring polity to democracy).

¹²⁹ See, e.g., Dolan et. al., *supra* note 96.

and blossomed only after implementing the expanded Bill of Rights. That expansion was aided by FDR's welfare state¹³⁰, Johnson's War on Poverty¹³¹, and a liberal democracy whose scope created a minimum, uniform standard of living, equal rights, and equal opportunities.¹³² Of course, crises happen, and their magnitude seems to be on the rise due to climate change and now COVID-19. One may say that crises are now periodical, which only further strengthens my argument that we need to rely on systemic solutions, rather than on ad-hoc, improvisations. Our democracy cannot regard poverty and vulnerable populations as if we were talking about New York City restaurants building sheds in the street to cope with inside restrictions.¹³³ Liberal democracies have created some expectation of individual well-being where the community's well-being supports individuality. Democracies demand stability, not temporary, band-aid solutions.

Liberal capitalism incorporates public and private services¹³⁴ and, despite its flaws, the liberal welfare democracy has the best record of protecting those in need.¹³⁵ Critiques aside, privatizing welfare services might bolster our dedication to capitalism and its blind belief in the market and private property.¹³⁶ It might temporarily improve their quality and delivery, but the record is inconsistent at best: here we are arguing to improve government services because volunteerism has not solved any systemic ills.¹³⁷ Additionally, mutual aid networks did not save the Soviet system either. True, the Soviet approach to individualism and racial inequality proved catastrophic,¹³⁸ but the neoliberal welfare state proves equally oblivious to cultural and racial intersectionality.¹³⁹ More to the point, the liberal welfare state is differently conceived from the soviet state. The latter doled out wages and pensions like the monopolist in charge it was. On the contrary, the liberal welfare system relies on the Rule of Law limiting the impact of monopolies and governmental duty to provide for its most vulnerable, to the extent

¹³⁰ See generally PAUL KEITH CONKIN, *FDR AND THE ORIGINS OF THE WELFARE STATE* (1967).

¹³¹ See generally DAVID ZAREFSKY, *PRESIDENT JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY* (1986).

¹³² See generally PAUL K. CONKIN, *FDR AND THE ORIGINS OF THE WELFARE STATE* (1967); DAVID ZAREFSKY, *PRESIDENT JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY* (1986) (for more on welfare policies).

¹³³ See, e.g., Kate Krader et al., *NYC Restaurants Rush Toward Reopening With Grim 25% Math in Mind*, BLOOMBERG (Feb. 11, 2021), <https://www.bloomberg.com/news/articles/2021-02-11/nyc-restaurants-scramble-to-reopen-cope-with-economic-hardship>; see also Valeria Ricciulli, *Streeteries. Is It Really an Open-Air Restaurant If It Has Walls and a Roof?* N.Y. MAG. (Nov. 2, 2020), <https://www.curbed.com/2020/11/nyc-outdoor-dining-winter-open-restaurants-cabins.html> (describing their inadequate, temporary nature).

¹³⁴ BENJAMIN HOLTZMAN, *THE LONG CRISIS: NEW YORK CITY AND THE PATH TO NEOLIBERALISM* (2021). (The Long Crisis explores the origins and implications of one of the most significant developments across the globe over the last fifty years: the diminished faith in government as capable of solving public problems. Conventional accounts of the shift toward market and private sector governing solutions have focused on the rising influence of conservatives, libertarians, and the business sector. To the contrary this book locates the origins of this transformation in the postwar efforts to preserve liberalism. When the city government could not provide services, rather than revolt, New Yorkers, organized. Through block associations, nonprofits, and professional organizations, they embraced an ethos of private volunteerism and, eventually, of partnership with private business in order to save their communities from neglect.).

¹³⁵ See generally J.F. SLEEMAN, *THE WELFARE STATE. ITS AIMS, BENEFITS AND COSTS* (1973) (for a survey of the British welfare state).

¹³⁶ HOLTZMAN, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ Joshua Yaffa, *Letter from Moscow: Exiled. The Vanishing of an American Radical*. THE NEW YORKER 26–31 (Oct. 25, 2021).

¹³⁹ SPADE, *supra* note 30.

possible, while also promoting capitalist individualism.¹⁴⁰ So far, it has delivered basic services for all with various degrees of success, especially abroad.¹⁴¹

For decades, my writing has focused on rethinking and reimagining the role of law and legal scholarship in terms of social dignity. While vocally critical of the welfare services, mutual aid has never seemed a viable democratic solution to systemic problems.¹⁴² As such, my steadfast support for state-based services for the liberal welfare state has only increased during our social, moral, and healthcare pandemics. This essay argues that a choice between public and private services, while ideologically quaint for the supporters of privatization, is a catastrophic choice for any democratic state built on steep economic inequality, such as our American democracy. That we can even imagine this contentious choice only means that the ideology¹⁴³ behind them is meaningfully divisive: one considers the government as the potential solution, while the other ignores the government altogether.

The position that welfare resonates with socialism, and socialism resonates with the Soviet paternalistic state should be put to rest by the above analysis.¹⁴⁴ If this is the reason for attacking

the liberal welfare state, then mutuality should be distrusted because, as shown here, it thrived in soviet times, too, as it thrives in any non-capitalist society: the poor help each other.¹⁴⁵ More interestingly, the rich stick together, too. In the United States, the rich drive the Congressional agenda, so taxing the rich is invariably turned into tax exemptions for the rich.¹⁴⁶ Also, internationally, the top one percent stay connected in ideologically supportive, mutual support networks.¹⁴⁷ Given such a potential confusion and ambiguity, this article will complement the comparative germination and the historical intersection of welfare services and mutuality with a brief review of their most recent past in the United States, in hopes to better guide future decision-making.

III. U.S. WELFARE AND MUTUAL AID—THE LAST THREE DECADES

With all its inherent limitations mentioned earlier, U.S. federal welfare programs continued to grow through the latter part of the twentieth century until the Clinton presidency, notably 1996.¹⁴⁸ After which, the official narrative embraced the Republican view of poverty as an individual choice. It took Republicans decades of hard work and indoctrination of both the academe and governmental employees, who attended either the Chicago University and absorbed Nobel Prize laureate Milton Friedman's ideas about the government being the problem as inefficient,¹⁴⁹ or who absorbed the more pernicious libertarian

¹⁴⁰ See generally JOHN VICKERS & VINCENT WRIGHT, *THE POLITICS OF PRIVATISATION IN WESTERN EUROPE* (1989) (Western European countries are very much aware of the dangers of privatizing public services in public sectors, and thus mindful of what is open to privatization and its dangers.).

¹⁴¹ See ABA, *supra* note 4.

¹⁴² See, e.g., Mark Weiner, *Toward a Critical Theory of Emergency Medical Services: Solidarity, Sovereignty, Temporality* (Telos, forthcoming 2021) (Of course, I am aware of exceptional services communities provide for their members on a voluntary basis, such as emergency services, but all seem limited in scope and geography.)

¹⁴³ See, e.g., DANA NEACSU, *THE BOURGEOIS CHARM OF KARL MARX & THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE* 72–117 (2020) (using ideology as the subjectivity defining the self within the public sphere, within their encounter with the public organization of power); PISTOR, *supra* note 25, at 113–17 (describing liberalism as an ideology).

¹⁴⁴ See *supra* text and footnotes.

¹⁴⁵ See, e.g., C.M. HANN, *SOCIALISM IDEALS, IDEOLOGIES, AND LOCAL PRACTICE* 1–18 (1994) (for an in-depth explanation of how “sharing” works in the Bushmen society in Africa, as well as in any non-capitalist society).

¹⁴⁶ See generally MARK ZEPEZAUER, *TAKE THE RICH OFF WELFARE* (1996); JAMES T. BENNETT, *CORPORATE WELFARE: CRONY CAPITALISM THAT ENRICHES THE RICH* (2015).

¹⁴⁷ See, e.g., Kerry A. Dolan et al., *Forbes World's Billionaires List: The Richest in 2021*, FORBES, <https://www.forbes.com/billionaires/#549ef44e251c> (Chinese and Russian billionaires top the list of the world's richest.).

¹⁴⁸ See generally R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* (2000) (analyzing the Clinton administration welfare policy).

¹⁴⁹ See generally MILTON FRIEDMAN, *TAX LIMITATION, INFLATION AND THE ROLE OF GOVERNMENT* (1978).

ideas of another Nobel Prize laureate James McGill Buchanan about reshaping the government's role into a night watch state to protect the rich.¹⁵⁰ Buchanan's language was aimed at the Right-wing elites; it is cryptic in its reliance on changing personal behavior, but the goal is the same: the state has no role when it comes to personal choice, and poverty is such a choice, ergo, welfare should be limited or eliminated. Buchanan notes that:

We must acknowledge that the bloated welfare transfer state that we now live with was allowed to grow in the shadow of the Cold War over the half century and without attention to its own external diseconomies. Belatedly, in the 1990s, reforms everywhere have been initiated that are aimed at reducing the relative weight of the public sector overall, or at least reducing its rate of growth.¹⁵¹

Ironically, welfare was to blame for creating a particular type of behavior, dependency, rather than the opposite: respite to recollect and strategize. Buchanan viewed morality in eliminating financial support.¹⁵²

These reforms proceed under varying names—privatization, devolution, subsidiarity, decentralization—some of which have been discussed in earlier sessions. At this point, I must shift the focus of my argument. I have suggested variously that the fundamental issues facing modern societies are moral, and that institutional reforms have an

influence in changing attitudes and patterns of behavior.¹⁵³

So did the Republican Congress the Clinton Administration.¹⁵⁴ Then, the academic, and mediatic description of welfare as “government clientelism”—disparaging Democrats supporting welfare services as a way to obtain votes from those on welfare¹⁵⁵—reached its peak. The Republican-dominated Congress passed legislation to replace cash support for those in need as long they were in need, with temporary assistance for those who, misguided, took a wrong turn in life.¹⁵⁶ Republicans in Congress successfully painted their governing failure as a person's choice incorporating Buchanan's personal choice views.¹⁵⁷ By joyfully employing racial slurs and racializing

¹⁵³ *Id.*

¹⁵⁴ See discussion in this section.

¹⁵⁵ See generally Susan C. Stokes, *Political Clientelism*, OXFORD HANDBOOK OF POLITICAL SCIENCE (2011) (for more on clientelism).

¹⁵⁶ See CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> (In 1996, the Temporary Assistance for Needy Families (TANF) replaced Aid to Families with Dependent Children (AFDC), which provided cash assistance to families with children experiencing poverty. Due to the type of assistance, “the caseloads have fallen.”).

¹⁵⁷ See generally NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017); Lynn Paramore, *Meet the Hidden Architect Behind America's Racist Economics*, INST. FOR NEW ECON. THINKING (May 30, 2018) (“Buchanan's ideas began to have huge impact, especially in America and in Britain. In his home country, the economist was deeply involved in efforts to cut taxes on the wealthy in 1970s and 1980s and he advised proponents of Reagan Revolution in their quest to unleash markets and posit government as the “problem” rather than the “solution.” The Koch-funded Virginia school coached scholars, lawyers, politicians, and business people to apply stark right-wing perspectives on everything from deficits to taxes to school privatization. In Britain, Buchanan's work helped to inspire the public sector reforms of Margaret Thatcher and her political progeny.”).

¹⁵⁰ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (2004).

¹⁵¹ JAMES M. BUCHANAN, & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* 217 (1999) (Buchanan's address).

¹⁵² *Id.*

of poverty, Republican legislators ended welfare as Americans knew it.¹⁵⁸ The public imagination was suffused with “the myth of the welfare mother with a Cadillac.”¹⁵⁹ Its prevalence was so pervasive that then-U.S. Democratic President Bill Clinton became a mere pawn in the destruction of the welfare system.¹⁶⁰ Gilman notes that:

The “welfare queen” was shorthand for a lazy woman of color, with numerous children she cannot support, who is cheating taxpayers by abusing the system to collect government assistance. For years, this long-standing racist and gendered stereotype was used to attack the poor and the cash assistance programs that support them. In 1996, Temporary Assistance for Needy Families (TANF) capped welfare receipt to five years and required work as a condition of eligibility, thus stripping the welfare queen of her throne of dependency.¹⁶¹

Ironically, earlier I hailed legislation for its role in the creation of welfare, only to note now that less than a century later, legislation curtailed it. Like magic, the lack of welfare produced a drop in the number of people on welfare. America’s poverty problem seemed solved! Once the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁶² was passed, the nation’s welfare caseload dropped by fifteen percent within the first few years. Public funding

was cut by \$54 billion U.S. dollars within the first six years of the program.¹⁶³ But unlike Johnson’s War on Poverty, which reduced the nation’s poverty rate from eighteen percent to nine percent in 1972, poor people became worse off under President Clinton’s Act.¹⁶⁴

But perhaps the worse social engineering of the 1996 welfare reform was the Charitable Choice provision, which authorized faith-based organizations to compete with secular organizations to provide federally funded welfare, health, and social services.¹⁶⁵ This provision, which the next administration—that of then-U.S. President George W. Bush—quickly embraced, allowed faith-based organizations to retain their religious character while providing social services so long as it did not diminish the recipients’ religious freedom.¹⁶⁶ Thus, we started the twenty-first century tolerating welfare services. When the government cut short its direct public assistance programs, choosing instead to subsidize religious organizations’ social activities, the shift from poverty as a societal ailment to poverty as an individual choice was complete. The poor were now “undeserving.” Once that happens, University of Pittsburgh Law Professor Thomas Ross reminds us, society easily stops funding services for the disadvantaged.¹⁶⁷ Once the label of undeserving poor creeps into popular belief, it becomes very difficult to perceive poverty accurately, as originating in “the structure of America’s political economy”—not in the behavior of the poor, who are often described as deviant, criminal, and “beyond hope and [without] any sense of initiative.”¹⁶⁸ Undeserving and having chosen to be poor, society loses interest in finding a systemic cure for poverty.¹⁶⁹ When this occurs,

¹⁵⁸ See generally R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* (2000) (analyzing the Clinton administration welfare policy).

¹⁵⁹ Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC., POL. & L. 247, 247 (2014).

¹⁶⁰ See generally Neacsu, *supra* note 6.

¹⁶¹ Gilman, *supra* note 159; see also Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISCIPLINARY L.J., 257, 258 (2016).

¹⁶² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 STAT. 2105.

¹⁶³ See Neacsu, *supra* note 6, at 419.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Ross, *supra* note 79, at 1509; *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

public assistance programs become secondary, and private charities receive first billing.¹⁷⁰

Charities, organizations described in Section 501(c)(3) of the Internal Revenue Code, comprise of both public charities and private foundations.¹⁷¹ They mimic corporations, and historically, have engaged in grant-making activities, as well as direct service activities.¹⁷² The donors are encouraged to give through various tax schemes, and some give.¹⁷³ However, it does not seem democratically wise to make the poor depend on the generosity of some.¹⁷⁴ Such a scheme rather than welfare might be perceived as disparaging and dispirited or even encouraging feudalism and its power structure. Charities, sometimes better organized than mutual aid networks, are not meant to replace public assistance.¹⁷⁵ Their natural commitments are not to provide for the poor to resolve a systemic problem but to provide specifically for the poor whose stories resonate with the charities' mission.¹⁷⁶ So, what is left for the poor? Absent a welfare-building Left, then, volunteerism, charities, mutual aid societies, and religious organizations are their only options.¹⁷⁷ As shown here, mutuality is a temporary successful solution in a society whose services for the vulnerable are missing,¹⁷⁸ but it can perennially complement well organized institutional services.¹⁷⁹ Most of the time, it is an academically flimsy, ideological expedient.

¹⁷⁰ *Id.*

¹⁷¹ 26 U.S.C. § 501 (2019).

¹⁷² See generally Neacsu, *supra* note 6.

¹⁷³ See, e.g., CHARLES KOCH FOUNDATION, <https://charleskoch-foundation.org/>; OPEN SOCIETY FOUNDATIONS, <https://www.opensocietyfoundations.org/george-soros>.

¹⁷⁴ Harvey P. Dale & Jill S. Manny, *Social Welfare Organizations: Better Alternatives to Charities?*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 337, 340 (2018).

¹⁷⁵ See generally Neacsu, *supra* note 6.

¹⁷⁶ *Id.*

¹⁷⁷ See generally THE DR. HUEY P. NEWTON FOUNDATION, THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS (2008).

¹⁷⁸ *Id.*

¹⁷⁹ See generally LAWRENCE M. MEAD & CHRISTOPHER BEEM, WELFARE REFORM AND POLITICAL THEORY (2005).

For instance, mutuality thrives on the premise that people have commitments and responsibilities toward each other.¹⁸⁰ But those commitments reach only a flimsy layer; they are not contingent on what the government is or is not doing to redistribute resources and lessen material inequalities. Philip Selznick, Sociology Professor at the University of California at Berkeley supports individual responsibilities arising from social involvements and commitments.¹⁸¹ Simultaneously, he clarifies that the responsibilities that people have as parents, neighbors, and citizens are not equal, because they stem from different sources.¹⁸² As a result, Selznick imposes meager societal duties on the affluent members.¹⁸³ The responsibilities of the affluent are limited to establishing baseline equality of condition. Mutuality implies an affluent society that does not leave its masses unaccounted for.¹⁸⁴ In another view of mutualism, that of the British school of mutualism, it is contingent on group behavior.¹⁸⁵ "More broadly, establishing social relations based on mutual regard is at best more difficult and at worst impossible in the context of gross disparities on income and wealth."¹⁸⁶ Nevertheless, even when conditional, the British mutualist case recognizes its minimal chances of success if made in isolation from the broader questions of social and economic justice. Without a minimum level of nurture, there is no opportunity for the poor. Moreover, their caregivers will fail if the need to balance work and care makes impossible demands upon their resources, however committed they may be.¹⁸⁷ Finally, to succeed, as the British scholarship clarifies, mutualism needs a society built on social responsibility, so it is not a crutch for a limping person, but a bouquet of flowers for someone well cared for:

¹⁸⁰ *Id.*, at 136–37.

¹⁸¹ PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ MEAD & BEEM, *supra* note 179.

¹⁸⁶ *Id.*

¹⁸⁷ See Neacsu, *supra* note 6.

The most compelling statement of why equality matters for community is still one the British Christian Socialist Richard Tawney made. As a Christian, Tawney started from the premise that all are entitled to equality of respect by virtue of their common relationship with the Creator. Such equality of respect, Tawney argued, was “incompatible with the existence of sharp contrasts between economic standards and educational opportunities of different classes.” For Tawney, the “fact of human fellowship [should not be] obscured by economic contrasts,” and a good society is one that uses its “material resources to promote the dignity and refinement of the individual human beings who compose it.” Thus, because mutualism starts with a deeper concept of social responsibility, it also sets higher demands on both the recipients of aid, and the society that offers it.¹⁸⁸

Mutual aid exerts a certain ideological attraction in societies with a strong welfare system, beyond the dislike of government. It is connected to the nature of duty, responsibility, and mutual obligation.¹⁸⁹ For instance, Janet Finch (mentioned in the forward) and renowned British feminist scholar Gillian Dalley focused on the morality of care.¹⁹⁰ Their main question is the search for “Where does the responsibility for providing care [. . .] lie?”¹⁹¹ Their Holy Grail is that “society as a whole should take responsibility for its weaker members.”¹⁹² For them, this principle of collective responsibility can naturally lead to different and more collective forms of services provided

in such a manner that it preserves the agency of the people who need care.¹⁹³

Dalley’s book incorporates studies on hybrid services using horizontal and vertical structures.¹⁹⁴ The nature of duty is Dalley’s explanation, but Dalley fails to prove that mutual aid breeds social empathy and ethical behavior beyond its horizontal reach.¹⁹⁵ Vertically, as history has shown, it is much more likely to breed clientelism or patronage, and from a moral point of view, hypocrisy.¹⁹⁶

Thus, when the “Newer” and leaner left is engaged in dismissing the welfare state as some sort of dinosaur and passionately promoting mutuality, the two services shine in their striking difference. By asking the academe or the public to make a choice, this “Newer” and leaner left is actually losing currency because it appears unfocused, unprepared, and not ready to help the poor. And then, the real question becomes: is any American government interested in assuring compliance with international human rights standards?

IV. CONCLUDING REMARKS: DARE TO THINK PRAGMATICALLY, REALISTICALLY

Today’s choice cannot be either welfare or mutuality, but compliance with the international standards established by international instruments for human rights.¹⁹⁷ Enlarging the scope of social services’ deliverance would conceptually help scholars and politicians acknowledge that welfare services and voluntarism have worked side by side for most of the world’s history, including our republic’s. There is a place for innovation. Public and private social services are needed because our American liberal democracy condones deep socioeconomic inequality and vulnerability remains a human condition. From the brief examination of these services, it is apparent that a makeover would improve both their scope and delivery.

¹⁸⁸ MEAD & BEEM, *supra* note 179.

¹⁸⁹ See generally GILLIAN DALLEY, *IDEOLOGIES OF CARING: RE-THINKING COMMUNITY AND COLLECTIVISM* (1988).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at ix.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ DALLEY, *supra* note 189.

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* discussion and footnotes.

¹⁹⁷ See *supra* discussion and footnotes.

Finding solutions to systemic problems caused by endemic racism, socio-economic inequality, and various forms of societal discrimination requires as many informed participants as possible. This requires reliable channels of information and means to neutralize disinformation. Voters have enjoyed infotainment for too long, and have traveled considerably from late-night comedy shows satirizing the news cycle through the prism of “fake news”—real in its premise, “fake” in its outcome—as a scathing criticism of our political complacency,¹⁹⁸ to alternative facts.¹⁹⁹ Voters still need reliable sources of information.²⁰⁰ One of the silver linings of COVID-19 has been the time to produce scholarship to provide further insight, both collectively and individually.²⁰¹ This is a moment to reframe the questions and explore our anxieties about engaging the state to work for the benefit of the people.

As the trifecta pandemic—poverty, racism, and COVID-19-health crisis—in the United States has shown, many Americans function on long-held biases. So, when explaining societal problems, these biases, at a minimum, ought to be consistently applied. For instance, if market performance is key for judging the poor’s moral behavior (using Buchanan’s jargon), then it should be key for the rich’s appraisal. Do poor mothers really need immediate participation in the job market to ensure that they have sufficient skills to lift themselves and their children out of poverty? I do not know the answer. But if our liberal society expects poor single mothers to participate in the

¹⁹⁸ See, e.g., DANA NEACSU, *POLITICAL SATIRE AND POLITICAL NEWS: ENTERTAINING, ACCIDENTALLY REPORTING OR BOTH? THE CASE OF THE DAILY SHOW WITH JON STEWART (TDS)* (Oct. 3, 2011) (unpublished Ph.D. thesis, Rutgers University) (<https://academiccommons.columbia.edu/doi/10.7916/D8959RJ7>).

¹⁹⁹ See generally KIMIZ DALKIR, REBECCA KATZ (EDS.) *NAVIGATING FAKE NEWS, ALTERNATIVE FACTS, AND MISINFORMATION IN A POST-TRUTH WORLD* (2020).

²⁰⁰ *Id.*

²⁰¹ See generally DANA NEACSU, *THE BOURGEOIS CHARM OF KARL MARX & THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE* (2020) (for a meaning making theory focused on jurisprudence and legal scholarship).

labor market, then it should request the same of the affluent, who should engage in some form of activity in addition to being “born” into the corporate, affluent class?²⁰² Otherwise, if the affluent reap the benefits of their status, so ought poor mothers reap the same benefits by the fact of their motherhood. Cammett notes that:

Scholars have long recognized that family support programs in the United States are premised on the idea that family dependency is a private matter. Moreover, the current approach seems to recognize no role for the state in honoring poor women’s agency—outside of their right to find employment—or giving them meaningful choices.²⁰³

Politically, after decades of failing the vulnerable, understandably, people cannot imagine the state in a role of positive, proactive engagement in addressing family financial problems. But advocating to rid liberal capitalism of such welfare services would come at costs hard to imagine for democracy. If it survives, it would be reduced to an empty label, reminiscent of all the labels Soviet Russia used to cover up its political travesty. For instance, in a recent work on the Rule of Law of the Soviet empire, a Telos scholar explained its “nominal constitutionalism.” He noted that it:

consists [of] a rare combination of secular ideology, law, and social reconstruction policy. In this sense, nominal constitutionalism, as opposed to a real one, has three principle characteristic features: (1) the absence of realizable human rights norms; (2) the rejection of the judicial control of constitutionality (only political or ideological control); and (3) great

²⁰² See Rich, *supra* note 161, at 271–72.

²⁰³ Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISCIPLINARY L.J. 363, 364 (2016).

flexibility (the substance of each norm or constitutional provision can be profoundly transformed via logical, semantic, and teleological interpretations and thus used in the interest of political power).²⁰⁴

This nominal constitutionalism is not so foreign from our American shores, either. It started under the former-President Ronald Reagan's administration, with scholarly help from James M. Buchanan and Milton Friedman.²⁰⁵ It focuses on diminishing the services of the welfare state built by previous democratic administrations.²⁰⁶ It continued under the Trump administration, when "nominal democracy" became our governmental mantra and Buchanan's influence reached its apex.²⁰⁷ For four years, we succumbed to Trump's rambling²⁰⁸ *in lieu of* John Stuart Mills's liberal free-market of ideas.²⁰⁹ However, former President Trump's authoritarianism²¹⁰ had no soviet roots: he unabashedly threatened the electorate that if he was re-elected, he would continue to defy the powers of his office. He bragged about defunding

both Social Security and Medicare, two of the pillars of the liberal welfare state.²¹¹ And there were no checks and balances insight. For the first time since the Civil War, the Rule of Law could not protect the current version of the American democracy. The abandonment of due process and even of the much-admired checks and balances did not happen overnight.²¹² It came after decades of decentralized government services and privatization when no one seemed in charge or cared about stewarding the American democratic experiment.

And then, COVID-19 happened. Only in one quarter, during the pandemic, when the American economy fell to post-World War II levels,²¹³ the top one percent saw their worth increase.²¹⁴ Voters could continue to ignore reality, and legal scholars could continue to embrace the Nobel Prize-winning theory of the day. But reality catches up with myths, and the difference between a vibrant democracy and a nominal democracy is that we, the people, do not have to accept it.²¹⁵ The American people still have the voting booth, and

²⁰⁴ Andrey N. Medushevsky, *Law and Revolution: The Impact of Soviet Legitimacy on Post-Soviet Constitutional Transformation*, 189 TELOS 121, 125–26 (2019).

²⁰⁵ See *supra* text and footnotes.

²⁰⁶ See, e.g., *Social Welfare Under Reagan*, CQ RESEARCHER (Mar. 9, 1984), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1984030900>.

²⁰⁷ MACLEAN, *supra* note 157.

²⁰⁸ Tom McCarthy, *Is Donald Trump an Authoritarian? Experts Examine Telltale Signs*, GUARDIAN (Nov. 18, 2018), <https://www.theguardian.com/us-news/2018/nov/18/is-donald-trump-an-authoritarian-experts-examine-telltale-signs>.

²⁰⁹ For more on this democratic creed, see, e.g., DANA NEACSU, *THE BOURGEOIS CHARM OF KARL MARX & THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE* 48 (2020).

²¹⁰ McCarthy, *supra* note 208.

²¹¹ Camille Caldera, *Fact Check: President Trump Has Not Said He Will Terminate Social Security*, USA TODAY (Aug. 15, 2020), <https://www.usatoday.com/story/news/factcheck/2020/08/15/fact-check-donald-trump-hasnt-said-he-terminate-social-security/3343439001/> ("Trump deferred the tax that funds Social Security, and vowed to 'terminate' the tax in the future. The vast majority of Social Security is financed through the payroll tax, according to the Social Security Administration.").

²¹² *Id.*

²¹³ See, e.g., *Gross Domestic Product*, U.S. BUREAU OF ECONOMIC ANALYSIS, <https://www.bea.gov/data/gdp/gross-domestic-product#gdp>; Dominic Rushe, *US Economy Suffers Worst Quarter since the Second World War as GDP shrinks by 32.9%*, THE GUARDIAN (Jul. 30, 2020), <https://www.theguardian.com/business/2020/jul/30/us-gdp-economy-worst-quarter-covid-19-unemployment>.

²¹⁴ Matthew Rozsa, *The Richest Billionaires Became Vastly Richer during Pandemic, Even as Stocks Tumbled*, SALON (May 28, 2020), <https://www.salon.com/2020/05/28/the-richest-billionaires-became-vastly-richer-during-pandemic-even-as-markets-tumbled/>.

²¹⁵ Devan Cole & Tara Subramaniam, *Trump on Covid Death Toll: 'It Is What It Is'*, CNN (Aug. 4, 2020), <https://www.cnn.com/2020/08/04/politics/trump-covid-death-toll-is-what-it-is/index.html>.

on November 20, 2020, they rejected this nominal democracy. The ravages of COVID-19 magnified our democratic ills. As of June 2020,²¹⁶ the United States, with only four percent of the world's population, represented twenty-five percent of the world's coronavirus cases.²¹⁷ Any plan to address that impact at any level could have only (and luckily did) come from the federal government,²¹⁸ not a mutual aid society.

With the new Biden administration in the United States and the recent \$1.9 trillion U.S. dollars rescue package bill, there is hope that our most vulnerable Americans will receive the much-needed help.²¹⁹ The bill is not charity; it is a mere attempt to ensure compliance with human rights international access standards. It is not mutual aid. It is what Americans deserve from a democratic government. It is needed for basic socio-economic human rights.

Fifteen years ago, I argued that the American welfare system needed a makeover.²²⁰ That call remains actual today. The American societal ailments are dynamic, which means we need to build on the democratic welfare state's social services, including health, employment, senior care, and policies establishing a minimum wage, the length of the working day, retirement, and accident insurance. These programs are the backbone of the United States' liberal democracy. The United States needs to improve their scope and delivery, and scholars ought not to collaborate in their demise because Americans might discover

that as flexible as we believe liberal democracy is, it is only as flexible as a Rubik's Cube.

²¹⁶ Scottie Andrew, *The US has 4% of the world's population but 25% of its coronavirus cases*, CNN (June 30, 2020), <https://www.cnn.com/2020/06/30/health/us-coronavirus-toll-in-fd-june-trnd/index.html>.

²¹⁷ See *Weekly Updates by Select Demographic and Geographic Characteristics*, CDC, https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (for up to date data).

²¹⁸ See, e.g., *Coronavirus (COVID-19)*, U.S. GOVERNMENT PUBLISHING OFFICE, <https://www.govinfo.gov/features/coronavirus> (last accessed Jan. 9, 2021).

²¹⁹ American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021).

²²⁰ See Neacsu, *supra* note 1.

TRUMP-ERA TERRORISM DESIGNATED SANCTIONS VIOLATE INTERNATIONAL HUMAN RIGHTS NORMS PROTECTING LIFE, HEALTH, AND SECURITY *by Shannon Jackenthal**

INTRODUCTION

In the waning days of the Trump administration, the U.S. Department of State designated Cuba as a State Sponsor of Terrorism.¹ The designation is accompanied by a widespread sanctions program that broadens the financial restrictions in place against the country, threatening to further strain an already-fraught Cuban economy.²

The international community has increasingly recognized the threat that unilateral coercive sanctions pose to civilians. In 2014, the United Nations General Assembly (UNGA) passed a resolution dictating the appointment of a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoy-

ment of human rights with a broad mandate to study the impact of these measures.³ The UNGA expressed alarm at the “disproportionate and indiscriminate human costs of unilateral sanctions and their negative effects on the civilian population[s].”⁴

The new sanctions directly implicate the concerns expressed by the UN. The systematic destruction wrought by unilateral coercive sanctions constitutes a violation of international human rights law enshrined in the International Covenant on Civil and Political Rights (ICCPR) and established by the normative framework under the Charter of the UN by threatening Cubans’ rights to life, health, and economic security.⁵ Sanctions serve as an impediment to Cubans receiving critical supplies that might ultimately save lives. While the sanctions will negatively impact the Cuban population—particularly in light of the ongoing COVID-19 pandemic—the Biden administration has indicated that while it is reviewing the designation, a shift in Cuban policy is not a “top priorit[y],” despite a purported commitment to centering human rights in U.S. foreign policy.⁶ Given the serious human rights implications, the Biden administration should rescind Cuba’s designation and leverage the opportunity to reevaluate its unilateral sanctions against Cuba.

I. BACKGROUND

The State Sponsors of Terrorism list consists of states determined by the U.S. Secretary of State to provide substantial support for international terrorism. These states are, thus, designated pursuant to the National

* Shannon Jackenthal is currently a third-year law student at American University Washington College of Law. She received a B.A. in International Affairs from George Washington University in 2015. Shannon would like to thank her editors at the *Human Rights Brief* for their invaluable input and guidance on this piece, and her wife Simone for her unconditional support.

¹ *State Sponsors of Terrorism*, U.S. DEP’T OF STATE, <https://www.state.gov/state-sponsors-of-terrorism> (last visited Nov. 15, 2021) [hereinafter *State Sponsors of Terrorism*].

² *Id.*

³ G.A. Res. 27/21, ¶¶ 22-23 (Oct. 3, 2014).

⁴ *Id.*

⁵ *US Sanctions Violate Human Rights and International Code of Conduct*, UN expert says, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24566> (last visited Nov. 15, 2021).

⁶ Matt Spetalnick et al., *Biden Reviewing Trump’s Listing of Cuba as a Terrorism Sponsor—White House*, REUTERS (Mar. 9, 2021, 2:34 PM), <https://www.reuters.com/article/us-usa-biden-cuba/biden-reviewing-trumps-listing-of-cuba-as-terrorism-sponsor-white-house-idUSKBN2B12IV>.

Defense Authorization Act, the Arms Export Control Act, and the Foreign Assistance Act.⁷ The designation results in far-reaching limits on the provision of economic and humanitarian assistance, a ban on defense sales, controls on “dual use” items, and other financial restrictions.⁸

Observers widely assessed Cuba’s designation as political rather than responsive to any credible terrorism concerns.⁹ This is supported by the administration’s basis for the designation: the Department of State arguably relied on a “technicality” related to Cuba’s sheltering of Colombian nationals and its refusal to extradite 1970s-era civil rights activists sought by the United States.¹⁰ Rather than using the sanctions to legitimately combat terrorism and terror financing, as noted by NBC News, “[t]he misuse of the terrorism designation is generally understood to be a *political handout* to Cuban-American hard-liners” for voting for Trump in Florida.¹¹ This designation, therefore, is demonstrably divorced from decreasing state support of terrorism.

The sanctions associated with the terrorism designation threaten significant harm to Cuba’s economy. Following the designation, Cubans expressed concern that it will “make it harder to put food on the table and shoes on their children’s feet.”¹²

⁷ See *State Sponsors of Terrorism*, *supra* note 1.

⁸ See *id.* Dual use items can be used for both civilian and military purposes.

⁹ Sébastien Roblin, *Biden Undermined on Cuba, Iran by Last-Minute Pompeo Terror Designations*, NBC NEWS (Jan. 13, 2021, 5:56 PM), <https://www.nbcnews.com/think/opinion/biden-undermined-cuba-iran-last-minute-pompeo-terror-designations-ncna1254191>.

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² Portia Siegelbaum, *Cubans Fear Impact of U.S. Terror Designation, But See ‘Glimmer of Hope’ with Biden*, CBS NEWS (Jan. 13, 2021, 6:58 AM), <https://www.cbsnews.com/news/cuba-sponsor-of-terrorism-us-trump-designation-cubans-worry-hope-in-biden/>.

Most remittances from the United States to relatives in Cuba will be barred.¹³ The UN Special Rapporteur on unilateral coercive measures signed on to a letter to the U.S. government citing concerns regarding sanctions against Cuba during the COVID-19 pandemic, noting that U.S. restrictions have “effectively prevented” Cuba from protecting its population from COVID-19.¹⁴

The international community has widely denounced the existing embargo against Cuba; the latest UN resolution condemning it included 187 states voting in favor, three against, and two abstentions.¹⁵ The Cuban Foreign Minister emphasized the “incalculable humanitarian damages” the embargo causes, characterizing it as a “flagrant, massive[,] and systematic violation of human rights.”¹⁶ The designation’s clearly delineated political motivation related to Trump’s voting base in Florida provides an opportunity to reexamine U.S. policy on unilateral coercive measures writ large.

II. LEGAL ANALYSIS

Unilateral coercive sanctions have been defined by the UN Human Rights Council as measures imposed “to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy.”¹⁷ The U.S. designation of Cuba is aimed at inducing Cuba to extradite individuals who sought

¹³ Matthew Lee & Joshua Goodman, *Trump Hits Cuba with New Terrorism Sanctions in Waning Days*, ASSOCIATED PRESS (Jan. 11, 2021), <https://apnews.com/article/joe-biden-mike-pompeo-cuba-venezuela-foreign-policy-41ddf-75b0c13d290cd539d90e6227b0a>.

¹⁴ Letter from the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights et al. to the Government of the United States of America, U.N. Doc. UA USA 8/2020 (Apr. 21, 2020) [hereinafter “Letter to U.S. Government”].

¹⁵ *Cuba: UN Members Overwhelmingly Support End of US Embargo, as Brazil Backs Washington*, UN NEWS (Nov. 7, 2019), <https://news.un.org/en/story/2019/11/1050891>.

¹⁶ *Id.*

¹⁷ *Mandate of the Special Rapporteur*, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/EN/Issues/UCM/Pages/Mandate.aspx> (last visited Nov. 15, 2021).

refuge from the United States in the civil rights era and certain Colombian nationals.¹⁸ This point is illustrated directly in the Trump administration's press release on the designation, which cited to several U.S. nationals residing in Cuba, including Joanne Chesimard who allegedly "execut[ed] [a] New Jersey State Trooper in 1973."¹⁹

Human rights obligations under international law are typically applied to states with respect to the territory over which they exercise jurisdiction.²⁰ However, the United States has an obligation to safeguard the rights of Cubans affected by its unilateral coercive measures under the UN Charter and customary international law.

The UN Charter calls for all states "to promote universal respect for and observance of human rights."²¹ It also calls for all states to take action to protect fundamental freedoms without distinction.²² According to the UN Human Rights Council, this provision is "flexible" and provides an avenue to assess the impact that unilateral coercive measures have on human rights.²³ States are bound to further the aims of the UN Charter and to protect human rights as customary international law or as general principles of law, neither of which are territorially limited.²⁴ Scholars have suggested that the restriction

on unilateral coercive measures is an emergent rule of customary international law, demonstrated by the UN's strong, repeated condemnation of these measures.²⁵

Given the impact that existing sanctions have had on Cubans and the anticipated economic effects of the most recent sanctions, several fundamental human rights are implicated, including the right to life, the right to health, and the right to economic development, particularly in the context of COVID-19. As noted by the UN Special Rapporteur on unilateral coercive measures, "[a]cts prohibiting or otherwise impeding humanitarian services violate State's obligation to respect the right to life . . . [a]ny death that may be linked to such prohibition would constitute an arbitrary deprivation of life."²⁶ While imposing the sanctions violates the state's obligation to respect the right to life, any death linked to the sanctions as a result of restrictions on obtaining food or medicine from U.S.-based sources—a likely scenario based on the wide reach of the sanctions—would constitute an arbitrary deprivation of life.²⁷

Unilateral sanctions violate not only international law prohibiting such action under the UN Charter, but because of the significant socioeconomic impact that these decisions have on the civilian population on the ground,²⁸ the sanctions also violate the right to health,²⁹ the right to life, and a right to economic development³⁰ under a framework that includes the UN Charter and the ICCPR. First, Article 55 of the UN Charter demands promoting "conditions of economic and social progress and development" and

¹⁸ See Lee & Goodman, *supra* note 13 (noting that Cuba had previously been designated as a state sponsor of terror before its removal during the Obama administration).

¹⁹ *U.S. Announces Designation of Cuba as a State Sponsor of Terrorism*, U.S. DEP'T OF STATE (JAN. 11, 2021), <https://2017-2021.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism/index.html>.

²⁰ See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, Art. 2(1) [hereinafter ICCPR] ("Each State Party . . . undertakes to respect and ensure all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant . . .") (emphasis added).

²¹ U.N. Charter, art. 1, ¶ 3.

²² *Id.*

²³ Rep. of the Human Rights Council, at 17-18, U.N. Doc. A/HRC/AC/13/CRP.2 (2014).

²⁴ Olivier De Schutter, *A Human Rights Approach to Trade and Investment Policies*, CONFRONTING THE GLOB. FOOD CHALLENGE (Nov. 2008).

²⁵ Idriss Jazairy, *Unilateral Economic Sanctions, International Law, and Human Rights*, 33 ETHICS & INT'L AFFS. 291, 294 (2019).

²⁶ Letter to U.S. Government, *supra* note 14.

²⁷ Siegelbaum, *supra* note 12.

²⁸ Stephen P. Marks, *Economic Sanctions as Human Rights Violations: Reconciling Political and Public Health Imperatives*, 89 AM. J. PUB. HEALTH 1509, 1510 (1999).

²⁹ Alena Douhan, *Why Sanctions Should Be a Key Issue in this US Election*, NEW HUMANITARIAN (Oct. 22, 2020), <https://www.thenewhumanitarian.org/opinion/2020/10/22/sanctions-human-rights-united-states-impact>.

³⁰ U.N. Charter, art. 55(a)-(b).

“solutions of international economic, social, health, and related problems.”³¹ The sanctions regime associated with the Trump administration’s designation includes significant limits on foreign assistance, controls on “dual use” items, and other financial restrictions.³² While the embargo already adversely affects the Cuban people, the additional measures threaten to further destabilize the island’s economy in the midst of the COVID-19 pandemic.³³ The sanctions ultimately contribute to the severe food and medicine shortages that force many into poverty and prevent effective healthcare.³⁴

Additionally, the ICCPR secures the “inherent right to life for every human being.”³⁵ The ICCPR has a direct jurisdictional element; however, given the United States’ affirmative and global obligation to advance human rights under the UN Charter, reference to U.S. duties under this Convention is appropriate. The Trump administration sanctions threaten to disrupt the economic situation in Cuba even further, directly implicating the rights to life, health, and economic development.³⁶

The protections enshrined in international law guarantee Cubans these rights. Given the difficulty of distributing humanitarian goods due to U.S. sanctions, the global pandemic compounds these concerns.³⁷ Beyond the food and medicine shortages in the country, the sanctions will exacerbate the situation by dissuading potential investors or partners who could provide assistance to Cubans at this crucial time, given the severe penalties attached to violating the sanctions and the heightened risk of entering Cuba’s market.³⁸ Thus, the United States is

running afoul of its obligations under the international human rights framework. The economic impact of the new sanctions regime will inevitably lead to discrete violations of Cubans’ human rights.

III. CONCLUSION

The unilateral use of coercive measures—including Cuba’s designation as a state sponsor of terror that is accompanied by additional extensive sanctions adversely impacting civilians—violates the rights to life, health, and economic security enshrined in several international conventions and affirmatively imposed upon the United States through binding international law. The Biden administration should prioritize reassessing these sanctions to ensure that the United States complies with its human rights obligations.

³¹ *Id.*

³² *State Sponsors of Terrorism*, *supra* note 1.

³³ See Siegelbaum, *supra* note 12 (describing Cubans’ fears about the impact of the sanctions).

³⁴ *Unilateral sanctions impinge on right to development—UN experts*, U.N. HUM. RTS. OFF. HIGH COMM’R (Aug. 11, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27373&LangID=E>.

³⁵ ICCPR, art. 6.

³⁶ Siegelbaum, *supra* note 12.

³⁷ Letter to U.S. Government, *supra* note 14.

³⁸ Siegelbaum, *supra* note 12.

THE CHEMICAL WAR ON DRUGS: WHY A U.S.- BACKED PROGRAM TO FUMIGATE COCA FIELDS IN COLOMBIA WOULD VIOLATE THE RIGHT TO HEALTH

*by Lily Baron**

In December 2020, Colombian officials announced that a U.S.-backed program to eradicate illegal coca cultivation by aerially fumigating coca fields with glyphosate—a program previously suspended for public health reasons in 2015—will recommence.¹ By restarting the program, however, Colombia will directly harm the health not only of the illicit coca growers, but of nearby communities who are indiscriminately impacted by the spray.² Colombia would therefore violate the right to health recognized by Article 12 of the International Covenant on Econom-

ic, Social and Cultural Rights (ICESCR)³ and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).⁴ Colombia would directly violate the affected farmers' and communities' right to health because the aerial fumigation program involves spraying glyphosate, an herbicide proven to cause various diseases,⁵ threaten food security,⁶ and contaminate water.⁷

Colombia first introduced aerial fumigation in the 1990s as part of its efforts to control cocaine production.⁸ Heavily supported by the United States and its "War on Drugs," the aerial fumigation program became a crucial component of "Plan Colombia," a multibillion-dollar U.S. effort to assist Colombia in its decades-long fight against drug trafficking by

* Lily Baron is a third-year law student at American University Washington College of Law. Lily graduated from the George Washington University in 2018 with a bachelor's degree, magna cum laude, in International Affairs with concentrations in international development and Africa and minors in history and sociocultural anthropology. She hopes to pursue a meaningful legal career with a focus on the intersection of the environment, economic development, and human rights.

¹ *Colombia Poised to Restart Coca Spraying, a Failed 'Drug War' Policy*, ADVOC. FOR HUM. RTS. IN THE AMERICAS (Dec. 19, 2020), <https://www.wola.org/2020/12/colombia-poised-restart-coca-spraying-failed-drug-war/> [hereinafter *Colombia Poised to Restart Coca Spraying*].

² See generally Connor Paige, *The Victims of Colombia Aerial Fumigation*, COLOM. REPS. (Apr. 4, 2014), <https://colombiareports.com/victims-aerial-fumigation/> (explaining that the livelihoods and health of Colombia's small-scale farmers are threatened by aerial glyphosate spraying yet remain one of the most overlooked groups affected by the continuing drug conflict).

³ International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art. 10, *opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 161 [hereinafter Protocol of San Salvador], <https://www.cidh.oas.org/Basicos/English/basic5.Prot.Sn%20Salv.htm> [<https://perma.cc/8Q7K-Y5KF>].

⁵ *Colombia Poised to Restart Coca Spraying*, *supra* note 1; Letter from The Washington Office on Latin America et al. to Members of Congress of the Republic of Colombia et al. (Nov. 30, 2020), https://colombiapeace.org/files/201130_coca_letter_eng.pdf.

⁶ Margaux Maxwell, *Indigenous Communities in Post-FARC Colombia Struggle to Destigmatize Sacred Coca Leaf*, MONGABAY (Jan. 23, 2019), <https://news.mongabay.com/2019/01/indigenous-communities-in-post-farc-colombia-struggle-to-destigmatize-sacred-leaf/>.

⁷ Gideon Lasco, *Dealing with Coca—Both Traditional Beverage and Illicit Drug Precursor*, DISCOVER MAG. (Feb. 7, 2020, 4:45 PM), <https://www.discovermagazine.com/health/dealing-with-coca-both-traditional-beverage-and-illicit-drug-precursor>.

⁸ Joshua Collins, *Colombia to Resume Fumigating Its Coca Fields with Glyphosate*, SIERRA CLUB (June 16, 2020), <https://www.sierraclub.org/sierra/colombia-resume-fumigating-its-coca-fields-glyphosate>.

cutting-off cocaine production at its source⁹ while, arguably, justifying the United States' continued intervention in Colombia.¹⁰

During the first twenty-five years of Colombia's aerial glyphosate spraying program, U.S. contractor pilots and Colombian police sprayed the chemical onto 4.42 million acres of Colombian territory, an area larger than Connecticut.¹¹ Nonetheless, in 2015, Colombia produced an estimated 649 tons of cocaine—the same level of production as 2001, when Plan Colombia was just getting started.¹² Despite its long reign and significant geographic reach, the program only proved capable of yielding short-term results in eradicating the cultivation of coca.¹³ It instead found notoriety because of the consequences of glyphosate's effects on human health.¹⁴

Colombia was first forced to narrow the geographic scope of its aerial glyphosate spraying program in 2005 as a consequence of a massive wave of protests by Quechua communities in Ecuador who were

experiencing collateral damage from the chemical from across the border.¹⁵ In 2002, the Health Office of Sucubíos, Ecuador reported an increase in skin problems among community members, especially children; the timing of which coincided with Colombia's commencement of aerial glyphosate spraying on the other side of the San Miguel River.¹⁶ Quechua communities, including residents of Nueva Loja near the San Miguel River, began filing complaints with human rights organizations and the Ecuadorian government.¹⁷ Galvanized by these complaints, Ecuador eventually negotiated an agreement with Colombia in which the Colombian government agreed to stop spraying glyphosate within ten kilometers of their shared border.¹⁸

Colombia later suspended its aerial glyphosate spraying program completely in 2015 after years of protests from some of its own citizens, primarily farmworkers and activists who asserted that the herbicide had been negatively impacting the health of those living in Colombia's rural farmlands since the program's start in 1996.¹⁹ The protests culminated in the Constitutional Court of Colombia's 2017 ban on glyphosate spraying, aimed at protecting the Afro-Colombian population that had been affected

⁹ William Neuman, *Defying U.S., Colombia Halts Aerial Spraying of Crops Used to Make Cocaine*, N.Y. TIMES (May 14, 2015), <https://www.nytimes.com/2015/05/15/world/americas/colombia-halts-us-backed-spraying-of-illegal-coca-crops.html>.

¹⁰ See generally Grace Lee, *Imperialism by Another Name: The US "War on Drugs" in Colombia* (Aug. 22, 2017) (University of Toronto) (on file with the E-International Relations Database) (arguing that the U.S. War on Drugs in Colombia provides the United States with an outlet to ensure the preservation of a pro-U.S. government through the use of military tactics, thereby preserving its strategic capitalist interests in the region).

¹¹ Adam Isacson, *Restarting Aerial Fumigation of Drug Crops in Colombia Is a Mistake*, ADVOC. FOR HUM. RTS. IN THE AMERICAS (Mar. 7, 2019), <https://www.wola.org/analysis/restarting-aerial-fumigation-of-drug-crops-in-colombia-is-a-mistake/> [hereinafter *Restarting Aerial Fumigation*].

¹² Lucy Sheriff, *A Push to Legalize Coca Leaf Production in Colombia*, THE WORLD (July 6, 2018, 10:30 AM), <https://www.pri.org/stories/2018-07-06/push-legalize-coca-leaf-production-colombia>.

¹³ *Restarting Aerial Fumigation*, *supra* note 11.

¹⁴ See, e.g., Adriana Camacho & Daniel Mejía, *The Health Consequences of Spraying Illicit Crops: The Case of Colombia*, CTR. FOR GLOB. DEV. 1, 5 (2015) (exploring the causal effects of aerial glyphosate spraying on human health).

¹⁵ See generally Ecuador: "Collateral Damage" from Aerial Spraying on the Northern Border, EL TRANSNAT'L INST. (Dec. 1, 2003), <https://www.tni.org/es/node/12061> (discussing aerial glyphosate spraying's collateral damage in Ecuador and consequent response by civil society).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ángela Meléndez, *Ecuador-Colombia Settlement Won't End Spraying*, INTER PRESS SERV. (Oct. 28, 2013), <http://www.ipsnews.net/2013/10/ecuador-colombia-settlement-wont-end-spraying/>.

¹⁹ *Colombia Peace Update: April 17, 2021*, ADVOC. FOR HUM. RTS. IN THE AMERICAS (Apr. 17, 2021), <https://colombiapeace.org/colombia-peace-update-april-17-2021/>; Stefano Pozzebon, *Colombia Wants to Resume Spraying a Toxic Chemical to Fight Cocaine. Critics Say It's Too Risky*, CNN (Aug. 28, 2020), <https://www.cnn.com/2020/08/28/americas/colombia-aerial-fumigation-cocaine-intl/index.html>.

by fumigation in Nóvita, a municipality of Colombia's Chocó Department.²⁰ In its ruling, the Court stated that the government would need to show that spraying was safe to be able to relaunch the program.²¹

Following a meeting with then-U.S. President Donald Trump in 2020, Colombian President Iván Duque announced that the aerial fumigation program would recommence.²² One year later, after meeting with officials from the Biden administration, President Duque issued a decree²³ specifying his government's plans for reviving the aerial fumigation program and, within days, obtained approval from the environmental licensing authority.²⁴ Although the U.S. House of Representatives has since passed a bill banning the use of U.S. Department of Defense funds for the aerial spraying of coca, a significant portion of the funding has always been and still is provided by the U.S. Department of State.²⁵ With U.S. funding still on the table, approval from the environmental licensing authority, and support from President Duque, the decision whether to recommence the program now rests with Colombia's National Drug Council (CNE), the decision-making body capable of reversing the program's 2015 suspension.²⁶

Even if the CNE grants approval and the program moves forward, glyphosate spraying would still violate affected communities' right to health as

recognized by various international legal instruments. The right to health is elucidated in the ICESCR, which Colombia ratified in 1969, as well as the Protocol of San Salvador, which Colombia acceded to in 1997.²⁷ Article 12 of the ICESCR provides "[t]he State Parties to the Present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²⁸ This right is also reiterated in Article 10 of the Protocol of San Salvador.²⁹ Colombia is required to take the steps necessary to meet its Article 12 obligations, including those required to improve "all aspects of environmental and industrial hygiene" and for "the prevention, treatment[,] and control of epidemic, endemic, occupational[,] and other diseases."³⁰ By deciding to spray glyphosate by air, which will inevitably have a negative impact on the health of coca farmers, food crop farmers, and local communities alike, Colombia would not be taking steps to prevent, treat, or control diseases. Rather, it would directly contribute to them.

There is a proven correlation between glyphosate and respiratory diseases,³¹ miscarriages,³² skin disorders,³³ birth defects,³⁴ neuro disorders,³⁵ and neurodegenerative diseases.³⁶ The Constitutional Court of

²⁰ Corte Constitucional [C.C.] [Constitutional Court], abril 21, 2017, Sentencia T-236/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) <https://www.corteconstitucional.gov.co/Relatoria/autos/2019/A387-19.htm>; Andrés Bermúdez Liévano, *Colombia Will Spray Chinese Glyphosate to Control Coca*, DIALOGO CHINO (Aug. 1, 2019), <https://dialogochino.net/en/agriculture/29391-colombia-will-spray-chinese-glyphosate-to-control-coca/>.

²¹ Pozzebon, *supra* note 19.

²² *Colombia Poised to Restart Coca Spraying*, *supra* note 1.

²³ Decreto 380, abril 21, 2021, Diario Oficial [D.O.] (Colom.).

²⁴ *Colombia Peace Update: April 17, 2021*, *supra* note 19.

²⁵ Adriaan Alsema, *US House Blocks Defense Funds for Colombia's Coca Spraying*, COLOM. REPORTS (Sept. 24, 2021), <https://colombiareports.com/us-house-blocks-funds-for-colombias-coca-spraying/>.

²⁶ *Colombia Peace Update: April 17, 2021*, *supra* note 19.

²⁷ ICESCR, *supra* note 3; Protocol of San Salvador, *supra* note 4.

²⁸ ICESCR, *supra* note 3, art. 12.

²⁹ Protocol of San Salvador, *supra* note 4.

³⁰ ICESCR, *supra* note 3, art. 12.

³¹ Kata Karáth, *Pandemic Upends Colombia's Controversial Drug War Plan to Resume Aerial Spraying*, SCIENCE MAG. (June 11, 2020, 11:15 AM), <https://www.sciencemag.org/news/2020/06/pandemic-upends-colombia-s-controversial-drug-war-plan-resume-aerial-spraying> (citing Adriana Camacho & Daniel Mejía, *The Health Consequences of Spraying Illicit Crops: The Case of Colombia*, 54 J. HEALTH & ECON. 147, 148 (July 2017)).

³² Letter from The Washington Office on Latin America et al., *supra* note 5.

³³ Karáth, *supra* note 31 (citing Adriana Camacho & Daniel Mejía, *The Health Consequences of Spraying Illicit Crops: The Case of Colombia*, 54 J. HEALTH & ECON. 147, 148 (July 2017)).

³⁴ *Id.*

³⁵ Camacho & Mejía, *supra* note 14, at 5.

³⁶ *Id.*

Colombia even cited these maladies in its decision to ban glyphosate spraying in 2017.³⁷ There is also vigorous debate over whether glyphosate is a carcinogen. According to the World Health Organization (WHO) and the International Agency for Research on Cancer (IARC), glyphosate is “probably carcinogenic.”³⁸ In spite of this information from the WHO and IARC, as well as its own domestic court decisions,³⁹ the United States maintains there is not enough evidence proving glyphosate causes cancer and continues to pressure President Duque to reinvigorate the aerial fumigation program as part of its Plan Colombia and the “War on Drugs.”⁴⁰ Notably, the United States attempts to substantiate its assertion that glyphosate is safe by citing research commissioned by none other than Monsanto, the company that originally patented the herbicide.⁴¹

There is also readily available anecdotal evidence, which describes the impacts of glyphosate on human health and safety in Colombia. For example, one individual from Crucito who was in his rice paddy

when his field was indiscriminately fumigated now has skin problems and eyesight issues.⁴² Another farmer from Antioquia who worked in coca fields during aerial fumigations in the early 2000s noted that the herbicide would fall on the field like a toxic fog, causing irritation so painful that workers’ skin would start to bleed.⁴³

Colombia is further evading its duty to mitigate these known health risks by failing to warn farmworkers of impending fumigation, in spite of Monsanto’s recommendation that those exposed to glyphosate prepare themselves by wearing personal protective equipment (PPE).⁴⁴ Monsanto’s recommendation aligns with General Comment No. 14 to the ICESCR, which provides that as part of State Parties’ obligations, they must improve “all aspects of environmental and industrial hygiene,” as well as prevent and reduce the population’s exposure to harmful substances, including harmful chemicals that directly or indirectly impact human health.⁴⁵ However, to be effective at eradicating coca production, aerial fumigation must occur precipitously.⁴⁶ Otherwise, coca growers would have time to deploy the many techniques they have developed to mitigate the effects of glyphosate on their crops, such as spraying molasses on the plants to prevent the herbicide from penetrating the foliage or cutting the stems so that the plants can grow back and be harvested a few months later.⁴⁷ Because of these considerations, providing workers with warnings so that they can wear PPE would be counter to the aerial fumigation program’s goal: ending illegal coca cultivation.⁴⁸

³⁷ Corte Constitucional [C.C.] [Constitutional Court], abril 21, 2017, Sentencia T-236/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

³⁸ Letter from The Washington Office on Latin America et al., *supra* note 5; Charles M. Benbrook, *How did the US EPA and IARC Reach Diametrically Opposed Conclusions on the Genotoxicity of Glyphosate-Based Herbicides?*, 31 ENV’T SCI. EUROPE 1, 2 (Jan. 14, 2019).

³⁹ Adam Isacson, *The Costs of Restarting Aerial Coca Spraying in Colombia*, ADVOC. FOR HUM. RTS. IN THE AMERICAS (Feb. 11, 2020), <https://www.wola.org/analysis/costs-restarting-aerial-spraying-coca-colombia/>; *Judge Reduces \$2B Award in Monsanto Roundup Case to \$87M*, L.A. TIMES (Jul. 26, 2019), <https://www.latimes.com/business/story/2019-07-26/monsanto-roundup-cancer-lawsuit-award>.

⁴⁰ Michael Krumholtz, *Colombia on the Verge of Restarting Aerial Fumigation with Glyphosate*, LATIN AM. REPS. (Feb. 15, 2021), <https://latinamericareports.com/colombia-on-the-verge-of-restarting-aerial-fumigation-with-glyphosate/5467/>.

⁴¹ *Id.*

⁴² Jacobo Garcia, *Colombians See Pros, Cons in Ban on Anti-Coca Spray*, DAILY HAMPSHIRE GAZETTE (May 22, 2015), <https://www.gazettenet.com/Archives/2015/05/cocaspray-hg-051515>; Jaya Nayar, *Aerial Fumigation in Colombia: The Bad and the Ugly*, HARV. INT’L REV. (Dec. 9, 2020), <https://hir.harvard.edu/aerial-fumigation-in-colombia-the-bad-and-the-ugly/>.

⁴³ Pozzebon, *supra* note 19.

⁴⁴ *Id.*

⁴⁵ CESCR, General Comment No. 14, ¶ 15, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

⁴⁶ See Camacho & Mejía, *supra* note 14 at 6–7.

⁴⁷ See *id.*

⁴⁸ Pozzebon, *supra* note 19.

However, failing to ensure that those who come in contact with glyphosate by providing warnings or PPE is in itself a violation of Article 12. By spraying glyphosate without warning, the Colombian government is acting counter to its obligation to improve aspects of environmental and industrial hygiene as well as prevent the population's exposure to harmful chemicals that impact their health. Instead, the government is willfully spraying a harmful chemical proven to cause damage to human health onto rural communities and farmworkers, many of whom, ironically, are actually cultivating *legal* crops nearby.⁴⁹

In a similar vein, glyphosate spraying endangers the food security of affected communities.⁵⁰ General Comment No. 14 to the ICESCR notes that the right to health is closely related to and dependent upon the realization of other rights, including the right to food and to adequate nutrition.⁵¹ Although highly sophisticated precision instruments are used to determine spray targets, there is evidence of destruction of legal crops.⁵² Because glyphosate is sprayed from planes, the chemical is largely left to the mercy of the wind⁵³ and often comes into contact with food sources like avocado and corn, thereby drastically impacting communities' food security.⁵⁴ Between 2001 and 2002, the Colombian government received over 6,500 complaints of damage to legal food crops caused by aerial fumigation.⁵⁵ For example, one women-owned cooperative in Putumayo lost their pineapple crop after it was mistaken for coca.⁵⁶ Another farmer found himself unable to feed his family and was forced to relocate after his food crops were destroyed.⁵⁷ These affected individuals and their communities are the same ones being urged to shift

their livelihoods away from coca production to other legal crops, which the government then indiscriminately decimates while trying to curtail coca production.⁵⁸ Unfortunately, the impact may be long-lasting: the replanting process for many of the destroyed food crops requires a large initial investment of time and money, and the crops may take years to mature.⁵⁹

In addition to its harmful effects on food security, the aerial fumigation program also impacts health by threatening nearby water sources.⁶⁰ According to General Comment No. 15 to the ICESCR, water is a public good fundamental for life and health.⁶¹ Glyphosate is highly soluble in water and can enter aquatic systems through spraying.⁶² Studies demonstrate that the herbicide has previously contaminated ground and surface waters in many countries.⁶³ There is also evidence of the harms to human health caused by these contaminated water sources. One study from Brazil, for example, demonstrated that a region receiving water contaminated with glyphosate experienced a marked increase in its infant mortality rate.⁶⁴ By spraying glyphosate, which indiscriminately affects water supplies, Colombia is violating Article 12 of the ICESCR.

Colombia remains the only coca-producing country in the world to use aerial glyphosate spraying as part of its anti-drug program.⁶⁵ Over the course of twenty-two years, Colombia has fumigated more than 800

⁴⁹ *Id.*

⁵⁰ Letter from The Washington Office on Latin America et al., *supra* note 5.

⁵¹ General Comment No. 14, *supra* note 45, ¶¶ 3, 11.

⁵² *The Aerial Eradication of Illicit Crops*, EL TRANSNAT'L INST. (Sept. 25, 2001), <https://www.tni.org/es/node/6115>.

⁵³ Paige, *supra* note 2.

⁵⁴ Maxwell, *supra* note 6.

⁵⁵ Nayar, *supra* note 42.

⁵⁶ Paige, *supra* note 2.

⁵⁷ *Id.*

⁵⁸ Letter from The Washington Office on Latin America et al., *supra* note 5.

⁵⁹ Lasco, *supra* note 7.

⁶⁰ Letter from The Washington Office on Latin America et al., *supra* note 5.

⁶¹ CESCR, General Comment No. 15, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

⁶² FOOD & AGRIC. ORG. OF THE U.N., FAO SPECIFICATIONS AND EVALUATIONS FOR PLANT PROTECTION PRODUCTS 28 (2000/2001); *The Aerial Eradication of Illicit Crops*, *supra* note 52.

⁶³ *The Aerial Eradication of Illicit Crops*, *supra* note 52.

⁶⁴ Mateus Dias, Rudi Rocha & Rodrigo R. Soares, *Down the River: Glyphosate Use in Agriculture and Birth Outcomes of Surrounding Populations* (Latin American and the Caribbean Econ. Ass'n, Working Paper No. 0024, 2020).

⁶⁵ Collins, *supra* note 8.

hectares of coca without significantly diminishing the rate of coca production.⁶⁶ Instead, the aerial fumigation program has led to a devastating ecological impact, indirectly exacerbating deforestation,⁶⁷ destroying non-illegal crops, killing animals essential to the ecosystem,⁶⁸ and ultimately putting the food security of affected communities at risk, while simultaneously hampering these communities' ability to find alternatives to coca production.⁶⁹

Although it was the United States that encouraged President Duque to recommence the aerial glyphosate spraying program, it is Colombia that is responsible for upholding the right to health as set forth in the ICESCR and Protocol of San Salvador.⁷⁰ While other coca growing countries like Bolivia and Peru have fought back against the arguably culturally myopic and neo-colonial enforcement of the United States' "War on Drugs" policies, Colombia has historically joined U.S. efforts.⁷¹ Only by halting Colombia's aerial fumigation program indefinitely and redirecting its efforts to eradicate cocaine production will Colombia be able to ensure its compliance with the right to health.

⁶⁶ *Colombia Poised to Restart Coca Spraying*, *supra* note 1.

⁶⁷ Collins, *supra* note 8.

⁶⁸ Letter from The Washington Office on Latin America et al., *supra* note 5.

⁶⁹ *Id.*

⁷⁰ *Colombia Poised to Restart Coca Spraying*, *supra* note 1.

⁷¹ Ocean Malandra, *How Coca Leaf Became Colombia's New Superfood*, VICE (Oct. 29, 2017, 12:00 PM), <https://www.vice.com/en/article/jpka94/how-coca-leaf-became-colombias-new-superfood>.

UNTIL THE UNITED STATES REGULATES TECH EXPORTS, IT WILL CONTINUE TO ENABLE CHINA'S SURVEILLANCE OF THE UYGHURS

*by Alexandra Haris**

INTRODUCTION

For decades, China has oppressed its Uyghur population, a mostly Muslim, Turkic-speaking ethnic group in the Xinjiang Uyghur Autonomous Region, including through acts of genocide.¹ China perpetuates genocidal acts through its policies of

* Alexandra ("Lex") Haris is a 2L at American University Washington College of Law where she is the Senior Articles Editor for the Human Rights Brief and a Junior Staffer for the Administrative Law Review. She is a Research Assistant for the Project on Addressing Prison Rape, and hopes to be a public defender upon graduation.

¹ When this Article refers to genocide, it means: "... killing members of [a] group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948. There is broad consensus among human rights experts that China's actions constitute acts of genocide. See *'Eradicating Ideological Viruses': China's Campaign of Repression against Xinjiang's Muslims*, HUM. RTS. WATCH (Sept. 9, 2018), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>; see also Raoul Wallenberg Centre for Human Rights, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, NEWLINES INSTITUTE (March 2021).

detaining members of the Uyghur population, which rely on U.S.-exported technologies.² Investigations conducted by human rights groups and international media indicate that the Chinese government implements U.S.-exported technology in the Xinjiang region to track and analyze individuals within the Uyghur population's movements and behavior in real time to identify persons to investigate and potentially send to internment camps.³ For example, Xinjiang's cities and villages have been split into squares of 500 people, each square equipped with a police station to regularly scan individuals' identification cards, take their photographs and fingerprints, and search their cell phones.⁴ This information is gathered and sent to a database known as the Integrated Joint Operations Platform, which creates a list of "suspicious people" to send to internment camps.⁵ In November 2019, the International Consortium of Investigative Journalists revealed classified Chinese government documents that showed in just one week in 2017, fifteen thousand members of the Uyghur population who were placed in detention centers after being flagged by the Integrated Joint Operations Platform.⁶ The surveillance state the Chinese government has created is restraining liberty and privacy, thereby, persecuting the Uyghur community.⁷

While private Chinese companies provide monitoring technology, such as facial recognition software, to the Chinese government, these

² Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html>.

³ See *id.*; see also Paul Mozur, *One Month, 500,000 Face Scans: How China is Using AI to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html>.

⁴ Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNS. FOREIGN REL. (March 1, 2021), <https://www.cfr.org/background/chinas-repression-uyghurs-xinjiang>.

⁵ *Id.*

⁶ *Id.*

⁷ *"Break their Lineage, Break their Roots" China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims*, HUM. RTS. WATCH (April 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting#>.

companies import surveillance technology from U.S.-based corporations.⁸ For example, major Chinese government-owned companies—namely Hikvision and Dahua⁹—have ties to Amazon, Apple,¹⁰ Hewlett Packard, and Intel.¹¹ Through these contracts, these U.S.-based corporations profit from China's use of technology to surveil Uyghur persons.¹²

The United States has an opportunity to block U.S. corporations' roles in the Chinese government's surveillance. China does not have the capacity to develop certain technologies that U.S. companies provide, such as Intel chips that are required to power China's supercomputing centers.¹³ If the U.S. government were to legally prohibit U.S. corporations from providing this technology, China would be unable to surveil Uyghurs persons with the same level of sophistication as it currently does.¹⁴ As a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"),¹⁵ the United States has an obligation

⁸ Roseanne Gerin & Alim Seytoff, *US Tech Products Enable Chinese Surveillance in Xinjiang, Researchers Find*, RADIO FREE ASIA (Aug. 5, 2021), <https://www.rfa.org/english/news/uyghur/us-tech-products-08052021185345.html>.

⁹ John Honovich, *Hikvision and Dahua Sanctioned for Human Rights Abuses*, IPVIM (Oct. 7, 2019), <https://ipvm.com/reports/sanction-hikua>.

¹⁰ Brendon Hong, *Amazon Partner in China Is Making Facial-Recognition Tech to Track Uighurs*, DAILY BEAST (Nov. 13, 2020), <https://www.thedailybeast.com/dahua-amazon-partner-in-china-is-making-facial-recognition-tech-to-track-uyghurs>.

¹¹ Alex Ward, *5 Real Steps the US Could Take to Help Uyghurs in China*, VOX (Jul. 28, 2020), <https://www.vox.com/2020/7/28/21337081/china-uighurs-muslims-trump-forced-labor-help>.

¹² *EU Companies Selling Surveillance Tools to China's Human Rights Abusers*, AMNESTY INT'L (Sep. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/09/eu-surveillance-sales-china-human-rights-abusers/>.

¹³ See Paul Mozur & Don Clark, *China's Surveillance State Sucks Up Data. U.S. Tech is Key to Sorting It*, N.Y. TIMES (Nov. 22, 2020), <https://www.nytimes.com/2020/11/22/technology/china-intel-nvidia-xinjiang.html> (explaining chips made by American semiconductor company Intel have been powering a Uyghur supercomputer tracking complex since 2016).

¹⁴ Ward, *supra* note 11.

¹⁵ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

to prevent U.S. corporations' roles in perpetuating genocide against the Uyghur minority group.¹⁶ Under Article V, the United States has an obligation to enact legislation necessary to effectuate the Convention's provisions to prevent genocide.¹⁷ The United States is failing to meet this duty because it has only used verbal condemnation and limited domestic restrictions on trade with certain entities.¹⁸

I. DENUNCIATIONS AND ENTITY LIST PLACEMENTS ARE NOT ENOUGH

It is well-documented that the U.S. government knows that China continues to track, systematically incarcerate, and execute Uyghur persons.¹⁹ However, the response—diplomatic statements and actions condemning China's repression of Uyghur persons—does not fulfill its aforementioned duty under Article V of the Convention.

The United States began responding to China on this issue in 2019 when the Trump administration placed Chinese technology companies, such as Hikvision and Dahua, on the U.S. Department of Commerce's Entity List, intending to bar China from receiving U.S. technological imports.²⁰ When the

¹⁶ See *id.*, art. V. (listing the duties as "Contracting Parties undertake to enact . . . the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide of any of the other acts enumerated in article III.").

¹⁷ See *id.*

¹⁸ See *infra* note 23 (explaining how the United States placed Chinese corporations on the Entity List, which is a domestic trade restriction list, but does not prohibit U.S. citizens or companies from working with them).

¹⁹ Priyanka Boghani, *How the U.S. Has Reacted to China's Treatment of Uyghurs*, PUB. BROAD. SERV. (Nov. 10, 2020), <https://www.pbs.org/wgbh/frontline/article/us-reacted-china-treatment-uyghurs/>; see Hong, *supra* note 9. The U.S. government has also shown awareness through proposed legislation, proposing a resolution in 2020 to recognize China's actions against Uyghurs as genocidal. S. Res. 760, 166th Cong. (2020); see also Rebecca Wright, Ivan Watson, Zahid Mahmood, and Tom Booth, *'Some are just Psychopaths': Chinese Detective in Exile Reveals Extent of Torture Against Uyghurs*, CNN (Oct. 5, 2021), <https://www.cnn.com/2021/10/04/china/xinjiang-detective-torture-intl-hnk-dst/index.html>.

²⁰ *Id.*

United States placed Hikvision and Dahua on the Entity List, it demonstrated its explicit knowledge of the situation for Uyghur persons by stating that the companies were “implicated in human rights violations and abuses in China’s campaign targeting U[y]ghurs.”²¹ However, the Entity List placement was ineffective; shortly after, Dahua participated in a security trade show in Las Vegas, Nevada, and later struck a \$10 million deal with Amazon for thermal cameras.²² Following the failed attempt to sanction these private companies, the Trump administration condemned China in June 2020²³ and January 2021²⁴ in presidential statements, and Biden administration followed suit in March 2021.²⁵ That said, there has recently been a movement within U.S. Congress to pressure the government to act more forcefully.²⁶

Congress has pressured the U.S. government to bolster its export controls because previous denunciations and policies have failed to thwart Uyghur surveillance and China’s committing of genocidal acts.²⁷ As of March 2021, NBC News reported that China is “expanding and entrenching a system for mass detention”²⁸ in an effort to sterilize Uyghur women.²⁹ Additionally, through a Dahua

hack in November 2020, IPVM revealed that the company’s surveillance tactics were extremely invasive and included race-based tracking.³⁰

The United States’ limited actions toward addressing China’s treatment of the Uyghurs—minimal restrictions and public statements—violates its legal obligations under the Convention. In 1988, the United States ratified the Convention,³¹ which defines what constitutes as genocide and outlines the obligations of State Parties.³² Article V of the Convention stipulates States Parties must “enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.”³³ Additionally, Article III(e) includes punishing “complicity in genocide,”³⁴ which is defined as whether genocide was a foreseeable result of a country’s actions.³⁵ The International Court of Justice has previously held other countries liable under Article III(e), including Serbia for its failure to prevent the Srebrenica genocide.³⁶

²¹ *Id.*

²² *Id.*

²³ Patrice Taddonio, *U.S. Enacts New Law Condemning China’s Treatment of Uyghur and Other Muslims*, PUB. BROAD. SERV. (June 18, 2020), <https://www.pbs.org/wgbh/frontline/article/u-s-enacts-new-law-condemning-chinas-treatment-of-uyghur-and-other-muslims/>.

²⁴ Boghani, *supra* note 19.

²⁵ Dareh Gregorian & Abigail Williams, *Biden Admin Sanctions Chinese Officials for Abuses Against Uyghurs*, NBC NEWS (Mar. 22, 2021), <https://www.nbcnews.com/politics/politics-news/biden-admin-announces-sanctions-against-chinese-officials-over-human-rights-n1261745>.

²⁶ Kate O’Keeffe, *House Republicans Call for Tougher Controls to Keep U.S. Tech from China*, WALL ST. J. (Oct. 25, 2021), <https://www.wsj.com/articles/house-republicans-call-for-tougher-controls-to-keep-u-s-tech-from-china-11635159601> (describing how certain lawmakers are pressuring the Commerce Department to fortify export controls to curb China’s access U.S. technology).

²⁷ *See id.*

²⁸ Gregorian, *supra* note 25.

²⁹ *Id.*

³⁰ *See Hong, supra* note 10 (explaining the tracking technology records traits such as beards, clothing, and emotional states that the company designates as “normal, anger, disgust, fear, [and] confused . . .”).

³¹ *US Ratifies Genocide Convention*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/after-1945/us-ratifies-genocide-convention>.

³² *See Genocide Convention, supra* note 15, art. 2 (defining genocide as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”).

³³ *Id.*

³⁴ *Id.*, art. 3.

³⁵ Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why it Matters*, 98 J. Crim. L. & Criminology 921, 921 (2007-2008).

³⁶ *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Mont.)*, 2007 I.C.J. (Feb. 26).

For years, the United States has foregone enacting the necessary legislation that would regulate domestic companies for their role in perpetuating genocidal acts abroad. By not doing so, the United States is ignoring its binding duty to legislatively prevent the aiding and abetting of the Uyghur genocide by prohibiting U.S. businesses from continuing to aid Chinese surveillance companies.³⁷ In some cases, the connections between U.S. businesses and Chinese surveillance companies may be clear; some Chinese companies even list U.S. businesses as partners on their websites.³⁸ In other cases, there is strong circumstantial evidence of a connection between U.S. companies and Chinese surveillance.³⁹ These associations are problematic because they are significantly advancing the Chinese government's ability to surveil Uyghur communities.⁴⁰

II. THE SOLUTION

To uphold international obligations under the Convention and to halt the United States' role in contributing to the ongoing genocide, the United States must take steps to further regulate and restrict exports on surveillance technology and software.⁴¹ China relies on technology from U.S. corporations and, without it, its surveillance program on the Uyghurs would lose their effectiveness or even collapse.⁴²

Other governing regional bodies, such as countries in the European Union (EU), have begun regulating

technological exports in the interest of international human rights, and China has felt the impact. These regulations have successfully allowed the EU to scrutinize and limit exports of specific technologies that the EU believes China will use to violate human rights.⁴³ These regulations also provide clear guidance to businesses, putting them on notice of the sanctions for illegally exporting such technology.⁴⁴ While this is a positive starting point, there remain significant gaps in this framework.⁴⁵ For instance, European companies can navigate around the regulations by receiving broad and elusive descriptions from Chinese companies about the exports' intended use.⁴⁶ Therefore, the United States must determine if the EU regulations go far enough, and develop its own, more specific regulations accordingly.

In addition to mirroring and improving on the EU's framework, the United States Department of Commerce should regulate technological exports by placing certain Chinese companies on the Department's Entity List,⁴⁷ which must include strict enforcement and use technology-neutral criteria⁴⁸ within the legislation.⁴⁹ Many administrations utilize the Entity List as a punitive measure against states perpetuating human rights abuses; most

³⁷ Lindsay Gorman & Matt Schrader, *U.S. Firms Are Helping Build China's Orwellian State*, FOREIGN POL'Y (Mar. 19, 2019), <https://foreignpolicy.com/2019/03/19/962492-orwell-china-socialcredit-surveillance/>.

³⁸ *Id.*

³⁹ China has collected blood samples of hundreds of Uyghurs, trying to use U.S. technology to convert the DNA sample into an image of the person's face. This is technology that has been developing in the United States to produce pictures of criminal suspects to aid law enforcement. Sui-Lee Wee and Paul Mozur, *China Uses DNA to Map Faces, with Help from the West*, NEW YORK TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/business/china-dna-uighurs-xinjiang.html>.

⁴⁰ *Id.*

⁴¹ Ward, *supra* note 11.

⁴² *Id.*

⁴³ See *EU to Limit Tech Exports to Hong Kong after Chinese Clampdown*, REUTERS (July 24, 2020), 2 (discussing the EU implemented regulations to support Hong Kong's autonomy because China was imposing a sweeping national security law to secure the territory).

⁴⁴ *Id.*

⁴⁵ See generally *Out of Control: Failing EU Laws for Digital Surveillance Export*, AMNESTY INT'L (Sept. 20, 2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/EU-R0125562020ENGLISH.pdf> (reporting gaps in international law framework due to narrow regulations).

⁴⁶ *Id.* at 30.

⁴⁷ This action is what republicans in U.S. Congress has been pushing for. See O'Keeffe, *supra* note 26.

⁴⁸ These criteria would not mention a specific type of technology that should be regulated, but instead focus on any technology's end use.

⁴⁹ *Entity List*, U.S. DEP'T. OF COM., BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list> (last visited Nov. 22, 2021) (explaining how companies are placed on entity lists, the review policies for entity lists, and the exceptions to the Entity List).

notably, the Trump administration placed Chinese semiconductor companies on the list by banning the export of U.S. technology to these entities unless certain conditions are met.⁵⁰

The United States should extend this blacklist to a broader list of Chinese surveillance and AI companies and should implement legislation to secure the regulation's longevity and effectiveness. Specifically, instead of basing its criteria of who should be regulated around the definition of "cyber surveillance technologies" on technical specifications, the United States should opt for a technology-neutral approach, which does not specifically regulate any type of technology and instead focuses on the export's intended end-use. Relevant considerations should include whether the technology is being used in connection with international human rights violations or designed to enable covert and non-covert surveillance of digital systems to monitor, extract, collect or analyze data. Regulation should account for the reality that many forms of technology can collect data. This type of regulation would cover a broad range of current and future technologies that pose a risk to human rights, thus allowing the United States to comply with its international obligations.

III. CONCLUSION

While the U.S. government has verbally condemned China for genocidal acts against the Uyghurs, its denunciations are meaningless if the U.S. government continues to allow U.S. companies to sell technology to China that enable atrocities against the Uyghurs.⁵¹ The United States must follow the EU's lead and be held accountable to binding international

law by implementing export regulation on these technologies.⁵² Until sales are regulated, the United States will continue to perpetuate China's atrocity crimes against the Uyghurs.

⁵⁰ Gorman & Schrader, *supra* note 37.

⁵¹ Margaret Besheet, *At UN: 39 Countries Condemn China's Abuses of Uyghurs*, VOICE OF AM. NEWS (Oct. 6, 2020), <https://www.voanews.com/east-asia-pacific/voa-news-china/un-39-countries-condemn-chinas-abuses-uyghurs>.

⁵² *EU Companies Selling Surveillance Tools to China's Human Rights Abusers*, AMNESTY INT'L (Sep. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/09/eu-surveillance-sales-china-human-rights-abusers/>.

KNOWINGLY BENEFITTING: BLOCKING RELIEF FOR DRC CHILD COBALT MINERS

*by Austin Clements**

John Doe I v. Apple, Inc., a recently decided¹ class action lawsuit in the District Court for the District of Columbia, sought to hold multinational corporations liable for labor abuses that exist within the cobalt supply chain in consumer electronics products.² Extractive industries in the Democratic Republic of Congo (DRC) are a prevalent site of human rights abuses and exploitation and, in many ways, are a relic of the DRC's colonial past.³ Artisanal mining in the country has led to increasingly dangerous working conditions for miners and a rise in the use of child labor to mine cobalt for electronics, such as cell phones, electric cars, and laptops.⁴ Artisanal

* Austin Clements is a J.D. Candidate at American University Washington College of Law. He is a Deputy Editor for the *Human Rights Brief* and a Junior Staff Writer for the *Journal of Gender, Social Policy, and the Law*.

¹ While this article was being written, this case was dismissed in the D.C. District. See *John Doe I et al. v. Apple, Inc.*, No. 1:19-cv-03737 (D.D.C. Nov. 2, 2021). A timely appeal has been filed with the D.C. Circuit Court.

² Amended Complaint at 1-2, *Jane Doe I v. Apple Inc.*, No. 1:19-03737 (D.D.C. June 6, 2020) [hereinafter Amended Complaint].

³ Accord GEORGES NZONGOLA-NTALAJA, *THE CONGO: FROM LEOPOLD TO KABILA* (2002); JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (1998) (accounting historical exploitation of the mineral, human, and other natural resources by colonial powers that transitioned from foreign colonial state control to foreign private corporate ownership.)

⁴ *Is My Phone Powered by Child Labour?*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/> (last visited Dec. 1, 2021).

mining is informal mining that is carried out using primitive tools in largely unsupervised zones without safety equipment.⁵ Often in these zones, tunnel collapses and child labor are rampant.⁶ However, the plaintiffs fell short of proving the burden required under U.S. law to show that they could recover damages from the defendants, which begs the question of whether plaintiffs can recover at all from U.S. based corporations for supply chain abuses committed abroad.

In *John Doe I*, the plaintiffs filed a claim against five tech giants—Alphabet, Apple, Dell, Microsoft, and Tesla—for violations under the Trafficking Victims Protection Reauthorization Act (TVPRA).⁷ The plaintiffs alleged that the companies knowingly benefitted from participation in a venture, which engaged in child labor, thus violating the plaintiffs' rights.⁸ For a claim under the TVPRA to prevail, the plaintiffs must prove: (a) the companies knew or should have known child labor was being used; (b) with this knowledge defendants continued to participate in a venture; (c) the defendants *knowingly benefitted* from the participation in the venture; and (d) the child plaintiffs were subjected to child labor.⁹ The corporate defendants acquired cobalt from Glencore and Umicore and Huayou Cobalt, which operate mines and artisanal mining zones (AMZs) in the DRC.¹⁰ The plaintiffs allege that in the AMZs they were injured as children, which squares the fundamental legal question of whether a U.S.-based corporation be held liable for human rights abuses that occur in its opaque supply chain right in the middle of the plaintiffs' claim.

⁵ *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, *2 (D.D.C. Nov. 2, 2021).

⁶ *Id.*

⁷ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

⁸ Amended Complaint at 4.

⁹ *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, at *20.

¹⁰ *Our evolving approach to ASM: a plan for co-existence and transformation*, GLENCORE (Aug. 24, 2020), <https://www.glencore.com/media-and-insights/insights/our-evolving-approach-to-artisanal-small-scale-mining>.

Corporate responsibility in domestic human rights law is widely debated and is a recurring barrier for plaintiffs seeking redress.¹¹ The issue is further complicated when supply chains are as diffuse and complex as the global cobalt supply chain,¹² and when local governments fail to exercise proper oversight.¹³ In the United States, there are three major pieces of legislation that plaintiffs have attempted to use to gain relief: the Alien Tort Statute (ATS),¹⁴ the Trafficking Victims Protection Act

(TVPA),¹⁵ and the Trafficking Victims Protection Reauthorization Act (TVPR).¹⁶

The Alien Tort Statute (ATS), which includes the Torture Victim Protection Act (TVPA),¹⁷ allows for jurisdiction over a non-citizen tortfeasor if the tort was “committed in violation of the law of nations or a treaty of the United States.”¹⁸ The original *John Doe I* Complaint included an ATS claim; however, the plaintiffs dropped the ATS claim in their Amended Complaint. The TVPA explicitly calls for an “individual” to perpetuate the act.¹⁹ In cases where there is no way to know who the identity of the exact actor imposing the forced or coerced labor, U.S. courts have been very wary of imposing liability. For example, most recently, the Supreme Court decided *Nestlé USA, Inc. v. Doe I*, in which it held that if the alleged tort was not committed in the United States and the only domestic activity alleged was general corporate activity, relief could not be pursued under the ATS.²⁰ This effectively bars the pursuit of trafficking or labor abuse claims under the ATS in most cases, and thus, survivors must seek relief through other means. In the case of DRC cobalt mining, the pursuit of relief under the ATS is further complicated because the TVPA requires proof of torture or an extrajudicial killing.²¹ However, the definitions of torture under the act require a level of

¹¹ See generally STÉPHANIE BIJLMAKERS, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW (2018) (arguing generally for the responsibility of the multinational corporation to the communities that are exploited by the corporation); Shuangge Wen & Jingchen Zhao, *The Bumpy Road of Home States’ Regulation of Globalized Business—Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act*, 69 CATH. U. L. REV. 125, 127, 129–30 (2020) (examining the impact of British soft law and common law on corporate responsibility and arguing that states remain the primary enforcers of human rights law because of the complexity of supply chains).

¹² See Galit A. Sarfarty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 423, 431–432 (2015) (analyzing the impact of domestic legislation and accountability for multinational mineral supply chains). Cobalt supply chains are almost entirely operated by a third-party in the mining, refining, and manufacturing processes. This exchange of ownership throughout the supply chain makes the cobalt nearly impossible to track. See Susan van den Brink, René Kleijn, Benjamin Sprecher, & Arnold Tukker, *Identifying Supply Risks by Mapping the Cobalt Supply Chain*, 156 RES., CONSERVATION & RECYCLING 2 (May 2020) (mapping the physical diversity and diffusion of the cobalt supply chain).

¹³ The DRC is attempting to control the artisanal cobalt industry by creating a state-based monopoly on purchase of the cobalt, although this has still yet to materialize. See Hereward Holland & Stanys Bujakera, *Congo creates state monopoly for artisanal cobalt*, REUTERS (Jan. 31, 2020), <https://www.reuters.com/article/congo-mining/congo-creates-state-monopoly-for-artisanal-cobalt-idUSL4N2A020N>.

¹⁴ The Alien Tort Statute was the first U.S. law to grant universal jurisdiction, since expanding to allow violations under the “law of nations” to be pursued in U.S. courts. 28 U.S.C. § 1350.

¹⁵ The TVPA uses a three-pronged approach: protection for foreign nationals, creation of new crimes and definitions, and increased prevention to ensure that foreign countries are not sites of trafficking as well. Victims of Trafficking and Violence Protection Act of 2000, 2000 Enacted H.R. 3244, 106 Enacted H.R. 3244, 114 Stat. 1464, 106 P.L. 386, 2000 Enacted H.R. 3244, 106 Enacted H.R. 3244

¹⁶ While there has been several TVPRAs, the most important for the current discussion is the 2008 reauthorization, which added the language of “knowingly benefits.” William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 P.L. 457, 122 Stat. 5044 § 221 (2)(A)(ii).

¹⁷ The language of the Torture Victim Protection Act was added as a provision on the Alien Tort Statute in 1991.

¹⁸ 28 U.S.C. § 1350.

¹⁹ Torture Victim Protection Act of 1991, 1992, H.R. 2092, 102nd Cong., § 2(a).

²⁰ *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021).

²¹ 28 U.S.C. § 1350.

specificity that the AMZ child labor practices do not meet.²² The ATS, while an avenue for some victims of child labor to hold American individuals accountable, has been held to be insufficient to hold corporate defendants liable.²³ And to further complicate jurisdictional matters, the Court in *John Doe I* believed that the TVPRA did not apply extraterritorially.²⁴

John Doe I may have abandoned its ATS claim early into the proceedings, but the TVPA and TVPRA theoretically remained viable avenues for potential relief.²⁵ Under this statutory approach, it is well established that plaintiffs may sue an individual or a corporation,²⁶ which removes one of the barriers to liability that is imposed in the ATS. The TVPRA's main evidentiary barrier is proving whether the defendant *knowingly* benefits from the child labor, which is exceedingly difficult to prove in the cobalt supply chain.²⁷

The cobalt supply chain is, both by nature and through intentional obfuscation, a very difficult

environment to prove that a defendant “knowingly benefits” from child labor. The cobalt supply chain, by its inherent nature, is complex and hard to track, with many different entities controlling various parts of the extraction and manufacturing of cobalt biproducts.²⁸ To complicate matters further, the supply chains for conflict minerals and cobalt were intentionally made more confusing following the passage of the Dodd-Frank Act.²⁹ This was to circumvent new requirements for reporting³⁰ on the sourcing of 3T minerals and cobalt.³¹ In practice, the lack of an adequate reporting mechanism makes enforcement of the first provision of the TVPRA untenable. Without an adequate reporting system, large corporations can continue to claim that they have no knowledge of the child labor within their supply chains, even when it is a very real possibility. Some NGOs have attempted to encourage reporting in cobalt supply chains, although these reporting attempts have not achieved widespread success because of corporate reluctance.³² It is for the very reason of the distance and obfuscation of the cobalt

²² Artisanal Mining Zones, by their design, are freelance and require assumption of risk by the miners themselves. The tunnels and mining techniques used are not standardized or safe, and cave-ins are common. Additionally, although child labor is supposed to be discouraged, in practice it is regularly allowed and observed through pseudo-willful blindness.

²³ See generally *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

²⁴ See *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, *26-30 (D.D.C. Nov. 2, 2021).

²⁵ While the TVPA and TVPRA added distinct provisions, they are treated as the same avenue of relief in this article.

²⁶ See *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1276 (11th Cir. 2020) (interpreting the language of the TVPA to include corporations and holding the congressional intent to not be so narrow to exclude corporations); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007) (Claiming in dicta it is common to assert a claim against a corporation under the ATS).

²⁷ Whoever *knowingly* benefits, financially or by receiving anything of value, from participation in a *venture* which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in *reckless disregard* of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished. . . . (emphasis added). While the TVPRA requires two other conditions to be met —participation in a venture and knowledge of child labor— only the first is discussed here.

²⁸ Raw cobalt is often mixed from different sites to purify the ore into pure metal that can be refined. During a 2014 Government Accountability Office inquiry, sixty-seven percent of companies could not determine if their minerals came from the DRC or not. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-561, SEC CONFLICT MINERALS RULE: INITIAL DISCLOSURES INDICATE MOST COMPANIES WERE UNABLE TO DETERMINE THE SOURCE OF THEIR CONFLICT MINERALS 2 (2015).

²⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, Part 3 of 3, 124 Stat. 1376, 111 P.L. 203, § 1502, 2010 Enacted H.R. 4173, 111 Enacted H.R. 4173. The Dodd-Frank Act is the only legislation to mandate reporting of source information for conflict minerals.

³⁰ This reporting mechanism is no longer enforced by the SEC. U.S. Sec. and Exch. Comm'n, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 7, 2017), <https://www.sec.gov/news/public-statement/corpfm-updated-statement-court-decision-conflict-minerals-rule>; See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 520 (D.C. Cir. 2015) (holding mandated disclosure was compelled speech under the First Amendment).

³¹ See Lisa Reisman, *Loophole in Conflict Minerals Law Creates Opportunity for Scrap Dealers*, METALMINER (Feb. 24, 2011), <https://agmetminer.com/2011/02/24/loophole-in-conflict-minerals-law-creates-opportunity-for-scrap-dealers/>.

³² *Cobalt*, RESPONSIBLE MINS. INITIATIVE, <http://www.responsiblemineralsinitiative.org/minerals-due-diligence/cobalt/> (last visited Dec. 1, 2021).

supply chain that the District Court held that the plaintiffs' injuries in *John Doe I* were too distant and could not be linked to the defendants.³³

The plaintiffs in *John Doe I* relied upon the transactions between the defendants and Huayou and Glencore, alleging that widespread knowledge that these two companies are notorious bad actors is sufficient to show that the defendants "knowingly benefitted."³⁴ The plaintiffs alleged that these companies are known to be serial abusers of human rights law, specifically regarding child labor practices, and thus they should be known as "notorious bad actors." Merely receiving ore supply from these companies, the plaintiffs argued, should be enough to show that the defendants "knowingly benefitted" from child labor practices.³⁵ However, there is no precedent to assert that proving someone is a bad actor is sufficient to show that the company knew they were benefitting from child labor. The plaintiffs alleged that Apple knew, or should have known, because they suspended purchases from Huayou in 2014 over concerns of child labor in their supply chain, but they later resumed purchases in 2018 without evidence that Huayou made any real changes in practice.³⁶ However, this was not sufficient to prove that Apple knew or should have known they were engaged with a company who continued to engage in child labor, as Huayou has since stopped buying cobalt from AMZs in the DRC following the filing of the lawsuit.³⁷ The District Court pointed out that merely engaging business partnership to gather and supply cobalt is not a venture itself to induce or provide child or forced labor.³⁸ It is unclear if the reputations of these "notorious bad actors" may be sufficient evidence to show that the defendants "knowingly benefitted" from child labor. Indeed, the

District Court saw it as an almost nonexistent claim, treating it only in passing on its way to determining that it was impossible for the defendants to have "knowingly benefitted."³⁹ The court saw the plaintiffs' injuries as too distant to be possibly be traced to the defendants under § 1589.⁴⁰

While there are multiple avenues by which plaintiffs could seek damages for child labor in cobalt supply chains using U.S. law, the oversight necessary to make these valid claims is not present in international supply chains. *John Doe I*'s complete rebuttal of TVPRA claims on the grounds that corporate defendants could not knowingly benefit from these practices lays bare the inadequacy of U.S. law to cover corporate liability. The U.S. government has taken no steps to ameliorate this issue through legislation, which makes its ratification of the Worst Forms of Child Labor Convention seem hollow.⁴¹ Attempts to make mineral supply chains more transparent (which is the only way to know if child labor exists in a supply chain) were ruled unconstitutional in the past.⁴² The TVPA and the TVPRA seem to be clear avenues of relief for foreign nationals who have faced child or forced labor in a U.S. corporation's supply chain. However, the both natural and intentional lack of reporting in supply chains, like the cobalt supply chain, make the evidentiary burden required almost impossible to prove. For U.S. law to provide for a reliable avenue of relief for abuses that occur in supply chains, Congress must further amend the language of the TVPRA to also cover willfully blind corporations that did not take adequate measures to ensure their supply chains were free of child labor.

³³ *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, *15–16 (D.D.C. Nov. 2, 2021).

³⁴ See Amended Complaint, at 75.

³⁵ *Id.* at 65.

³⁶ See *id.* at 79.

³⁷ Harry Sanderson, *China's top cobalt producer halts buying from Congo miners*, FIN. TIMES (May 28, 2020), <https://www.ft.com/content/ce9af944-fb70-4576-88d0-dc76821facfd>.

³⁸ See *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, *12 (D.D.C. Nov. 2, 2021).

³⁹ *Id.* at *24.

⁴⁰ *Id.* at *22.

⁴¹ International Labour Organization [ILO], Worst Forms of Child Labour Convention, No. 182 (June 17, 1999). http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C182.

⁴² See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 520–521 (D.C. Cir. 2015).



Regional bodies are some of the primary creators of international law and are on the front lines of human rights protections. The Regional Systems Team seeks to provide up-to-date coverage of the world's regional bodies. For the first time, the Regional Systems team is expanding beyond coverage of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights to cover both the European Court of Human Rights (ECtHR) and African Court for Human and Peoples' Rights (ACHPR). The Regional Systems team seeks to not only cover these issues but also analyze them within the context of their respective regions.

The following articles examine some recent decisions from the ECtHR and ACHPR. The first article follows the case of Vedat Şorli, a Turkish national who was convicted for his posts on Facebook under a Turkish law that criminalizes insults against the President. Şorli has since sought a judgment from the ECtHR on the compatibility of this law with the European Convention on Human Rights. The second article examines the ECtHR's new standard for evaluating mass surveillance regimes as outlined in two recent decisions, *Big Brother Watch v. UK* and *Centrum för rättvisa v. Sweden*. The final article discusses an advisory opinion from the ACHPR on criminal vagrancy laws and analyzes the potential impact of the ACHPR's recommendations. Each of these articles highlights the critical role of regional courts in shaping the human rights landscape of the future and putting an end to the abuses of the past.



PROTECTING PRIVACY OR ENABLING INVASION?: SAFEGUARDS FOR MASS SURVEILLANCE IN EUROPE

by *Hannah Friedrich**

In *Centrum för rättvisa v. Sweden* and *Big Brother Watch and Others v. United Kingdom*, the European Court of Human Rights (ECtHR) created new criteria to test whether mass surveillance regimes comply with Article 8 of the European Convention on Human Rights (ECHR).¹ The Swedish nonprofit human rights litigation group, the Center for Justice, brought a petition against Sweden in *Centrum för rättvisa*, and multiple advocates for the right to digital privacy brought a petition against the United Kingdom (UK) in *Big Brother Watch*.² The Grand Chamber handed down both decisions on May 25, 2021. The ECtHR's prior surveillance case law only addressed targeted interception, and the Court struggled to apply its existing standards to mass surveillance regimes.³ Under a new mass surveillance test, the Court ruled that the Swedish and UK governments were both in violation of Article 8. However, some judges on the

Court expressed doubt that the test will be sufficient to enforce Article 8 protections and warn that the test risks enabling Member states to surveil their citizens with only nominal privacy protections.⁴

Article 8 of the ECHR provides persons in countries within the Council of Europe with the right to privacy, family life, and "correspondence," and these rights may only be subjected to certain restrictions which are "in accordance with law" and "necessary in a democratic society."⁵ When the petitioners originally brought *Centrum för rättvisa* and *Big Brother Watch* before the ECtHR in 2018, Sweden's Signals Intelligence Act and the UK's Tempora computer system exploited gaps in the Court's jurisprudence, because neither operation targeted specific individuals.⁶ The petitioners in both cases work closely with journalists and immigrant clients, and both had concerns that their respective countries' surveillance regimes were threatening journalistic sources and the security of international communications.⁷ The operation of the Tempora system in particular offered no public transparency, and was unknown to the public until Edward Snowden leaked its existence in 2013.⁸ On appeal, the Grand Chamber recognized the gap in case law and chose to craft the new mass surveillance test in *Big Brother Watch*, subsequently applying it in *Centrum för rättvisa*.⁹

Targeted interception case law failed to regulate the Swedish and British mass surveillance regimes be-

* *Hannah Friedrich is a 1L at Washington College of Law. She received her undergraduate degree in English from Trinity University. She is interested in Civil Rights, Education, and Labor Law.*

¹ See *Centrum för rättvisa v. Swed.*, App. No. 35252/08, ¶¶ 1-13 (Eur. Ct. H.R. 2021), <https://hudoc.echr.coe.int/en-g?i=001-210078>; *Big Brother Watch and Others v. U.K.*, App. Nos. 58170/13, 62322/14, and 24960/15, ¶¶ 1-14 (Eur. Ct. H.R. 2021), <https://hudoc.echr.coe.int/fre?i=001-210077>; *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 8, Nov. 4, 1950, 005 E.T.S. 4.

² *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 10-12; *Big Brother Watch*, App. No. 58170/13 at ¶ 13.

³ See *Zakharov v. Russ.*, App. No. 47143/07, ¶ 149 (December 4, 2015), [https://hudoc.echr.coe.int/eng#{\"appno\":\[\"47143/06\"\],\"it emid\":\[\"001-159324\"\]}](https://hudoc.echr.coe.int/eng#{\).

⁴ See *Big Brother Watch*, App. No. 58170/13 at Annex (a) ¶¶ 14-17 (Lemmens, J., Vehabović, J., and Bošnjak, J., jointly concurring in part).

⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 8, Nov. 4, 1950, 005 E.T.S. 4.

⁶ *Centrum för rättvisa*, App. No. 35252/08 at ¶ 4; *Big Brother Watch*, App. No. 58170/13 at ¶ 5.

⁷ *Centrum för rättvisa*, App. No. 35252/08 at ¶ 164; *Big Brother Watch*, App. No. 58170/13 at ¶ 432.

⁸ *Big Brother Watch*, App. No. 58170/13 at ¶¶ 282-286.

⁹ *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 268-271; *Big Brother Watch*, App. No. 58170/13 at ¶¶ 354-357.

cause its guidelines anticipate surveillance of specific individuals.¹⁰ Mass surveillance uses selectors instead of individual targets to narrow the scope of interception, resulting in broad information gathering.¹¹ Selectors are specific to the type of communication, and in the regimes at issue, the most common selectors targeted communications sent across borders.¹² The new test requires the intercepting public authority to be subject to a domestic legal framework providing safeguards at every stage of the approval, enactment, and completion of mass surveillance.¹³ Supervision is intended to increase in scrutiny as surveillance progresses through stages of information gathering and examination.¹⁴ Surveilling states are also required to destroy information after an appropriate time to reduce the risk of gathered information being stolen.¹⁵

Although in these cases the new test was used to limit the authority of surveilling states, the creation of any guidelines for surveillance risks sanctifying similar regimes. The majority *Big Brother Watch* opinion focuses on prevention of mass surveillance as a means of circumventing targeted interception restrictions, so that selectors can't be used strategically to surveil specific individuals.¹⁶ However, the concurring and dissenting opinions criticize the test for vague language, lack of hard limitations, and a bias towards Member state governments.¹⁷ The proposed safeguards are appropriate in scope, but insufficient

in their lack of definite terms.¹⁸ Judge Pinto de Albuquerque suggests banning mass surveillance entirely, and subjecting targeted interception to close judicial oversight with specific protections for privileged groups like journalists.¹⁹ It remains to be seen if future jurisprudence will reverse or further refine the loosely defined safeguards and restore the Article 8 protections currently at risk of erosion.

¹⁰ See *Zakharov*, App. No. 47143/07 at ¶ 149 (finding that a Russian citizen could not claim an Article 8 violation because he could not prove that a mass surveillance regime targeted him specifically).

¹¹ See *Big Brother Watch*, App. No. 58170/13 at ¶¶ 322-23.

¹² See *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 164, 171; *Big Brother Watch*, App. No. 58170/13 at ¶ 344.

¹³ See *Big Brother Watch*, App. No. 58170/13 at ¶¶ 354-357.

¹⁴ *Id.* at ¶¶ 348-350.

¹⁵ *Id.* at ¶ 361.

¹⁶ *Big Brother Watch*, App. No. 58170/13 at ¶¶ 353-55.

¹⁷ See *id.* at Annex (a) ¶¶ 14-17 (Lemmens, J., Vehabović, J., and Bošnjak, J., jointly concurring in part); *Id.* at Annex (b) ¶¶ 4-5, 14 (Pinto de Albuquerque, J., concurring in part and dissenting in part).

¹⁸ See *id.* at Annex (b) ¶ 15 (Pinto de Albuquerque, J., concurring in part and dissenting in part).

¹⁹ See *id.* at Annex (b) ¶¶ 19-29 (Pinto de Albuquerque, J., concurring in part and dissenting in part).

THE COMPATIBILITY OF VAGRANCY LAWS WITH HUMAN RIGHTS INSTRUMENTS IN AFRICA

*by Fabian Kopp**

On December 4, 2020, the African Court on Human and Peoples' Rights (AfCHPR) issued an advisory opinion in response to the Pan African Lawyers Union's (PALU) question on whether vagrancy laws in the African Union member states comport with the African Charter on Human and Peoples' Rights (the Charter), the African Charter on the Rights and Welfare of the Child (the Children's Rights Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Women's Rights Protocol).¹ The advisory opinion emphasizes that the obligations present in regional human rights instruments extend human rights to people no matter their socioeconomic status, and it highlights the traditional shortcomings of such instruments, namely through the lack of enforcement mechanisms.²

Vagrancy laws broadly target offences such as begging, idleness, being without a fixed abode, being a reputed thief, and being a rogue—essentially criminalizing an individual's manner of living.³ The

individuals whose rights are at risk are people experiencing homelessness, unemployment, poverty, or otherwise subject to arbitrary policing.⁴ Vagrancy is criminalized in at least eighteen African countries, another eight countries outlaw being a “rogue” or a “vagabond,” and three more countries in the continent have laws against idle and disorderly people.⁵

Vagrancy laws are often designed to curtail the mobility of people, criminalize begging, reduce the costs of looking after the poor, and prevent property crimes.⁶ Furthermore, vagrancy laws are often the vestiges of colonial criminal codes.⁷ Recent scholarship shows that former French and British colonies retain varying percentages of colonial criminal codes as law in post-colonial states, although action for reform and revision has taken place since 1955 until today.⁸

The Court holds that vagrancy laws are contrary to Articles 2, 3, 5, 6, 7, 12, and 18 of the Charter, Articles 3, 4(1), and 17 of the Children's Rights Charter, and Article 24 of the Women's Rights Protocol.⁹ In sum, the Court reasons that the broad interpretation and arbitrary enforcement of vagrancy laws readily allows for discrimination before the law; prevents the equal protection of the law; violates promises of dignity, liberty, and a fair trial; restricts the ability of people to freely move; breaks apart families; infringes upon the best interests of the child; and provides

* Fabian Kopp is a first-year law student at American University Washington College of Law. He graduated with a degree in international affairs from Mercer University.

¹ Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018, Advisory Opinion, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 5 (Dec. 4, 2020) [hereinafter Advisory Opinion], <https://www.african-court.org/cpmt/storage/app/uploads/public/5fd0c6/49b/5fd0c649b6658574074462.pdf>

² *Id.* ¶ 155.

³ *Id.* ¶ 58; *Vagrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴ Advisory Opinion ¶ 58.

⁵ *Id.* ¶ 60.

⁶ *Id.* ¶ 59.

⁷ Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 J. AFR. L. 218, 223 (2000).

⁸ See, e.g., Maya Berinzon & Ryan C. Briggs, *Legal Families Without the Laws: The Fading of Colonial Law in French West Africa*, 64 AM. J. COMPAR. L. 329, 361 (2016); S. Afr. Litig. Ctr. & Ctr. for Hum. Rts. Educ., Advice & Assistance, *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* 1, 15-28 (2013), <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/No-Justice-for-the-Poor-A-Preliminary-Study-of-the-Law-and-Practice-Relating-to-Arrests-for-Nuisance-Related-Offences-in-Blantyre-Malawi.pdf>

⁹ Advisory Opinion ¶ 155.

warrantless arrests of women who are suspected of being sex workers.¹⁰ Article 1 of each human rights instrument provides that states should take necessary steps to provide the full application of rights recognized within each document.¹¹ Therefore, states have an obligation to amend or repeal vagrancy laws to bring them into conformity with each instrument.¹²

PALU's request for the advisory opinion from the Court comes as several states are questioning the purpose of and beginning to repeal their vagrancy laws.¹³ For example, the High Court of Malawi ruled that the offence of being a "rogue and vagabond" was unconstitutional.¹⁴ The Community Court of Justice of the Economic Community of West African States held that the arbitrary detention of women labelled prostitutes violated the women's human rights under the Charter, the Women's Rights Protocol, and various international human rights instruments.¹⁵ The advisory opinion from the Court and other courts' decisions within the African Union point to the continuing confrontation with vagrancy laws, but work remains to be done to ensure people's human rights are supported no matter their socioeconomic status. Due to the limits of the Court's enforcement authority, states are the actors responsible for bringing laws into compliance with human rights instruments. Time is of the essence; as states take time to amend or repeal their existing vagrancy laws, people will continue to suffer only due to the manner in which they live.

¹⁰ *Id.* ¶¶ 75, 80, 87, 94, 102, 107, 120, 123, 128, 140.

¹¹ *Id.* ¶ 153.

¹² *Id.* ¶ 154.

¹³ *Id.* ¶ 61.

¹⁴ *Gwanda v S*, [2017] MWHC 23 (Malawi), <https://malawilii.org/mw/judgment/high-court-general-division/2017/23>.

¹⁵ *Njemanze v. Nigeria*, No. ECW/CCJ/JUD/08/17, Judgment, Community Court of Justice of the Economic Community of West African States [ECOWAS], 41-42 (Oct. 12, 2017), http://www.courtecawas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf.

THE POLITICS OF FREEDOM OF EXPRESSION IN TURKEY

*by Danya Hamad**

In the past couple of years, Turkey has increasingly restricted its citizens' right to the freedom of expression. Each year, the Turkish government charges and convicts thousands of people for insulting the President of the Republic under Article 299 of the Turkish Criminal Code.¹ Article 299 reads as follows, "anyone who insults the President of the Republic shall be punished by a term of imprisonment of between one and four years."² Article 299 affords a higher degree of protection to the President than to other persons and lays down greater penalties for persons who make defamatory statements.³ In the case of *Şorli v. Turkey*, the European Court of Human Rights (ECtHR) takes a further look at this issue to determine if the increased protection to the head of a state by means of special law on insult is compatible with the European Convention on Human Rights (ECHR).⁴ The outcome of this case is not only important in understanding and protecting the freedom of expression of persons within Turkey, but it also provides an important interpretation for the freedom

of expression of persons who make political posts in Kurdish, which is a prominent issue given Turkey's ongoing crackdown on Kurdish oppositions.⁵

In *Şorli*, the petitioner is a Turkish national that the Turkish government, in 2017, prosecuted and convicted for insulting the President of the Republic under Article 299 on account of two Facebook posts he had shared on his account.⁶ The Facebook posts in question included two caricatures/images depicting the President along with some political statements, one of which was written in Kurdish.⁷ After two months of pre-trial detention, the applicant received a suspended sentence of eleven months and twenty days.⁸ The applicant brought the case before the ECtHR under ECHR Article 10, which guarantees the right to freedom of expression, including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."⁹

The ECtHR recently held that the Turkish government interfered with the applicants' exercise of his right to freedom of expression through pre-trial detention of the applicant, criminal conviction, and the five-year period of his suspended sentence.¹⁰ Turkey's actions effectively prevented the applicant from exercising his right to freedom of expression.¹¹ Furthermore, by issuing a suspended sentence, the state continues to prevent convicted individuals from expressing their views on public matters due to the fear of violating the terms of their sentence.¹²

* Danya Hamad is an LLM student at American University Washington College of Law from Columbus, Ohio. She received her J.D. from Capital University Law School and her M.A. in International Relations from American University School of International Service with a concentration in International Negotiation and Conflict Resolution. She is passionate about international criminal law and human rights.

¹ Turkey: End Prosecutions for 'Insulting President', HUM. RTS. WATCH (Oct. 17, 2018), <https://www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president>.

² *Şorli v. Turkey*, App. No. 42048/19, (Eur. Ct. H.R. 2021), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-212394%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-212394%22]}).

³ HUM. RTS. WATCH, *supra* note 1.

⁴ *Şorli*, App. No. 42048/19

⁵ Turkey: Crackdown on Social Media Posts, HUM. RTS. WATCH (Mar. 27, 2018), <https://www.hrw.org/news/2018/03/27/turkey-crackdown-social-media-posts>.

⁶ *Şorli*, App. No. 42048/19 at ¶ 9.

⁷ *Id.* ¶ 5.

⁸ *Id.* ¶ 9.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

¹⁰ *Şorli*, App. No. 42048/19 at ¶ 47.

¹¹ *Id.* ¶ 48.

¹² *Id.* ¶ 45.

The Court held in its opinion that Article 299's increased protection of the Turkish President from public insults is incompatible with the spirit of the ECHR.¹³ Lastly, the Court recognized that an appropriate form of redress would be for Turkey to bring its relevant domestic law, such as Article 299, in line with Article 10 and the spirit of the ECHR.¹⁴

The Court's holding importantly identifies that not only is Turkish domestic law incompatible with Article 10 of the ECHR, but the procedural methods in place, such as suspended sentences, are further incompatible with Article 10.¹⁵ Additionally, the Court's affirmation of the defendant's right to freedom of expression given the political nature of his posts could also indicate that Turkey's recent crackdown on Kurdish opposition, including social media propaganda, is also incompatible with Article 10.

¹³ *Id.* ¶ 47.

¹⁴ *Id.* ¶ 54.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

* * *