



IMPUNITY WATCH ANNUAL REVIEW



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College of Law**

ARTICLES

Children with Disabilities and the Syrian Conflict

Khawla Wakkaf & Arlene S. Kanter

ISIS Child Soldiers: Law and Accountability

Kseniia Guilaeva

NOTES

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YOUNG WRITERS CONTEST WINNER

Legacy of the Nuremburg Trials

Katherine Mills

NEWS REPORTS

Collective Year in Review: Select Articles from Regional News Desks

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CHILDREN WITH DISABILITIES AND THE SYRIAN CONFLICT

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INTRODUCTION

No one knows how many children have been killed and injured in Syria since the current conflict began. Maintaining statistics on dead and injured people during wartime is always difficult. It is even more difficult when the fighting takes place on city streets and in villages, as in Syria today. Even estimating the number of children killed or injured is nearly impossible, especially if they are separated from their parents who are also killed or injured. However, what we do know is that for every dead child, it is estimated that three children are seriously injured or permanently disabled, and an even greater number experience psychological trauma.¹ One of the few international studies about the death of children during armed conflicts estimates that at least two million children have been killed in armed conflicts in a single ten-year period; 1986-1996.²

Of the children who are not killed during armed conflicts, many are injured and become disabled. In fact it is war, which is one of the largest causes of disability. Further, most people with disabilities live in countries affected by wars or natural disasters.³ The World Health Organization (WHO) estimates that there are over one billion people, or 15 percent of the world's population, who have a disability.⁴ Of those, approximately 93 million are children.⁵

¹ Women's Commission for Refugee Women and Children, *Disabilities Among Refugees and Conflict-Affected Populations*, 6 (June 2008), http://siteresources.worldbank.org/DISABILITY/Resources/280658-1239044853210/5995073-1246917381414/INT0001sk_DisabilitiesRefugeesConflictPopulaJune2008.pdf.

² Special Representative of the U.N. Secretary-General for Children and Armed Conflicts & United Nations Children's Fund (UNICEF), Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World, 19 (April 2009), https://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf [hereinafter "Machel Study"].

³ The Atlas Alliance and CBM, *Disability in Conflicts and Emergencies*, http://www.cbm.org/article/downloads/71140/Fact_sheet_Disability_in_Conflict_and_Emergencies.pdf.

⁴ *Disability and Health*, WORLD HEALTH ORG. [WHO] (Nov. 2016), <http://www.who.int/mediacentre/factsheets/fs352/en/>.

⁵ Handicap International, *Disability in Humanitarian Context: Views from Affected People and Field Organisations*, 5 (July 2015), https://d3n8a8pro7vhmx.cloudfront.net/handicapinternational/pages/1479/attachments/original/1443729529/_Handicap_International__Disability_in_humanitarian_context.pdf?1443729529.

In times of armed conflicts, children with disabilities are particularly vulnerable, and are often unable to find shelter and food, or are left to flee on their own, to areas of safety.⁶ While humanitarian relief organizations want to help these children, they are often ill-equipped to respond to their many needs or even to locate them.⁷ Children can also become targeted victims of war as parties to the conflict ignore rules of war and launch their attacks, often without any warning, in areas with high population of children, such as at schools and hospitals.⁸ Moreover, deaf children and children with intellectual disabilities are even more vulnerable to attacks since they cannot hear or understand what to do in dangerous situations.⁹ Children with physical disabilities, too, face additional barriers when they try to escape to safety or cross borders as refugees.¹⁰

Another major obstacle facing children during armed conflicts is the lack of medical care.¹¹ During times of heavy fighting, doctors are often forced to leave hospitals, which may also run out of supplies. Psychological support, too, can be in short supply, which can have devastating consequences for children who are separated from their families or who witness the

⁶ United Nations International Children's Emergency Fund [UNICEF], *The State of the World's Children 2013: Children with Disabilities*, 49 (May 2013), https://www.unicef.org/guyana/SOWC_Report_2013.pdf.

⁷ Int'l Committee of the Red Cross [ICRC], *People with Disabilities in Emergencies* (May 7, 2015), <https://www.icrc.org/en/document/people-disabilities-emergencies>.

⁸ U.N. Secretary-General, *Children and Armed Conflict*, ¶ 157, U.N. Doc. A/70/836-S/2016/360 (Apr. 20, 2016) (noting since the beginning of the Syrian conflict in the spring of 2011, more than 6,500 schools have been destroyed, partially damaged or used for shelter or military purposes); *see also Syria war: All east Aleppo hospitals to suspend operations, health directorate announces*, ABC News, (Nov. 19, 2016), <http://www.abc.net.au/news/2016-11-19/all-east-aleppo-hospitals-suspend-operations-health-directorate/8039738>.

⁹ *See* Jeremy Klaszus, *After Tumult of War, Deaf Syrian Family Finds Peace in Canada*, UNHCR (Mar. 21, 2016), <http://www.unhcr.org/en-us/news/latest/2016/3/56efaf729/tumult-war-deaf-syrian-family-finds-peace-canada.html>.

¹⁰ UNICEF, *supra* note 6, at 49; *see also* Sara Malm, *Mentally Disabled six-year-old Syrian migrant is found abandoned in Turkish coal bunker after his family tied up his legs and left him to die*, DAILY MAIL (Nov. 20, 2015), <http://www.dailymail.co.uk/news/article-3326717/Mentally-disabled-six-year-old-Syrian-migrant-abandoned-Turkish-coal-bunker-family-tied-legs-left-die.html>.

¹¹ *Children's Hospital Among Two Medical Facilities Bombed in Eastern Aleppo as Withering Attacks Resume*, DOCTORS WITHOUT BORDERS (Nov. 17, 2016), <http://www.doctorswithoutborders.org/article/children%E2%80%99s-hospital-among-two-medical-facilities-bombed-eastern-aleppo-withering-attacks>.

death of loved ones.¹² Further, children with disabilities who are able to leave war zones and escape to areas of safety, including in refugee camps in other countries, continue to suffer. Recent reports indicate that Syrian children who have escaped to refugee camps, for example, face horrific living conditions, leading many of them to suicide.¹³

The purpose of this paper is to address the impact of the Syrian conflict on children with disabilities. This paper begins with a discussion of the background of the Syrian conflict and its effect on children, generally, and on children with disabilities, in particular. The second section of this article addresses the major obstacles facing children with disabilities in Syria, including the extent of disabilities among children in Syria today. The third section discusses the current Syrian legal protections for people with disabilities, which are inadequate, followed by an overview of international legal protections for children with disabilities during armed conflicts. The final section of the article discusses lessons learned from past conflicts that have addressed the needs of children survivors of armed conflicts. The paper ends with specific recommendations regarding how to protect the rights and lives of Syrian children with disabilities.

¹² *Syria: Providing Psychological Support for Patients in Distress*, DOCTORS WITHOUT BORDERS (Oct. 24, 2013), <http://www.doctorswithoutborders.org/news-stories/voice-field/syria-providing-psychological-support-patients-distress>; see also Malm, *supra* note 10; Inka Weissbecker & Ashley Lechner, *Addressing Mental Health Needs Among Syrian Refugees*, MIDDLE EAST INST. (Sep. 22, 2015), <http://www.mei.edu/content/article/addressing-mental-health-needs-among-syrian-refugees>

¹³ Sulome Anderson, *Syria's Refugee Children Have Lost All Hope*, FOREIGN POLICY (June 29, 2016), <http://foreignpolicy.com/2016/06/29/syrias-refugee-children-have-lost-all-hope/>; see also UNHCR, Executive Committee of the High Commissioner's Programme, *Conclusions on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110 (LXI)-2010*, (contained within) U.D. Doc. A/AC.96/1095 (Oct. 12, 2010).

I. THE HUMAN TOLL OF THE SYRIAN CONFLICT

A. The Effect of the Syrian Conflict on People with Disabilities

Since the beginning of the Syrian conflict in March 2011, more than 470,000 Syrians have been killed,¹⁴ and nearly half of the population has been displaced.¹⁵ Over 7.6 million people are internally displaced,¹⁶ with more than 4.8 million living as refugees outside of Syria.¹⁷ In addition, more than 1.5 million people have lost one of their limbs or sustained physical injuries according to a 2015 Syrian government report.¹⁸ This number does not include those people with non-physical injuries or those who have fled the country.

In addition, as of August 2015, the United Nations Office for the Coordination of Humanitarian Affairs (“UNOCHA”) estimated that 13.5 million Syrians are in need of humanitarian assistance,¹⁹ including at least 1.5 million people with disabilities.²⁰ Of those people, more than half are children,²¹ including one in four who are at risk of developing a mental health disorder.²² Moreover, as of December 2016, UNOCHA estimated that at least 2.8 million Syrians have sustained permanent disabilities due to the ongoing conflict.²³ Another study by Handicap International and Help Age International found similar results. This study

¹⁴ Anne Barnard, *Death Toll From War in Syria Now 470,000, Group Finds*, N.Y. TIMES (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/world/middleeast/death-toll-from-war-in-syria-now-470000-group-finds.html?_r=0.

¹⁵ *Syria's Children Are Living a Nightmare*, SAVE CHILDREN, <http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.7998857/k.D075/Syria.htm#citation-1>. See, Mica Bevington, *Syrian Crisis Situation Report*, HANDICAP INT'L 3 (Jan. 2016), https://d3n8a8pro7vhmx.cloudfront.net/handicapinternational/pages/2159/attachments/original/1454522300/Syria_Situation_Report_January_2016.pdf?1454522300.

¹⁶ See Bevington, *supra* note 15, at 3.

¹⁷ *Syrian Arab Republic Key Figures*, United Nations Office for the Coordination of Humanitarian Affairs [UNOCHA], <http://www.unocha.org/syria> (last visited Dec. 2016).

¹⁸ *Syrian Conflict Leaves 1.5 Million Disabled*, EL WATAN NEWS (Oct. 9, 2015, 08:22 AM), <http://www.elwatannews.com/news/details/815519>.

¹⁹ *2016 Humanitarian Needs Overview Syrian Arab Republic*, UNOCHA, 24 (Oct. 2015), http://reliefweb.int/sites/reliefweb.int/files/resources/2016_hno_syrian_arab_republic.pdf.

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.* at 7.

²³ *2017 Humanitarian Needs Overview Syrian Arab Republic*, UNOCHA, 7 (Dec. 2016), http://reliefweb.int/sites/reliefweb.int/files/resources/2017_Syria_hno_161204_0.pdf.

found that of those Syrians who have fled the country as refugees to Lebanon and Jordan, 30 percent have some disability.²⁴ This number includes people with physical, sensory and intellectual impairments, chronic disease and psychological distress.²⁵ One can only assume that this number has increased over the past three years as the conflict has intensified.

B. The Effect of the Syrian Conflict on Children with and without Disabilities

Children may be born with disabilities or they may acquire disabilities later in their lives, often as a direct result of armed conflicts.²⁶ Although the exact number of children with disabilities is not known, one can assume that the number of children with disabilities in Syria has increased dramatically since the war began in 2011.²⁷

Injuries are the main cause of physical disabilities for Syrian children, especially for those who lack access to medical care and appropriate treatment.²⁸ Thousands of Syrian children have permanent impairments due to amputations.²⁹ Other children develop physical disabilities from diseases such as tuberculosis, poliomyelitis and other diseases.³⁰ A lack of nutrition can also result in permanent disabilities among children in Syria today.³¹

²⁴ *Hidden Victims of the Syrian Crisis: Disabled, Injured and Older Refugees*, HELP AGE INT'L & HANDICAP INT'L 12 (2014), http://d3n8a8pro7vnm.cloudfront.net/handicapinternational/pages/454/attachments/original/1397045203/Hidden_Victims_of_the_Syrian_Crisis%E2%80%94disabled_injured_and_older_refugees.pdf?1397045203.

²⁵ *Id.*

²⁶ *Children and Young People with Disabilities Fact Sheet*, UNICEF, 6 (May 2013), https://www.unicef.org/disabilities/files/Factsheet_A5__Web_NEW.pdf.

²⁷ See generally UNOCHA, *supra* note 23.

²⁸ *The Syrian War and People with Disabilities*, DISABLED WORLD (Sept. 3, 2013), <https://www.disabled-world.com/editorials/syria.php>. See also *A Devastating Toll: The Impact of Three Years of War on the Health of Syria's Children*, SAVE CHILDREN, 3 (2014), http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/SAVE_THE_CHILDREN_A_DEVASTATING_TOLL.PDF [hereinafter SAVE THE CHILDREN].

²⁹ SAVE THE CHILDREN, *supra* note 28.

³⁰ *Id.*

³¹ World Health Organization [WHO], *Nutrition for Health and Development: A global agenda for combating malnutrition*, 9, Doc No. WHO/NHD/00.6 (2000), http://apps.who.int/iris/bitstream/10665/66509/1/WHO_NHD_00.6.pdf.

In 2014, the Syrian Network for Human Rights published a study which found that at least 1.1 million people have been wounded as a result of the hostilities,³² nearly half of whom are women and children.³³ At least ten to fifteen percent of these men, women and children were found to have some type of disability, including many with missing limbs.³⁴ Most disabilities were the direct result of injuries due to shelling, bombings and shootings that caused eye, spinal cord or limb injuries.³⁵

In addition to these physical disabilities, many Syrian children have mental health issues brought on by the trauma associated with witnessing violence³⁶ or the killing of a family member.³⁷ Other Syrian children have developed mental health issues as a result of their exposure to torture³⁸ sexual violence,³⁹ and the lack of food and other humanitarian services.⁴⁰ In addition, children who have been traumatized by fighting near their homes and fled Syria to refugee camps in nearby countries, have found little help to address their trauma. With no psychological services or support available at the refugee camps, many children, including those with disabilities, have attempted suicide.⁴¹ Further, people with disabilities remain stigmatized in Syrian culture. As a result, many children who became physically disabled due to the war feel

³² Syrian Network for Human Rights [SNHR], *The Wounded in Syria....An Endless Pain*, 2-4 (June 26, 2014), http://sn4hr.org/public_html/wp-content/pdf/english/wounded-en.pdf.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2-4, 11.

³⁶ Bundes Psychotherapeuten Kammer, *Mindestens die Hälfte der Flüchtlinge ist psychisch krank* (Sept. 16, 2015), <http://www.bptk.de/aktuell/einzelseite/artikel/mindestens-d.html> [hereinafter “BPtK”].

³⁷ Selcuk R. Sirin & Lauren Rogers-Sirin, *The Educational and Mental Health Needs of Syrian Refugee Children* (Oct. 2015), <http://www.migrationpolicy.org/research/educational-and-mental-health-needs-syrian-refugee-children>.

³⁸ Abu Mohammed, *Torture and Punishment in the So-Called Caliphate*, RAQQA NEWS (Jul. 13, 2016), <http://www.raqqa-sl.com/en/?p=1894>.

³⁹ Sulome Anderson, *Child Marriages Rise Among Syrian Refugee Girls*, ATLANTIC (May 28, 2013), <https://www.theatlantic.com/international/archive/2013/05/child-marriages-rise-among-syrian-refugee-girls/276287/>.

⁴⁰ Anderson, *supra* note 13.

⁴¹ *Id.*

ashamed of their impairments.⁴² It has been reported that in the refugee camps, children with disabilities stay in their tents in order to avoid bullying by their peers on account of their disabilities.⁴³

In addition, a 2015 study by the German Federal Chamber of Psychotherapists found that 50 percent of the Syrian refugees in Germany have mental health issues.⁴⁴ The study also found that between 40 and 50 percent of refugees have post-traumatic stress disorder (“PTSD”) and 50 percent have depression.⁴⁵ In the case of refugees who suffer from PTSD, 40 percent of them showed suicidal plans or thoughts.⁴⁶

Similarly, a February 2015 study by the Migration Policy Institute (MPI) of Syrian children in a refugee camp in Slahiye, Turkey, found that after interviewing 311 children, 79 percent of them reported witnessing the killing of a family member and 45 percent showed symptoms of PTSD.⁴⁷ The mental health issues of these children ranged from depression, somatic symptoms, and psychosomatic disorder to PTSD.⁴⁸ Many of these children also do not attend schools or drop out, while those who do attend school struggle to engage or adapt to their new environment.⁴⁹ Such studies of Syrian children refugees highlight the dangerous impact of war on the lives of children, including the significant impact of war on the long-term development of children survivors of the Syrian conflict.⁵⁰

⁴² Telephone Interview with Raed Almasri (aka Abowael Alhoms), President, National Syrian Project for Prosthetic Limbs (Nov. 2016).

⁴³ *Id.*

⁴⁴ Omer Karasapan, *Syria's Mental Health Crisis*, BROOKINGS (Apr. 25, 2016), <https://www.brookings.edu/blog/future-development/2016/04/25/syrias-mental-health-crisis/>.

⁴⁵ *See* BPtK, *supra* note 36.

⁴⁶ *Id.*

⁴⁷ Sirin & Rogers-Sirin, *supra* note 37, at 13.

⁴⁸ *Id.* at 12-14.

⁴⁹ *Id.* at 9.

⁵⁰ Sirin & Rogers-Sirin, *supra* note 37, at 14, 17.

Moreover, in Syria, today millions of children are out of school and lack adequate psychological aid.⁵¹ According to a 2016 report by UNHCR, more than 3.7 million Syrian refugee children are out of school on any given day.⁵² Further, one in three schools in Syria has been destroyed or damaged.⁵³ There is therefore an urgent need for international coordination between civil society organizations and hosting states to provide appropriate medical care and educational services for these children. In the meantime, all sides of the conflict, particularly the Syrian government, should adhere to the rules of war by immediately stopping attacks on schools and hospitals.⁵⁴

II. SYRIAN LAWS FAIL TO PROTECT THE RIGHTS OF CHILDREN WITH DISABILITIES

Before the Syrian conflict, people with disabilities in Syria faced discrimination on the basis of disability in the absence of any sort of disability pride movement, cultural awareness or laws to protect them.⁵⁵ As of 2008, between 5 and 10 percent of Syria's population was considered disabled.⁵⁶ However, due to the stigma about disability in Syria, both before and since the war, children and adults with disabilities remain largely invisible, ashamed of their

⁵¹ *UNHCR reports crisis in refugee education*, UNHCR (Sept. 15, 2016), <http://www.unhcr.org/news/press/2016/9/57d7d6f34/unhcr-reports-crisis-refugee-education.html>.

⁵² *Id.*

⁵³ U.N. Secretary-General, *Children in armed conflict: Report of the Secretary-General*, ¶ 105, U.N. Doc. A/70/836 (April 20, 2016).

⁵⁴ Rome Statute of the International Criminal Court art. 8(2)(b)(ii), July 17, 1998, 2187, U.N.T.S. 90 [hereinafter Rome Statute].

⁵⁵ This information is based on the observations of one of the authors, Khawla Wakkaf, while she worked with NGOs in the Syrian community. *See also* 10% المعاقين نسبة في سوريا... فأيين هم؟ [10% the percentage of disabled in Syria ... Where are they?], SYRIA-NEWS http://syria-news.com/readnews.php?sy_seq=86320 (last visited Apr. 17, 2017) (discussing the stigma of disability held by some Syrians).

⁵⁶ *Awareness Campaign on the Rights of Persons with Disabilities during the Syrian Revolution*, DISABILITY RIGHTS SYRIA (Sept. 4, 2012), <http://disability-rights-syria.blogspot.com/2012/09/awareness-campaign-on-rights-of-persons.html>.

condition, and self-exiles in their homes. Obtaining proper estimates of the number of children with disabilities in Syria, therefore, both before and since the war is impossible.⁵⁷

Prior to Syrian conflict, however, the Syrian government introduced several laws designed to address the needs of people with disabilities.⁵⁸ However, these laws are primarily social welfare laws which portray the person with a disability as in need of charity or protection; they are not laws based on a human rights model of disability which sees the person with a disability as an equal and contributing member of society.⁵⁹ For example, two Executive Orders issued in 2003 and 2009, respectively, provide people with disabilities with some governmental services including an exemption from paying fees related to the importation of cars.⁶⁰ But such laws fail to recognize children and adults with disabilities as rights holders, entitled to equality, non-discrimination and inclusion in society.⁶¹

Another example of Syria's paternalistic approach to disability is seen in its 2004 Persons with Disabilities Act No. 34.⁶² This law provides medical and rehabilitation services for persons with disabilities.⁶³ The Act also exempts people with disabilities from the payment of certain taxes and fees.⁶⁴ However, the law views all persons with disabilities as in need for charity and does not distinguish between people with physical or mental disabilities or people who are capable or working or those who may need government assistance. For example, Article (3) of the Act offers the exemption of fees and loans in certain settings: Only to people with physical

⁵⁷ ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 26-29 (Routledge 2015).

⁵⁸ Special Advantages for the Disabled Law No. 46 of 2009 (Syria); People with Special Needs Law No. 34 of 2003 (Syria).

⁵⁹ KANTER, *supra* note 57 at 37-39, 48-49.

⁶⁰ Special Advantages for the Disabled Law No. 46 of 2009 (Syria); People with Special Needs Law No. 34 of 2003 (Syria).

⁶¹ *See* Special Advantages for the Disabled Law No. 46 of 2009 (Syria); People with Special Needs Law No. 34 of 2003 (Syria).

⁶² *See generally* The Persons with Disabilities Law No. 34 of 2004 (Syria), available in Arabic at <http://www.damascusbar.org/AlMuntada/showthread.php?t=13907>.

⁶³ *Id.* art. 9.

⁶⁴ *Id.*

disabilities.⁶⁵ Further, there is no mention in the law of the different types of disabilities and the particular stigma that still attaches to the label of the mental or intellectual disabilities in Syria today. While the Syrian Persons with Disabilities Act provides needed services to some people with disabilities, it continues to perpetuate a medical or charitable model of disability, which fails to recognize the potential of people with disabilities as contributing members of society. Nor does the law impose any penalties on those who violate its provisions or outlaw discrimination against people with disabilities. For example, Article (9) subsection (5) of the Act, suggests that disability is a disease that should be “detected and prevented” in order to “reduce its aggravation.”⁶⁶ This language is directly contrary to contemporary views of disability as part of the “human” diversity and humanity.⁶⁷ This law therefore shows the way in which Syrian law and Syrian society, too, fail to view people with disabilities as equal members of society entitled to inclusion and participation in society.

III. SYRIAN’S DISABILITY LAWS VIOLATE INTERNATIONAL LAW

A. Violation of the Convention on the Rights of People with Disabilities

According to Syrian law, people with disabilities are viewed through the lens of the medical model of disability as opposed to the social model.⁶⁸ The medical model of disability views disability as an individual problem to be cured or treated. In contrast, the social model of disability places the responsibility on society to remove the barriers that prevent people with disabilities from being treated on an equal basis with others.⁶⁹ By removing these physical,

⁶⁵ People with Special Needs Law No. 34 of 2003, art. 3 (Syria).

⁶⁶ *Id.*

⁶⁷ G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 3(d) (Dec. 13, 2006) [hereinafter CRPD]; see also Arlene S. Kanter, *The Law: What’s Disability Studies Got To Do With It Or An Introduction To Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 419-20 (2011).

⁶⁸ Kanter, *supra* note 67, at 419-420.

⁶⁹ *Id.* at 426-427.

attitudinal and legal barriers, people with disabilities are guaranteed the same rights and should enjoy the same opportunities to participate in society as do people without disabilities.⁷⁰

The social model of disability is specifically included in the United Nations Convention on the Rights of People with Disabilities (CRPD). The CRPD was adopted by the United Nations in 2006 and entered into force in May 2008.⁷¹ The CRPD does not view people with disabilities as ill or suffering. Instead, the CRPD defines persons with a disability as those who “have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁷² According to the CRPD, therefore, disability is a social construction that exists because society itself creates barriers that prevent people with disabilities from participating on an equal basis with all others without disabilities.

The purpose of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁷³ The CRPD recognizes that certain populations within the group of people with disabilities may require special protections as in Article 7, which requires “States parties to take all necessary measures to ensure that children with disabilities enjoy the same rights as other children.”⁷⁴ The CRPD also recognizes that certain situations may call for specialized responses. For example, Article 11 explains that such protections must be available especially during “situations of risk and humanitarian emergencies.”⁷⁵ Article 11 of the CRPD also specifically requires States Parties to “take, in accordance with their obligations under

⁷⁰ Kanter, *supra* note 67, at 426-427.

⁷¹ CRPD, *supra* note 67, art. 1.

⁷² *Id.*

⁷³ *See Id.*

⁷⁴ CRPD, *supra* note 67, art. 7.

⁷⁵ *Id.* art. 11.

international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”⁷⁶ Thus, Article 11 makes clear that as a matter of international law, States Parties which have ratified the CRPD, such as Syria did in 2009, should refrain from attacking people with disabilities, and shall take all the necessary steps to provide them with medical, humanitarian assistance as well as safe and accessible evacuation routes. In short, the CRPD explicitly guarantees, for the first time in international law, the obligation of States Parties to take steps to ensure the safety of all children and adults with disabilities during armed conflicts.⁷⁷ Despite this mandate, people with disabilities in Syria, including children with disabilities, are routinely killed,⁷⁸ attacked,⁷⁹ injured,⁸⁰ tortured,⁸¹ abandoned,⁸² and denied access to humanitarian relief and medical care.⁸³

Since Syria’s ratification of CRPD in 2009, the government has made no effort to implement it. Article 4 of CRPD requires States Parties to adopt “appropriate” legislative and administrative measures to promote the rights of persons with disabilities and to ensure their protection.⁸⁴ The current Syrian Persons with Disabilities Act, as discussed above, does not conform to the CRPD and there has been no effort by the Syrian government to repeal it or to

⁷⁶ CRPD, *supra* note 67, art. 11.

⁷⁷ *Id.*

⁷⁸ Emma Glanfield, *How much more depraved can ISIS get? Group's Sharia judges order children with Down syndrome and other disabilities to be killed in chilling echo of the Nazis*, DAILY MAIL (Dec. 14, 2105), <http://www.dailymail.co.uk/news/article-3358840/How-depraved-ISIS-Group-s-Sharia-judges-order-children-s-syndrome-disabilities-killed-chilling-echo-Nazis.html>.

⁷⁹ Jeremy Klaszus, *After tumult of war, deaf Syrian family finds peace in Canada*, UNHCR (Mar. 21, 2016), <http://www.unhcr.org/en-us/news/latest/2016/3/56efaf729/tumult-war-deaf-syrian-family-finds-peace-canada.html>.

⁸⁰ *Id.*

⁸¹ Faris Al-Rifai, *Even disabled die under torture in Assad’s prisons: Ceasar’s photos*, ZAMAN AL WASL, (Mar. 12, 2015), <https://en.zamanalwsl.net/news/9318.html>.

⁸² Malm, *supra* note 10.

⁸³ LANDMINE & CLUSTER MUNITION MONITOR, *Victim Assistance and CRPD Article II*, (June 25, 2015), http://www.the-monitor.org/media/2034853/MonitorBriefingPaper_VAandArticle11_25June2015.pdf.

⁸⁴ CRPD, *supra* note 67, art. 4.

amend it to conform to the CRPD. Additionally, Article 35 of CRPD requires States Parties to submit a report to the CRPD committee within two years of ratifying the CRPD, and at least every four years thereafter.⁸⁵ These country reports are intended to allow each country to explain the steps it has taken toward implementing the CRPD, thereby enhancing the rights of persons with disabilities in their respective countries.⁸⁶ Syria has not filed its country report, which was due in 2011.

B. Violation of the Convention on the Rights of the Child

In addition to ratifying the “CRPD” Syria has signed and ratified the Convention on the Rights of the Child (CRC).⁸⁷ Like the CRPD, the CRC protects the rights of children in wartime.⁸⁸ The CRC guarantees equal protection for children from all forms of violence, including children with disabilities.⁸⁹

Article 38 of the CRC specifically addresses the rights of children in times of war and armed conflicts. It requires governments to do everything they can “to ensure protection and care of children who are affected by an armed conflict”⁹⁰ Thus both the CRPD and the CRC protect children with disabilities during armed conflicts. They also require States Parties, such as Syria, to comply with the rules of war and other human rights law to ensure the safety and protection of children as well as adults with disabilities during conflicts.

Prior to the adoption of CRPD and CRC, there were very limited international law provisions that specifically protected children and adults with disabilities in armed conflicts. The

⁸⁵ CRPD, *supra* note 67, art. 35.

⁸⁶ *Id.*

⁸⁷ UNHCR, Convention on the Rights of the Child, 28 (Dec. 1, 2006), <http://www.unhcr.org/uk/4d9474b49.pdf>.

⁸⁸ G.A. Res. 44/25, Convention on the Rights of the Child, art. 38 (Nov. 20, 1948) [hereinafter CRC].

⁸⁹ *Id.* art. 19.

⁹⁰ CRC, *supra* note 88, art. 38.

only provision that called for such protection prior to these treaties was the Third Geneva Convention, which requires special protection and care, generally, for people with disabilities.⁹¹

C. Violation of the Geneva Conventions

Protection of persons with disabilities under International Humanitarian Law (“IHL”) derives from the principle of “humanity.”⁹² Such protection can be inferred from various provisions of the Geneva Conventions. People with disabilities, generally, also are among the protected groups under the Common Article Three of the Geneva Conventions.⁹³ This article provides protection for people who are not or who are no longer taking an active part in the hostilities.⁹⁴ Persons who are wounded and sustain physical or mental disabilities because of armed conflicts are also protected under the Geneva Conventions, including Common Article Three.⁹⁵ Wounded and sick people also are entitled to humane treatment and the right for medical care and humanitarian assistance.⁹⁶ The First Additional Protocol to the Geneva Conventions relating to the protection of Victims of International Armed Conflicts defines wounded and sick as persons “who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.”⁹⁷ Further, IHL principles go further to require the right to humane treatment and medical care for prisoners of wars (“POWs”) including those who are disabled. Article (30) of the Third Geneva Convention also requires that

⁹¹ Geneva Convention Relative to the Treatment of Prisoners of War, art. 30, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III].

⁹² Janet E. Lord, *Persons with Disabilities in International Humanitarian Law, Paternalism, Protectionism or Rights?*, in DISABILITY, HUM. RTS. AND LIMITS OF HUMANITARIANISM 155, at 160 (Michael Gill & Cathy J. Schlund-Vials eds., 2014).

⁹³ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3 Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 91, art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

⁹⁴ GC III, *supra* note 91, art. 3.

⁹⁵ GC I, *supra* note 93, art. 3; GC II, *supra* note 93, art. 3; *Id.*; GC IV, *supra* note 93, art. 3.

⁹⁶ GC I, *supra* note 93, art. 3; GC II, *supra* note 93, art. 3; GC III, *supra* note 91, art. 3; GC IV, *supra* note 93, art. 3.

⁹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 8, 8 Jun. 1977, 1125 UNTS 3.

“[s]pecial facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.”⁹⁸ The adoption of the Fourth Geneva Convention after World War II also implies the protection for people with disabilities as civilians, a category that is protected in all circumstances, unless they are taking a direct part in the hostilities of the conflict.⁹⁹

Syria is a party to these Geneva Conventions. The intentional targeting of civilian populations and individuals who are not taking a direct part in the hostilities, or engaging in attacks that might result in an incidental loss of the civilian population is a grave violation of the Geneva Conventions and constitute a war crime.¹⁰⁰ Common Article Three of the Geneva Conventions specifically prohibits parties to the conflict from engaging in any attack without taking the principle of distinction into consideration to avoid attacks that might result in civilian casualties.¹⁰¹ Additionally, endangering the civilian population[s] qualifies as a crime against humanity, if it is committed as part of a “widespread or systematic attack directed against any civilian population.”¹⁰² Finally, Common Article Three requires parties to the conflict to provide medical care to the wounded, and prohibits acts of murder, mutilation, torture or cruel treatment.¹⁰³ None of these practices required of the Geneva Conventions are being followed in Syria today. To date, no cases against Syria have been brought to the International Criminal Court since the Court has no jurisdiction to begin an investigation since Syria is not joined it.

⁹⁸ GC III, *supra* note 91, art. 30.

⁹⁹ GC IV, *supra* note 93, art. 3 (stating “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria”).

¹⁰⁰ Rome Statute, *supra* note 54, art. 8.

¹⁰¹ GC I, *supra* note 93, art. 3; GC II, *supra* note 93, art. 3; GC III, *supra* note 91, art. 3; GC IV, *supra* note 93, art. 3.

¹⁰² Rome Statute, *supra* note 54, art. 7.

¹⁰³ GC I, *supra* note 93, art. 3(1)(a); GC II, *supra* note 93, art. 3(1)(a); GC III, *supra* note 91, art. 3(1)(a); GC IV, *supra* note 93, art. 3(1)(a).

Further, the United Nations Security Council could refer cases involving Syrian war crimes to the Criminal Court, but apparently Russia has repeatedly used its veto power to shield Syria from international scrutiny.

D. Charter on Inclusion of Persons with Disabilities in Humanitarian Actions

In 2016, the international community took an unprecedented step towards strengthening the protection of people with disabilities during armed conflicts and emergency situations. The 2016 Charter on Inclusion of Persons with Disabilities in Humanitarian Action recognizes that people with disabilities are disproportionately affected by armed conflicts and that they have specialized needs during times of conflict.¹⁰⁴ The new Charter therefore requires States Parties to take all necessary steps to protect people with disabilities, including those who are refugees, migrants or displaced, and to include them in all humanitarian responses without any discrimination based on their disabilities.¹⁰⁵ However, as a charter and not a treaty, it has no binding authority, nor does it impose any legal obligations on state or non-state actors to insure its implementation. Further, although the new Charter recognizes the importance of international cooperation between “national and local authorities and all humanitarian actors,” it does not provide any mechanism for such cooperation.

The Charter does recognize, however, the importance of collecting data in order to fully protect the rights of people with disabilities.¹⁰⁶ Most such data comes from civil society or international organizations that are working in or near areas of the conflict to address these humanitarian emergencies. Yet, because of safety concerns, these organizations typically can not gain access to many areas where people with disabilities may be located. Thus, even the

¹⁰⁴ See Charter on Inclusion of Persons with Disabilities in Humanitarian Action, art. 1.7, May 23, 2016 [hereinafter CIPDHA].

¹⁰⁵ CIPDHA, *supra* note 99, art. 1.1, 1.8.

¹⁰⁶ CIPDHA, *supra* note 99, art. 1.9, 2.3(c).

Charter's data collection requirement cannot be fully implemented, due to the realities on the ground during armed conflicts and the challenges of collecting such data in humanitarian emergencies. As a result, thousands of people with and without disabilities will not be counted and will continue to remain invisible even to those organizations working actively to protect them from danger and to provide them with services they need.

IV. THE LIMITS OF INTERNATIONAL LAW

A. Lack of Protection from Torture and Mistreatment

While the Syrian war has left hundreds of thousands of Syrian children with new permanent disabilities, persons with pre-existing disabilities also have suffered disproportionately in relation to other populations.¹⁰⁷ People with disabilities in the Syrian conflict have been singled out for mistreatment as were people with disabilities during prior wars. During World War II, for example, the Nazis created the "T-4," or "euthanasia program" to specifically exterminate people with disabilities.¹⁰⁸ As a part of this program, more than 200,000 disabled people were murdered by the Nazis.¹⁰⁹ This number included thousands of children with disabilities who were injected with lethal doses of drugs.¹¹⁰

Similar to the Nazi program, reports from Syria indicate that ISIS has engaged in targeted killing of children with disabilities. ISIS has issued a "fatwa" authorizing the killing of all

¹⁰⁷ UNOCHA, *supra* note 19, at 24. *See*, VIOLATIONS DOCUMENTATION CTR. SYRIA, <http://vdc-sy.net/en/> (last visited Mar. 24, 2017) (documenting the daily death toll during the ongoing Syrian conflict) [hereinafter VDC]. *See generally* ALUN McDONALD ET AL., SAVE THE CHILDREN, INVISIBLE WOUNDS: THE IMPACT OF SIX YEARS OF WAR ON THE MENTAL HEALTH OF SYRIA'S CHILDREN, (2017), <http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/INVISIBLE%20WOUNDS%20FINAL%20020317.PDF>.

¹⁰⁸ *The Murder of the Handicapped*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007683> (last accessed Mar. 24, 2107).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Mark P. Mostert, *Useless Eaters: Disability as Genocidal Marker in Nazi Germany*, 36.3 J. SPECIAL EDUC. 157-70, at 164 (2002). *See* Michael Biddis, *Disease and dictatorship: the case of Hitler's Reich*, 90 J. ROYAL SOC'Y MED., 342-46, at 343-45(1997).

children with disabilities.¹¹¹ A fatwa is “an Islamic legal pronouncement, issued by an expert in religious law (mufti), pertaining to a specific issue.”¹¹² Although the numbers are difficult to ascertain, reports indicate that ISIS fighters have executed at least 38 children with disabilities, including with Down syndrome.¹¹³ ISIS used lethal injection or suffocation to kill these children, who were between one week old and three months of age.¹¹⁴ In addition, all sides of the conflict use different methods of torture which has resulted in death and permanent disabilities for many children and adults.¹¹⁵ For example, the Caesar Report, which was published in 2014, found that more than 11,000 detainees were “systematic[ally] kill[ed]” under torture in one of the Syrian Regime detention centers.¹¹⁶ The Caesar Report included photos of 55,000 dead bodies, including those of children and adults with disabilities who died as a result of torture.¹¹⁷ ISIS also uses different methods to torture children including using electric shock which results in their death or permanent disability.¹¹⁸ Many children who have received electric shock by ISIS have been left with permanent psychological scars as well.¹¹⁹

Deaf children in particular are at risk during wartime since they cannot hear the fighting or warnings with instructions of where to flee to safety.¹²⁰ For example, Mohamad al Kawarit, a

¹¹¹ Glanfield, *supra* note 78.

¹¹² Shaykh Muhammad Hisham Kabbani, *What is a Fatwa?*, THE ISLAMIC SUPREME COUNCIL OF AMERICA, <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html>.

¹¹³ Glanfield, *supra* note 78.

¹¹⁴ *Id.*

¹¹⁵ AL WASL, *supra* note 81; see also Abu Mohammed, *Torture and Punishment in the So-Called Caliphate*, RAQQA NEWS (Jul. 12, 2016), <http://www.raqqa-sl.com/en/?p=1894> (methods of torture used by ISIS).

¹¹⁶ Desmond de Silva et al., A Report into the credibility of certain evidence with regard to Torture and Execution of Persons Incarcerated by the current Syrian regime (Caesar Report), 16 (2014); Ian Black, *Syrian regime document trove shows evidence of ‘industrial scale’ killing of detainees*, GUARDIAN (Jan. 21, 2014), <https://www.theguardian.com/world/2014/jan/20/evidence-industrial-scale-killing-syria-war-crimes?view=desktop> (providing analysis of the Caesar Report).

¹¹⁷ Black, *supra* note 116. See AL WASL, *supra* note 81.

¹¹⁸ Mohammed, *supra* note 115 (concerning methods of torture used by ISIS).

¹¹⁹ *Id.*

¹²⁰ Hugh Naylor, *In a Syrian town under a brutal siege, a young girl is left deaf and hopeless*, THE WASHINGTON POST (June 20, 2016), https://www.washingtonpost.com/world/middle_east/in-a-syrian-town-under-a-brutal-siege-a-young-girl-is-left-deaf-and-hopeless/2016/06/19/d65ccbc0-27e5-11e6-8329-6104954928d2_story.html?utm_term=.621c9a97c4a2.

15-year-old deaf child was hit by a bullet in his neck because he could not hear the shooting around him.¹²¹ In 2014, a school for deaf children in Raqqa, Syria was also shelled and destroyed.¹²² However, there is no information about how many disabled persons died as a result of attacks due to lack of accessibility to areas controlled by ISIS.

The Violation Documentation Center in Syria (VDC) also has documented incidents in which people with disabilities, including children, were killed by snipers, shootings, shelling and field explosions.¹²³ For example, Hiba Samir Zabateh, a 13-year-old girl with a disability was shelled and killed in Homs,¹²⁴ while another child with a disability was executed together with the rest of his family of nine.¹²⁵

B. Lack of Access to Health Care and Humanitarian Aid Inside Syria

Lack of access to health and mental health care within Syria remains a serious problem. Most psychiatric hospitals in Syria have been destroyed or damaged, and there is no estimate of the number of patients who have died as a result of these attacks.¹²⁶ Only two specialized psychiatric hospitals remain operating in Syria as of April 2017. They are the Ibn Rushd and Ibn Khaldoon hospitals.¹²⁷ The Ibn Rushd hospital has been exposed to gunfire,¹²⁸ but, until recently,

¹²¹ See Klaszus, *supra* note 9.

¹²² *US Led Coalition Airstrike Kill 11 IS Militants in Al-Raqqa*, SYRIAN OBSERVATORY FOR HUM. RTS. (Nov. 24, 2014), <http://www.syriahr.com/en/?p=7398>.

¹²³ See generally VDC, *supra* note 107.

¹²⁴ *Hiba Samir Zabateh*, VIOLATIONS DOCUMENTATIONS CTR. SYRIA, <http://www.vdc-sy.info/index.php/en/details/martyrs/47599#.WM7RQzvyvIU>.

¹²⁵ VDC, "Latest Martyrs 13/07/2013," 13 July. 2013, available at: <http://www.vdc-sy.info/index.php/en/home>, last visited: 21 November 2016.

¹²⁶ *Al-Watan, Drastic Shortage of Psychiatrists Amid Substantial Surge in Number of Patients*, SYRIAN OBSERVER (Apr. 8, 2014), <http://www.syrianobserver.com/EN/Features/27029/Drastic+Shortage+of+Psychiatrists+Amid+Substantial+Surge+in+Number+of+Patients>.

¹²⁷ *Compare Mental Health Care in Syria: Another Casualty of War*, WORLD HEALTH ORG., <http://www.emro.who.int/syr/syria-news/mental-health-care-in-syria-another-casualty-of-war.html> (discussing Ibn Rushd), and Vanessa Beeley, *The Rape and Torture of Mental Hospital Patients & Staff by FSA in Syria*, WALL WILL FALL (Sept. 28, 2014), <https://thewallwillfall.org/2014/09/28/the-rape-and-torture-of-mental-hospital-patients-staff-by-the-fsa-in-syria/> (discussing Ibn Khaldoon), *with Id.* (discussing "eight or nine" psychiatric clinics before the crisis).

¹²⁸ WORLD HEALTH ORG., *supra* note 127.

has been accepting patients.¹²⁹ However, the facility reports that it is now running out of medicine and few psychiatrists are available to help.¹³⁰ The Ibn Khaldoon Hospital, too, has had to close and move some of its patients after it was subjected to attacks.¹³¹ One independent report by Vanessa Beeley, published in 2014, stated that in 2012 there were clashes between the Syrian Regime and Rebels near the Ibn Khaldoon Hospital.¹³² After the attack on the hospital, 250 patients were released, killed or tortured.¹³³ Beeley's report also cited a man with a psychosocial disability who was kidnapped for ransom. He was, later found naked in the snow suffering from frostbite, and had to have both of his legs amputated.¹³⁴

Specialized hospitals in Syria also lack medical and humanitarian assistance to treat people with psychiatric or intellectual disabilities.¹³⁵ This situation has led to the death, neglect and abuse of many people with mental disabilities.¹³⁶ For example, eight people died in 2012 at Dar al-Ajaza psychiatric hospital in Aleppo due to lack of medical care, clean water and food.¹³⁷ In addition, people with disabilities in Dar al-Ajaza were abandoned by their medical staff and remained there, living in inhumane conditions, without heat and power.¹³⁸ After the hospital was

¹²⁹ WORLD HEALTH ORG., *supra* note 127. See also Ibn Rush Hospital, FACEBOOK (last updated Feb. 8, 2017), https://m.facebook.com/%D9%85%D8%B4%D9%81%D9%89-%D8%A7%D8%A8%D9%86-%D8%B1%D8%B4%D8%AF-%D9%84%D9%84%D8%A3%D9%85%D8%B1%D8%A7%D8%B6-%D8%A7%D9%84%D9%86%D9%81%D8%B3%D9%8A%D8%A9-412217802150049/?locale2=ar_AR.

¹³⁰ WORLD HEALTH ORG., *supra* note 127.

¹³¹ Vanessa Beeley, *The Rape and Torture of Mental Hospital Patients & Staff by FSA in Syria*, WALL WILL FALL (Sept. 28, 2014), <https://thewallwillfall.org/2014/09/28/the-rape-and-torture-of-mental-hospital-patients-staff-by-the-fsa-in-syria/>; See Al-Watan, *supra* note 126.

¹³² Beeley, *supra* note 127.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *The Forgotten Mental Patients on Syria's Front Line*, DAILY STAR (Dec. 21, 2012, 10:33 AM), <http://www.dailystar.com.lb/News/Middle-East/2012/Dec-21/199385-the-forgotten-mental-patients-on-syrias-front-line.ashx>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

hit by air strikes in 2012, the hospital workers locked 12 patients in a small room where they shared three dirty mattresses filled with urine, vomit and feces.¹³⁹

The general lack of medical care in Syria during the conflict has made it impossible for the doctors or nurses who have remained in their hospitals to treat adults and children. This lack of medical care has resulted in the death of many children, while others have sustained permanent disabilities.¹⁴⁰ During the end of 2013, for example, the continuous attacks on medical facilities and medical personnel, left almost 60 percent of public hospitals in Syria damaged; most of them are no longer operating today.¹⁴¹ Half of Syria's doctors fled the war, and more than 95 percent of the medical staff in cities, such as Aleppo, have fled the country.¹⁴² As of November 19, 2016, all hospitals in Eastern Aleppo have suspended their operations.¹⁴³

As the hostilities continue, tens of thousands of children are at risk of dying from their injuries. With only a few hospitals still functioning in Syria, and with the high number of wounded patients, the few remaining doctors have no choice but to resort to quick but irreversible treatment, such as amputating limbs.¹⁴⁴ In fact, because of the lack of medical equipment and other options, Syrian physicians report that they amputate the limbs of injured children to save them from bleeding to death.¹⁴⁵ As a result, thousands of children are amputees, with permanent disabilities.¹⁴⁶ Left with no alternatives, doctors have reported using dirty

¹³⁹ DAILY STAR, *supra* note 135.

¹⁴⁰ SAVE THE CHILDREN, *supra* note 28, at 3.

¹⁴¹ *Humanitarian Bulletin: Syrian Arab Republic*, OCHA 3 (Dec. 2013), <http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20Humanitarian%20Bulletin%20No%2039.pdf>.

¹⁴² Omer Karaspan, *The war of Syria's health system*, BROOKINGS (Feb. 23, 2016),

<https://www.brookings.edu/blog/future-development/2016/02/23/the-war-on-syrias-health-system/>.

¹⁴³ *Syria war: All east Aleppo hospitals to suspend operations, health directorate announces*, ABC NEWS (Nov. 19, 2016), <http://www.abc.net.au/news/2016-11-19/all-east-aleppo-hospitals-suspend-operations-health-directorate/8039738>.

¹⁴⁴ *Children's Hospital Among Two Facilities Bombed in Eastern Aleppo as Withering Attacks Resume*, DOCTORS WITHOUT BORDERS (Nov. 17, 2016), <http://www.doctorswithoutborders.org/article/children%E2%80%99s-hospital-among-two-medical-facilities-bombed-eastern-aleppo-withering-attacks>.

¹⁴⁵ SAVE THE CHILDREN, *supra* note 28, at 3.

¹⁴⁶ *Id.*

clothes and equipment, thereby causing the further spread of disease, infection, and death.¹⁴⁷ In addition, according to a recent report by Save the Children, the lack of anesthesia has left doctors with no option but to knock children unconscious using metal bars.¹⁴⁸

The unavailability of vaccinations also has left many children to die or become disabled.¹⁴⁹ Many children, most of them younger than 3 years old, have contracted meningitis or polio, which has left them paralyzed.¹⁵⁰ Other children have died or become disabled from chronic illnesses.¹⁵¹ For example, 14 year-old Omar, who suffered from leukemia, lacked access to medical care and medication, which led to the amputation of his leg after he developed a tumor.¹⁵² Soon after the amputation, he died.¹⁵³ In such situations, children are especially vulnerable, including psychologically, as they may develop depression in their struggle to adapt to their new conditions.¹⁵⁴ Further, children who rely on wheelchairs or other lifesaving equipment face additional challenges in an inaccessible environment, especially when they seek to escape the war to nearby countries.¹⁵⁵

Lack of nutrition in times of war or conflict also can lead to dire consequences for children, including death.¹⁵⁶ For instance, a deficiency in minerals and vitamins, such as A and D, can cause physical and intellectual disabilities in children.¹⁵⁷ The impact of the lack of food

¹⁴⁷ SAVE THE CHILDREN, *supra* note 28, at 3.

¹⁴⁸ *Id.*

¹⁴⁹ SAVE THE CHILDREN, *supra* note 28, at 9, 10.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 4

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Almasri, *supra* note 42.

¹⁵⁵ U.N. CHILDREN'S FUND (UNICEF), *THE STATE OF THE WORLD'S CHILDREN*, at 49, U.N. Sales No. E.13.XX.1 (2013).

¹⁵⁶ *See generally*, WHO, *supra* note 31.

¹⁵⁷ UNICEF, *supra* note 26, at 27.

and nutrition on children with disabilities can also exacerbate their already vulnerable situation, leaving them malnourished, permanently disabled or dead.¹⁵⁸

A study conducted by UNICEF in 2014, for example, found that around 3.2 million Syrian children under the age of five are in danger of malnutrition, while around 86,000 children of the same age suffer from severe malnutrition.¹⁵⁹ In addition, lack of access to clean water can cause diseases as well as place children at risk for developing disabling conditions.¹⁶⁰ Nearly half the Syrian population lack access to clean water.¹⁶¹ The continuous fighting in the City of Aleppo, for example, has left nearly two million Syrians with little or no access to clean water.¹⁶² This lack of water, food, safety and other basic human rights can also cause serious problems for children, which has led some children to commit suicide.¹⁶³ Over a two-month period in 2016, for example, at least six children and teens in Madaya attempted suicide in order to escape the brutality of their lives.¹⁶⁴

In Syria, siege and starvation has become a common weapon used by both the Syrian Regime and the armed groups, leaving civilians, including children, to die from the lack of food or disease.¹⁶⁵ Over one million people in Syria live under siege lacking access to food, water and

¹⁵⁸ UNICEF, *supra* note 26, at 28. See also WHO, *supra* note 31, at 18, 47.

¹⁵⁹ World Health Organization Syrian Arab Republic Annual Report 2015, WORLD HEALTH ORG. (2016), http://www.who.int/hac/crises/syr/sitreps/syria_annual_report_2015.pdf?ua=1.

¹⁶⁰ UNICEF, *supra* note 26, at 6.

¹⁶¹ John Vidal, *Water supplies in Syria deteriorating fast due to conflict, experts warn*, GUARDIAN (Sept. 7, 2016), <https://www.theguardian.com/environment/2016/sep/07/water-supplies-in-syria-deteriorating-fast-due-to-conflict-experts-warn>.

¹⁶² Rick Gladstone, *Fighting in Aleppo Leaves 2 Million without Water, U.N. Says*, THE N. Y. TIMES (Aug. 9, 2016), <http://www.nytimes.com/2016/08/10/world/middleeast/fighting-in-aleppo-leaves-2-million-without-water-un-says.html>.

¹⁶³ Euan McKirdy & Schams Elwazer, *Child suicide attempts on the rise in besieged Syrian town, group warns*, CNN (Sept. 8, 2016), <http://www.cnn.com/2016/09/08/middleeast/madaya-child-suicide-attempts-save-the-children/>.

¹⁶⁴ *Id.*

¹⁶⁵ ‘*In Madaya you see walking skeletons*’: Harrowing accounts of life under siege in Syria, AMNESTY INT’L (Jan. 8, 2016), <https://www.amnesty.org/en/latest/news/2016/01/harrowing-accounts-of-life-under-siege-in-syria/>.

health care.¹⁶⁶ This number includes at least 250,000 Syrian children who are trapped under siege and left behind traumatized and distressed.¹⁶⁷

For example, in Madaya, around 40,000 people were trapped and starved for months before the first humanitarian aid shipment reached the area.¹⁶⁸ Civilians, including children with disabilities and chronic diseases, were forced to eat only leaves salt and water.¹⁶⁹ Famine in Madaya, also led to the death of many people, and psychological scars, including depression and paranoia in those who survived.¹⁷⁰

The UN Security Council has adopted numerous resolutions calling for a ceasefire in Syria and to allow humanitarian access for United Nations agencies and its partners to provide much needed medical supplies inside Syria's conflict zones. However, none of these resolutions have been implemented.¹⁷¹

C. The Perilous Plight of Children with Disabilities As Refugees

Some Syrian children with disabilities have been able to escape the war, fleeing to neighboring countries, where they have sought safety in refugee camps. However, there, too, their health has deteriorated due to the lack of food and medical care in the refugee camps.¹⁷² Moreover, it has been reported that rape and sexual violence are rampant in most Syrian refugee camps.¹⁷³ It is well documented, generally, that people with disabilities are three times more

¹⁶⁶ Siege Watch, *First Quarterly Report on Besieged Areas in Syria February 2016*, THE SYRIA INST. (Feb. 2016), <https://siegewatch.org/wp-content/uploads/2015/10/PAX-RAPPORT-SIEGE-WATCH-FINAL-SINGLE-PAGES-DEF.pdf>.

¹⁶⁷ McKirdy & Elwazer, *supra* note 163.

¹⁶⁸ Siege Watch, *supra* note 166, at 36.

¹⁶⁹ AMNESTY INT'L, *supra* note 165.

¹⁷⁰ McKirdy & Elwazer, *supra* note 163.

¹⁷¹ *Syria 2015: Documenting war-wounded and war-dead in MSF-supported medical facilities in Syria*, MEDECINS SANS FRONTIERES (Feb. 8, 2016), https://www.doctorswithoutborders.org/sites/usa/files/syria_2015_war-dead_and_war-wounded_report_en.pdf.

¹⁷² *Syrian children with disabilities tell their stories of courage and resilience in Domiz Camp, Iraq*, UNICEF, https://www.unicef.org/mena/media_8267.html.

¹⁷³ Anderson, *supra* note 39; see also UNHCR, SYRIAN REFUGEE SITUATION ANALYSIS OF YOUTH IN LEBANON (2014).

likely to be subjected to rape or sexual harassment.¹⁷⁴ While there is little research about rape cases in the Syrian refugee camps, reports indicate that the number of rapes and sexual violence toward Syrian women and children in Lebanon has increased substantially during the last few years.¹⁷⁵ As a result, more and more Syrian parents are forcing their girls into early marriage in an effort to ensure their protection and to avoid sexual violence and harassment. One young 14 year-old girl, Maya, was forced to marry. She is quoted as saying through her tears: "I don't want to get married; I don't want to have children. I'm only doing this for security. Isn't it shameful that I'm 14 years old and I have to marry a 45-year-old man?"¹⁷⁶

In addition to the sexual violence and abuse in the refugee camps, the lack of medical care, food, and psychological support, has taken a toll on young Syrians with disabilities. Many humanitarian organizations simply cannot get access to the Syrian children with disabilities, who are living in makeshift refugee camps, to provide them with much needed medical care and food.¹⁷⁷ In Lebanon, for example, the Lebanese government's opposition to normalizing life for Syrian refugees leaves hundreds of thousands of Syrians living in makeshift camps where NGOs struggle to locate them.¹⁷⁸ The Lebanese government has refused to allow the development of a formal Syrian refugee camp and continues to impose strict regulations on Syrian families, with the hope that they will be forced to return to Syria.¹⁷⁹ Such restrictions forbid Syrian refugees from working, from receiving residential permits, and requiring them to pay an average rent- called a "residency renewal fee"-of \$200 for a tent in a makeshift camp.¹⁸⁰

¹⁷⁴ NORA GROCE, GLOBAL SURVEY ON HIV/AIDS DISABILITY (2004), <http://documents.worldbank.org/curated/en/520371468140965858/pdf/343130ENGLISH0Survey0HIVAIDS.pdf>.

¹⁷⁵ See Anderson, *supra* note 39.

¹⁷⁶ *Id.*

¹⁷⁷ Oliver Holmes, *New restriction in Lebanon mean Syrian refugee live in fear*, REUTERS (Apr. 17, 2015), <http://www.reuters.com/article/us-mideast-crisis-lebanon-refugees-idUSKBN0N819Z20150417>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *Id.*

A study that was conducted in Lebanon in 2014 found that at least 41 percent of Syrian youth in Lebanon refugee camps are depressed or have suicidal motives.¹⁸¹ In fact, an increase in suicide attempts among the Syrian refugee children has been widely reported.¹⁸² A 12 year-old girl named Khowla, who lives in a tent in makeshift refugee camp, south of Tripoli, Lebanon, attempted to kill herself by swallowing rat poison after losing hope that her life would improve.¹⁸³ She is quoted here: “*Mama, there are seven of us and you work and work to feed us, but you can’t keep up. Without me, there will be one less person to feed...If the situation doesn’t change and our lives stay like this, we should all kill ourselves.*”¹⁸⁴

V. FAILURE OF THE INTERNATIONAL COMMUNITY TO RESPOND

A. Reasons for the Failure

There are numerous explanations offered for why the international community has failed so miserably in responding to the plight of Syrian children with disabilities during the current armed conflict. One reason is obvious. It is difficult to provide supplies, medical treatment and humanitarian assistance in a dangerous war zone.¹⁸⁵ Another reason is the lack of available funding for humanitarian assistance.¹⁸⁶ Early in 2016, the UN estimated that around \$7.7 billion would be required to respond to the Syrian crisis.¹⁸⁷ As of December 2016, only 49 percent of

¹⁸¹ UNHCR, *supra* note 173.

¹⁸² Anderson, *supra* note 13.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Stephanie Nebehay, *Aleppo aid convoy hit by air strike: U.N. expert*, REUTERS (Oct. 5, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-convoy-idUSKCN1250QF> (discussing Sept. 19, 2016 airstrike, launched on the UN-Syrian Arab Red Crescent convoy in Urum al-Kubra, southwest of the city of Aleppo).

¹⁸⁶ *Quick facts: What You Need To Know About the Syria Crisis*, MERCY CORPS (last updated Mar. 9, 2017), <https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>.

¹⁸⁷ United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *Humanitarian Response Plan(s): Syria Humanitarian Response Plan 2016*, FTS ARCHIVE (Apr. 5, 2017), https://ftsarchive.unocha.org/reports/daily/ocha_R1_A1118___1701190230.pdf [hereinafter *SHRP*]; UNOCHA, *Humanitarian Response Plan(s): Syria regional refugee and resilience plan (3RP) 2016*, FTS ARCHIVE (Apr. 5, 2017), https://ftsarchive.unocha.org/reports/daily/ocha_R1_A1133___1701190230.pdf [hereinafter *SRRP*].

this amount had been raised,¹⁸⁸ and of those funds, UNICEF has reported that only 39 percent of the needed funds to help Syrian refugees in Lebanon were ever received.¹⁸⁹

Syrian nonprofit agencies that provide services to Syrian children with disabilities are also underfunded and lack the resources and equipment needed to sustain their mission. For example, the National Syrian Project for Prosthetic Limbs (NSPP) is one of the few organizations that provides prosthetic limbs to children who have lost their limbs due to the ongoing armed conflict.¹⁹⁰ Since it began its work in February 2013, NSPP has provided prosthetic limbs and medical equipment to more than 250 disabled children under the age of 16.¹⁹¹ Nonetheless, there are many more children whose need for prosthetics cannot be met due to the organization's limited resources.¹⁹²

Palmyra Relief is another Syrian charity located in the United Kingdom that provides similar services to wounded Syrian children.¹⁹³ Because of the high cost of prosthetic limbs and this organization's limited funds, it has been able to help only six children, relying on the generosity of individual donors.¹⁹⁴

Another explanation for the current crisis in access to humanitarian aid is the lack of coordination among humanitarian actors as well as the absence of a reliable information management system that could help direct where help is most needed.¹⁹⁵ Further, restrictions on the delivery of aid, imposed by host countries on the delivery of aid, such as in Lebanon, -where

¹⁸⁸ *SHRP*, *supra* note 187; *SRRP*, *supra* note 187.

¹⁸⁹ See Anderson, *supra* note 13.

¹⁹⁰ *National Syrian Project for Prosthetic Limbs*, SYRIA RELIEF, <https://www.syriarelief.org.uk/programmes/medical-aid/prosthetic-limb-centres/>.

¹⁹¹ Almasri, *supra* note 42.

¹⁹² *Id.*

¹⁹³ See generally Palmyra Relief, <https://palmyrarelief.org/>.

¹⁹⁴ Telephone Interview with Mohammed Antabli, Founder of Palmyra Relief (Oct 7, 2017).

¹⁹⁵ DISABLED WORLD, *supra* note 28.

it remains difficult to provide assistance to children outside of the formal refugee camps.¹⁹⁶

These restrictions include the refusal of the Lebanese Government to build a formal refugee camp for its country's Syrian refugees.¹⁹⁷

Moreover, some reports allege that the failure of the UN and other NGOs to provide humanitarian assistance to Syrian children is due to lack of their impartiality during the Syrian Armed Conflict.¹⁹⁸ Most of the UN aid goes to the Syrian Government.¹⁹⁹ While many people, including displaced people, need humanitarian assistance in the Regime-controlled areas, hundreds of thousands of people, including countless disabled children, who are living in areas controlled by the opposition, are also in desperate need for assistance. However, the Syrian Government apparently blocks such aid from reaching them.²⁰⁰ For instance, 95 percent of the UN food aid in Damascus goes to the Regime-held areas, leaving thousands of children in the opposition- controlled Damascus suburbs without any aid, whatsoever.²⁰¹

The UN is supposed to play a neutral role in the Syrian Conflict. Therefore, sending UN aid to the Syrian Government for distribution is a breach of the UN's commitment to neutrality, especially as it has become known that the government is not distributing aid to people in the areas held by the opposition.²⁰² Just last year, the Guardian published a series of investigative articles which reported that the UN contributed tens of millions of dollars to the Syrian

¹⁹⁶ See Holmes, *supra* note 177 (referencing how Lebanon is not a state party to the 1951 Refugee Convention, and how the Lebanese Government rejected any proposals to build a formal refugee camp for Syrians on its territory, suggesting that this lead to the requirement of most Syrians to pay a monthly fee to live in a makeshift camp in Lebanon).

¹⁹⁷ *Id.*

¹⁹⁸ Nick Hopkins & Emma Beals, *How Assad regime controls UN aid intended for Syria's children*, GUARDIAN (Aug. 29, 2016), <https://www.theguardian.com/world/2016/aug/29/how-assad-regime-controls-un-aid-intended-for-syrias-children>.

¹⁹⁹ *Id.*

²⁰⁰ UN: *Stop Taking Sides*, SYRIAN CAMPAIGN, <https://act.thesyriacampaign.org/sign/stop-taking-sides?t=14&akid=319.97181.4kNTjX>.

²⁰¹ *Id.*

²⁰² Nick Hopkins & Emma Beals, *UN pays tens of millions to Assad regime under Syria aid programme*, GUARDIAN (Aug. 29, 2016), <https://www.theguardian.com/world/2016/aug/29/un-pays-tens-of-millions-to-assad-regime-syria-aid-programme-contracts>.

Government, some through charities owned by President “Assad’s closest allies,” including his wife and cousin.²⁰³ Further, in the 2016 Humanitarian Response Plan, which was prepared to provide a strategy for humanitarian response for that year,²⁰⁴ did not include in its research for this plan any input from NGOs that provide assistance and relief in the rebel held areas. Instead, the UN included information only from the Syrian Regime.²⁰⁵ As a result of these actions, more than 70 agencies delivering aid to Syrians suspended their collaboration with the UN and demanded a UN fraud investigation in Syria.²⁰⁶ Additionally, according to the subsequent reports, WHO spent millions of dollars on blood bags and gave them to Syria’s national blood bank which is controlled by “Syrian Department of Defense” and not available to people in the rebel held areas. Thus, questions remain whether much needed aid is reaching and will be able to reach the people who need it, but who are living in areas outside of the government’s control.²⁰⁷

International organizations are required to work together to reach all victims of war and humanitarian crises. Article 32 of CRPD recognizes the importance of cooperation between international organizations to create inclusive and accessible programs for all people with disabilities.²⁰⁸ Many programs were created to ensure the implementation of Article 32. For example, one such organization is the Global Partnership Disability Program, which was created to enhance and protect the rights of people with disabilities, especially in the Global South.²⁰⁹ Such programs could support efforts to respond to the Syrian humanitarian crisis. For instance, a

²⁰³ See Hopkins & Beals, *supra* note 198.

²⁰⁴ UNOCHA, *Humanitarian Response Plan, January-December 2016*, RELIEFWEB (Dec. 2015), http://reliefweb.int/sites/reliefweb.int/files/resources/2016_hrp_syrian_arab_republic.pdf.

²⁰⁵ See Hopkins & Beals, *supra* note 198.

²⁰⁶ Emma Beals & Nick Hopkins, *Aid groups suspend cooperation with UN in Syria because of Assad ‘influence’*, GUARDIAN (Sept. 8, 2016), <https://www.theguardian.com/world/2016/sep/08/aid-groups-un-syria-concern-assad-united-nations>.

²⁰⁷ See Hopkins & Beals, *supra* note 198.

²⁰⁸ CRPD, *supra* note 67, art. 32.

²⁰⁹ Global Partnership for Disability and Development, *What Is the GPDD*, BURTON BLATT INST., <http://bbi.syr.edu/gpdd/about.html> (last visited Apr. 2, 2017).

program could be developed consisting of disability rights organizations from the Arab countries in coordination with their governments in order to create a disability-focused aid program to address the needs of Syria's disabled children. An Arab partnership disability program would not only serve Syrian disabled children, but in the long run, it would also serve the larger purpose of raising awareness about the plight and rights of all Arabs with disabilities.

Moreover, there is a need for a data management system that could help organizations coordinate their respective efforts.²¹⁰ Such a system would be a vital way to share information about current operations and the location of targeted groups.²¹¹ Additionally, agencies could share best practices and locate any gaps in services. There is a need to join forces and efforts to ensure that "no one is left behind."

B. The Consequences of Failing to Protect Children with Disabilities and Others in Wartime

The problem of protecting children with disabilities in Syria is not the lack of international laws designed to protect children with disabilities during armed conflicts, as the previous section explains. International treaties such as the CRPD, CRC and the Geneva Conventions provide sufficient international legal protections for children and all civilians during wartime. Syria is a party to these treaties, which means they are obligated under international law to comply with their terms. However, these treaties are not being implemented and are not preventing the many atrocities that we are witnessing in Syria today.

Indeed, the situation in Syria is not unique. Throughout history, countries have not enforced treaties they have ratified, and the international community, generally, has failed to

²¹⁰ DISABLED WORLD, *supra* note 28.

²¹¹ *Id.*

properly respond to and protect children and their families during armed conflicts.²¹² We have witnessed the results of such failure in genocides and ethnic cleansing.²¹³ In Rwanda, for example, after the withdrawal of the UN peacekeeping mission, more than 800,000 people, including many children, were killed in less than 3 months.²¹⁴ Studies also reveal the significant physiological and mental impact on the children who survived the Rwanda genocide.²¹⁵ For instance, one study found that 47 percent of children exposed to violence were diagnosed with PTSD.²¹⁶ Even today, Rwandans struggle to recover from this genocide and its consequences, just as survivors of World War II continued to suffer long after the war ended.²¹⁷ Children survivors of World War II have been found to be more than twice as likely to be diagnosed with mental health issues as they aged.²¹⁸ Children displaced during World War II also were twice as likely to have “traumatic experiences” than were non-displaced children.²¹⁹

C. Lessons from History

Despite the dire consequences of armed conflicts on children with and without disabilities, experience in other conflicts provide examples of how to help children with disabilities in Syria. One important resource is the availability of care givers for children survivors of war. Research has shown that the availability of the main care giver, especially the

²¹² See Oona Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 936 (2002) (discussing the effect of international treaties on improving human rights protections); PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1065 (13th ed. 2013) (discussing the effect of international treaties on improving human rights protections); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 349-373 (2009) (discussing the effect of international treaties on improving human rights protections) and ARLENE S. KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS 291-303 (2015) (discussing the effect of the CRPD on domestic law).

²¹³ *Humanitarian Evacuations In Armed Conflict*, GLOBAL PROTECTION CLUSTER ¶ 2.2 (Nov. 2014), http://www.globalprotectioncluster.org/_assets/files/news_and_publications/GPC-Seminar-Summary_Conclusions-04_2015-screen.pdf.

²¹⁴ *The Rwandan Genocide*, HIST. (2009), <http://www.history.com/topics/rwandan-genocide>.

²¹⁵ Emmy E. Werner, *Children and war: Risk, resilience, and recovery*, 24 DEV. & PSYCHOPATHOLOGY 553, 554 (May 2012).

²¹⁶ *Id.*

²¹⁷ See generally *Id.*

²¹⁸ *Id.* at 554.

²¹⁹ *Id.* at 555.

mother, play a significant role in improving the mental health of a disabled child.²²⁰ Education, too, has been found to have a positive impact on improving a child's mental health by providing a "sense of stability" and a normal everyday life that was absent during wartime.²²¹ Further, children who attend school have an opportunity for social interaction with their peers.²²² In Yugoslavia for example, "school-based interventions" resulted in significant improvements in the mental health of children who survived the conflict in that country, including for children with PTSD.²²³

In addition, a report entitled, "The Impact of Armed Conflict on Children" (the Machel Report) by Graça Machel, identified school-based interventions as having a significant impact on the lives of children who survived conflicts. The Machel Report calls for the inclusion of education as part of humanitarian assistance.²²⁴ The Report also cites the successful experience in Afghanistan, when UNICEF, together with the government of Afghanistan and NGOs, launched a "back-to-school campaign" that helped bring more than six million children to school, even during the ongoing violence.²²⁵

In addition to caretaking and education, mental health services are also necessary to help children recover from the effects of war. The Machel Report also calls for an increase in providing psychosocial support for children affected by wars as part of humanitarian assistance programs.²²⁶ Such programs have been found to offer a feeling of security and stability to these children as well as increase their self-esteem.²²⁷

²²⁰ Werner, *supra* note 215, at 555.

²²¹ *Id.* at 556; GRAÇA MACHEL, IMPACT ARMED CONFLICT ON CHILDREN 22 (Sept. 2000), <http://reliefweb.int/sites/reliefweb.int/files/resources/INTERNATIONAL%20CONFERENCE%20ON%20WAR.pdf>

²²² Werner, *supra* note 215; Machel, *supra* note 221, at 26.

²²³ Werner, *supra* note 215.

²²⁴ Machel, *supra* note 221, at 22.

²²⁵ Machel Study, *supra* note 2, at 117.

²²⁶ Machel, *supra* note 221, at 21.

²²⁷ *Id.* at 21-22.

Another example on the importance of the availability of mental health services for children who have lived through conflicts is from Rwanda. Approximately 25 percent of the survivors of the Rwandan genocide were reported to have PTSD.²²⁸ To assist them, UNICEF and the government of Rwanda developed a program to provide services to these victims of trauma.²²⁹ Although the services were found to be effective and had positive impact on mental health, including children survivors, other studies revealed that many persons with mental health disorders, including PTSD, did not receive services or received services years after the genocide had ended.²³⁰ Some studies of this program also found that its data management system was ineffective.²³¹ Nevertheless, the UNICIF trauma program in Rwanda has been cited as an important step toward promoting the services directed to improve the mental health of children affected by war.²³²

In addition to schools and mental health services, the Machel Report has been cited to support the creation of a child protection system to provide them with humanitarian aid.²³³ Such a system includes laws and regulations that ensure all children's access to education, health care and justice.²³⁴

These programs developed in Afghanistan and Rwanda that successfully addressed the education, mental health needs and protection of children who had survived wars in those countries are models for Syria as well. While it might be difficult to replicate such programs inside Syria while the conflict continues, it should be possible to introduce such programs in the

²²⁸ L. C. Ng & B. Harerimana, *Mental health care in post-genocide Rwanda: evaluation of a program specializing in posttraumatic stress disorder and substance abuse*, NCBI (May 19, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5012309/>.

²²⁹ Machel, *supra* note 221, at 21.

²³⁰ See generally Ng & Harerimana, *supra* note 228.

²³¹ *Id.*

²³² Machel, *supra* note 221, at 21.

²³³ Machel Study, *supra* note 2, at 145.

²³⁴ *Id.*

refugee camps in the neighboring countries.

VI. CONCLUSION

While the main cause of disability among Syrian children may be attributed to the violence and use of weapons associated with the Syrian armed conflict, the lack of child protection and humanitarian aid remains another challenge facing Syrian children with disabilities today. Even those children who have successfully fled Syria to refugee camps in nearby countries, remain in great danger. Without access to food, shelter, water and medical care, children in refugee camps, like their counterparts who are still living in Syria, will not survive. And if they do, they will have many physical and mental health challenges to overcome. In addition, the lack of psychological support available to Syrian children with disabilities, including those living in refugee camps, increases their vulnerability, resulting in greater risks to their safety and health. Further, the inability of most Syrian children to attend school has a significant impact on their current mental health as well as the long-term prospects for their recovery after the war.

Failure to address the needs of children with disabilities will lead to increased demands on an already overwhelmed medical and humanitarian aid system. It also will lead to more suicide deaths among young Syrians as well as the lifelong mental health consequences that will lead to an increase in the number of Syrians who may need mental health care and remain marginalized from society on that basis. Building on the work done by the international community, a coordination and collaboration among all the different sectors of society is vital to help children with disabilities, who remain the forgotten victims of the Syrian war.

APPENDIX

General Recommendations: The following are specific steps that could be taken to today from the international community, individual countries and organizations to address the plight of Syrian children with disabilities as well as all children who have become the victims of the conflict.

1. Ensure that humanitarian and medical aid reaches the besieged areas with Syrian children.
2. Increase international pressure on the governments of Russia and Syria to comply with the international humanitarian and human rights laws, including the CRPD and the CRC.
3. Demand a report from the Syrian Government to the CRPD Committee about the situation of persons with disabilities inside Syria and what steps were done to ensure their safety and enhance their rights, as per Syria's obligation under Article 33 of the CRPD.
4. Consider imposing on State Parties to the CRPD a requirement to submit their reports to the CRPD Committee every 6 months in times of armed conflicts to ensure that appropriate steps are taken to protect persons with disabilities.
5. Bring to prosecution those responsible for the human rights violations of children with disabilities.
6. Investigate the failure of UN humanitarian aid to reach children with disabilities in need in Syria.
7. Create a Syrian child protection system to ensure safe evacuation routes and greater protection for Syrian children, including those with disabilities.
8. Create an effective data management system to collect demographic information about and the number of Syrian children with disabilities.

9. Apply more political pressure on the Government of Lebanon to ratify the 1951 Refugee Convention and to allow the establishment of a formal temporary camp where UNICIF can lead efforts to massive back to school campaigns for all Syrian children.
10. Encourage more research about the effect of the Syrian armed conflict on children, generally, and children with disabilities, in particular.
11. Develop a partnership among Arab states to provide medical and humanitarian assistance to Syrian children with disabilities within and outside of Syria; to provide psychological support for traumatized Syrian children and their families; and to raise awareness about the importance of educational and social inclusion through peer education methods. People with disabilities and disability rights groups should be involved in all the steps of this process.
12. Launch a “back to school campaign” for Syrian refugees children now living as refugees in neighboring countries.

Specific Recommendations:

1. Ensure that all programs for refugees and all refugee camps are accessible and appropriate for people with mental disabilities and trauma survivors, including individuals with a diagnosis of mental illness or psychosocial disorders.
2. Ensure that refugee camps are accessible for all persons with physical disabilities including providing ramps and other appropriate assistance especially at distribution points and in rest areas. Financial assistance should be available to provide mobile devices for children and people with physical impairment.
3. Ensure that information regarding available services, in particular any trauma programs, are accessible and available to all Syrian refugees including those who are

living in makeshift camps and who are blind or deaf or with vision or hearing impairments.

4. Ensure that mental health services are embedded in social support systems to avoid stigma. Further, individuals should not be referred to or placed in institutions. Psychiatric medications should be available among the range of health care supports available after receiving the full and informed consent of the person with a mental disability.
5. Rehabilitation programs should be made available for persons and children with physical disabilities. Such facilities should be established in coordination with NGOs that provide prosthetic limbs and other equipment for persons and children who sustained physical impairments due to the ongoing Syrian conflict. These programs shall be designed to increase the self-esteem and independence of adults and children with disabilities and to ensure their full inclusion in the community by helping them retain employment in the case of adults and attend schools in the case of children.
6. Establish programs that are specifically targeted to provide mental health support for Syrian women and girls who have been subjected to sexual violence. Such programs shall be culturally sensitive to the Syrian society in order to build trust and insure the dignity and safety of these women and girls.

ISIS CHILD SOLDIERS: LAW AND ACCOUNTABILITY

Kseniia Guliaeva

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I. INTRODUCTION

The practice of using children in the warfare certainly is not new. A number of countries throughout the history have resorted to the recruitment and use of children to gain an advantage in the battlefield however the practice of using children in the modern world is for the most part a totally different phenomenon. The emergence of new international actors posed new challenges before the international community and consequently, international law. Islamic State of Iraq and Syria is one of the leaders in posing those challenges, as its practices of recruiting and brutally using children to advance its military and political interests are unprecedented. Abusing children's trust and exploiting them for killing people for the sole purpose of pursuing its agenda is dreadful and international community has so far failed to provide any adequate solution for this complex problem.

This paper is designed to unveil political and legal aspects of child use and recruitment by Islamic State of Iraq and Syria and suggest possible ways to hold the organization accountable for unimaginable atrocities it is committing in the Middle East and around the world. The second chapter of this paper provides a brief history of the recruitment and use of child soldiers and an overview of the practices employed by the organization in engaging children in armed conflicts. The third chapter focuses on examining existing legal instruments referring to the recruitment and use of child soldiers, while the last chapter analyzes accountability mechanisms available at this point with an attempt to identify the most viable option that would allow holding Islamic State of Iraq and Syria responsible for its crimes.

II. BRIEF HISTORY OF RECRUITING AND USING CHILD SOLDIERS

The practice of using children in warfare, appalling in the modern world, has a long history. First uses of child soldiers date back to the antiquity. The Bible tells the story of young David serving King Saul as an armor bearer,¹ Greek philosophy and literature also depict the use of children in the warfare.² In particular, Greek mythology depicts the story of Hercules and his nephew Lolaus, who performed functions similar to those of armor-bearers during Hercules's fight with Hydra.³ It should be noted that the functions of armor-bearers were not limited to bearing a shield and additional weapons for their masters⁴ and protecting their chiefs during the campaign - they were also responsible for killing enemies wounded by their commanders.⁵ These examples demonstrate the level of acceptance of children's involvement in military campaigns allowed at the time.

The Middle Ages were not exempt from use of children in military conflicts either. The Ottoman Empire used so-called Janissary corps, an infantry unit originally formed to serve as Sultan's bodyguards, in all its major battles.⁶ European practice of using children in warfare led to the so-called Children's Crusade.⁷ Although scholars continue to question the validity of the Children's Crusade,⁸ it still significantly impacts the understanding of the use of children in military campaigns.

¹ *100 Bible Verses about Soldiers*, (Stephen Smith, ed., Jan. 10, 2017) OpenBible, <https://www.openbible.info/topics/soldiers>.

² *Philosophies of Peace and Just War in Greek Philosophy and Religions of Abraham: Judaism, Christianity, and Islam*, 16 (Medhi Faridzadeh, ed., 2004).

³ Joshua Mark, *The Life of Hercules in Myth & Legend*, Ancient History Encyclopedia (July 23, 2014), <https://www.ancient.eu/article/733/>.

⁴ *100 Bible Verses about Soldiers*, *supra*, note 1.

⁵ *Id.*

⁶ GEORGE F. NAFZIGER, *HISTORICAL DICTIONARY OF THE NAPOLEONIC ERA*, 153-54 (2001).

⁷ Peter Raedts, *The Children's Crusade of 1213*, 3 J. MEDIEVAL HIST. 279, 323 (1977).

⁸ *Id.*

In the face of an invasion by Allied powers, Napoleon conscripted many children that participated in the battles under the direction of Napoleon.⁹ Great Britain,¹⁰ the United States of America,¹¹ Serbia,¹² and many other countries used children as young as twelve-years old in warfare before and during World War I.¹³ Up until this moment there were essentially no international legal instruments prohibiting or in any way restricting the use of children in the armed conflicts. After the World War I, however, the international community started seeking ways to protect children from such involvement. This led to the adoption of the Geneva Declaration of the Rights of the Child in 1924.¹⁴ Without specifically referring to the use of children in armed conflict, the Declaration emphasized that children shall be protected against any forms of exploitation.¹⁵ Although the document was not binding in its nature and was far from being comprehensive, it amounted to an attempt to address the status and rights of children on international fora.

The outburst of World War II further demonstrated the lack of a legal framework for the protection of children from engagement in armed conflicts as the use of youth during the war thrived with doubled force. Nazi Germany established the Hitler Youth Program¹⁶ and SS Youth

⁹ MICHAEL LEGGIERE, *THE FALL OF NAPOLEON: THE ALLIED INVASION OF FRANCE, 1813-14*, 99-100 (2014).

¹⁰ Greg James, *How Did Britain let 250,000 underage soldiers fight in WW1?*, BBC, <http://www.bbc.co.uk/guides/zcvdhyc>.

¹¹ P.W. SINGER, *CHILDREN AT WAR*, 13 (2005).

¹² MARIAN WENZEL, *AUNTIE MABEL'S WAR: AN ACCOUNT OF HER PART IN THE HOSTILITIES OF 1914-18*, 112 (1980).

¹³ *The Teenage Soldiers of World War One*, BBC NEWS, (Nov. 11, 2014), <http://www.bbc.com/news/magazine-29934965>.

¹⁴ Geneva Declaration of the Rights of the Child of 1924, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924), http://netzwerk-kinderschutz-msh.de/_media/A_02_FachWissen/InfoMaterialien/RechtlicheGrundlagen/genfer_erklaerung_1924_englisch1.pdf.

¹⁵ *Id.*

¹⁶ *Hitler's Boy Soldiers 1939-1945*, The History Place, (1999), <http://www.historyplace.com/worldwar2/hitleryouth/hj-boy-soldiers.htm>.

Division,¹⁷ Japan trained its own young soldiers,¹⁸ and the Soviet Union,¹⁹ Great Britain,²⁰ and a number of other countries in some ways used children during the war.²¹

Even though the international community took many preventative measures in the aftermath of World War II to stop the future involvement of youth in military operations, children continued to and are still often used in armed conflicts. In Vietnam,²² Cambodia,²³ and Uganda,²⁴ thousands of children were recruited and used during armed conflicts. In the quite recent armed conflict in Sierra Leone, children were reportedly used by all sides of the conflict – Revolutionary United Front, the Armed Forces Revolutionary Council and by the pro-governmental Civil Defense Forces,²⁵ which presented children with amulets that would supposedly make their skin invulnerable to bullets.²⁶

Thus, children unfortunately are still a common phenomenon in today's armed conflicts. The scholars indicate that the number of children currently used in battle revolves around 300,000, with the average age of a child being 12 years old.²⁷ A significant amount of these

¹⁷ Lewis D. Eigen, *Child Soldiers Are Unfortunately Nothing New*, Scriptamus, (Nov. 2, 2009), <https://scriptamus.wordpress.com/2009/11/02/child-soldiers-are-unfortunately-nothing-new/>.

¹⁸ *Id.*

¹⁹ OLGA KUCHERENKO, *LITTLE SOLDIERS: HOW SOVIET CHILDREN WENT TO WAR, 1941-1945* 201 (2011).

²⁰ *How did Britain let 250,000 Underage Soldiers Fight in WWI?*, BBC, <http://www.bbc.co.uk/guides/zcvdhyc> (last visited Mar. 20, 2017).

²¹ DAVID ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 54-55 (2005).

²² Laura Davis, *Vietnam: Child Soldiers, Land Mines, And the Khmer Rouge*, LAURA DAVIS (Jan. 18, 2016), <http://lauradavis.net/vietnam-child-soldiers-land-mines-and-the-khmer-rouge/>.

²³ Karen Emmons, *Adult Wars, Child Soldiers*, UNICEF 10 (2002), <https://www.unicef.org/eapro/AdultWarsChildSoldiers.pdf>.

²⁴ Will Storr, *Kony's Child Soldiers: 'When You Kill for the First Time, You Change'*, THE TELEGRAPH (Feb. 12, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/uganda/10621792/Konys-child-soldiers-When-you-kill-for-the-first-time-you-change.html>.

²⁵ *Sierra Leone Rebels Forcefully Recruit Child Soldiers*, HUM. RTS. WATCH (May 31, 2000, 8:00 PM), <https://www.hrw.org/news/2000/05/31/sierra-leone-rebels-forcefully-recruit-child-soldiers>.

²⁶ Susan Shepler, *Made Bulletproof by Magic, Armed with an AK: The Politics of Traditional Warriors and Modern Warfare in Sierra Leone*, presented at American Anthropological Association meetings in Atlanta, GA (2004).

²⁷ Kara Anderson, *"Cubs of the Caliphate" The Systematic Recruitment, Training, and Use of Children in the Islamic State*, DRAKE U. 3 (2016), <http://www.drake.edu/media/departmentsoffices/international/nelson/2016%20paper,%20Children%20in%20ISIS,%20K.%20Anderson.pdf>.

children are being used by non-state actors,²⁸ the Islamic State of Iraq and Syria being one of them.

III. RECRUITMENT AND USE OF CHILD SOLDIERS BY ISIS

The Islamic State of Iraq and Syria (hereinafter – ISIS) is essentially a jihadist organization originating from Al-Qaeda that controls certain parts of Syria and Iraq and enforces an exceptionally strict and twisted interpretation of Sharia laws on various religious and ethnic minorities living on the ISIS controlled territories. The ultimate purpose of ISIS is to establish a Caliphate.²⁹ In order to achieve its goals ISIS resorts to all available methods of propaganda and warfare, including recruitment and use of children in the battle.³⁰

It is hard to estimate how many child soldiers ISIS is currently using, however the available figures are truly disturbing. It was reported that as of February 2015, ISIS was using approximately 1,500 children in their core groups of fighters, while around 1,100 children were recruited by ISIS between January and August of 2015 alone.³¹ Although the techniques ISIS uses to recruit children are not brand new, they certainly brought the child recruitment to a whole new level.³²

ISIS recruits children of foreign fighters that have joined ISIS and children abandoned by their families in the ISIS-controlled territories. It also conducts forced recruitment by kidnapping

²⁸ Anderson, *supra* note 27, at 3.

²⁹ Bobby Ghosh, *The Iraqi Minorities in ISIS's Crosshairs*, THE ATLANTIC (Aug. 7, 2014), <http://www.theatlantic.com/international/archive/2014/08/the-iraqi-minorities-in-isis-crosshairs/375745/>; *What is 'Islamic State'?*, BBC NEWS (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-29052144>.

³⁰ Lizzie Dearden, *Isis is Using Far More Child Soldiers Than the World Realised*, INDEP. (Feb. 19, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-using-more-child-fighters-than-feared-as-suicide-bombers-and-soldiers-after-brainwashing-at-a6883626.html>.

³¹ Charlotte Alfred, *A Shocking Number of Kids Are Fighting and Dying for ISIS*, THE WORLD POST (Feb. 19, 2016, 6:43 PM), http://www.huffingtonpost.com/entry/isis-child-soldiers_us_56c779b9e4b0ec6725e28d90.

³² See UN Secretary-General, *Children and armed conflict: Report of the Secretary-General*, A/70/836–S/2016/360 (2016), available at - <http://www.refworld.org/docid/575535f04.html>.

children and threatening their families and recruits volunteers that want to join the organization as a result of its extensive propaganda campaign.³³

Children as a target proved to be exceptionally vulnerable and susceptible to the material and psychological strategies of recruitment routinely employed by ISIS.³⁴ Materially, ISIS presents an attractive alternative to poor families and children living in war-torn territories deprived of a number of social benefits like good healthcare and education.³⁵ For example, Hacibayram, a poor neighborhood in Ankara, Turkey, is reported to be one of the major sites for child recruitment.³⁶ Thus, a promise of an improved standard of living in these circumstances is exceptionally attractive. ISIS offers children about 100 dollars payment per month (as opposed to adult fighters that earn approximately 200 dollars per month)³⁷ and provides access to educational and healthcare institutions.³⁸ Moreover, children, being particularly vulnerable human beings, may be persuaded to join the group by something as simple as a promise of a new toy or an attractive, beautiful uniform that ISIS fighters are wearing.³⁹ A Syrian boy recruited by ISIS at the age of sixteen told the Human Rights Watch that “when ISIS came to my town...I liked what they are wearing, they were like one herd. They had a lot of weapons. So I spoke to them, and decided to go to their training camp in Kafr Hamra in Aleppo.”⁴⁰

³³ Anderson, *supra* note 28, at 7.

³⁴ *Id.* at 11.

³⁵ *Id.* at 9.

³⁶ Jessica Stern & JM Berger, ‘Raising tomorrow’s mujahideen’: the horrific world of Isis’s child soldiers, THE GUARDIAN (Mar. 10, 2015); Priyanka Motaparthy, “Maybe We Live and Maybe We Die”: Recruitment and Use of Children by Armed Groups in Syria, HUM. RTS. WATCH (June 22, 2014), <https://www.hrw.org/report/2014/06/22/maybe-we-live-and-maybe-we-die/recruitment-and-use-children-armed-groups-syria>.

³⁷ Anderson, *supra* note 28, at 34.

³⁸ Umberto Bacchi & Arji Limam, *Isis mimics Britain’s NHS with ‘Islamic Health Service ISHS’*, INTERNATIONAL BUSINESS Times (Apr. 24, 2015), <http://www.ibtimes.co.uk/isis-mimics-britains-nhs-islamic-state-health-service-ishs-1498183>.

³⁹ Anderson, *supra* note 28, at 10; Anmar Al Shamaery & Gilgamesh Nabeel Nabeel, *ISIL Grooming Children To Be Killers: Terrorists cross a new line, groom kids for brutality*, USA TODAY (Mar. 13, 2015), at A1.

⁴⁰ Motaparthy, *supra* note 37.

Psychological methods of recruitment used by ISIS resemble those used by Al-Qaeda. However, the success and scale of their implementation are truly unprecedented.⁴¹ ISIS provides lost teenagers and children with “a new identity, a sense of belonging, and a different set of values and beliefs”.⁴² In his interview with CNN, one of the former child soldiers said that “being a part of ISIS made him feel proud, strong, and filled with a sense of purpose”.⁴³ It demonstrates how seriously ISIS approaches the task as it understands child psychology and uses it to its full advantage. It attracts children by providing them with religiously-justified ideas for the movement and its methods and helps recruits to feel the sense of empowerment. It does all this while portraying themselves as martyrs that seek to change the world and make it a better and purer place to live. Moreover, it instills in these children the sense of thrill and adventure so attractive to young minds.⁴⁴

ISIS has established a number of recruiting offices, at least several of which are located in al-Mayadin and al-Bokamal—Syrian cities close to the territory controlled by the organization.⁴⁵ However, the territorial scope of ISIS recruitment is not limited to Syria and Iraq. Many of the recruited children are reported to be from African countries such as Nigeria, Mali, Ghana, Niger, Libya and Egypt.⁴⁶ It began to gain more recruiting power in Asia, in particular in Indonesia, Malaysia,⁴⁷ and the Philippines.⁴⁸ Europe is not immune to the ISIS recruiting practices either,

⁴¹ Anderson, *supra* note 28, at 10.

⁴² Boaz Ganor, *Four Questions on ISIS: A “Trend” Analysis of the Islamic State*, 3 *PERSP. ON TERRORISM* 9, 9 (2015).

⁴³ Arwa Damon, *Child fighter tormented by ISIS*, CNN (Nov. 13, 2014), <http://www.cnn.com/2014/11/12/world/meast/syria-isis-child-fighter/>.

⁴⁴ Rami Khouri, *ISIS is About the Arab Past, Not the Future*, 15-18 (Wilson Center, May 2015).

⁴⁵ Anderson, *supra* note 28, at 7.

⁴⁶ *Id.* at 14.

⁴⁷ Nadirah Rodzi, *Malaysian Police: Malaysian Children Being Trained in ISIS Camps*, ASIA ONE (Jan. 12, 2016), <http://news.asiaone.com/news/malaysia/malaysian-police-malaysian-children-being-trained-isis-camps>.

⁴⁸ Tom Batchelor & Levi Winchester, *MAPPED: Terrifying Growth of ISIS in just ONE year...and how Asia & Russia is next target*, SUNDAY EXPRESS (Aug. 18, 2015), <http://www.express.co.uk/news/world/598626/Islamic-State-map-areas-terror-group-control>.

providing ISIS with more foreign children fighters that fled France, the United Kingdom, Germany, Belgium, Sweden, Denmark and former Soviet Union countries.⁴⁹ The use of mass media and education by ISIS allows it to project its influence and recruitment strategies far beyond the Middle East region and spread terror and fear around the world. Religious schools teaching Islam are routinely used to brainwash children and provide them with an ideological basis that will make them particularly susceptible to subsequent recruitment.⁵⁰ Children are made to feel loved and needed, they are made to believe that joining the organization would give them the ultimate sense of purpose, which is fighting against nonbelievers.⁵¹ Violent videos depicting children performing executions distributed by the mass media and ISIS itself facilitate the recruitment process and inspire children around the world to recreate the portrayed acts. In an attempt to recreate the death of a Jordanian pilot, Yemen children posted a video showing them cage their ten-year old friend, dip him into fuel and set him on fire, as they watch.⁵² Similar recreations were done by children in Libya, Egypt and other countries.⁵³ Furthermore, a number of children from various countries, including many European states posted videos declaring their desire to join ISIS in its fight against infidels.⁵⁴

ISIS is also not opposed to forced recruitment of children. As of June 2015, ISIS kidnapped and recruited more than 400 children solely in the Anbar province of Iraq.⁵⁵ Mohammed, a Syrian boy told CNN that he was taught in the mosque to join ISIS and wanted to

⁴⁹ Anderson, *supra* note 28, at 14.

⁵⁰ *Id.* at 13-14.

⁵¹ *Id.* at 13.

⁵² Yemeni Boys Reportedly Reenact ISIS Burning Death of Jordanian Pilot, FOX NEWS (March 5, 2015), <http://www.foxnews.com/world/2015/03/05/yemeni-boys-reportedly-reenact-isis-burning-death-jordanian-pilot.html>.

⁵³ Anderson, *supra* note 28, at 30.

⁵⁴ *Id.* at 7-8.

⁵⁵ Anderson, *supra* note 28, at 12.

do so, but his father did not allow it.⁵⁶ After that ISIS threatened his father to cut off his head if he prevents his son from enrolling with ISIS.⁵⁷

The recruitment, however, is far from the end of the complicated and systematic approach that ISIS undertakes in its operations. Further indoctrination and physical training are designed to make dedicated and valuable fighters out of “former” children. ISIS has established a number of schools that provide recruited children with a necessary physical and mental training.⁵⁸ Children are taught to carry and shoot weapons, create bombs, engage in hand-to-hand combat, and overall undergo training resembling that designed for adults.⁵⁹ Together with the mental training involving engaging children in extrajudicial killings, torturing and other human rights abuses, ISIS basically builds a whole new generation prone to violence and absolutely loyal to the organization.⁶⁰

This training is designed to prepare children for carrying out a number of activities in future battles in which ISIS engages, as children fill various positions in the ISIS forces – from cooks, messengers and cleaners to guards and spies.⁶¹ ISIS also engages children in executing and torturing prisoners, participating in battles along with the adult fighters, and strongly encourages, and sometimes forces, them to become suicide bombers.⁶² For instance, Yasir, a boy recruited by ISIS, told CNN that in performing his task of guarding an ISIS base in Deir Ezzor,

⁵⁶ Anderson, *supra* note 28, at 10.

⁵⁷ *Id.*

⁵⁸ *Id.* at 22-23.

⁵⁹ *ISIS has recruited 400 children in Syria since January – report*, QUESTION MORE (March 24, 2015), <https://www.rt.com/news/243701-isis-recruited-children-syria/>.

⁶⁰ Adam Smith, *Children of the Caliphate: The Threat Posed by the Islamic State School System 6-8* (Nelson Institute Undergraduate Conference on Global Affairs).

⁶¹ U.N. Secretary-General, *Report of the Secretary-General on children and armed conflict in the Syrian Arab Republic*, ¶ 13, U.N. Doc. S/2014/31 (Jan. 27, 2014).

⁶² Anderson, *supra* note 28, at 17-21.

he routinely wore an explosive vest and carried a pistol and AK-47.⁶³ All of these actions help the group to maintain a state of fear, make ISIS fighters follow its ideological goals, and disorient the enemies that usually get confused seeing children in the battle.⁶⁴

ISIS is clearly not the first non-state actor to engage children in combat; however, it is probably the first non-state actor to employ so many comprehensive recruitment mechanisms and actually systematically use children on such a scale. While other groups were typically trying to conceal the use of children, ISIS appears to have a great pride in its engagement of children. It continuously advertises its use of children in the media and makes sure that as many people as possible are exposed to their ways and methods of exploitation.⁶⁵ Its strategy of unprecedentedly extensive and brutal use of children is designed to form a whole new generation of people truly believing in the values and ideas of the organization and eager to carry on its mission with the ultimate goal of establishing a Caliphate.⁶⁶ All of this makes ISIS one of the most dangerous and unpredictable forces of the 21st century. Although the United States and other states have launched attacks in an attempt to defeat ISIS since 2014,⁶⁷ not much has been achieved and ISIS continues to recruit and brutally use children in the battle up to this day.

IV. LEGAL FRAMEWORK GOVERNING THE USE AND RECRUITMENT OF CHILD SOLDIERS

As mentioned above, mass atrocities experienced during World War II pushed the international community to establish a framework protecting civilians, including children, and

⁶³ Arwa Damon, *Child Fighter Tormented by ISIS*, CNN (Nov. 13, 2014, 6:36 AM), <http://www.cnn.com/2014/11/12/world/meast/syria-isis-child-fighter/>.

⁶⁴ Anderson, *supra* note 28, at 20-22.

⁶⁵ *Id.* at 32-33.

⁶⁶ See Anderson, *supra* note 28, at 8.

⁶⁷ Bobby Ghosh, *ISIS: A Short History*, THE ATLANTIC (Aug. 14, 2014), <https://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/>.

resulted in the extensive adoption of the Geneva Conventions in 1949 and Additional Protocols in 1977. Geneva Convention IV establishes the prohibition of enlisting children “in formations or organizations subordinate to it.”⁶⁸ It is designed to prevent the practices of forcing children to participate “in organizations and movements devoted largely to political aims,” like those that took place during World War II.⁶⁹ More specifically, Article 51 of the Convention contains a prohibition of forcing children to serve in the armed or auxiliary forces and pressuring or propagandizing them into voluntary enlistment by the occupying power.⁷⁰

Although the Geneva Convention contains certain provisions relating to children in the armed conflicts, it does not specifically address children as direct participants in the warfare. As a number of children involved in the armed conflicts grew over time, the international community came to realize the need for a more direct approach. Additional Protocols to the Geneva Conventions marked the first steps towards the prohibition of recruiting children, stipulating that children under the age of fifteen shall not participate in hostilities.⁷¹ Notably, unlike Additional Protocol I, Additional Protocol II prohibits the recruitment of children not only into the military forces of states, but also into “armed groups.”⁷²

⁶⁸ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 50, ¶ 2, Aug. 12, 1949, 75 U.N.T.S. 287.

⁶⁹ *Commentary of 1958 to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War Article 50*, INT’L COMMITTEE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=41266EBF07176FEFC12563CD0042C4CE> (last visited Jan. 20, 2017).

⁷⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 51, Aug. 12, 1949, 75 U.N.T.S. 287.

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, ¶ 3(c), June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77, ¶ 2, June 8, 1977, 1125 U.N.T.S. 3.

⁷² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, ¶ 3(c), June 8, 1977, 1125 U.N.T.S. 609.

Optional Protocol on the Involvement of Children in Armed Conflict also bridges a gap present in the Convention on the Rights of the Child⁷³ by stating that armed groups shall not “under any circumstances recruit... persons under the age of eighteen years” and requiring states to take all “feasible measures to prevent such recruitment and use.”⁷⁴ Additional Protocol II to the Geneva Conventions establishes that in order to qualify as an armed group, a group must be “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.”⁷⁵

Despite the existence of these regulations, the problem of child soldiers attracted worldwide attention after the publication of the Report of Graca Machel on the Impact of Armed Conflict on Children in 1996, which outlined the impact of armed conflicts on children,⁷⁶ and spurred the Security Council debate on the issue.⁷⁷ Since then Security Council has adopted a number of resolutions calling for the protection of children affected by armed conflicts,⁷⁸ and the international community came to an agreement and established the International Criminal Court in order to fight with the impunities all around the world.

The Rome Statute of the International Criminal Court contains a more detailed prohibition, stipulating that “conscripting or enlisting children under the age of 15 and using them to participate actively in hostilities” is a war crime, irrespective of whether it is committed

⁷³ Convention on the Rights of the Child, art. 38, ¶ 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁷⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, May 25, 2000, 2173 U.N.T.S. 222.

⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, ¶ 1, June 8, 1977, 1125 U.N.T.S. 609.

⁷⁶ See U.N. Secretary-General, Impact of Armed Conflict on Children: Expert of the Secretary-General, U.N. Doc. A/51/306 (Aug. 26, 1996).

⁷⁷ Press Release, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Security council holds debate on children and armed conflict, U.N. Press Release SC/6895 (July 26, 2000).

⁷⁸ S.C. Res. 1261 (Aug. 30, 1999); S.C. Res. 1314 (Aug. 11, 2000); S.C. Res. 1379 (Nov. 20, 2001); S.C. Res. 1460 (Jan. 30, 2003); S.C. Res. 1612 (July 26, 2005); S.C. Res. 1882 (Aug. 4, 2009); S.C. Res. 1998 (July 12, 2011); S.C. Res. 2225 (June 18, 2015).

in the course of internal or international armed conflict.⁷⁹ Therefore, it encompasses activities conducted by non-state actors and theoretically provides an accountability mechanism for their crimes. The Special Court for Sierra Leone⁸⁰ emphasized that the Rome Statute did codify an already existing norm of customary international law stating that this conclusion is supported by extensive recognition of the rule⁸¹ by the Fourth Geneva Convention of 1949,⁸² Additional Protocols to the Geneva Conventions,⁸³ Convention on the Rights of the Child,⁸⁴ African Charter on the Rights and Welfare of the Child,⁸⁵ European Convention on the Exercise of Children's Rights⁸⁶ and a number of other international agreements.⁸⁷ National legislation of a number of countries also contains the prohibition of child recruitment and use in the armed conflict.⁸⁸ Since it is argued that the formulation of the prohibition contained in the Rome Statute represents the rule of customary international law, let us examine this rule more closely.

Contrary to the formulation of Additional Protocol I and Convention on the Rights of the Child that refer only to the recruitment of children, Article 8(2)(b)(xxvi) of the Rome Statute

⁷⁹ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome State of the International Criminal Court*, art. 8(2)(b)(xxvi), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

⁸⁰ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-S.L., Jan. 16, 2002, 2178 U.N.T.S. 138.

⁸¹ Prosecutor v. Norman, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber of the Special Court For Sierra Leone (May 31, 2004).

⁸² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 14, 24, 51, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁸³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the to the protection of victims of international armed conflicts (Protocol I) art. 77, June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

⁸⁴ Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁸⁵ Org. of African Unity [OAU], *African Charter on the Rights and Welfare of the Child* art. 22 ¶ 2, OAU Doc. CAB/LEG/24.9/49.

⁸⁶ European Convention on the Exercise of Children's Rights, Jan. 7, 2000, E.T.S. No. 160, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cdaf>.

⁸⁷ G.A. RES. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Organization of African Unity [OAU], African (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

⁸⁸ Prosecutor v. Norman, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber of the Special Court For Sierra Leone (May 31, 2004).

specifies three components: recruitment, conscription, and/or use.⁸⁹ The elements of the crime indicate that to be found in violation a criminal must either conscript or enlist a person or persons under the age of 15, or use him or her to actively participate in hostilities.⁹⁰ The terms enlistment and conscription were further explained in *Prosecutor v. Lubanga Dyilo*.⁹¹ Conscription is defined as a forcible act of recruitment while enlistment is defined as a voluntary act of recruitment.⁹² A similar understanding of the terms was adopted by the Appeals Chamber of the Special Court for Sierra Leone in *Prosecutor v. Norman*.⁹³ Therefore, recruitment in the form of enlistment and conscription covers all situations of voluntary or forced recruitment of children by non-state actors, and can be considered a continuing crime that lasts from the moment a child has voluntarily joined the forces or was forced to join until his or her demobilization or the attainment of 15 years old, even if he or she has never been actually used in the warfare.⁹⁴

Use of children in turn is reflected in the formula of “active participation in hostilities.” This formula originates from article 3 of the Geneva Conventions which refers to “persons taking no active part in hostilities,” as well as from the General Assembly resolution on the basic principles of protection of civilian populations in armed conflicts.⁹⁵ Case law indicates that active participation in hostilities encompasses not just activities directly related to the warfare and combat, but also “any labor or support that gives effect to, or helps maintain, operations in a

⁸⁹ *Rome Statute*, *supra* note 81.

⁹⁰ *Elements of Crime*, CASE MATRIX NETWORK, <https://www.casematrixnetwork.org/cmn-knowledge-hub/klamberg-commentary/elements-of-crime/#c2356>.

⁹¹ *Prosecutor v. Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 246-47 (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

⁹² *Prosecutor v. Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 247 (2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

⁹³ *See Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber of the Special Court For Sierra Leone (May 31, 2004).

⁹⁴ *See Alan Nissel, Continuing Crimes in the Rome Statute*, 25 MICH. J. INT’L L. 653, 654 (2004); *See also Joost Pauwelyn, The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems*, 66 BRITISH Y.B INT’L L. 415, 415 (2009).

⁹⁵ G.A. Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations In Armed Conflicts (Dec. 9, 1970).

conflict,”⁹⁶ such as “carrying load for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields.”⁹⁷ In spite of that the exact meaning of active participation in the hostilities is to be determined on a case by case basis.⁹⁸ Therefore, this definition is considered by the courts as broad enough to include a number of activities not directly related to the battle, and allows qualifying many instances of use of child soldiers by ISIS as war crimes.

Article 30 of the Rome Statute specifies the required mens rea element stating that to be criminally liable a person shall commit the incriminating acts “with intent and knowledge.”⁹⁹ For the purposes of this rule, intent means that the person meant to engage in a certain conduct and meant for the consequences to occur or was aware that they “will occur in the ordinary course of events.”¹⁰⁰ These elements shall be considered and evaluated subjectively, which means that the prosecutor has to prove that the accused was personally aware that certain circumstances will occur;¹⁰¹ thus it is also not enough to demonstrate that the accused was aware that the consequences might occur – his certainty of the outcome is required.¹⁰²

In turn, knowledge means that the accused knew of the circumstances that will occur as a result of his conduct.¹⁰³ Therefore, it shall be demonstrated that the perpetrator knew that his actions will necessarily result in recruiting and/or using children under fifteen years old.

⁹⁶ Prosecutor v. Brima, SCSL-04-16-T, Judgment, ¶ 737 (Special CT. for Sierra Leone, 2007).

⁹⁷ *Id.*

⁹⁸ Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, ¶ 628 (2007), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

⁹⁹ *Rome Statute*, *supra* note 81, art. 30, ¶ 2.

¹⁰⁰ *Id.*

¹⁰¹ Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT’L CRIM. JUST. 471, 482 (2008).

¹⁰² Otto Triffterer, *The New International Criminal Law-Its General Principles Establishing Individual Criminal Responsibility*, in THE NEW INT’L CRIM. L. (Kallipoi Koufa ed. 2003).

¹⁰³ *Rome Statute*, *supra* note 81, art. 30, ¶ 3.

However, the Elements of the Crime provide a more flexible definition of knowledge, stating that the perpetrator “knew or should have known” that the circumstances will occur.¹⁰⁴

Prosecutor v. Thomas Lubanga Dyilo, the first case involving prosecution for recruiting and using child soldiers, applied the last standard in emphasizing that the accused shall demonstrate that he exercised due diligence in considering whether his actions will result in certain circumstances and his failure to do so and willful blindness to the possibility of occurrence of such circumstances should not be regarded as relieving him of the responsibility.¹⁰⁵ Thus, the Pre-Trial Chamber essentially recognized that negligence should be considered as an exception to the standard set out in the Rome Statute.¹⁰⁶

Perpetrators that committed acts of recruiting and/or using child soldiers and satisfied the abovementioned mental requirement may be subjected to either individual criminal responsibility, command responsibility or so called joint criminal enterprise responsibility. Article 25 of the Rome Statute establishes rules for holding accountable those who committed;¹⁰⁷ ordered, solicited or induced;¹⁰⁸ aided, assisted and abetted;¹⁰⁹ and/or somehow contributed to a group crime.¹¹⁰ Individual responsibility arises for those perpetrators that specifically recruit by way of conscription or enlistment and/or use children under the age of fifteen in the hostilities.¹¹¹ Facilitation implies an indirect form of committing a crime; for example by financing the

¹⁰⁴ Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from A Comparative Criminal Law Perspective*, 19 CRIM. L. F. 473, 497 (2008).

¹⁰⁵ *Prosecutor v. Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, ¶ 358 (2007), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

¹⁰⁶ Badar, *supra* note 106, at 502.

¹⁰⁷ *Rome Statute*, *supra* note 81, art. 25 ¶ 3(a).

¹⁰⁸ *Id.* art. 25 ¶ 3(b).

¹⁰⁹ *Id.* art. 25 ¶ 3(c).

¹¹⁰ *Rome Statute*, *supra* note 81, art. 25 ¶ 3(d).

¹¹¹ See Kevin Jon Heller, *The Rome Statute in Comparative Perspectives*, 17, STAN. HANDBOOK OF COMP. CRIM. L. 22 (2009).

organization recruiting child soldiers.¹¹² Furthermore, a person should be held responsible if he “in any other way contributed to the commission or attempted commission of such a crime by a group of purpose acting with a common purpose.”¹¹³

This norm represents the so-called ‘joint criminal enterprise’ responsibility introduced by the International Criminal Tribunal for the Former Yugoslavia (hereinafter – ICTY) in *Prosecutor v. Dusko Tadic*.¹¹⁴ The Court reasonably stated that if an individual perpetrator were found responsible for committing a wrongful act, other persons that assisted in the commission of such crime would not be held responsible for more than aiding and abetting, which may “understate the degree of their criminal responsibility.”¹¹⁵ The court further elaborated the concept in *Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic and Nikola Sainovic*, stating that contribution implies “using the de jure and de facto powers”¹¹⁶ available to the person,¹¹⁷ causing all persons of the joint criminal enterprise to be held equally guilty of the crimes irrespective of the role played by each perpetrator.¹¹⁸

Thus, to hold a person criminally responsible for the crime of child soldiering under the joint enterprise doctrine, the prosecutor has to prove that a person was a member of the group designed to recruit and/or use child soldiers and knew or should have known of the group’s

¹¹² GERHARD WERLE & FLORIAN JESSBERGER, *PRINCIPLES OF INT’L CRIM. L.* 183 (Oxford University Press, 3rd ed. 2014).

¹¹³ *Rome Statute*, *supra* note 81, art. 25 ¶ 3(d).

¹¹⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶ 190 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

¹¹⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶ 192 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

¹¹⁶ *Milosevic et al. (IT-99-37-PT)*, Indictment, 22 May 1999, ¶ 16, available at - http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-2ai011029e.htm.

¹¹⁷ *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction, ¶¶ 25-26 (Int’l Crim. Trib. For the Former Yugoslavia May 21, 2003), <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00207160-00207178.pdf>.

¹¹⁸ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber Judgment, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), <http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf>.

intention to do so and of the circumstances that would follow.¹¹⁹ The recruitment policies employed by ISIS leave no doubt that its leaders are fully aware of the circumstance of their conduct and therefore can be held accountable together with the persons aiding and abetting them in the commission of atrocities against children and their engagement in armed conflicts.

Article 28 of the Rome Statute further stipulates superior and command responsibility, thus distinguishing between military and civilian commanders, the former requiring a higher standard of knowledge.¹²⁰ Superior responsibility implies that civilian superiors may be held accountable for crimes committed by the inferiors under their effective authority or control or crimes committed as a result of their failure to properly exercise such control, which is supported by the practice of ICTY,¹²¹ International Criminal Tribunal for Rwanda (hereinafter – ICTR)¹²² and the Special Court for Sierra Leone.¹²³ Command responsibility on the other hand implies the responsibility of military commanders for the crimes committed under their command and requires four elements: “(i) a superior-subordinate relationship in which the superior, (ii) either knew or owing to the circumstances at the time, should have known of the crimes committed by his subordinates, (iii) and failed to take necessary and reasonable measures to prevent the crimes which (iv) resulted from a lack of control exerted by the superior.”¹²⁴ This concept is especially useful in the context of the crime of recruiting and using child soldiers as it allows military

¹¹⁹ Prosecutor v. Sesay, Case No. SCSL-04-15-T, Trial Chamber Judgment, ¶¶ 251-66 (Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>.

¹²⁰ *Rome Statute*, *supra* note 80, at art. 28.

¹²¹ Prosecutor v. Delalic, Case No. IT-96-21-A, Appeal Judgment, ¶¶ 195-96 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, ¶ 76 (Int’l Trib. for the Former Yugoslavia Mar. 24, 2000), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

¹²² Prosecutor v. Baglishema, Case No. ICTR-95-1A-A, Appeals Judgment, ¶ 51 (Int’l Crim. Trib. for Rwanda July 3, 2002), http://hrlibrary.umn.edu/instate/ICTR/BAGILISHEMA_ICTR-95-1A/BAGILISHEMA_ICTR-95-1A-Appeal_Reasons.htm; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Appeal Judgment (Int’l Crim. Trib. for Rwanda Mar 23, 2005), http://hrlibrary.umn.edu/instate/ICTR/KAJELIJELI_ICTR-98-44A/KAJELIJELI_ICTR-98-44A-A.html.

¹²³ Prosecutor v. Brima, Case No. SCSL-04-16-T, Trial Chamber Judgment, ¶ 782 (June 20, 2007), <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf>.

¹²⁴ JULIE MCBRIDE, *THE WAR CRIME OF CHILD SOLDIER RECRUITMENT* 77 (T.M.C. Asser Press, 2014).

commanders to be found responsible for the crimes committed by child soldiers under their command and control, as it has been done by ICTR¹²⁵ and the Special Court for Sierra Leone.¹²⁶

V. LEGAL AND POLICY PROBLEMS OF ACCOUNTABILITY OF ISIS FOR THE WAR CRIMES OF RECRUITING AND USING CHILD SOLDIERS

There is no doubt that ISIS leaders and commanders must be held accountable for the atrocities committed by them, including their crimes of recruiting and using child soldiers. Even though it is doubtful that accountability in this regard may be considered as a deterring factor for future ISIS commanders, killing them without trial and exposure to the mass media would deprive the world of an important historical lesson and would allow all their atrocities to evaporate into oblivion. Therefore, holding them accountable should definitely be regarded as a priority. The international community has developed a number of mechanisms to make that happen, some more effective than the others, and we have to come up with an appropriate model for this particular case, taking into account relevant political, cultural, social and religious considerations.

One of the options is to try ISIS commanders in the International Criminal Court. It may seem as an ideal solution at first. However there are a number of considerations that have to be taken into account here.

The matter may be referred to the International Criminal Court by means of a UN Security Council referral,¹²⁷ as it has been done before with the conflicts in Darfur¹²⁸ and Libya.¹²⁹ For this to happen, the resolution has to be passed by nine members of the Security

¹²⁵ Prosecutor v. Ntagerura, ICTR-99-46-A, Trial Chamber Judgment, ¶ 749, (Int'l Criminal Tribunal for Rwanda 2004).

¹²⁶ Prosecutor v. Fofana, SCSL-04-14-T, Appeals Chamber, ¶ 18, (Special Ct. for Sierra Leone 2008).

¹²⁷ *Rome Statute*, *supra* note 81, at art. 13(b).

¹²⁸ S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

¹²⁹ S.C. Res. 1970, ¶¶ 4-8 (Feb. 26, 2011).

Council including the concurring votes of the five permanent members including Russia and the United States.¹³⁰ Although these countries have a longstanding history of contradictory interests and currently struggle to find common ground in order to resolve a current conflict in Syria,¹³¹ finding a solution for holding ISIS leaders accountable might be easier as the organization poses a threat to international security as a whole and does not particularly serve interests of any of the parties. In April 2015, the ICC Prosecutor attempted to pressure the international community into taking action and claimed that the preliminary examination of the crimes allegedly committed by ISIS would not start unless the UN Security Council, Syria or Iraq refer the matter to the Court.¹³² Following that, a number of countries including Lithuania, Chile and the UK attempted to push the acceptance of the resolution, but to no avail.¹³³

The referral can be territorial or individual.¹³⁴ Territorial referral would relate to the territory that is controlled by ISIS which implies certain parts of Syria and Iraq.¹³⁵ This approach would enable the ICC Prosecutor to investigate and prosecute crimes committed by all parties in a given territory.¹³⁶ In order to conduct its activities, however, the International Criminal Court would have to rely on the support of the Syrian regime and Iraqi government that would most likely push for exemption of its nationals from the jurisdiction of the Court as it was done by the

¹³⁰ U.N. Charter art. 27, ¶ 3.

¹³¹ *How Syria Became the New Global War*, INDIAN STRATEGIC STUDIES, <http://strategicstudyindia.blogspot.com/2016/10/how-syria-became-new-global-war.html> (Oct. 13, 2016).

¹³² Alexandre Galand, *The Situation Concerning the Islamic State: Carte Blanche for the ICC if the Security Council Refers?*, EJIL: TALK!, <http://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/> (May 27, 2015).

¹³³ See U.N.S.C., 70th Sess. 7433 mtg., U.N. Doc. S/PV 7433 (Apr. 24, 2015).

¹³⁴ *Rome Statute*, *supra* note 81, at art. 12.

¹³⁵ *Islamic State and the crisis in Iraq and Syria in maps*, BBC, <http://www.bbc.com/news/world-middle-east-27838034> (Jan. 20, 2017).

¹³⁶ WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 309 (Oxford University Press 2010); Mahnoush H. Arsanjani & W. Michael Reisman, *Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 385-403 (2005).

operative clause incorporated into the referral resolution on Libya.¹³⁷ This scenario is hardly acceptable, as it would allow a number of criminals of the Syrian regime to get away with the war crimes that had been committed by them during the course of the conflict and would not satisfy the people's need for justice and accountability in the region. Cooperation with the Assad's regime can also be regarded as a legitimization of the Assad's regime and Western countries led by the United States would not allow that. On the contrary, if the international community insists on holding Assad and other Syrian regime officials accountable for their international crimes within the scope of this referral, the Russian Federation, supporting Assad, and/or China would most likely veto the resolution stopping the process in its tracks, as they had done before.¹³⁸ Thus, territorial referral of the situation to the International Criminal Court is very unlikely.

Alternatively, the UN Security Council can exercise an individual referral that would mean subjecting specific ISIS leaders and fighters to the jurisdiction of the Court. This option seems more appropriate as it excludes other parties' accountability issues from the equation thus facilitating reaching a compromise on the matter. This solution is also much better in terms of using the limited resources of the Court, because it would allow the Court to focus on the atrocities committed by a particular organization and be more efficient in investigating and prosecuting ISIS crimes. However, it is claimed that such a referral can be considered as contradicting the previous practice of the International Criminal Court by manipulating justice against a particular group.¹³⁹

¹³⁷ S.C. Res. 1970, *supra* note 128, at ¶ 6.

¹³⁸ U.N.S.C., 7180th mtg., U.N. Doc. SC/1147 (May 22, 2014).

¹³⁹ OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 579 (2d ed. 2008).

Thus, in 2003 the International Criminal Court received the first state referral from Uganda that specifically mentioned the Lord's Resistance Army.¹⁴⁰ In response, the Chief Prosecutor Luis Moreno-Ocampo stated that the Court would stay impartial and consider Uganda's referral as an authorization to investigate all crimes committed in the territory of Northern Uganda.¹⁴¹ Although nothing in the Rome Statute prevents the international community from sending in individual referrals, some scholars interpret the Prosecutor's response as indicating the prohibition of referring a particular group to the ICC.¹⁴² In the Mbarushimana case, the Pre-Trial Chamber expressly stated that "a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated."¹⁴³ Similarly, in the Al Bashir case the Court emphasized that referral implies the submission of the entire situation to the Court's jurisdiction, irrespective of the interests of the referring party.¹⁴⁴ This approach is also supported by the *travaux préparatoire* for the Rome Statute of the International Criminal Court, which indicates that the word "situation" was chosen over the words "case" and "matter."¹⁴⁵ Therefore, even if the Security Council opts to exercise individual referral expressly subjecting ISIS to the jurisdiction of the International Criminal Court, it is for the Court to decide whom to prosecute, and the previous practice of the Court

¹⁴⁰ *Statement by Chief Prosecutor Luis Moreno-Ocampo*, INT'L CRIM. CT. (Oct. 14, 2005), https://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf.

¹⁴¹ *Id.*

¹⁴² See Galand, *supra* note 134.

¹⁴³ Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Defence Challenge to the Jurisdiction of the Court, ¶ 27 (Oct. 26, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.10.26_Prosecutor_v_Mbarushimana.pdf.

¹⁴⁴ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for Warrant, ¶ 45 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

¹⁴⁵ Galand, *supra* note 134.

clearly favors the impartial approach prohibiting such a limited referral. Even though there is a slight chance that the Court would adopt a different approach with regard to ISIS as a non-state actor whose atrocities affect not only national, but international security as well, it is unlikely that the international community would take a risk of following this path.

The International Criminal Court can exercise its jurisdiction toward ISIS leaders and fighters if Syria and/or Iraq accept the jurisdiction of the Court, without fear of any of the permanent members vetoing a UN Security Council resolution; however this is highly unlikely for a number of reasons, as stated above.

Apart from that, it should also be noted that any cooperation with the International Criminal Court at this point may be controversial as the International Criminal Court's credibility has significantly decreased within the past several years. It was accused of being biased towards western countries, since the cases that have been investigated by the Court were almost exclusively focused on African states.¹⁴⁶ This for obvious reasons caused a negative reaction from a number of African states and ultimately resulted in a withdrawal of Gambia, Burundi and South Africa, while other states like Kenya, Namibia, and Uganda also consider the possibility of doing the same.¹⁴⁷ However, the most recent blow to the credibility and international influence of the Court probably occurred when Russia withdrew from the International Criminal Court in November 2016.¹⁴⁸ In an attempt to restore its image, the International Criminal Court Prosecutor issued a report stating that the US military forces and the

¹⁴⁶ William Muchayi, *Africa and the International Criminal Court: A Drag Net that Catches Only Small Fish?*, NEHANDA RADIO (Sept. 24, 2013), <http://nehandaradio.com/2013/09/24/africa-and-the-international-criminal-court-a-drag-net-that-catches-only-small-fish/>.

¹⁴⁷ *Russia Withdraws from ICC as Nations Leave Court*, INQUIRER.NET (Nov. 17, 2016, 7:55 AM), <http://newsinfo.inquirer.net/845007/russia-withdraws-from-icc-as-nations-leave-court>.

¹⁴⁸ *Id.*

CIA may have committed war crimes in relation to its operation in Afghanistan.¹⁴⁹ While going after the United States officials may be viewed as a smart move designed to restore the trust of the international community, the time dictates that in case of its failure the Court risks to permanently impair its standing and come off as powerless in its pursuit of justice against influential political players. Furthermore, in light of the recent presidential election in the United States, these actions of the Prosecutor may illicit a negative reaction from the future administration, which is not particularly prone to following the standards of international law now and may quite easily take offense for such accusations and pursue the goal of further undermining the reputation, credibility and real influence of the court.

Another option is for the United Nations Security Council to establish a separate ad hoc tribunal, the sole task of which is to investigate and prosecute ISIS leaders. In this case, the international community is likely to be faced with the same problems that arose in adopting a resolution on the referral of the situation to the International Criminal Court. Russia and/or China may veto the resolution if any conditions of setting up a tribunal do not satisfy their interests. Even if the international community and, more importantly, permanent Security Council members come to an agreement, the establishment of such tribunal would require considerable diplomatic and political efforts as well as substantial financial resources. The tribunal's proximity to the actual areas where the alleged crimes were committed would allow easier access to evidence and witnesses and, therefore, would facilitate much faster and more efficient service of justice, provided that the tribunal and its activities are sufficiently funded. The composition of the court should also ensure a proper representation of Iraqi and Syrian judges who have a deep understanding of fundamental religious and cultural conflicts in the region and would be able to

¹⁴⁹ *Report on Preliminary Examination Activities*, INT'L CRIM. CT. 47, ¶ 211 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

instill the sense of trust in people. This would basically legitimize the tribunal since even if the tribunal is established, the credibility of its decisions may be undermined by the fact that the tribunal basically served victor's justice as it was done with the Nurnberg's tribunal.¹⁵⁰

A third option would be for the United Nations to enter into an agreement with Syria and/or Iraq to establish special tribunals for the purpose of investigating and prosecuting crimes committed by ISIS leaders and fighters. The legitimacy of such tribunals would be exceptionally high as they are most likely to be recognized not only by local populations, but potentially even by the accused persons. The problem here is the relationship between the international community and the Syrian regime. If the tribunal is set up with the support and cooperation of the Assad regime, the west would involuntarily legitimize the regime, which does not seem acceptable to western countries. On the other hand, if the tribunal is established against the regime's will it could end up being ineffective, as the Syrian regime would be able to prevent enforcement and implementation of any activities taken by the court.

Moreover, as domestic courts serve as a basis for an international system of criminal justice,¹⁵¹ it is possible to try ISIS leaders and officials in domestic Syrian and Iraqi courts. However, it is often hard for domestic courts to handle such factually and jurisdictionally complicated questions concerning accusations of international crimes.¹⁵² It can also be argued that domestic tribunals are too involved in the issue and therefore would not be able to ensure sufficient due process guarantees or secure an impartial trial for the accused of committing international crimes, as was proved by the negative experience of the Iraqi High Tribunal that

¹⁵⁰ ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 505-06 (3d ed. 2007).

¹⁵¹ ANTONIO CASSESE & PAOLA GAETA, CASSESE'S INT'L CRIM. L. 25 (3d ed. 2013).

¹⁵² *U.S. Plans for Iraq Tribunals "A Mistake"*, HUM. RTS. WATCH (Apr. 6, 2003), <https://www.hrw.org/news/2003/04/06/us-plans-iraq-tribunals-mistake>; Kevin Jon Heller, *A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal*, 39 CASE W. RES. J. INT'L L. 261 (2007).

tried Saddam Hussein and other Baathist leaders.¹⁵³ The territorial dispersion of the crimes committed by ISIS also poses a problem, and it is questionable whether each state is entitled to properly exercise territorial jurisdiction over these crimes.¹⁵⁴

Additionally, international community may decide to establish a hybrid international tribunal through an agreement between the United Nations, Syria and/or Iraq, which is most likely to be done at the end of the conflict. The hybrid tribunal would reflect the transnational nature of the crimes committed by ISIS. Furthermore, support of the Arab League in setting up the tribunal would help to ensure that cultural religious and other regional interests are taken into account and would help the west to avoid future claims about imposed western justice and discrimination against other regions of the world. It would be more flexible in reacting to various sensitive religious and political questions as it would operate with a better understanding of inner interests and processes prevalent in the Middle East region. In spite of all these advantages, setting up a tribunal combining understanding and rules of the two completely different national legal systems would be a great challenge. It would also require a significant financial aid from more economically developed countries that probably would like to have their say in the issue in return for money, which potentially can cause problems and slow not only the service of justice but the establishment of the tribunal per se.

VI. CONCLUSION

There is no ideal way to address the problem of recruiting and using child soldiers by ISIS. Its practices of child recruitment and use of children terrorize and terrify the world and there are no members of the international community affected by its activities, however the

¹⁵³ HUM. RTS. WATCH, *supra* note 152.

¹⁵⁴ Heller, *supra* note 154, at 267.

situation is complicated by a number of political considerations of the states advancing their international agenda, including protecting their interest in the ongoing conflict in Syria. This apparently leaves no place for primary consideration of children's interests, as no significant steps were taken to remedy the issue. It is time for international community to summon a political will to address the problem and hold ISIS accountable for the atrocities it is committing, as international law provides viable mechanisms to ultimately make that happen, provided the countries finally come to an agreement. However, we should remember that the more international community is deliberating, the more children are being either killed in the battle or subjected to ISIS propaganda that inspires them to do everything to bring a Caliphate into existence.

**PUBLIC SELF-CENSORSHIP AS A RESPONSE TO A SUDDEN
REVELATION OF MASS SURVEILLANCE**

Stephen Cramarosso

ABSTRACT

This Article discusses the ramifications of the revelation of United States surveillance policy to the public. This revelation has caused particular subsets of the public to alter their online activity to such an extent that the quality of political discourse, and the free exchange of information has been meaningfully compromised. The current nature of U.S. national security surveillance (broad, sweeping and indiscriminate gathering of information from U.S. citizens, and ambiguously targeted programs) dissuades individuals from actively engaging in online discussions about many of the central issues our society faces today. Though not a direct restraint on speech or free press, US surveillance, and the reverberating public sentiment which rose in response, amounts to a de facto suppression in the exchange of information. Because true and honest dialogue is stifled for the very reason it should be discussed most actively—governmental encroachment upon privacy in novel mediums of technological communication—the public’s reaction of withdrawal from its previously unfettered activity online should be a matter of great concern.

This article will attempt to show that the circumstances surrounding U.S. surveillance have materially changed the character of American discourse and activity online by first, outlining America’s opaque surveillance policies and American citizens’ general lack of understanding of the law. Next, this article will discuss the general feeling of powerlessness that was created among scholars, authors, and—more broadly—the general public when Edward Snowden leaked government documents to *The Washington Post* and *The Guardian*. Additionally, this article will show that as a response to the Snowden leaks, much of the public determined that it was a risk to discuss certain topics or issues over electronic devices. And in

turn, that this risk, through the principle of risk aversion, decreased American discussions and research regarding modern-day surveillance.

Finally, this article will consider the legal and practical implications of the public's self-censoring response to the realization that they are being watched in such a sweeping manner, and will attempt to offer solutions for overcoming the chilling effect that has occurred in the wake of this realization.

I. INTRODUCTION

U.S. national security policies generally exist under a fair degree of secrecy.¹ However, there have recently been numerous disclosures—whether governmentally sanctioned or illicit—pertaining to the nature of U.S. security programs and policies.² In addition to the documents Edward Snowden released to *The Washington Post* and *The Guardian* in 2013, the government has recently made disclosures and revelations about the National Security Agency (“NSA”), such as the further declassification of the United States Signals Intelligence Directive SP0018 (“USSID 18”), outlining U.S. surveillance policy.³ These revelations have made many increasingly reserved in their electronic activities and communications on the web and elsewhere, and have caused self-censoring among those who consider themselves a higher priority for surveillance.⁴ In reality, these individuals may be nothing more than writers or researchers on controversial topics, and pose no threat to national security.⁵ This paper will attempt to address not only how self-censorship has developed as a response to the American public’s increased knowledge of the U.S. government’s surveillance policies but will attempt to

¹PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, BRENNAN CENTER FOR JUSTICE, NOTICE PCLOB-2015-01, COMMENTS ON THE BOARD’S PLAN FOR EXAMINATION OF EO 12333 ACTIVITIES, 9-10 (Oct. 26, 2012), <http://www.brennancenter.org/sites/default/files/legacy/PCLOB%20Submission%20FINAL%20-%2010%2026%2012.pdf> (discussing methods used by executive and judicial branches to shield governmental actions from public view). See generally Nat’l Sec. Agency, United States Signals Intelligence Directive SP0018 Legal Compliance and U.S. Persons Minimization Procedures (2011) [hereinafter USSID 18]; NAT’L SEC. AGENCY, LEGAL FACT SHEET: EXECUTIVE ORDER 12333 (Jan. 25, 2011), <https://www.aclu.org/files/assets/eo12333/NSA/Legal%20Fact%20Sheet%20Executive%20Order%2012333.pdf>.

² Anna Johansson, *Did Ted Cruz Leak Classified Info During the GOP Debate?*, Inquisitr (Dec. 17, 2015), <http://www.inquisitr.com/2640510/did-ted-cruz-leak-classified-info-during-the-gop-debate/> (discussing apparent U.S. sanction of Cruz’s disclosure of ‘classified information’).

³ Dustin Volz, *Everything we learned from Edward Snowden in 2013*, NAT’L J. (Dec. 31, 2013), <http://www.nationaljournal.com/s/64142/everything-we-learned-from-edward-snowden-2013>; Spencer Ackerman, *Fisa judge: Snowden’s NSA disclosures triggered important spying debate*, THE GUARDIAN (Sept. 13, 2013), <http://www.theguardian.com/world/2013/sep/13/edward-snowden-nsa-disclosures-judge>; Spencer Ackerman, *Fisa court documents reveal extent of NSA disregard for privacy restrictions* (Nov. 19, 2013), <http://www.theguardian.com/world/2013/nov/19/fisa-court-documents-nsa-violations-privacy> (Stating USSID had been “declassified on Monday night”).

⁴ See generally *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor*, PEN AMERICA (Nov. 12, 2013), http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf [hereinafter PEN].

⁵ Id.

show why this should be considered akin to a constitutional violation of both free speech and free press.

This paper will begin by broadly outlining some legal components of U.S. surveillance policies, beginning with the Foreign Intelligence Surveillance Act. An examination of the USA PATRIOT and USA FREEDOM Acts will follow. This section will end with two lesser known, but equally influential prongs of the U.S. Surveillance apparatus. First of these two will be Executive Order 12333 and its accompanying USSID18. Last will be the UKUSA Agreement.

Moving past the structure of surveillance policy, Part II will cover how exactly the U.S. surveillance apparatus was revealed to the general public. This section will follow not only the leaks themselves, but will chart public sentiment as well. In doing so, Part II will discuss the effect that the nature of the leaks themselves had on the public, rather than the information leaked. Finally, Part II will conclude with a general outline of the true nature of counter-terrorism and surveillance policies for the purpose of granting a better picture of what the government does, what the public knows about this, and what the public thinks it knows about this.

Part III will discuss how the above has lead to self-censorship, or a “chilling effect” amongst the public. Part IV will then begin to discuss the constitutional implications of self-censorship as it relates to national security. Finally, Part V will discuss, more pointedly, the court’s treatment of chilling as a constitutional matter. It will show that, although this particular instance of chilling does not fit within the court’s typical definition, it should still be considered a violation.

II. COMPONENTS OF U.S. NATIONAL SECURITY SURVEILLANCE POLICY.

A bit of background regarding the history of United States national security policy is necessary to understand how self-censorship developed and how it has become a concern. United States' national security policies are largely derived from three or four sources—though there are other influential subsidiary sources of authority.⁶ These sources, which will be further detailed and defined below, are FISA, the USA PATRIOT Act, the UK/USA Agreement, and to a less direct degree, a series of executive orders.⁷ Because national security policy is reactionary and amended over time, the laws are disjointed and require significant research to understand.⁸ Further, because of the sensitive nature of national security procedures, many of the key U.S. strategies for monitoring potential national security threats are confidential in part or in whole.

A. FISA throughout the years.

The Foreign Intelligence Surveillance Act of 1978 (“FISA”) was presented to President Carter by Congress and signed into law in 1978.⁹ It has undergone more than a dozen amendments since its original enactment and its current form was approved in 2015.¹⁰ In the

⁶ See *Generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C); Foreign Intelligence Surveillance Act of 1978, Pub. L. No 114-25, 129 Stat. 317 (2015); Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008) (amending Executive Order 12,333); U.S. National Security Agency, UKUSA Agreement Release, 1940-1956 (June 24, 2010), at https://www.nsa.gov/public_info/declass/ukusa.shtml (reproducing the full text of the UKUSA Agreement); USSID 18, *supra* note 1.

⁷ See *Generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C); Foreign Intelligence Surveillance Act of 1978, Pub. L. No 114-25, 129 Stat. 317 (2015); Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008) (amending Executive Order 12,333); U.S. National Security Agency, UKUSA Agreement Release, 1940-1956 (June 24, 2010), at https://www.nsa.gov/public_info/declass/ukusa.shtml (reproducing the full text of the UKUSA Agreement); USSID 18, *supra* note 1.

⁸ Adam Liptak, *Civil Liberties Today*, NEW YORK TIMES (Sept. 7, 2011), http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?_r=0 (Discussing PATRIOT Act as direct response to 9/11, and near complete lack of dissent among legislators).

⁹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (amended multiple times, most recently by Pub. L. 114-25).

¹⁰ See *generally* *Id.*

first 15 years of its authorization, FISA went without amendment.¹¹ In the first twenty years of its existence, FISA was amended only twice—in 1994 and 1998.¹² The 1994 amendment, the Counterintelligence and Security Enhancements Act, gave the president the power to authorize certain physical searches without a court order and governed these searches and the use of information obtained from them.¹³ Next, FISA was amended in 1998 by the Intelligence Authorization Act for Fiscal Year 1999, which gave the government, among other things the ability to access certain business records with a court order.¹⁴ Aside from these two amendments, US foreign intelligence authority derived from FISA essentially went unchanged during these two decades.

Beginning with the 1998 amendment, and continuing in 1999 and onward, FISA saw an explosion of activity, with eleven amendments to the bill in just eight years—1999 through 2006.¹⁵ Some of these amendments were more invasive than others, but there is damage beyond the direct authorities provided to the government by FISA.¹⁶ This damage, stems from the uptick in legislative activity and relates to self-censorship amongst Americans.

This uptick in U.S. surveillance reformation and the broadening of executive powers to combat terrorism was a response to the September 11th attacks.¹⁷ However, the reasoning behind

¹¹ See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978). *See generally* Counterintelligence and Security Enhancements Act of 1994, Pub. L. No. 103-359, 108 Stat. 3423 (1994).

¹² *See generally* Counterintelligence and Security Enhancements Act; Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2396 (1999).

¹³ *See generally* Counterintelligence and Security Enhancements Act.

¹⁴ *See generally* Intelligence Authorization Act for Fiscal Year 1999.

¹⁵ *Amendments to the Foreign Intelligence Surveillance Act*, FAS.ORG, <http://www.fas.org/sgp/crs/intel/m071906.pdf> (last visited Mar. 19, 2016).

¹⁶ *Compare* Intelligence Authorization Act for Fiscal Year 2000, Pub. L. 106-120 No. 113 Stat. 1606 §601 (amending the definition of “agent of a foreign power” in section §101(b)(2) of FISA), *with* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 No. 115 Stat. 272 (allowing for extensions on the duration of wiretaps, increasing the number of FISA judges, etc).

¹⁷ *The U.S. and Int’l Response to 9/11*, HERITAGE FOUND., <http://www.heritage.org/research/projects/enemy-detention/response-to-911> (last visited Feb. 19, 2016) (analyzing passage of P.L. 107-40, which authorized broad counter terrorism powers to the president in response to 9/11).

these amendments is largely inconsequential for our purposes. What is truly important is how this increase in surveillance is perceived by those who would discuss it in a scholarly and critical light. The mentality instilled in scholars from this increase and the implications that follow such a sentiment are discussed at length below.

B. The USA PATRIOT Act and the USA FREEDOM Act.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“Patriot Act”) and the subsequent Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and Online Monitoring Act (“Freedom Act”)—arguably the most well-known and contentiously discussed segments of America’s modern surveillance policy—are amendments to FISA, the Electronic Communications Privacy Act of 1986 (“ECPA”) and other important acts.¹⁸

Two particularly impactful and inflammatory provisions of the Patriot Act are sections 215 and 702. Under section 215, intelligence agencies may apply for an order requesting the production of information from a “U.S. Person.”¹⁹ A U.S. Person has been defined in this context as a citizen of the United States, a permanent alien, an unincorporated association of mostly United States Citizens, or a Corporation incorporated in the United States.²⁰ The substantive purpose of section 215 of the Patriot Act was largely reinstated only one day after its sunset by the Freedom Act, which takes away the ability for the government to hold bulk metadata itself but requires major service providers to hold on to the records so that the government may access them if need be.²¹

¹⁸ See generally USA Patriot Act, *supra* note 6.

¹⁹ 50 U.S.C. § 1861 (2015) (in litigation at the time of writing; *Klayman v. Obama*, 2015 WL 6873127).

²⁰ 50 U.S.C. § 1801(i) (2015).

²¹ Aarti Shahani, *Phone Carriers Tight-Lipped on How they will Comply with New Surveillance Law*, NAT’L PUB. RADIO (June 8, 2015, 5:07 AM), <http://www.npr.org/sections/alltechconsidered/2015/06/04/411870819/phone-carriers-are-tight-lipped-over-law-that-overhauls-nsa-surveillance>.

Under section 702, intelligence agencies do not need to obtain a warrant for surveillance, but the agencies may not “intentionally target” U.S. persons.²² However, some scholars speculate that the supposed limitations written into this provision are not specific enough, and that intelligence agencies have gotten around this by interpreting any information sent outside the country as presumptively a “non-US person,” and by never considering any bulk collection of information as intentional targeting.²³

The Freedom Act does not allow the government to hold phone company metadata itself, but it does now require phone companies, when presented with a warrant from FISA, to provide not only the number requested, but every single number in contact with that number, and then every single number in contact with those numbers.²⁴ This is a broad expansion from what was written into law under the Patriot Act, which did not have such an obligation.²⁵

C. Executive Order 12333 and USSID 18

Executive Order (EO) 12333 was signed by President Reagan on December 4, 1981.²⁶ Along with Department of Defense (DoD) directives, which contain more detail covering procedures, EO 12333 forms USSID 18.²⁷ Generally, EO 12333 lays out broad policy, and the other directives that form USSID 18 specify how the broad policy is to be followed.²⁸ Historically, EO 12333 was not updated until after the September 11th terrorist attacks.²⁹ For over 20 years, EO 12333 remained untouched, until in 2004, when EO 13355 was signed into

²² 50 U.S.C. § 1881a(b)(1) (2008).

²³ Axel Arnbak & Sharon Goldberg, *Loopholes for Circumventing the Constitution: Unrestrained Bulk Surveillance on Americans by Collecting Network Traffic Abroad*, 21 MICH. TELECOMM. & TECH. L. REV. 317, 330 (2015).

²⁴ Shahani, *supra* note 21.

²⁵ *Id.*

²⁶ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

²⁷ Arnbak & Goldberg, *supra* note 23, at 334.

²⁸ See Arnbak & Goldberg, *supra* note 23, at 334-35.

²⁹ Compare *Id.*, with Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004).

law by President George W. Bush.³⁰ The next amendment to the order, also signed by President Bush, came in 2008 in the form of EO 13470.³¹

Through EO 12333, President Regan defined the protocol governing surveillance operations abroad, and created the authority to monitor foreign signals intelligence through defining what the government could and could not do in relation to signals collection.³² It largely fills in the gaps left—targets outside of the country—by FISA.³³ Essentially, according to the NSA, EO 12333 “applies when surveillance is ‘conducted through various means around the globe, largely from outside the United States, which is not otherwise regulated by FISA.’”³⁴

EO 13355 was largely passed to accommodate structural changes in the US intelligence apparatus.³⁵ It modified the powers held by the Director of Central Intelligence.³⁶ The changes brought about in EO 13470 were much more drastic. President Bush used this executive order to give authority to the newly created Director of National Intelligence.³⁷

Because EO 12333 and its amendments specifically govern the collection of data outside of the US, the order is susceptible to the same problems of interpretation that FISA and the Patriot Act were faced with.³⁸ Under EO 12333, operations from abroad are presumed to affect foreigners, who do not receive constitutional protections.³⁹ Therefore, any operations conducted pursuant to EO 12333, which will be abroad by the terms of the order, are not restricted by the constitution, regardless of whether they ultimately turn up information on US citizens.

³⁰ Compare Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), with Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004).

³¹ Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008).

³² Arnbak & Goldberg, *supra* note 23, at 333.

³³ *Id.* at 335.

³⁴ *Id.* (quoting NAT’L SEC. AGENCY, *MEMORANDUM: THE NATIONAL SECURITY AGENCY: MISSIONS, AUTHORITIES, OVERSIGHT AND PARTNERSHIPS*, NSA CSS, 2 (Aug. 9, 2013)).

³⁵ Exec. Order No. 13355, 69 Fed. Reg. 53593 (Sept. 1, 2004).

³⁶ *Id.*

³⁷ See Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008).

³⁸ Arnbak & Goldberg, *supra* note 23, at 322, 325-26.

³⁹ *Id.* at 325-326.

Until recently, many of the relevant policies outlined in EO 12333 and the greater USSID 18 had been classified.⁴⁰ Journalists have increasingly expressed concerns regarding the passage of these executive orders, and the operations sanctioned by them.⁴¹

D. The UKUSA Agreement

The UKUSA Agreement (UKUSA) was originally arrived upon in 1946, and was later updated in 1955 to include Canada, Australia and New Zealand, in addition to the United States and the United Kingdom.⁴² These nations are referred to as the “5-eyes nations.” The agreement originally covered the monitoring of high-frequency radio signals.⁴³ As this technology faded in importance, the agreement has essentially kept up with technological changes, monitoring newer and newer forms of communication.⁴⁴

The agreement has evolved into something that, though discouraging spying on any of the members of the 5-eyes nations, expressly allows the nations to do so.⁴⁵ Further, UKUSA allows these nations to spy on the other four nations party to the agreement with or without their permission.⁴⁶ This seems to have blurred the lines upon what information the United States can gather on its own citizens: “There used to be a very clear distinction between intelligence gathering on non-nationals and domestic citizens, but that appears to have changed.”⁴⁷

⁴⁰ Arnbak & Goldberg, *supra* note 23, at 333.

⁴¹ *Id.* at 322.

⁴² Paul Farrell, *History of the 5-Eyes – Explainer*, GUARDIAN (Dec. 2, 2013), <http://www.theguardian.com/world/2013/dec/02/history-of-5-eyes-explainer>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Paul Farrell, *History of the 5-Eyes – Explainer*, GUARDIAN (Dec. 2, 2013), <http://www.theguardian.com/world/2013/dec/02/history-of-5-eyes-explainer>.

⁴⁷ *Id.*

III. UNVEILING THE SURVEILLANCE STATE.

A. The Flow of the Leak Filled the Pool of Mistrust.

Relatively sluggish counter-terrorist intelligence operations prior to the September 11th attacks took a dramatic turn in the years after the attacks.⁴⁸ These operations were largely unknown to America for a significant number of years prior to Edward Snowden's leaks.⁴⁹ Then, on June 5, 2013, *The Guardian* printed a document showing a Foreign Intelligence Surveillance Court (FISC) order for Verizon to release metadata from millions of American's phone calls.⁵⁰

To many, this was not initially important news. Four days after the first story broke, only 27% of Americans said they were following news on the surveillance encroachment.⁵¹ However, as leak after leak was released, exposing not just specific instances of violation, but entire programs dedicated to gaining metadata and information from Americans such as PRISM—an eavesdropping program giving the government access to emails and other data from large tech sources such as Google, Yahoo and Facebook—attention to the story seemed to gain momentum.⁵² On June 11, just six days after the story had broken, only 8% of Americans had heard nothing about the leaks.⁵³ Still, the leaks continued to pour in, causing one journalist who

⁴⁸ See *supra* Part 1.

⁴⁹ Andy Greenberg, *Ten Things We've Learned About the NSA from a Summer of Snowden Leaks*, FORBES (Sept. 9, 2013), <http://www.forbes.com/sites/andygreenberg/2013/09/09/ten-things-weve-learned-about-the-nsa-from-a-summer-of-snowden-leaks/#23e960958373> (discussing ten of the most influential leaks that the public was unaware of prior to publishing).

⁵⁰ Joshua Eaton, *Timeline of Edward Snowden's Revelations*, ALJAZEERA AMERICA <http://america.aljazeera.com/articles/multimedia/timeline-edward-snowden-revelations.html>. (last visited 2/21/16).

⁵¹ Harry Enten, *Poll shows Obama's real worry: NSA leaks erode trust in government*, THE GUARDIAN (June 13, 2013), <https://www.theguardian.com/commentisfree/2013/jun/13/poll-obama-nsa-leaks-trust>.

⁵² Eaton, *supra* note 50 (giving date of PRISM leak, as well as other leaks); Enten, *supra* note 51 (providing polls showing wider attention paid to leaks each day after first leak); Dominic Rushe, *PRISM scandal: tech giants flatly deny allowing NSA direct access to servers*, GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/07/prism-tech-giants-shock-nsa-data-mining>, (defining nature of PRISM program).

⁵³ Enten, *supra* note 51.

initially seemed skeptical of the importance of the leaks to eventually refer to them as a “megaleak,” and to put them on par with the Pentagon Papers.⁵⁴

With each leak, public sentiment diminished. A poll taken from June 6 to June 9 of 2013, immediately after the first leak revealing the US demand for Verizon to release telephone records, revealed that 56% of Americans found the NSA surveillance “acceptable” and only 41% found it “not acceptable.”⁵⁵ Roughly one week later—and less than two weeks after the initial disclosure—after more information had been released about both Snowden’s motive and about details of NSA operations, public sentiment had shifted. A new poll found that only 48% of Americans approved of NSA operations, and 47% disapproved.⁵⁶ In a survey conducted July 17-21, 2013, 50% approved of the NSA’s surveillance activities, while 44% disapproved, showing a slight bump in approval for the activity.⁵⁷

Leak after leak was released, disclosing more about the government’s surveillance activities.⁵⁸ Though the most seemingly pertinent releases happened early on, with the disclosure of PRISM and the Verizon order, other very important disclosures also came later. However, these disclosures were often related to foreign relations, not American privacy.⁵⁹ The leaks generally focused on issues surrounding US activity outside of the country.⁶⁰ Roughly three months after the first leak, another national survey of Americans held that a full 55% felt that

⁵⁴ Greenberg, *supra* note 49.

⁵⁵ *Majority View NSA Phone Tracking as Acceptable Anti-Terror Tactic*, PEW RES. CTR. (June 10, 2013), <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/>, [hereinafter *Acceptable Anti-Terror*], (framing survey categories as “acceptable,” “not acceptable,” and “don’t know.”).

⁵⁶ *Public Split over Impact of NSA Leak, But most want Snowden Prosecuted*, PEW RES. CTR. (June 17, 2013), <http://www.people-press.org/2013/06/17/public-split-over-impact-of-nsa-leak-but-most-want-snowden-prosecuted/>, [hereinafter *Public Split*].

⁵⁷ *Few See Adequate Limits on NSA Surveillance Program*, PEW RES. CTR. (July, 26, 2013), <http://www.people-press.org/2013/07/26/few-see-adequate-limits-on-nsa-surveillance-program/>, [hereinafter *Few See*].

⁵⁸ See generally Eaton, *supra* note 50.

⁵⁹ See generally Eaton, *supra* note 50.

⁶⁰ *Id.*

NSA data collection was a violation of privacy, and only 33% felt the collection was needed.⁶¹

Despite the fact that between July 9 and September 3, 2013, ten out of twenty revelations dealt directly with issues abroad and therefore did pertain to individual privacy, we see the most drastic shift in public opinion in concern about privacy violations between July 17th and September 10th.⁶²

This suggests that it was not necessarily just the substance of the leaks that created this negative sentiment, but that the slow yet incessant nature of the leaks, seemingly endless, was reason alone to sow distrust. If one were to argue that the substance alone affected public sentiment, then one should see the biggest dip immediately after the disclosure of the Verizon order and PRISM, as these directly affected American privacy and were very telling about the nature of the surveillance policy. Rather, this article posits, among other things, that by slowly piling on information day after day, week after week, Snowden and the journalists he worked with created an even greater sense of magnitude for the disclosures than would have existed if more had been disclosed in fewer increments. Here, it seemed as though they would never end; it seemed as though each week we were learning more about our government, and that next week there would assuredly be another shocking disclosure.

There is the logical argument to be made that the aggregation of this information is what lead to the high disapproval of NSA surveillance over time, but a recent poll would suggest otherwise. In late December of 2015, after years of NSA surveillance disclosures slowed, public sentiment has shifted again, showing a full 55% of Americans are concerned that the government

⁶¹ Emily Ekins, *Reason-Rupe September 2013 National Survey*, REASON (Sep. 10, 2013, 12:30 PM), <http://reason.com/poll/2013/09/10/reason-rupe-september-2013-national-survey>.

⁶² Compare *Few See*, *supra* note 53, with Ekins, *supra* note 61.

won't go far enough in monitoring for terrorists.⁶³ The information was still out there, but as it faded from media focus, it seemed as though we had finally learned all that the government had been doing. With the attack in Paris, American citizens as a whole, despite their knowledge of governmental overreach, have begun to support these programs.⁶⁴ The accumulation of information relating to government surveillance was not enough to prevent an overseas attack from affecting how we think about individual privacy rights in America; simply knowing more about the invasiveness of the program was not enough. It follows that the feeling created by the long-term nature of the leaks was a tangible part of creating the mistrust which led to the censorship discussed below.

B. The Nature of the Counter-Terrorism and Surveillance

Untrustworthy actions by the government have lead members of the public to believe that even if they are not doing anything unlawful or wrong, they can still be targeted by the government.⁶⁵ In the case of whistleblowers, historically, even those that have worked through the proper channels have “said good morning to a pistol pointed at [their] head[s] in the shower by an FBI agent.”⁶⁶ While simply researching topics such as Islam, the Islamic State, or national security is not on par with literal whistle blowers, the point stands: We have seen the government

⁶³ Mark Murray, *NBC/WSJ Poll: Terror Fears Reshape 2016 Landscape*, NBC NEWS (Dec. 14, 2015, 5:30 PM), <http://www.nbcnews.com/meet-the-press/nbc-wsj-poll-terror-fears-reshape-2016-landscape-n479831>.

⁶⁴ *Id.*

⁶⁵ Ewen MacAskill & Gabriel Dance, *NSA Files: Decoded*, GUARDIAN (Nov. 1, 2013), <https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1> (stating ACLU argues NSA protocol goes far beyond what Constitution allows. i.e. allows unlawful targeting of innocent people's data); Annie Braun, *Librarians: Patriot Act Has Led to Self-Censorship*, ARIZONA DAILY SUN (Feb. 18, 2006), http://azdailysun.com/news/local/librarians-patriot-act-has-led-to-self-censorship/article_5d414310-66ba-5038-b9ec-78643aa64d74.html (discussing sentiments of individuals who feel they are being monitored despite no wrongdoing; “‘I’m not doing anything wrong’ in response to questioning the role of the Patriot Act.”).

⁶⁶ David Medine, Chairman, Privacy and Civil Oversight Board, Public meeting at the JW Marriott Hotel, Washington D.C., at p 29 line 9 (July 23, 2014), <https://www.pclob.gov/library/20140723-Transcript.pdf>.

fail to play by the rules before.⁶⁷ Those who attempt to challenge the system are likely to have a target on their back, regardless of whether their challenge is legitimate or not. We have seen our rights stripped away in the name of national security.

Government surveillance of citizens has been described as an incredibly broad mechanism of data retrieval. Edward Snowden described NSA surveillance saying:

The NSA specifically targets the communications of everyone. It ingests them by default. It collects them in its system and it filters them and it analyses them and it measures them and it stores them for periods of time... So while they may be intending to target someone associated with a foreign government or someone that they suspect of terrorism, they're collecting your communications to do so.⁶⁸

The British Government Communications Headquarters (“GCHQ”) processes are such as to allow for finding “needles” in a “vast haystack of data.”⁶⁹ “Certain triggers” allow GCHQ to sift through information, discarding much.⁷⁰ The concern, however, is that these triggers are indiscriminately picked up by intelligence gathering, and the wrong people, such as scholars and activists who research certain subjects, are at great risk of being monitored by these intelligence agencies.

Even if not arguing that governmental actions are malicious, they are imprecise. The no fly list is a well-known aspect of US counter-terrorism policy after the September 11th attacks. Established in 2003, the ACLU estimated that thousands of passengers had been subjected to

⁶⁷ David Medine, Chairman, Privacy and Civil Oversight Board, Public meeting at the JW Marriott Hotel, Washington D.C., at p 28-29 (July 23, 2014), <https://www.pclob.gov/library/20140723-Transcript.pdf>.

⁶⁸ Interview by Lana Lam with Edward Snowden, Whistleblower/former NSA contractor, in Hong Kong (June 6, 2013).

⁶⁹ Ewen MacAskill et al., *GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications*, GUARDIAN (June 21, 2013, 12:23 PM), <http://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa>.

⁷⁰ *Id.*

detention and questioning because of the no fly list within less than a year.⁷¹ The fear is that once put on this list, it is very difficult to be removed from it. In 2013, Judge Anna Brown, a federal judge in Oregon, said there is no “meaningful mechanism for travelers who have been denied boarding to correct erroneous information in the government’s terrorism databases.”⁷²

This issue can be applied to all counter-terrorism mechanisms. GCHQ, though not a United States surveillance center, closely works with the United States.⁷³ GCHQ talks about “triggers” for identifying threats, but does so by looking through vast amounts of information, collected from the public.⁷⁴ The NSA utilizes similar procedures, allowing for data retention for up to five years.⁷⁵ When these triggers are used to search for information held for elongated periods of time, it is reasonable to expect that an innocent individual who is simply researching topics related to these “triggers” will be put on this trigger list unjustly.⁷⁶ While it cannot be said for certain how exactly the programs meant to search for these “triggers” work, it does not seem a far stretch to assume that out of the millions of people monitored by these surveillance programs, many Americans have been added to these watch-lists for activating a surveillance “trigger.”

⁷¹ Jayashri Srikantiah, *With Databases Everywhere, the U.S. Government may be Turning into Big Brother*, DAILY J. (July 1, 2003), <https://www.aclu.org/no-fly-list-risk>.

⁷² Pete Williams, *No-Fly List Offers No Hope for Correcting Mistakes, Judge Rules*, NBC NEWS (Dec. 10, 2013, 6:07 PM), <http://www.nbcnews.com/news/us-news/no-fly-list-offers-no-hope-correcting-mistakes-judge-rules-n139896>.

⁷³ MacAskill et al, *supra* note 69 (outlining The Guardian’s understanding that 850,000 NSA employees and U.S. private contractors had access to GCHQ databases); See *supra* Part 1(d).

⁷⁴ MacAskill et al, *supra* note 69.

⁷⁵ Glenn Greenwald & James Ball, *The Top Secret Rules that Allow NSA to Use Data without a Warrant*, GUARDIAN (June 20, 2013, 6:59 PM), <https://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant> (explaining “minimization procedures” US must abide by and the method for collecting, holding data).

⁷⁶ *Id.*

IV. HOW THIS HAS LED TO SELF-CENSORSHIP

The policies of the United States government themselves, in tandem with the manner in which these policies were divulged to the public have lead to a chilling of speech on these subjects.⁷⁷ This chilling has been particularly prevalent amongst scholars, researchers and the like, whose business it is to discuss sensitive issues such as these.⁷⁸ However, it has also reached the general public not only directly, through their own self-censorship, but additionally has affected the public by depriving them of the conversations which would have existed on the subject had scholars and the like not chilled their speech.⁷⁹

Before continuing, it should be noted that perceptions of governmental overreach must be tempered by issues of genuine national security, as can be seen by the Court's decision in *Korematsu v. United States* to "curtail the civil rights of a single racial group" based upon "pressing public necessity;"⁸⁰ If the nation is truly at risk, certain liberties may constitutionally be constrained for the good of the public.⁸¹ However, as the years have gone by, there have not necessarily been any indications that this incredible increase in surveillance has lead to a safer world than would exist without the increase, or that the measures are even needed to keep us safe. In 2013, global terrorism rose over 40% from 2012 numbers, despite our increased counter-terrorism policies.⁸² However, despite the United State's failure to lower global terrorism, American deaths abroad remain low, at only 16 in 2013.⁸³

⁷⁷ See generally PEN *supra* note 4.

⁷⁸ See generally *Id.*

⁷⁹ ALEX MARTEWS & CATHERINE TUCKER, GOVERNMENT SURVEILLANCE AND INTERNET SEARCH BEHAVIOR, 28 (2015) (finding public has chilled internet activity in response to awareness of revelation of government surveillance).

⁸⁰ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁸¹ *Id.*

⁸² Spencer Ackerman, *Global terrorism rose 43% in 2013 despite al-Qaida splintering, US reports*, GUARDIAN (Apr. 30, 2014), <https://www.theguardian.com/world/2014/apr/30/global-terrorism-rose-despite-al-qaida-splintering>.

⁸³ *Id.*

This can, of course, be tempered with the noteworthy words of Justice Ginsburg: by claiming that because we have not been particularly threatened by terrorism, we do not need increased surveillance, we are essentially “throwing away [our] umbrella in a rainstorm because [we] are not getting wet.”⁸⁴ Still, perception is what matters; When astute members of the public notice a sharp increase in surveillance activity in tandem with sharp technological advancements, while at the same time, observing no real perceptible terrorist threats, an ulterior motive seems more believable.

In 2003, Attorney General John Ashcroft released information relating to Section 215 of the Patriot Act “to counter the troubling amount of public distortion and misinformation” relating to the section.⁸⁵ This shows that from the beginning, people were concerned with the expansion of surveillance authority held by the government. However, this statement was made very early on in the recent phase of governmental expansion over surveillance powers. The largest effect, and the only one which has been studied, has been chilling as a response to Snowden’s revelations.

The Guardian reported in 2013 that GCHQ, a British surveillance agency, began processing and spying on American citizens—among others—and sharing this information with the NSA.⁸⁶ Effectively, this allows the NSA to collect and hold broad information from and related to US Persons of whom there is no suspicion of criminal or terrorist activity. The NSA would be unable to do this under FISA and the PATRIOT Act authority, which bars surveillance

⁸⁴ *Shelby County, Ala. V. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting) (referencing voting preclearance, not counter-terrorism policy, but making the point that you cannot get rid of a protection simply because the protection subverted the problem).

⁸⁵ Michael Isikoff, *FBI sharply increases use of Patriot Act provision to collect US citizens’ records*, NBC NEWS (Jun. 11, 2013).

⁸⁶ MacAskill et al, *Supra* note 69; Arnbak & Goldberg, *supra* note 23 at 335.

intentionally targeting U.S. persons without a warrant, or under the authority of EO 12333 and its amendments, which allows only for surveillance of targets outside the U.S.⁸⁷

It is argued that the United States uses the countries in the “Five Eyes” to circumvent the constitutional rights of its citizens. Aside from loopholes discussed above in place in the Patriot Act, which continue in the Freedom Act, it is argued that the U.S. gets around these constitutional restraints on surveying citizens by having other countries surveil American citizens for them. The information is then shared between the countries. This, like the conclusion reached upon sections 215 and 702 of the Patriot Act leads those who follow this topic to the conclusion that any restraints put on the United State’s surveillance of its own citizens are moot. When it is shown that there is not only the potential for exploitation of citizen’s rights, but that the government is in fact actively navigating around certain constitutional and statutory safeguards put in place to protect citizens from such an over-intrusive government, there will naturally be a reaction.

This reaction, which will be discussed in depth below, is to self-censor activity that has the potential to be monitored through electronic means. Regardless of whether the U.S. surveillance law actually allows the government to monitor the particular activity, action is repressed because there is a fear that the government is not respecting the spirit of the law, and is either navigating around the law by artificially reclassifying our status as protected citizens, or is simply having another entity—one which is not constrained by our constitution—survey the American people for them.

This article does not attempt to claim that Americans were unaware of the existence of government surveillance programs prior to the Snowden leaks. However, it does attempt to show that Americans were not only largely unaware of the specifics of government surveillance, but

⁸⁷ 50 U.S.C.A. 1881a(b)(1) (2008).

were largely unaware of what the government is technically allowed to do under its various laws and regulations. The Snowden leaks have prompted Americans to self-censor their web activity; through this self-censorship, our quality of free speech and press is diluted and ultimately compromised due to an often subtle, but diffuse hesitation among the populace to explore these subjects.

The nature of the Snowden leaks actually exacerbates this problem, rather than making it better. We went from (mostly) blissful ignorance in 2013 to a stark realization that our government was not only hiding its surveillance activities from us, but that it was hiding surveillance activities which were directed at the entire population, and done so upon questionable authority.⁸⁸ Snowden obviously had a small amount of information as compared to rest of the information the United States deems confidential, yet was able to shock the public.⁸⁹ In 2004, before Snowden leaked the documents, only 26% of Americans believed the Patriot Act went “too far” and violated Americans’ civil liberties.⁹⁰ In June 2013, in the immediate wake of the leaks, 47% of Americans said that they “disapprove” of surveillance programs to fight terrorism.⁹¹

⁸⁸ Volz, *supra* note 3.

⁸⁹ Edward Snowden, *The World Says No to Surveillance*, N.Y. TIMES, (June 4, 2015), <http://www.nytimes.com/2015/06/05/opinion/edward-snowden-the-world-says-no-to-surveillance.html?hpw&rref=opinion&action=click&pgtype=Homepage&module=well-region®ion=bottom-well&WT.nav=bottom-well> (listing reactions around the world to the revelations; UN, Europe, Latin America). See Johnathan Weisman & Jennifer Steinhauer, *Patriot Act Revisions Backed by Both Parties*, N.Y. TIMES (Apr. 30, 2015) <http://www.nytimes.com/2015/05/01/us/politics/patriot-act-faces-revisions-backed-by-both-parties.html> (detailing bipartisan support of bill that responds directly to big portion of Snowden leak).

⁹⁰ Lydia Saad, *Americans Generally Comfortable with Patriot Act*, GALLUP, (Mar. 2, 2004) http://www.gallup.com/poll/10858/Americans-Generally-Comfortable-Patriot-Act.aspx?g_source=patriot&g_medium=search&g_campaign=tiles.

⁹¹ Susan Page, *Snowden Should be Prosecuted for NSA Leaks*, USA TODAY (June 18, 2013) <http://www.usatoday.com/story/news/politics/2013/06/17/americans-say-snowden-should-be-prosecuted-for-nsa-leaks-in-usa-today-poll/2430583/>.

The Freedom Act allows phone service providers to disclose the number of requests the government has made to the public.⁹² This disclosure, though allowed, is not required, so like the Snowden leaks, it has the potential to simply create more uncertainty amongst the public about what the government is doing.⁹³ Prior to the leaks, people had no idea what the phone company was doing. After the leaks, if an individual is to look into how many times a request has been made from their phone company they may do so. This, however, will do nothing to inhibit self-censorship. If anything, it will increase it, because individuals will now know exactly how often the government is looking at phone numbers held by the carrier.⁹⁴

Even if members of the public were to check the amount of requests made by the government from their phone company and be satisfied with the number, this would not guarantee an end to the chilling. There is naturally going to be skepticism because the damage of the Snowden leaks has already been done.⁹⁵ People simply do not understand what the laws and orders allow the government to do. Even scholars do not know everything, because there are many substantive government acts that are classified to the public.⁹⁶ Despite the public's general lack of knowledge about what exactly government surveillance entails, the public is indeed aware that they are being surveiled. In a 2014 *Pew Research* panel, 87% of adults had heard at least "a little" about the government information collection; only 5% of adult respondents reported hearing "nothing at all."⁹⁷ Those who have heard "a lot" about government surveillance

⁹² Shahani, *supra* note 21.

⁹³ *Id.*

⁹⁴ *Id.* (discussing ability to see amounts of requests to phone company for numbers from US).

⁹⁵ See generally MARTHEWS & TUCKER, *supra* note 79 (discussing general tendency of public to act as if the government is watching them).

⁹⁶ See generally National Security Agency, U.S. Signals Intelligence Directive SP 0018, Legal Compliance and U.S. Persons Minimization (2011) [hereinafter USSID 18].

⁹⁷ Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RES. CTR, (Nov. 12, 2014), <http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/>.

are more likely to “self-monitor” according to the same panel.⁹⁸ The self-monitoring referenced by this study means specifically checking up on Internet presence, but it can be shown that people’s actions are affected specifically because of the knowledge that they are being surveyed.

Many Americans believe that there is a risk to their activities online, through text, cellphone, even LAN lines. Twenty-five percent of those aware of government surveillance have said they changed the way they use technology.⁹⁹ While this is not specifically self-censorship as to speech, it does show that Americans have, in general, changed the way they operate online.

The public’s concern with Internet privacy can be seen in the infamous and completely ineffective Facebook privacy status that dates back to at least 2012.¹⁰⁰ Though it is ineffective as a protection from privacy intrusions (the post generally references the UCC and the Rome Statute as authority—neither of which seem to be directly authoritative over the relationship between Facebook and an individual accountholder), the fact that this message has managed to survive for roughly three years despite being “debunked” shows that online privacy is a major source of concern for many Americans.¹⁰¹ While the post does not relate directly to governmental surveillance, it, again, shows that there is a growing concern with Internet privacy. It also shows that people are willing to take steps to protect themselves from invasions of this privacy, even if they are ineffective.

⁹⁸ Madden, *supra* note 97.

⁹⁹ George Gao, *What Americans think about NSA surveillance, national security, and privacy*, PEW RES. CTR. (May 29, 2015), <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>.

¹⁰⁰ *Facebook Privacy Notice*, SNOPE (Sept. 28, 2015) (giving language of notice; excerpt “Due to the fact that Facebook has chosen to involve software that will allow the theft of my personal information, I state: at this date... in response to the new guidelines of Facebook... The content of my profile contains private information. The violation of my privacy is punishable by law (UCC 1-308 1-308 1-103 and the Rome Statute)...”), Hope King, *Why People Fall for the Biggest Hoax on Facebook*, CNN MONEY (Oct. 1, 2015) <http://money.cnn.com/2015/10/01/technology/facebook-privacy-notice-hoax/> (giving specific reference to 2012 response to this status, confirming date referenced).

¹⁰¹ *Facebook Privacy Status*, *supra* note 100 (refuting effectiveness of viral Facebook privacy status); King, *supra* note 100.

Additionally, the fact that this message continues to spread year after year despite its easily refutable nature shows that people are not only concerned about this, but that they have a deep lack of understanding regarding the law. If the public lacks an understanding of this basic point of law, it cannot be expected to understand complex national security law, particularly when much of the law in question is confidential. People simply know that the government is doing something invasive, which resulted in a national scandal.

In a more pointed study, empirical documentation has shown evidence of a chilling effect “in relation to increased awareness of government surveillance.”¹⁰² This is a new study, which has not yet been followed up upon. It raises some possible confounds, such as the potential that the results occurred not because the participants feared government surveillance, but merely because they became more generally aware that their activity was not private.¹⁰³ However, the study, on its face seems to show a clear correlation between awareness of governmental surveillance, and changes in online patterns.¹⁰⁴

Further, though there is showing that the general public has taken steps, effectively chilling its activity in response to revelations on governmental surveillance, the public in general is not even aware of the full extent of government surveillance. Only 31% say they had heard a lot about the program nearly two years after the initial leaks.¹⁰⁵ The real damage is seen when looking at scholars, who are more aware of the specifics of the program, who also would seek to write about subjects that may trigger government interest.

PEN American Center, a literary and human rights organization, released a 2013 study speaking to the chilling effect felt by members of the community due to government

¹⁰² See generally MARTHEWS & TUCKER, *supra* note 79.

¹⁰³ *Id.* at 26.

¹⁰⁴ See generally *Id.*

¹⁰⁵ Lee Rainie, *Americans' Privacy Strategies Post-Snowden*, PEW RES. CTR. (Mar. 16, 2015).

surveillance.¹⁰⁶ The chilling effect felt by many of these members varies, sometimes resulting in more drastic effects than at other times.¹⁰⁷ Twenty-eight percent of writers in this survey reported having “curtailed or avoided social media activities,” and a full 40% had at least considered doing so.¹⁰⁸ Twenty-four percent of writers have deliberately avoided discussing topics over the phone or email, and an additional 9% had considered doing the same.¹⁰⁹ These speak directly to the free exchange of information, which is pivotal to a functioning democracy. If our writers are unable to openly discuss information amongst themselves, then that information will not be developed in a meaningful way.

This self-censorship, while notable, does not directly speak to the issue at hand. More pertinent is the finding that as much as 16% of the writers surveyed have avoided writing about, or even speaking about a particular topic because of a fear of government surveillance.¹¹⁰ Another 11% have seriously considered avoiding writing about or speaking about a topic for the same reason.¹¹¹ This means that over one-quarter of writers asked were negatively influenced against either writing about, or even speaking about certain topics.

While the knowledge of secretive and ethically questionable government surveillance may be bad enough to spark outrage in some, the true problem is much more insidious. Both the substance of these revelations and the manner in which they were revealed have the potential to chill not only political discussion, but to prevent individuals from actively engaging in research on any topic which they consider to be a high risk of triggering government interest.

¹⁰⁶ See generally PEN, *supra* note 4.

¹⁰⁷ See generally *Id.*

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ PEN, *supra* note 4 at 3.

In a 2011 clinical study, researchers found an increased tendency to avoid risk among individuals primed to feel as though they were “powerless” and that their position was “unstable.”¹¹² An earlier series of studies also drew strong comparisons between an individual’s sense of power and her propensity for engaging in what is deemed to be “risk-taking” behavior.¹¹³ It easily follows that a secret government program, which a large segment of the public feels violates their civil liberties, will make a member of the public feel less powerful. It is also not such a stretch to assume that in light of what we have learned about government surveillance policy, what we do not yet know, and what we know the government has the capability to do, that it could be considered “risk-taking” behavior to research topics related to dissent from the government or even Islam with any depth.

This study is so pertinent to this issue because studies show an increasing sentiment of powerlessness amongst Americans. In a recent Pew study, only 9% of people tested believed that they have a lot of control over how much information is collected about them.¹¹⁴ A lack of control over what information is collected about them can be analogized with a feeling of powerlessness. Because Americans determine it a risk to talk about certain things online, lest they be monitored by the government; because people are risk averse; and because this risk aversion is exacerbated by feelings of powerlessness, it follows that government surveillance of the population would lead people to avoid the risk of discussing things which they consider triggers for surveillance.¹¹⁵

¹¹² Jennifer Jordan et al, *Something to Lose and Nothing to Gain: The Role of Stress in the Interactive Effect of Power and Stability on Risk Taking*, 56 ADMIN. SCI. Q. 530, 538-39, 544 (2011) (discusses the relationship between feelings of powerlessness and risk-avoidance).

¹¹³ Anderson & Galinsky, *Power, optimism, and risk-taking*, 36 EUR. J. OF SOC. PSYCHOL., 511, 529 (2006).

¹¹⁴ Gao, *supra*, note 99.

¹¹⁵ *Id.* See generally MARTHEWS & TUCKER, *supra* note 79.

This theory of risk aversion in relation to powerlessness fits well with the discussion of the general population, who may be less sure about the specifics of surveillance law than the more politically active. However, this connection does not even need to be made when looking at the surveillance state's affect on authors, scholars and others who would speak on "trigger" matters. PEN writers assume that they are being monitored.¹¹⁶ Because of this, their actions can be considered a direct effect of both the substance of government surveillance and the way it was divulged to the public.

V. HOW A PUBLIC ACT—SELF-CENSORING—CAN CONSTITUTE A GOVERNMENTAL CONSTITUTIONAL VIOLATION

It would be very difficult to make a specific constitutional argument regarding free speech and press upon the fact that government surveillance has chilled people's speech. *Clapper v. Amnesty Int'l USA* held that for national security purposes, an individual may not gain standing through damages resulting from a failure to perform an action.¹¹⁷

Even if it is not a technical violation, the U.S. government should have an interest in ensuring freedom of research and expression so as to ensure a well functioning democracy. People should not feel as though they are putting a target on their back whenever they research a topic. The fear is not just of surveillance itself, because innocent people should have nothing to worry about regarding government intrusion. The fear is that, by researching these topics, they are arbitrarily being singled out for later surveillance from the government.

If we believe that radicalism and terrorism are real threats—threats which the vast majority of us would never consider committing—then we should not be discouraging the public

¹¹⁶ PEN, *supra* note 4 at 3.

¹¹⁷ *Clapper v. Amnesty int'l USA*, 133 S. Ct. 1138, 1151 (2013) (holding "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

from better understanding what causes these attacks. If we want to prevent them, the best way is to allow people to study these issues without concern. We know that the mechanisms are automated, and we know that they pick up keyword searches of people, and rank them as a threat based on their activity.¹¹⁸ We know that American citizens lose their protected status as an American citizen under the Constitution the second their web address is routed out of the U.S.¹¹⁹ If one researches too deep into issues such as this, it becomes more likely that one will “trigger” surveillance;¹²⁰ surveillance that is sanctioned by any of the ways described above, where the government has interpreted its laws to exclude the individual from protection. This threat is made doubly real when considering the intense bureaucracy surrounding the system which would almost certainly prevent an individual from removing herself from any watch list, effectively labeling her a terror suspect for at least the next five years—likely longer, and possibly indefinitely.¹²¹

If this is the state of our world, where the public—particularly the members of the public who actively wish to discuss and question our government—is prevented from having an open dialogue about issues for fear of government surveillance, then the state of our democracy is compromised. For democracy to work, people need to be informed about what is happening. People cannot be informed about what is happening in their society if they are afraid to research or discuss pertinent topics. The lack of transparency about what is truly going on, in tandem with the connotations of becoming a high priority target for U.S. surveillance leads to a society, which is afraid to learn about topics that are deeply affecting them. This fear leads to an ignorant

¹¹⁸ MacAskill et al., *supra* note 69.

¹¹⁹ Arnbak & Goldberg, *supra* note 23 at 330.

¹²⁰ See MacAskill et al., *supra* note 69.

¹²¹ Greenwald & Ball, *supra* note 75 (giving government sanctioned five year period to hold information).

populace, too unaware of the events transpiring around it to recognize how much it is truly being harmed.

People will still discuss and research this topic, there is no stopping that. The only thing this policy serves to do is drive radicals underground. If people everywhere—particularly those who feel passionately about the issues but are not actively researching and writing on it because of fear of government surveillance—were able to participate in more a robust dialogue, radical propaganda may be diluted by more proactive conversations: conversations detailing new approaches to dealing with our country’s problems, such as the approach suggested by Indonesian President Joko Widodo.¹²² Widodo suggests that to combat Islamic extremism, combine military strategies with a ‘soft approach’ of leveraging religious and cultural forces.¹²³ This is an approach that cannot even be attempted on an individual scale under our current regime of surveillance. Attempting to understand the viewpoint and culture of religious extremism to better learn how to dissuade it would almost surely “trigger” government surveillance. Under our current surveillance state, we are dissuaded from truly understanding issues, and therefore cannot hope to contribute meaningfully to a long-term solution to religious extremism and terrorism.

VI. CHILLING AS A VIOLATION OF CONSTITUTIONAL RIGHTS.

Everything written above should matter because of the “chilling effect.” The government instituted policies that have caused its citizens, whether rightly or wrongly, to suspect overreach and to distrust government. It has been a direct reaction to Snowden’s leaks. This suspicion has stifled the public’s willingness to discuss important topics in such a way as to suggest chilled activity.

¹²² Uri Friedman, *One President’s Remarkable Response to Terrorism*, ATLANTIC (Jan. 15, 2016).

¹²³ *Id.*

A. What is Chilling?

The Chilling effect refers to “[t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right to free speech.”¹²⁴ A chilling effect occurs when a citizen, in an attempt to abide by the law, abstains from an activity that she would otherwise have performed for fear of repercussions.¹²⁵ The government has a right and an interest in deterring and preventing unlawful activity, so generally speaking, chilling only becomes an issue when the activity deterred is either constitutionally protected, or is otherwise lawful activity which should not be deterred. Historically, the court has looked at chilling effects amongst the public—or a segment thereof—elicited from the threat of prosecution under a vague and overbroad statute.¹²⁶ If someone does not want to engage in an activity because it may violate a vague and overbroad statute, they have been chilled.¹²⁷

Here, however, is a novel issue. The purpose of the US surveillance programs detailed above is the prevention of terrorist activity.¹²⁸ Generally, chilling arises when people are concerned about violating a law.¹²⁹ Here, those being chilled are not concerned that they will accidentally violate terrorism laws because they are not committing terrorist acts.¹³⁰ The chilling comes from people’s belief that the government is monitoring them collectively, i.e., it comes directly from active government targeting of legal activity, not from a passive law, waiting for

¹²⁴ BLACK’S LAW DICTIONARY (10th ed. 2014) (accessed through WestLaw) (giving definition of “chilling effect”).

¹²⁵ See *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Black, J., Concurring) (explaining—seminally—chilling effect as it relates to teachers and inhibition of their “free play of the spirit”).

¹²⁶ See *Dombrowski v. Pfister*, 380 U.S. 479, 487-89 (1965) (discussing chilling violation regardless of likelihood of successful prosecution; discussing over-breadth of statute).

¹²⁷ *Id.*

¹²⁸ See *supra* Part I.

¹²⁹ Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 811-12 (1969).

¹³⁰ See PEN *supra*, note 4 at 5; See generally MARTHEWS & TUCKER, *Supra* note 79.

violation.¹³¹ It is not fear of prosecution under some law that is deterring individuals from expressing free speech and expression, but rather, it is knowledge of a policy already being instituted on a broad scale that is deterring free speech and expression.¹³²

In 1998 and 1999, a list of words related to the so-called “Echelon” program was passed around the Internet.¹³³ The Echelon program picks up keywords typed in emails and Internet searches.¹³⁴ Included in this list are words such as “Dictionary,” and “Fish,” but the list also contains words like “Assassinate” and “Anonymous,” and “Nitrate.” Most concerning, though, is that the list also includes “NSA,” “CIA,” “Counter Terrorism Security,” and “Military Intelligence.”¹³⁵ Again, though not subject to prosecution for typing in these words, the user may experience—or believe she will experience—significant negative repercussions for engaging in this activity. If the public is to avoid negative government treatment, then they are required to remain willfully ignorant about the laws and the governmental structure that controls their lives. There are negative repercussions if a citizen tries to find out about the government and the world around them. Therefore the public is chilled from learning about and speaking on these issues.

There is a divisive, yet very present history in the courts on the chilling effect that certain government actions may have on the public.¹³⁶ Some courts in the past held that chilling cannot exist, because the only injury a government can cause to potential litigants is the “consequence of their violation of a valid state law.”¹³⁷

¹³¹ PEN *supra*, note 4 at 5-6.

¹³² PEN *supra*, note 4 at 5-6.

¹³³ Dylan Love, *These are Supposedly the Words that Make the NSA Think You're a Terrorist*, BUS. INSIDER, (Jun. 13, 2013 5:42 pm), <http://www.businessinsider.com/nsa-prism-keywords-for-domestic-spying-2013-6#comments>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Compare *Dombrowski*, 380 U.S. at 487-89 (finding constitutional violation from deterrent effect of overbroad law), with *Douglas v. City of Jeannette*, 319 U.S. 157, 165 (1943) (finding no injury to plaintiff except that which comes from prosecution i.e. no harm to plaintiff without targeted government action against plaintiff).

¹³⁷ *Douglas*, 319 U.S. at 165.

B. Vagueness and Overbreadth.

While U.S. surveillance is certainly “vague,” in that the laws are either confidential or marred in ambiguities, and while it is certainly “overbroad,” in that it essentially affects 300 million Americans, this was almost certainly not what the courts were contemplating when imposing this as a standard for considering chilling. Rather, when contemplating chilling, the court wants to know if individuals will unintentionally break the law while performing activity thought to be licit.¹³⁸ Because of this, traditional chilling analysis is not a perfect application.

In this instance, it is not that people are unaware of what will constitute a violation of *law*, so go to great lengths to avoid breaking the law; it is that they are unaware of what constitutes enough of an action to be considered a higher priority for terrorist activity. The average citizen does not know exactly what she has to do to go from merely being caught in dragnet surveillance to activating the “certain triggers” that mark her as a target for surveillance.¹³⁹ However, because the surveillance system in place is considered by the public to be so broad and indiscriminate in what is collected, the deterrence still stands.¹⁴⁰ Individuals are chilled regardless of the reason.

The U.S. government is extremely powerful; to say that the only way an individual’s actions may be chilled is through fear of prosecution mischaracterizes the world we live in. Part of the reason this is chilling even though the chilled activity—simply researching trigger topics—will not lead to prosecution, is because the problem can be less easily remedied, and therefore, more longstanding than prosecution. Whereas a criminal prosecution may be an

¹³⁸ *Dombrowski*, 380 U.S. at 487-89.

¹³⁹ MacAskill et al., *supra* note 69 (referencing “certain triggers” as the nature of minimization tactics used to efficiently monitor dragnet internet data); *See generally* Gao, *supra* note 99 (showing American’s lack of understanding of counter-terrorism by outlining the incompatible duality of American thought on national security and surveillance: wanting to limit surveillance and privacy, but wanting the government to find and monitor suspected terrorists as well).

¹⁴⁰ *See supra* Part I.

opportunity to exonerate an innocent individual in public view, there is no such remedy for government surveillance.

C. Procedural Shortcomings of U.S. Counter-Terrorism.

The chilling effect exists when someone who considers their actions to be moral abstains from participating in those actions for fear of violating an unclear law. Someone who truly believes that her actions should not break the law may nonetheless avoid the conduct for fear of how the government will rule. However, someone who believes strongly enough about their position is likely to feel as though they will win a case on the matter. The deterrent factor of the law is diminished in this capacity.

In the case of US surveillance, this does not exist. Because the policies are so vague, people don't know what the law is. Because the bureaucracy is so slow and rigid, it is much more difficult to reverse the effects of a so-called "false positive," in the system. As seen in mistakes made regarding no-fly lists, U.S. counter-terrorism policies often provide no outlet for release when a mistake is made.¹⁴¹ Further, the very nature of U.S. surveillance—both its secrecy and its sweeping process—discourages the removal of any given target from suspicion.

The program probably does work as it is supposed to, keeping those who should not be a high priority target from becoming one, and focusing on those who are more dangerous.¹⁴² Because of this, there is not much incentive to take efforts to remedy the slight burden on the individual. While at an individual level, there may often not be enough of an incentive to remedy monitoring, because it is slight and difficult to notice, when taken in the aggregate, these harms

¹⁴¹ Williams, *supra* note 72.

¹⁴² Ronald Kessler, *Surveillance: A Success Story*, POLITICO, (Aug. 23, 2013), <http://www.politico.com/story/2013/08/surveillance-an-american-success-story-095828> (stating that by 2013, US Surveillance had uncovered 54 terrorist plots by using "surveillance and internet interception programs").

multiply, and become much more insidious. People are nonetheless chilled, but the injury is so slight as to not incentivize many individuals to defend themselves against the infringement.

Though traditional chilling analysis is not a perfect fit, chilling is very clearly occurring. A novel way of eliciting constitutional violations should not make such violations constitutional. It has been shown that the public has censored its lawful discourse because it is concerned with government activity.

VII. Conclusion

President Obama has spoken on the balance between the state of U.S. surveillance and our constitutional right to privacy, saying: "I think it's important to recognize that you can't have a hundred percent security and also then have a hundred percent privacy and zero inconvenience. You know, we're going to have to make some choices as a society."¹⁴³ While I do not disagree with Mr. Obama that we as a society need to make some choices as to what ideals we value, I believe we have made the wrong choices. Benjamin Franklin said these famous words: "Those who give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."¹⁴⁴ While there is disagreement about the Founding Father's actual meaning when he wrote this and his overall opinions on the importance of national security, I believe the point stands:¹⁴⁵ Short-term satisfaction is not worth long-term loss. By allowing government surveillance to "inconvenience" us and dissuade active dialogue and research, we may gain the "temporary [s]afety" of freedom from concerns of an attack, but we lose the "essential [l]iberty" of unencumbered, information-driven political discourse. This is to be avoided at all costs. An ignorant public is a stunted public; a public that cannot understand the nature of the world it

¹⁴³ *Transcript: Obama's Remarks on NSA Controversy*, WALL STREET J. (June 7, 2013).

¹⁴⁴ *Ben Franklin's Famous 'Liberty, Safety' Quote Lost Its Context In 21st Century*, NAT'L PUB. RADIO (Mar. 3, 2015).

¹⁴⁵ *Id.*

occupies; a public that loses the ability to grasp the reins of politics and drive its future. A democracy has no place engaging in activity that even remotely inhibits the public's desire to use any and all means necessary to better educate themselves on the state of the world.

**SUBMINIMUM IS NOT THE SOLUTION:
PEOPLE WITH DISABILITIES DESERVE A BETTER ANSWER TO THE
UNEMPLOYMENT PROBLEM**

Alyssa Galea

ABSTRACT

In many countries, people with disabilities as a group face greater challenges with unemployment and economic instability than people who do not have disabilities. This is particularly true with regards to income. The United States, Canada, and Israel are three examples of countries that have laws that allow employers to pay workers with disabilities a lower wage than the national hourly minimum. The recent “Fight for 15” protests in the United States are an example of how many people who make the national minimum wage find that it is inadequate for their daily living expenses, which leaves them dependent on welfare benefits. Several city and state governments have had a sympathetic response to the fast food workers and have proposed incremental increases in their pay. However, people with disabilities face a greater challenge in lobbying for increased wages. For them, the lower wage requirements are often the bargaining chip that enabled them to obtain employment in the first place. Since employers in many cases have been hesitant to hire those who have “decreased productive capacity,” the sub-minimum wage laws were designed to make it easier for workers with disabilities to get jobs. This has led to a situation in which some people with disabilities actually support laws that relegate them to minimal salaries because they fear that the alternative is total unemployment, which is illustrated by the controversy over the phasing out of sheltered workshops in the United States. This paper seeks to examine the subminimum wage laws for workers with disabilities in the United States, Canada, and Israel, and the effects such laws have on workers with disabilities. Additionally, this paper will explore the support for and opposition to these laws and make some recommendations for improving the prospects of workers with disabilities in a way that recognizes their economic rights.

I. INTRODUCTION

During the summer of 2015, a group of fast food workers forced many Americans to think about the minimum wage. Federal minimum wage currently stands at \$7.25 per hour.¹ In the so-called “Fight for 15,” workers in the fast food industry have started to lobby their governments to increase guarantee wages of \$15 per hour.² The workers have argued that the current minimum wage is just too low for them to keep up with the increasing costs of living and to afford to support their basic needs like rent and food. As a result, these workers are forced to rely on food stamps and other welfare benefits to make ends meet. They argue that this effectively forces taxpayers to subsidize their salaries.³

Lawmakers have heard the concerns of fast food workers and they seem to be listening. Plans to incrementally increase minimum wages for employees of fast food franchises have been adopted in New York State, Tacoma and Seattle, Washington, and San Francisco and Los Angeles, California.⁴ Similar increases are also up for vote in Massachusetts and Washington, D.C.⁵

The United States is not the only country to recognize that wages for unskilled workers are not keeping up with rising costs. In 2014, Israel increased its minimum wage.⁶ The government praised this move as allowing more working class families to lead dignified lives.⁷

¹ Steven Greenhouse, *The Rapid Success of Fight for \$15: 'This is a Trend that Cannot be Stopped,'* THE GUARDIAN (Jul. 24, 2015, 8:54 EDT), <http://www.theguardian.com/us-news/2015/jul/24/rapid-success-15-dollars-minimum-wage-new-york>.

² *Id.*; Patrick McGeehan, *New York Plans \$15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES (Jul. 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html?_r=1.

³ Greenhouse, *supra* note 1; McGeehan, *supra* note 2.

⁴ Greenhouse, *supra* note 1; McGeehan, *supra* note 2.

⁵ Greenhouse, *supra* note 1; McGeehan, *supra* note 2.

⁶ *Histadrut Sign Agreement Raising The Minimum Wage In Israel*, PUB. SERV. INT’L (Jan. 15, 2015), <http://www.world-psi.org/en/histadrut-sign-agreement-raising-minimum-wage-israel>.

⁷ *Id.*

Several Canadian provinces address this problem by allowing the minimum wage to increase annually according to the Consumer Price Index.⁸

These examples show how unskilled workers have been able to gain political attention for their economic struggles. They have been able to convince their legislatures about the importance of a living wage and solutions are being examined. However, these recent successes are quite limited in scope. This is clear in the United States, where most wage increases are currently only focused on fast food workers. However, it would be fair to say that the increases in all three nations are limited because they exclude an entire group of workers: those with disabilities.

This paper will examine the subminimum wage laws in the United States, Canada, and Israel and their pros, cons, and consequences to make the argument that such laws should be abolished. Section II will provide an overview of the subminimum wage laws that are in place in each of the three countries. In Section III, I will examine the reasons that people with disabilities and others have provided in support of subminimum wage laws. Section IV will discuss the employment and economic challenges that individuals with disabilities face. In Section V, I will discuss the problems with subminimum wage laws. Section VI will provide an overview of the protections that currently exist for workers with disabilities in each of the three countries. Finally, in Section VII I will offer some suggestions for improving the employment opportunities for individuals with disabilities.

⁸ *Current and Forthcoming Minimum Hourly Wage Rates For Experienced Adult Workers in Canada*, GOV'T OF CAN. (Jan. 27, 2015), <http://srv116.services.gc.ca/dimt-wid/sm-mw/rpt1.aspx?lang=eng>.

II. THE LAWS

The United States, Canada, and Israel are three examples of countries that have subminimum wage laws in place. Under these laws, some employers may be legally exempt from paying workers with disabilities the same minimum wage they are required to pay workers who do not have disabilities. In the United States, many states operate sheltered workshops where people with disabilities work separately from other workers for usually much less pay. In Israel, the law allows for employers to obtain waivers to pay workers with disabilities less than the minimum wage. In Canada, three provinces have some type of subminimum wage law on the books.

A. United States

The concept of a subminimum wage for workers with disabilities is nothing new in the United States. It was originally introduced in the National Industrial Recovery Act of 1933 (“NIRA”), a short-lived piece of legislation that was part of President Roosevelt’s New Deal.⁹ The Supreme Court overturned the NIRA, as it did with many other New Deal-era laws.¹⁰ However, the practice of paying a subminimum wage to workers with disabilities was included in the Fair Labor Standards Act (“FLSA”), passed in 1938.¹¹ The initial idea was to incentivize employers to hire veterans who had become disabled in the war.¹² After nearly eight decades, the subminimum wage has been extended, most often in the form of sheltered workshop employees, to over 400,000 American workers with disabilities.¹³

⁹ Laura C. Hoffman, *Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment*, 17 PUB. INT. L. REP. 14, 15 (2011).

¹⁰ *Id.*

¹¹ *Id.*; Melia Preedy, Note, *Subminimum or Subpar? A Note in Favor of Repealing The Fair Labor Standards Act’s Subminimum Wage Program*, 37 SEATTLE U.L. REV. 1097, 1106 (2014).

¹² Preedy, *supra* note 11, at 16.

¹³ U.S. GEN. ACCT. OFF., GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 18 (2001) [hereinafter GAO].

Section 14(c) of the FLSA allows employers who have received a certificate from the US Department of Labor Wage and Hour Division to individuals with disabilities hourly wages that are less than the federal minimum wage.¹⁴ The Secretary of Labor has the power to grant these certificates to employers “to the extent necessary to prevent curtailment of opportunities for employment.”¹⁵ Essentially, the law allows employers to pay workers at a lower rate when the workers would otherwise not be considered for employment because they have a disability that affects their so-called productive capacity.¹⁶ Such disabilities might include blindness, mental illness, intellectual disability, cerebral palsy, alcoholism, and drug addiction.¹⁷ To establish how much the worker with the disability will be paid, the employer must determine the quantity and quality of work that an employee without a disability can perform in a given time, and then evaluate the quantity and quality of work that the employee with a disability can produce in that same time.¹⁸ The percentage of work that the employee with a disability is able to do is used to determine the rate they will be paid commensurate with their productivity.¹⁹

Section 14(c) further requires that employers paying a subminimum wage review the performance of their employees with disabilities every six months and adjust their pay rate accordingly.²⁰ The wages of an employee with a disability must also be adjusted annually to reflect the changes in pay that experienced workers who do not have disabilities receive.²¹

¹⁴ U.S. DEP’T OF LAB.: WAGE AND HOUR DIV., FACT SHEET #39: THE EMPLOYMENT OF WORKERS WITH DISABILITIES AT SUBMINIMUM WAGES, 1 (2008) [hereinafter FACT SHEET].

¹⁵ 29 U.S.C. § 214(c) (2015).

¹⁶ FACT SHEET, *supra* note 14.

¹⁷ *Id.*

¹⁸ FACT SHEET, *supra* note 14.

¹⁹ *See Id.*

²⁰ FACT SHEET, *supra* note 14.

²¹ *Id.*

About 84% of American employers who pay subminimum wages to employees with disabilities are sheltered workshops.²² Currently, the federal government is pressuring states to phase out sheltered workshops as a result of the Supreme Court's ruling in *Olmstead v. L.C.*, which held that individuals with disabilities should be integrated into the community as much as possible.²³ The controversy over sheltered workshops will be addressed in more detail in sections III and V below. For now, though, it is important to note that the demise of sheltered workshops does not mean that all workers with disabilities will be guaranteed a minimum wage because FLSA Section 14(c) applies to other employers as well.

B. Canada

Three Canadian provinces, Alberta, Manitoba and Saskatchewan, have laws on the books similar to FLSA Section 14(c) authorizing certain employers to pay workers with disabilities a subminimum wage.²⁴ For example, the Alberta law states:

If the Director is satisfied that a proposed employment arrangement between an employer and a prospective employee who has a disability is satisfactory for both of them in all the circumstances, the Director may issue to the employer a permit authorizing

- (a) the employer to pay the prospective employee a wage less than the minimum wage prescribed by the regulations, and
- (b) the prospective employee to receive less than the minimum wage.²⁵

The law also allows the employer or prospective employee to appeal the permit to an umpire if there is a dispute.²⁶ Unlike the FLSA, the Canadian laws do not delineate the types of disabilities

²² Preedy, *supra* note 11, at 1106.

²³ 527 U.S. 581 (1999); David Sommerstein, *Advocates Fight To Keep Sheltered Workshops For Workers With Disabilities*, NPR (Apr. 14, 2015), <http://www.npr.org/2015/04/14/395287097/advocates-fight-to-keep-sheltered-workshops-for-disabled-workers>. (note that the Supreme Court case that Sommerstein mentions is *Olmstead v. L.C. ex. Rel. Zimring*, 527 U.S. 581 (1999), commonly referred to as the *Olmstead* case).

²⁴ Gwen Suprovich, *The Minimum Wage in Canada*, CANADIAN LAB. CONG. (Apr. 2015), [http://canadianlabour.ca/sites/default/files/media/minwagecanada-2015-04-13%20\(1\).pdf](http://canadianlabour.ca/sites/default/files/media/minwagecanada-2015-04-13%20(1).pdf); *Minimum Wage Database Introduction*, GOV'T OF CAN. (Jan. 27, 2015), <http://srv116.services.gc.ca/dimt-wid/sm-mw/intro.aspx?lang=eng> [hereinafter *Can. Database*].

²⁵ Employment Standards Code, R.S.A. 2000, c E-9.

²⁶ *Id.*

that workers may have to be included in the subminimum wage provision. The laws also do not mandate periodic review of the wages paid to employees with disabilities under the permits.²⁷

Quebec also has a law that excludes workers who are participating in vocational integration programs from the general minimum wage requirement, similar to the way American workers in sheltered workshops are paid below minimum wage.²⁸

C. Israel

Unlike the United States and Canada, Israel's law concerning minimum wage for individuals with disabilities is fairly new. It was implemented in 2006.²⁹ The regulations state that a person with a disability's pay is to be determined by their work ability.³⁰ Similar to the laws in the United States and Canada, the law was intended to incentivize the hiring of employees with disabilities.³¹ The law allows employers to pay an adjusted (read: lower) minimum wage to workers who, because of their disabilities, have a lower rate of production than individuals without disabilities.³² The subminimum wage is used most often in employment settings that involve manufacturing or other repetitive tasks.³³ The disabled person may only receive one-half or one-third of the national minimum wage.³⁴

III. SUPPORT FROM PEOPLE WITH DISABILITIES FOR SUB-MINIMUM WAGE LAWS

Despite the many criticisms of subminimum wage laws, there are many people, including people with disabilities, who support the current system. People with disabilities and their allies

²⁷ Employment Standards Code, R.S.A. 2000, c E-9.

²⁸ Can. Database, *supra* note 24; Hoffman, *supra* note 9.

²⁹ Ruth Siani, *Bosses Allowed to Pay Disabled People Less Than Minimum Wage*, HAARETZ (Oct. 31, 2006), <http://www.haaretz.com/news/bosses-allowed-to-pay-disabled-people-less-than-minimum-wage-1.203818>.

³⁰ *Id.*

³¹ Michal Soffer et al., *Sub Minimum Wage for Persons with Severe Disabilities: Comparative Perspectives*, 13 J. COMP. POL'Y ANALYSIS: RES. & PRAC. 265, 267 (2011).

³² Soffer, *supra* note 31.

³³ *Id.*

³⁴ Siani, *supra* note 29.

have spoken out in support for the ability to work in sheltered environments and to earn some income for the work that they do. These perspectives are helpful in considering the pros and cons of having such laws in place.

Not everyone in the United States is pleased with the post-*Olmstead* push to phase out sheltered workshops. Some individuals with disabilities and advocates believe that sheltered workshops offer a supportive and stable environment that employees with disabilities would not be able to find elsewhere.³⁵ This was the position taken by several workers at an upstate New York workshop, who told National Public Radio reporters that they enjoyed their jobs. In the workshops, most workers complete simple, repetitive tasks such as hole-punching or assembling different items, and are paid according to how many of the tasks they complete.³⁶ Some workers reported that they did not feel ready to hold positions in integrated work settings. Among the concerns the workers cited were being made fun of by people without disabilities, being yelled at, not being trusted by bosses and customers, losing their jobs, and being punished for mistakes.³⁷ Some parents of sheltered workshop employees also oppose closing them for similar reasons. They fear that employers are not ready to accommodate workers with more serious disabilities.³⁸ Their concern is that a combination of negative attitudes and difficulty obtaining support services, like transportation assistance and job coaching, will lead to a decrease in employment opportunities for people with disabilities.³⁹ Other supporters argue that individuals with disabilities should have the ability to decide whether or not to take a job that offers a lower

³⁵ Sommerstein, *supra* note 23.

³⁶ *Id.*

³⁷ Sommerstein, *supra* note 23; see also Cara Matthews, *Sheltered workshops for disabled to be phased out*, USA TODAY (Jul. 28, 2014), <http://www.usatoday.com/story/news/nation/2014/07/28/sheltered-workshops-disabled-phased-out/13302139/>.

³⁸ Matthews, *supra* note 37.

³⁹ Sommerstein, *supra* note 23.

pay rate.⁴⁰ Organizations that serve individuals with disabilities worry about the scope of the policy reforms that eliminating the subminimum wage would entail and, like some of the workers and parents, believe that a low-paying job is better than no job at all.⁴¹

Sheltered workshops aside, there are proponents of the American subminimum wage law who believe that it provides valuable assistance for people with disabilities. Several well-known organizations hire workers with disabilities for subminimum wages in non-sheltered environments, including Goodwill, Easter Seals, United Cerebral Palsy, and the Arc.⁴² These types of employers have argued that having a subminimum wage law allows individuals who would otherwise not get hired an opportunity to participate in the workforce and earn money, even though their wages might be less than two dollars an hour.⁴³ Such proponents have also pointed out that the oversight measures built into section 14(c) of the FLSA protect workers with disabilities by ensuring that their employers are reviewing and updating their pay to ensure that their wages are commensurate with their earning capacity.⁴⁴ They believe that workers are also protected by the provision in the law that allows workers, or their guardians when applicable, to petition for reconsideration of their wage rate.⁴⁵ Lastly, as with sheltered workshops, there is the argument that individuals with disabilities should be free to choose to work for employers who pay them a subminimum wage if that is what they wish to do.⁴⁶

Similarly, in Israel, not all organizations for the disabled were opposed to the subminimum wage law. While their position later changed in response to fears about abuse of legal loopholes, Bizchut (the Israel Human Rights Center for People With Disabilities) and other

⁴⁰ Matthews, *supra* note 37.

⁴¹ Hoffman, *supra* note 9, at 17.

⁴² Preedy, *supra* note 11, at 1113.

⁴³ *Id.* at 1114.

⁴⁴ Preedy, *supra* note 11, at 1116-17.

⁴⁵ *Id.* at 1117.

⁴⁶ *Id.* at 1115.

supporters of people with disabilities initially supported the sub-minimum wage law in Israel. They believed that the law would increase employment for workers with disabilities by offering an incentive to employers who would otherwise be reluctant to hire them.⁴⁷ Conversely, in Canada there has not been a lot of support for subminimum wage laws and individuals have spoken out against them.⁴⁸ However, there have not been efforts to repeal these laws in the provinces in which they are in effect.⁴⁹

However, a review of the arguments for subminimum wages/sheltered work environments would be incomplete without remembering some additional factors. First, while the existence of sheltered workshops is the subject of extensive debate in its own right, it would be possible for such work environments to exist while still paying the people who work there the same minimum wage that other employees are entitled to. Second, the argument that subminimum wage laws are good because they enable people who employers would otherwise not want to hire find work cannot be entertained without also considering the fact that this may be merely a bandage on the larger problem of stereotypes and discrimination that prevent people with disabilities from obtaining higher-paying jobs.

IV. EMPLOYMENT AND ECONOMIC CHALLENGES FACED BY PEOPLE WITH DISABILITIES

While subminimum wage laws have both supporters and opponents, one area not up for debate is the actual status of employment for people with disabilities. Empirical data from all three countries shows that when it comes to finding a job and earning a livable salary, people

⁴⁷ Siani, *supra* note 29.

⁴⁸ Todd Humber, *Workers With Disabilities Not Worth Less*, CANADIAN HR REPORTER (Aug. 29, 2011), <http://www.hrreporter.com/blog/editor/archive/2011/08/29/workers-with-disabilities-not-worth-less>; Ravi Malhotra, *Manitoba Law Discriminatory*, WINNIPEG FREE PRESS (Aug. 24, 2011), <http://www.winnipegfreepress.com/opinion/analysis/manitoba-law-discriminatory-128301633.html>.

⁴⁹ See Malhotra, *supra* note 48.

with disabilities still lag far behind their non-disabled peers. The statistics available from the three countries illustrate the employment rates and average salaries for the entire population of people with disabilities within the country, not just those who are paid a subminimum wage. People with disabilities are a diverse population whose members vastly differ in terms of their skill sets, levels of education, and career ambitions. The subminimum wage laws are not meant to apply to the entire population of individuals with disabilities in any of these countries, as there are workers with disabilities who are recognized to be capable of performing higher-paying jobs. However, these statistics are helpful in showing that unemployment and low salaries are problematic across the board for people with disabilities. Subminimum wage laws do nothing to help increase employment opportunities for people who are too overqualified to be considered for them. The laws may even make it more difficult for people who would be able to perform more demanding jobs to find employment because of the stereotypes and stigmas they enforce, an issue which is discussed in more detail in Section V.

It is important when evaluating the wisdom of any policy to be cognizant of which groups are benefitted and which groups are burdened. One lesson from the Fight for 15 that applies here is who the real beneficiaries of low wages are. It is true that not having to pay the full minimum wage to a worker with a disability saves their employer money. However, when wages are so low that a worker is not able to make ends meet on their salary alone, it is taxpayer-funded welfare programs that make up the gap.

A. United States

In the United States, data from the Bureau of Labor Statistics show that people with disabilities are more likely to be unemployed, have lower salaries, and to be out of the workforce

than people without disabilities.⁵⁰ Only 17.1% of people with disabilities were employed in 2014, compared to 64.6% of people without disabilities.⁵¹ The employment-population ratio for people with disabilities decreased between 2013 and 2014, while the ratio for people without disabilities increased.⁵² People with disabilities were less likely to be employed than people without disabilities within every educational attainment level.⁵³ People with disabilities were more likely to work part-time (33%) than people without disabilities (18%).⁵⁴ People with disabilities were also more likely to be self-employed and less likely to work in management and professional occupations than people with no disability.⁵⁵ About 80% of people with disabilities were out of the labor force, while only 30% of people without disabilities were out of the labor force.⁵⁶

Data from the last census revealed that people with disabilities had a median income of \$17,000, and people without disabilities had a median income of \$28,000.⁵⁷ More than half of the workers with disabilities who are paid a subminimum wage are paid \$2.50 an hour or less.⁵⁸ Available United States Department of Agriculture reports from 2013 reveal that adults with disabilities are commonly recipients of benefits from social welfare programs.⁵⁹ Households with non-elderly disabled adults constituted 20% of all households that received benefits from the

⁵⁰ *Persons With A Disability: Labor Force Characteristics 2014*, BUREAU OF LAB. STAT. U.S. DEP'T OF LAB. (Jun. 16, 2015), <http://www.bls.gov/news.release/pdf/disabl.pdf> (last visited May 2016) [Hereinafter LABOR STATISTICS].

⁵¹ LABOR STATISTICS, *supra* note 50, at 4.

⁵² *See Id.* at 2.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ LABOR STATISTICS, *supra* note 50.

⁵⁶ *Id.*

⁵⁷ *Disability & Socioeconomic Status*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/ses/resources/publications/factsheet-disability.aspx> (last visited Nov. 21, 2015).

⁵⁸ GAO, *supra* note 13.

⁵⁹ KELSEY FARSON GRAY, U.S. DEP'T AGRIC., CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2013, at 20 (2014).

Supplemental Nutrition Assistance Program (“SNAP”).⁶⁰ Across such households, 69% received Supplemental Security Income (“SSI”) and nearly 51% received income from Social Security.⁶¹

B. Canada

It is also true in Canada that people with disabilities are less likely to be employed than people without disabilities. As of 2011, 49% of working-age (25 to 64) Canadians with disabilities were employed, whereas 79% of Canadians without disabilities were employed.⁶² Surveyors found that the more severe a person’s disability was, the less likely they were to be employed.⁶³ The difference between employment rates for people with and without disabilities decreased when the individual had a university degree, although individuals with disabilities are less likely to finish high school and attend a university than individuals without disabilities.⁶⁴ In 2010, the self-reported median total income of 15- to 64-year-olds with disabilities was \$20,420, compared with \$31,160 for those without disabilities.⁶⁵

While these statistics reflect the employment ratios in Canada as a whole, data also shows that in every Canadian province, people with disabilities are less likely to be employed than people without disabilities.⁶⁶ Survey data is available from 2006 that differentiates employment rates by province for people with and without disabilities. Looking at how the three provinces with subminimum wage laws compared to the other provinces, Alberta had the smallest gap

⁶⁰ GRAY, *supra* note 59, at 20.

⁶¹ *Id.*

⁶² *Study: Persons with Disabilities and Employment*, STAT. CAN. (Dec. 3, 2014), <http://www.statcan.gc.ca/daily-quotidien/141203/dq141203a-eng.htm> [Hereinafter *Disabilities and Employment*].

⁶³ *Disabilities and Employment*, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *A Profile of Persons With Disabilities Among Canadians Aged 15 Years Or Older: 2012*, STAT. CAN. (Mar. 3, 2013), <http://www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm#a5>.

⁶⁶ *Unemployment Rate By Province, Territory And Disability Status- Canada- 2006*, STAT. CAN. (Jul. 24, 2008), <http://www.statcan.gc.ca/pub/89-628-x/2008007/c-g/5201141-eng.htm>.

between the percentages of people with and without disabilities who were employed, but Manitoba and Saskatchewan were in the middle of the list.⁶⁷

C. Israel

People with disabilities in Israel are also more likely to be unemployed and make less money than workers without disabilities. Only 50% of working age people with disabilities are employed, compared to 72% of people without disabilities.⁶⁸ 22% of working age people with disabilities are interested in working but are not employed. There are more than 200,000 people in this category.⁶⁹ Only 5.4% of employers reported that they employ people with disabilities.⁷⁰

The average income for people with disabilities is roughly 1,400 Israeli New Sheqel lower than the average income of people without disabilities.⁷¹ When surveyed, 61% of people with disabilities reported that they were unhappy with their financial situation, and 54% reported that they were not able to cover their monthly household expenses. In comparison, 41% of people without disabilities reported that they were unhappy with their financial situation and 36% reported that they were unable to cover their monthly household expenses.⁷² Israelis with disabilities have also protested that the amount that they receive in disability benefits has not kept up with the inflated cost of living, and that their benefits are not equivalent to the state's minimum wage.⁷³

⁶⁷ STAT. CAN., *supra* note 66.

⁶⁸ LITAL BARLEV-KOTLER & DORI RIVKIN, MYERS-JDC BROOKDALE INSTITUTE, AVITAL SANDLER-LOEFF, ISRAEL UNLIMITED, JDC ISRAEL, PEOPLE WITH DISABILITIES IN ISRAEL: FACTS & FIGURES 11 (2014) [hereinafter FACTS & FIGURES].

⁶⁹ FACTS & FIGURES, *supra* note 68.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Disabled Protest for Minimum Wage-level Benefits*, HAARETZ SERVICE (Oct. 25, 2010), <http://www.haaretz.com/israel-news/disabled-protest-for-minimum-wage-level-benefits-1.321089>.

V. PROBLEMS WITH SUB-MINIMUM WAGE LAWS

The previous section detailed some of the obvious problems with subminimum wage laws for workers with disabilities. The laws have not been able to close the large gap in employment rates between workers who have disabilities and those who do not, and leave many workers with disabilities making small salaries and dependent on welfare programs to fill in the gap. However, the salary and unemployment rate discrepancies are not the only problems associated with subminimum wage laws. The laws reflect attitudes and instances of discrimination and stigma against workers with disabilities that can make it difficult for them to find employment. Regardless of what may have been good intentions in enacting the subminimum wage laws, in today's society they contradict the rights to equal opportunities and the right to make a living that are guaranteed by international treaties. They also go against national laws, such as the ADA, that are designed to eliminate discrimination by focusing on abilities and guaranteeing accommodations to enable workers with disabilities to have equal access to their workplaces.

On an international level, the United Nations has taken the stance that people with disabilities all over the world have the right to be free from workplace discrimination and to be able to earn a living. In 1948, the General Assembly drafted the Universal Declaration of Human Rights ("Declaration") and established that being able to work is a right that is guaranteed to everyone.⁷⁴ The Declaration states, in pertinent part,

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.

⁷⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/RES/217 (Dec. 10, 1948) [hereinafter Universal Declaration].

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.⁷⁵

The Declaration is thus an important part of the subminimum wage discussion because it talks about the right of *everyone* to freely choose a job, to be protected from discrimination, and to earn enough to lead a dignified life. These principles, as applied to individuals with disabilities, were strengthened by the Convention on the Rights of Persons with Disabilities (“CRPD”) in 2006.⁷⁶ In its preamble, the CRPD explains that, despite previous efforts to protect the rights of people with disabilities and eliminate discrimination, “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,” so the UN came together to reaffirm and protect those rights.⁷⁷ Like the Declaration, the CRPD affirms the right to work, stating:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances...⁷⁸

⁷⁵ Universal Declaration, *supra* note 74, art. 23.

⁷⁶ See *Generally* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. [hereinafter CRPD] (Canada and Israel have ratified the CRPD, but the United States has not).

⁷⁷ *Id.*

⁷⁸ *Id.* art. 27.

The article goes on to discuss the right of persons with disabilities to be provided with reasonable accommodations in the workplace and to have effective access to training programs and placement services.⁷⁹

Both the Declaration and the CRPD stand for the right of people with disabilities to have jobs and to be treated with the same respect and dignity as people who do not have disabilities. Subminimum wage laws seem blatantly contradictory to this position because they do not treat individuals with disabilities as equals. As the spokesman for a disability organization in Israel explained, "[The subminimum wage law is] saying we're worth less than other people... There are also people without disabilities whose productivity is low yet nobody suggests reducing their minimum wage."⁸⁰ In America, for example, the vast majority of employees are implicitly told by the government that, no matter what their skill at their position, they are entitled to earn a minimum of \$7.25 an hour.⁸¹ However, individuals with disabilities who work for employers paying subminimum wages must first prove their productive value. In addition, workers in settings like sheltered workshops are often not considered to be employees in the traditional sense. This lack of status leads to a lack of the bargaining and negotiating power that both the Declaration and CRPD present as a right of all workers.⁸²

Additionally, The Declaration and CRPD both present the idea that there is more to economic rights than ensuring people are paid wages. The Declaration speaks of favorable payment to ensure an existence of dignity and the CRPD speaks of making a living.⁸³ Both of these phrases convey the idea that people should not just receive some payment for the work they

⁷⁹ CRPD, *supra* note 76, at art. 27.

⁸⁰ Siani, *supra* note 29.

⁸¹ Greenhouse, *supra* note 1.

⁸² Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma? Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J. L. & SOC. CHANGE 151, 166 (2013).

⁸³ Universal Declaration, *supra* note 74; CRPD, *supra* note 76.

perform. Rather, they express that people deserve to be paid an amount that they can live off of an amount that will allow them to provide for their basic necessities. The Declaration mentions that people's wages should be supplemented by social programs if necessary, but this sounds very different than the idea that any working person should be dependent on social service programs to survive in the way that people with disabilities making a subminimum wage are.⁸⁴ The latter entails a responsibility to pay employees an amount that is intended to be a living wage with social supports available as a safety net, while the former expects social service programs to subsidize low wages. Both the Declaration and CRPD go against the subminimum wage justification that at least employees are able to make some money. Rather, they suggest that this will not be enough until they are given a chance to make a living. There have been recent critiques in the United States, Canada, and Israel arguing that the minimum wage is not high enough for the average person to live off of without additional state assistance.⁸⁵ With this being the case, it is clear that the subminimum wage is nowhere near enough.

Additionally, both the Declaration and the CRPD discuss free choice of employment.⁸⁶ They express that people have the right to choose where to work, and that people with disabilities have the same freedom to choose as people who do not have disabilities. Some proponents of subminimum wage laws argue for freedom of choice as a reason for upholding the laws. As discussed above, they believe that individuals with disabilities should have the autonomy to choose whether or not they want to work at the kind of job that will pay them less than the minimum wage. Realistically, however, this is not much of a choice at all. In the vast majority of cases, it is safe to assume that an individual given the opportunity to do the same job

⁸⁴ Universal Declaration, *supra* note 74.

⁸⁵ Carey Nadeau & Amy Glamseier, *Minimum Wage: Can an Individual or a Family Live on It?*, MA. INST. TECH. (Jan. 16, 2016), <http://livingwage.mit.edu/articles/15-minimum-wage-can-an-individual-or-a-family-live-on-it>; Greenhouse, *supra* note 1; *Histadrut Sign Agreement Raising The Minimum Wage In Israel*, *supra* note 6.

⁸⁶ Universal Declaration, *supra* note 74; CRPD, *supra* note 76.

for \$2.00 an hour or \$10.00 an hour would choose to be paid \$10.00. The entire reasoning behind subminimum wage laws is that they are intended to give individuals who are not able to find employment a chance to work. True freedom of choice requires at least two attractive options that a person can pick between. Having to pick between being taking a job that pays a subminimum wage and having no job at all is not a real choice. Nor does it reflect any display of autonomy when people with disabilities, particularly mental and developmental disabilities, end up working in sheltered workshops because their parents or guardians feel more comfortable with that arrangement. Some proponents take comfort in the fact that, outside of sheltered workshops, people with disabilities have to ask to be paid a subminimum wage. Again, these requests would not be made unless they had to be.

An additional justification that has been offered for subminimum wage laws is that they have protections in place to ensure that employees with disabilities are treated fairly and their wages are adjusted appropriately over time. Just because this is what the law requires, though, does not mean that this is what is happening. There are indications that protecting the rights of workers with disabilities is often just not a priority. For example, in the United States, the Department of Labor found that FLSA Section 14(c) is not being properly enforced and that the department is not in a position to ensure that employees are actually receiving the wages that they are entitled to and that employers are actually reevaluating hourly rates at the times they are supposed to.⁸⁷ The report found that agencies are more concerned with enforcement of laws about child labor and other issues so that disability enforcement is not getting the attention and resources it deserves.⁸⁸

⁸⁷ GAO, *supra* note 13.

⁸⁸ *Id.*

Meanwhile, in Canada, many Canadian employers have not used the sub-minimum wage law and commentators have argued against the laws, saying that they are discriminatory and reinforce harmful stereotypes.⁸⁹ Even though there is opposition to the laws and they are not very popularly used, there have not been efforts to remove the remaining subminimum wage laws, and their associated stereotypes, from the employment codes in the provinces where they are still the law.⁹⁰ When surveyed, 11% of Canadians aged 25 to 64 reported that they were limited in their employment because of a disability.⁹¹ Many young Canadians with disabilities reported experiencing employment discrimination, with 33% who had severe or very severe disabilities saying that they had been refused a job because of their disability.⁹² Discrimination was experienced by young men with severe disabilities at a particularly high rate, with 62% of unemployed men between the ages of 25 and 34 reporting that they had been refused a job because of their disability.⁹³

Laws that presume people with disabilities are unable to contribute to society as productive workers in the same way workers without disabilities are not helping to combat harmful stereotypes. For example, Israeli researchers have found that there is still a large amount of stigma against people with disabilities in their country. Many people with disabilities reported that they wanted to be more involved in their communities, but that they did not leave their homes or have a satisfying amount of social involvement.⁹⁴ The researchers found that stigma and negative perceptions of people with disabilities led to their exclusion from different aspects of community life, such as schools and workplaces.⁹⁵ As a result of this stigma, people with

⁸⁹ Humber, *supra* note 48; Malhotra, *supra* note 48.

⁹⁰ *Id.*

⁹¹ *Disabilities and Employment*, *supra* note 61.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ FACTS & FIGURES, *supra* note 68, at 14.

⁹⁵ *Id.*

disabilities often try to hide them if they can.⁹⁶ Many people have negative perceptions of people with disabilities and are not optimistic about what they are able to achieve, with 18% of the public believing that people with disabilities are “an annoyance and danger to society.”⁹⁷ This has led to social exclusion and patterns of employment and housing discrimination, particularly when people have mental health or intellectual disabilities.⁹⁸ The notion that people with disabilities do not deserve equal rates of pay and should only work in certain types of positions does nothing to combat this way of thinking.

VI. EXISTING PROTECTIONS FOR WORKERS WITH DISABILITIES

In addition to the Declaration and CRPD, there are laws and policies in place within each of the three countries considered here that are designed to protect the rights of people with disabilities and promote their employment. As with the Declaration and CRPD, the rights and protections outlined by these laws seem rather inconsistent with subminimum wage laws. While they differ by location, one thing all the laws have in common is that they prohibit employment discrimination on the basis of disability and encourage employers to make efforts to help increase the number of individuals with disabilities in the workforce.

A. United States

In the United States, the Rehabilitation Act (“Rehab Act”) and the Americans with Disabilities Act (“ADA”) are perhaps the best-known laws that prohibit discrimination against people with disabilities in hiring and employment in both the public and private sectors. Several sections of the Rehab Act, which was enacted in 1973, prohibit employers from discriminating against employees with disabilities. Section 501 prohibits federal employers from discriminating

⁹⁶ FACTS & FIGURES, *supra* note 68, at 14.

⁹⁷ *Id.*

⁹⁸ *Id.*

against qualified individuals with disabilities.⁹⁹ This section establishes the Interagency Committee on Employees who are Individuals with Disabilities, whose job is to review the government's hiring, placement, and advancement practices for employees with disabilities and evaluate how well their needs are being met.¹⁰⁰ This section also requires every department, agency, and instrumentality within the executive branch of the government to develop an affirmative action program to promote the hiring and promotion of individuals with disabilities for positions within their purview.¹⁰¹ Similarly, Section 503 prohibits employment discrimination based on disability for any federal contractor or subcontractor with a contract or subcontract in excess of \$10,000.¹⁰² It, too, requires that each party who contracts with the federal government for an amount greater than \$10,000 utilize affirmative action practices to promote the employment and advancement in employment of qualified individuals with disabilities.¹⁰³ More broadly, Section 504 prohibits discrimination against qualified individuals with disabilities by federal agencies or by any programs or activities that receive federal financial assistance or are conducted by federal agencies.¹⁰⁴ Additionally, the Rehab Act authorizes funding for other programs, such as state vocational rehabilitation programs and job training, which assist employees with disabilities.¹⁰⁵

Whereas the Rehab Act is concerned with public sector employment, the ADA, which was passed in 1990, prohibits employment discrimination based on disability in the private sector. The ADA prohibits employment discrimination against any qualified individual, which is defined as a person who can perform the essential functions of a position with or without the use

⁹⁹ 29 U.S.C. § 791 (2016).

¹⁰⁰ 29 U.S.C. § 791 (2016).

¹⁰¹ *Id.*

¹⁰² 29 U.S.C. § 793 (2016).

¹⁰³ *Id.*

¹⁰⁴ 29 U.S.C. § 794 (2016).

¹⁰⁵ *Employment Laws: Disability & Discrimination*, U.S. DEPT. OF LABOR, <http://www.dol.gov/odep/pubs/fact/laws.htm> (last accessed Feb. 19, 2016).

of reasonable accommodations.¹⁰⁶ Discrimination against a qualified individual with a disability includes treatment such as limiting, segregating, or classifying a job applicant in an adverse way because of their disability; not making reasonable accommodations to a job applicant or employee; denying employment opportunities to otherwise qualified individuals with disabilities based on the need to make reasonable accommodations to their impairments; and using selection criteria and qualification standards that tend to screen out individuals with disabilities.¹⁰⁷

More recently, the Obama administration has taken steps to combat employment discrimination based on disability. President Obama signed the Workforce Innovation and Opportunity Act in 2014 to focus on increasing job training and competitive employment opportunities for individuals with disabilities, and has drafted a rule designed to put these goals into effect.¹⁰⁸ Among the proposed changes are no longer allowing unpaid work to be considered a vocational rehabilitation goal and requiring economic self-sufficiency to be among the criteria for establishing such goals, no longer allowing states and schools to make agreements to employ people at less than minimum wage, no longer allowing individuals with disabilities under the age of 25 to work for subminimum wage unless they have first received meaningful opportunities for competitive integrated employment, and providing career counseling to individuals with disabilities who are paid less than minimum wage.¹⁰⁹ Additionally, the rule would require increased funding to be used for helping individuals with more severe disabilities participate in supported employment.¹¹⁰

¹⁰⁶ 42 U.S.C. § 12102(8) (2016).

¹⁰⁷ 42 U.S.C. § 12112(b) (2016).

¹⁰⁸ Michelle Diamant, *Feds Take Aim At Sheltered Workshops*, DISABILITY SCOOP (Apr. 14, 2015), <https://www.disabilityscoop.com/2015/04/14/feds-aim-sheltered-workshops/20216/>.

¹⁰⁹ Diamant, *supra* note 108.

¹¹⁰ *Id.*

States also have enacted affirmative action programs to increase employment opportunities for individuals with disabilities within state government. In New York, for example, this takes the form of the 55b program.¹¹¹ Under this section of the state civil service law, the New York State Civil Service Commission is authorized to designate up to 1,200 positions normally filled through competitive examination to be filled through the appointment of qualified persons with disabilities.¹¹² These individuals must provide documentation of a medical diagnosis of disability in order to qualify for the program, but they are not required to complete written or oral civil service examinations to be appointed.¹¹³

B. Canada

In Canada, there are laws at both the national and provincial level that prohibit discrimination against individuals with disabilities. On a national level, the Canadian Human Rights Act serves to effectuate the principle that all individuals should have an equal opportunity to “make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on... disability.”¹¹⁴ The law also authorizes the Governor in Council to make regulations prescribing accessibility standards for services, facilities, and premises to benefit people with disabilities.¹¹⁵

The Canadian Charter of Rights and Freedoms likewise prohibits discrimination. It states that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

¹¹¹ *Workers with Disabilities Program (55-b)*, NY DEPT. OF CIV. SERV., <https://www.cs.ny.gov/dpm/b55.cfm> (last accessed Feb. 19, 2016).

¹¹² *Workers with Disabilities Program*, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ Canadian Human Rights Act, R.S.C. 1985, c. H-6.

¹¹⁵ *Id.*

discrimination based on... mental or physical disability.”¹¹⁶ The law goes on to say that this establishment of equality does not preclude the establishment of laws and programs that are designed to ameliorate the conditions of disadvantaged groups like people with disabilities.¹¹⁷

Manitoba, one of the provinces with a subminimum wage law, also has a law specifically designed to protect individuals with disabilities. In effect since 2013, the Accessibility for Manitobans Act (“Accessibility Act”) cites both the CRPD and the Canadian Charter of Rights and Freedoms as part of the explanation of the need for the law.¹¹⁸ The law’s purpose is to “achieve accessibility by preventing and removing barriers that disable people...”¹¹⁹ The Accessibility Act recognizes that one of the areas in which people are commonly disabled by barriers is employment.¹²⁰ It recognizes that barriers may be physical, architectural, informational, attitudinal, technological, or perpetuated by policies and practices.¹²¹ The Accessibility Act describes the role of the Accessibility Advisory Council, whose role it is to make recommendations for accessibility standards and implementation.¹²² This council must include amongst its members “persons disabled by barriers or representatives from organizations of persons disabled by barriers.”¹²³

¹¹⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11 (U.K.).

¹¹⁷ *Id.*

¹¹⁸ The Accessibility for Manitobans Act, C.C.S.M. c. A1.7 (Can.), http://www.accessibilitymb.ca/pdf/accessibility_for_manitobans_act.pdf.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ The Accessibility for Manitobans Act, C.C.S.M. c. A1.7 (Can.), http://www.accessibilitymb.ca/pdf/accessibility_for_manitobans_act.pdf.

C. Israel

While Israel has had laws in place since the 1950s establishing social welfare benefits for people with disabilities, the first law that really recognized the rights and abilities of individuals to participate as equal members of society came in 1998 with the passage of the Equal Rights for Persons with Disabilities Law (“Equal Rights Law”).¹²⁴ The Equal Rights Law defines its objective as “to protect the dignity and liberty of a person with disabilities and anchor his right to equal and active participation in society in all walks of life, as well as provide a suitable response to his special needs in such a manner as to enable him to live his life with maximum independence, in privacy and with dignity, by exploiting his fullest potential.”¹²⁵ It establishes that affirmative action is a permissible means to remedy past wrongs against individuals with disabilities and to promote their equality.¹²⁶ The Equal Rights Law contains a section on employment that is quite similar to the ADA. It prohibits employers from discriminating against any individual based on disability, provided that the individual is qualified for the position. Discrimination is prohibited in connection with hiring, the terms of employment, promotions, training, severance pay, and retirement benefits. Employers are required to make modifications to the workplace to meet the needs of employees or applicants with disabilities.¹²⁷ Additionally, the Equal Rights Law requires that in any business with more than 25 employees, there must be fair and proportional representation of people with disabilities.¹²⁸

In December 2014, Histadrut, Israel’s General Federation of Labor, signed an agreement with the Israeli government to increase employment opportunities for individuals with

¹²⁴ Arie Rimmerman et al., *Israel's Equal Rights for Persons with Disabilities Law: Current Status and Future Directions*, 25 DISABILITY STUDIES Q. (2005).

¹²⁵ The Equal Rights for People with Disabilities Law, 5758-1998, 1, (Isr.).

¹²⁶ *Id.*

¹²⁷ *Id.* at 3-4.

¹²⁸ *Id.* at 5.

disabilities.¹²⁹ The government has agreed that by 2017, a minimum of three percent of public service positions will be filled by workers with disabilities. After 2017, the government will consider increasing the minimum to five percent.¹³⁰

VII. IMPROVING EMPLOYMENT

This section will discuss potential solutions to the issue of unemployment faced by people with disabilities that do not involve wage discrimination. Even though the subminimum wage laws were passed with good intentions, it is time for the governments of the United States, Canada, and Israel to look into other ways to increase employment opportunities for people with disabilities that protect their equal economic rights. The Fight for 15 and other minimum wage increases reflect a shift in attitudes moving toward a livable wage for unskilled workers and a lessening of their dependency on social welfare programs. There is no reason why people with disabilities should be left out of this movement.

One idea for improving employment prospects for people with disabilities is fighting negative stereotypes by educating people about the capabilities of people with disabilities and how providing accommodations can enable them to succeed in many integrated employment settings. As discussed above, individuals with disabilities still have to face negative perceptions about their ability to work and subminimum wage laws reinforce the idea that having a disability makes someone unable to contribute a productive work product. Instead of this deficit-based focus, governments could work with people with disabilities to show how successful they can be and how accommodations can be utilized to empower individuals with disabilities.

Another part of the solution likely involves improving integrated educational environments for students to help them finish school and work on the skills required to prepare

¹²⁹ *Histadrut*, *supra* note 6.

¹³⁰ *Id.*

them for competitive employment. In the United States for example, the Department of Education has been more focused on ensuring that children with disabilities are educated in the least restrictive environment, meaning that they are in the same schools and classes as their peers who do not have disabilities to the maximum extent possible.¹³¹ If children with disabilities are in the same classes as their peers, they will better be able to take advantage of the planning and training for employment or post-secondary education that their peers receive. Also, schools can be encouraged to make sure that students with disabilities receive appropriate job development and life skills training.¹³² Additionally, integrated education could help combat the problem, discussed above, of workers in sheltered workshops being worried about being made fun of and misunderstood by customers and employers in integrated work settings by increasing familiarity and a sense of community between people who do and do not have disabilities. It will be easier for these groups to work together if they are already used to being educated together.

A third solution is offering more vocational training programs that do not turn into dead-end possibilities like sheltered workshops traditionally have and instead help workers develop useful skills that they can apply to future employment. It is estimated that in the United States, for example, only 5% of workers employed by sheltered workshops ever move on to employment in an integrated setting within their communities.¹³³ Clearly, subminimum wage jobs are not currently being used as skill-building stepping stones. One way to prevent these kinds of situations is to not consider segregated subminimum wage positions to be actual jobs and to stop issuing permission to employers to pay a subminimum wage. Possible replacements for this system include integrated employment models that focus on creating positions in a

¹³¹ Hoffman, *supra* note 82, at 171-72.

¹³² Preedy, *supra* note 11, at 1121.

¹³³ *Id.* at 1120.

community setting where people with and without disabilities can work alongside one another.¹³⁴ Already, several Canadian provinces have gotten rid of their subminimum wage laws.¹³⁵ The state of New Hampshire has done this as well.¹³⁶ Furthermore, sheltered workshops were banned in Vermont.¹³⁷ The state has become a leader within the United States in terms of inclusive employment for people with disabilities, showing that meaningful improvements can be made. Vermont redirected funding from workshops to individuals to allow them to utilize job training services and other employment supports.¹³⁸

Additionally, countries could work to strengthen and enforce their anti-discrimination laws. This is important because it will not be enough for countries to just get rid of their subminimum wage laws without finding ways to ensure that workers with disabilities have access to meaningful employment. As discussed in section VI, the United States, Canada, and Israel already have strong policies in place to protect workers with disabilities from employment discrimination and ensure that they are provided with reasonable accommodations. To start, the governments of these countries could take increased steps to ensure that workers know their rights and employers know their responsibilities. This might include increasing resources to aid workers who need to bring discrimination complaints against their employers and increasing the penalties for employers who are found to be repeat violators of the law. Similarly, the governments could boost efforts to incentivize employers to hire individuals with disabilities and expand affirmative action programs.

¹³⁴ Preedy, *supra* note 11, at 1120.

¹³⁵ JOHN BUTTERWORTH ET AL, INST. FOR CMTY. INCLUSION, STATE AND INTERNATIONAL EFFORTS TO REFORM OR ELIMINATE THE USE OF SUB-MINIMUM WAGE FOR PERSONS WITH DISABILITIES, at iii (2007).

¹³⁶ Michelle Diamant, *In First, State To Ban Subminimum Wage*, DISABILITY SCOOP (May 8, 2015), <https://www.disabilityscoop.com/2015/05/08/in-first-ban-subminimum/20279/>.

¹³⁷ Chris Serres, *Inclusion Pays Off*, STAR TRIBUNE (Nov. 11, 2015, 12:00 AM), <http://www.startribune.com/Vermont-took-bold-step-to-end-segregation-of-disabled-adults/330697181/>.

¹³⁸ *Id.*

Another idea to borrow from the Fight for 15 in this situation is a viable response to concerns that increasing wages will cause layoffs and fewer workers to be hired. Much like governments have agreed to do with fast-food workers, an increased minimum wage could be implemented gradually, with incremental steps required over two or three years until the target hourly wage is reached. This would give both employees and employers time to get used to the changes and figure out how to adjust their budgets accordingly.

VIII. CONCLUSION

Despite minimum wage increases for other workers and international agreements establishing that individuals with disabilities are entitled to equal rights, countries like the United States, Canada, and Israel still allow employers to pay certain workers with disabilities less than the minimum wage. This practice prevents these individuals from being able to economically support themselves, leaving them dependent on social welfare programs. Despite the existence in all three countries of laws prohibit discrimination and encourage employers to hire individuals with disabilities, subminimum wage laws treat people with disabilities differently and presume that they are undeserving of the minimum wage protections guaranteed to other workers. While it may not be realistic to expect that every individual with a disability can have a job that will allow them to support themselves financially, like everyone else they deserve the opportunity to try.

LEGACY OF THE NUREMBURG TRIALS

Katherine Mills

Robert H. Jackson once declared that “it is not the function of the government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error,” clearly placing the continuation of his work-- exposing injustice-- into the capable hands of the ordinary citizen. Jackson’s bold step in the form of the Nuremberg trials reminded the international community that the ideals of equality, justice, and fairness extend to all members of the human race, even if they commit atrocities. In this way, Jackson speaks to citizens of the international community seventy years later, reminding us to expose injustice wherever it is found, while keeping our own values of equality, justice, and fairness intact. This begins with the recognition by we as citizens that our voice is not inconsequential. Once this fundamental is attained, the second necessary ingredient in exposing injustice is becoming an upstanding citizen of the global community. In summation, we must retain equality, justice, and fairness in our labors to unveil inequity and not perpetrate further injustice.

Jackson’s prompting that “it is the function of the citizen to keep the government from falling into error” brings to light the fundamental issue “the citizen” must deal with in order to expose injustice: inadequacy. We as citizens may fall into the trap of self-doubt and marginalization of our singular power against the seemingly omnipotent perpetrators of injustice. Society reinforces our belief that we are in fact powerless. The media spews a constant stream of daily injustices in which the discouraged citizen will drown without recognition of their influential voice. In the United States, we have the loudest voice as citizens, because our government must listen to its meek and ordinary. In other corners of the world, oppressive administrations silence the meek and ordinary voices for fear of their impact; if such regimes are frightened by an apparently insignificant voice, then the power of the citizen must not be as limited as we are led to believe. In a world so loud with the noises of distraction, yet so

permeated by silence, a singular, ordinary voice can ring clearly through the clamor of distraction and density of silence. Stemming from Jackson's statement above, every citizen's duty is to exercise our voice, especially in a country that facilitates the power of the citizen. In the oppressive regions where free speech is a far off dream, citizens must still use their voices, for it is the absence of speech that creates a silence which accentuates the power of our voice. Even the lone utterance of a citizen is not inconsequential; it is necessary for the betterment of the vast international community.

If the citizen's voice is to assist the international community, then we must seek out injustice and promote upstanding behavior-- in short, transition from ordinary citizens to upstanding affiliates. Becoming such is simple in theory; one must remain informed on human rights issues and use that information to generate change and expose injustice. In practice, the task appears more difficult; societal pressures, daily lives, media restrictions, and the modern world's culture of narcissism unite to discourage upstanding behavior and the gathering of information. Unfortunately, our society places a prime importance on image and insists that upstanding behavior will hurt, rather than help, our image. Combatting this issue is relatively straightforward: we must look at the world with an objective eye, and note instances of social propaganda. The root of such instances should be taken into account, and we should note bias in it, lest it appear again. Essentially, the most effective way to combat societal pressures that bar us from becoming an upstanding member of the international community is to keep a vigilant eye, and be wary of forming an opinion based on this propaganda.

Another issue to overcome when seeking out injustice and promoting upstanding behavior is the problem of narcissism, one that permeates the modern world. Primarily, we as citizens must overcome such narcissistic tendencies—believing that because an issue does not

immediately affect us, it must not be worth our attention—within ourselves. The paramount solution is to recognize that atrocities committed against one human are committed against all humans. The issue of human rights spans political borders, ethnic and racial divisions, languages, religious differences, and more. Being *human* means that *human* rights matter.

It may seem impossible to advocate for an issue when it appears that the world is too self-absorbed to listen to others' problems. This piece is not as difficult to solve as Narcissism. Whether the voice is a singular individual or that of an organization of many people, the message was spread and will ultimately resonate with others. Those that are self-absorbed will eventually have to take notice.

These simple solutions may allow us to become advocates for change, but daily life and the ever present media can roadblock our efforts to remain informed. Daily life is generally full without adding a search for credible information on human rights issues. Fortunately, the solution is rather simple—many organizations and news feeds have options for daily emailed newsletters that offer such information in a time-sensitive way. Though it is often argued that there is not enough time in today's modern society to remain informed and up-to-date on current events, cutting out parts of one's daily routine is relatively uncomplicated and presents few challenges. Furthermore, being passionate about an issue usually leads us to make time for personal education without making a conscious effort. The excuse of a daily routine getting in the way of advocacy is therefore invalid.

An additional hindrance to advocacy is that some areas of the world restrict media, making it difficult for one to obtain reliable information. Combatting this issue is difficult to do, but it is not impossible. There are various organizations dedicated to providing reliable information, even if it may take longer to seek out such sources. Citizens should read

information from these areas objectively, keeping in mind any biases that may result in concealment of necessary information. Becoming an upstanding affiliate of the international community may appear difficult when put into practice, we can overcome major issues with simple solutions and expose injustice.

Exposing injustice is a task that forces us as citizens to face those that have committed unspeakable acts that violate the basic human rights of others; facing these perpetrators, we must remember to retain equality, justice, and fairness. Jackson certainly taught these ideals in the Nuremberg trials by prosecuting the Nazis without barring them from equality, justice, and fairness, all of which they denied the Jews. Jackson knew that this would set an example for the world about choosing the side of justice and righteousness. Despite the evil committed by these people, they were to be treated as people because regarding them as otherwise would make the prosecutors the same as the perpetrators. The problem with denying the accused their due process is that then prosecutors then lose the right to expose injustice when they are being unjust themselves.

This lesson is essential to continuing Jackson's work of exposing injustice today. As citizens continuing Jackson's work, we must remember that revealing inequity does not give one the right to be unjust. Giving perpetrators the rights of equality, justice, and fairness not only teaches them a lesson about human rights, but it teaches the world a lesson- or rather reminds it of Jackson's lesson from seventy years ago. Keeping these values in mind during all steps of the process of exposing injustice will prevent a cycle of inequity to continue. The values of equality, justice, and fairness must be retained in the citizen's efforts to expose injustice.

Robert H. Jackson reminds us to expose injustice in the international community today, but keep our own values of equality, justice, and fairness intact. Putting this task in motion

requires that we as citizens realize the importance of our voice in a relatively silent world. The next step in exposing injustice is to shift from ordinary citizens to upstanding members of the international community, to make a difference with our essential voice. To complete the process, one must remember the lesson Jackson taught the world seventy years ago with the Nuremberg trials-- everyone must be granted the rights of equality, justice, and fairness. Jackson passed on his life's work of exposing injustice to the ordinary citizen of the world, stating, "it is not the function of the government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error."

SELECT ARTICLES FROM EACH NEWS DESK

Impunity Watch Reporting Staff

AFRICA DESK

Boko Haram says They Are Willing to Negotiate the Release of the Chibok Girls

By Samantha Netzband

May 31, 2016

ABUJA, Nigeria—It has been over two years since the abduction of 219 girls from the Chibok school in Nigeria. Islamic extremist group Boko Haram is responsible for the abduction. Boko Haram has killed at least 2,600 people in Nigeria, but they are looking to make a deal with the government for the release of the girls.

Amir Muhammad Abdullahi, who is reportedly second-in-command of Boko Haram, has said that only a third of the original number of girls abducted remain captive. The Nigerian government has had success in securing the return of 11,595 people between February and April of this year.

One Chibok girl was recently released in what the government is perceiving as a sign of good faith from the members of Boko Haram. She was found in the Sambisa forest reserve with a suspected member of Boko Haram. The girl reported that only 6 of the captive girls have died, rather than the larger number claimed by Abdullahi. The girl believes that they may be located in the Sambisa forest reserve where she was found. The Sambisa forest reserve is a large forest located near the border of Cameroon.

Reports of a second Chibok girl release turned out to be false. The head of Chibok Abducted Girls Parents group said the second girl was not one of the abducted girls. The second girl is said to have been abducted from her home in Madagali. She

was returned along with 96 other citizens who had been abducted from their homes and held hostage.

Abdullahi says that no one is winning the battle that Boko Haram has waged with Nigeria.

For further information please see:

Pulse – Insurgents reportedly call for truce to release Chibok girls – 22 May 2016

International Business Times – Boko Haram willing to discuss surrender and release of Chibok girls – 21 May 2016

All Africa – Nigerian Army Confirms Rescue of Another Chibok School Girl – 20 May 2016

BBC – Boko Haram abductees freed in Nigeria – 20 May 2016

8 Dead as a Result of Stampede for Food in Zambia

By Samantha Netzband

March 13, 2017

LUSAKA, Zambia— 8 are dead after a stampede in Zambia. The stampede happened as people were trying to receive food aid in the capital city of Lusaka. A church called the Church of Christ was handing out food aid at the Olympic Development Centre to about 35,000 people when the stampede happened. Many of the people the church hoped to serve are residents of Lusaka's slums.

Police spokeswoman Esther Katongo confirmed that eight were dead. Six of the

victims were female, one male, and one male juvenile. Five died at the scene while the three other succumbed to their injuries at the hospitals that they were rushed to. After the chaos police ordered the church to halt the handouts of food, but some still stayed hoping to still get food. An official statement reads “The victims are among the 35,000 which the group called Lesedi seven, had invited for prayers at OYDC. The group had also organized food hampers to distribute to people. This Lesedi seven is a grouping under Church of Christ.”

Zambia like many other countries near the horn of Africa is experiencing an extreme drought that is crippling resources. Food prices have also risen which has made food unaffordable for many. Zambian police are inquiring into all eight deaths as well as the other twenty or so people that were

injured. Despite the chaos Inspector General Kakoma Kanganja has said he has had a hard time convincing people to go home. Many families are so desperate for the food they will risk their lives to get it.

For more information, please see:

Africa News – Zambia: 8 dead, 28 Injured in stampede for free Church food – 6 March 2017

Al Jazeera – Zambians seeking food aid killed in stampede – 6 March 2017

Stuff – 8 die in as crowd stampedes to get food handouts in Zambia – 6 March 2017

ZNBC – 8 die in stampede – 6 March 2017

ASIA DESK

Landmark Case for Transgender Man Gives LGBT Activists Hope

By Nicole Hoerold

February 2, 2017

BEIJING, China- The LGBT communities of China and Taiwan have been gaining increased attention over the past few years. Rights activists are applauding some small, yet encouraging victories, in an ongoing effort to legalize gay marriage and gain equal rights.

In December 2016, a Taiwanese legislative committee approved draft changes on a proposal to legalize same-sex marriage. The proposed amendments to Taiwan’s civil code have been sent to party caucuses for negotiation and further review. Once this process is complete, a final version of the

legislation will be voted on. Though the measure has yet to be passed, it is a major step towards gaining equal rights and protections for Taiwan’s LGBT community.

China has received similar attention for a December 2016 landmark ruling in a discriminatory dismissal case. A Chinese court held in favor of Mr. Chen, a transgender man who claims he was illegally dismissed from his position at a Chinese medical clinic after only one week on the job. Though the court ruled in favor of Mr. Chen, finding his dismissal illegal and awarding him a month’s wages, it was not willing to declare that Mr. Chen’s dismissal was due to discrimination against transgender individuals.

Nonetheless, advocates are thrilled that a Chinese court agreed to hear the case. Gay marriage is illegal in China, and

homosexuality was long considered a mental illness. It was only in 2014 that Chinese courts ruled against therapy to “correct” homosexuality.

Though LGBT rights are still absent in both Taiwan and China, many are hopeful that change is on the way. Mr. Chen’s case has given activists hope that a legal remedy may be possible in the future.

For more information, please see:

New York Times – On Taking Gay Rights From Taipei to Beijing: Don’t Call It a ‘Movement’ – 18 January, 2017

BBC – China: Limited victory for man in transgender dismissal case – 3 January, 2017

BNA – China: Despite Landmark Ruling, LGBT Rights Lacking in China’s Workplaces – 19 January, 2017

The Guardian – Chinese transgender man wins landmark wrongful dismissal case – 3 January, 2017

Thailand Urged to Criminalize Torture and Enforced Disappearances

By Nicole Hoerold

March 6, 2017

BANGKOK, Thailand – On February 28, the UN human rights office urged the government of Thailand to criminalize enforced or involuntary disappearances and the torture of individuals. Thailand has a prolonged history of disappearances, including that of lawyer Somchai Neelapaijit in 2004, and human rights activist Pholachi Rakchongcharoen in 2014. A UN working group on enforced disappearances recorded

a total of 82 cases of disappearance in Thailand since 1980.

Currently, Thailand does not legally recognize torture and enforced disappearances as criminal behavior. In May 2016, Thailand’s government did announce its intention to submit a bill to criminalize the behaviors. Importantly, the proposed bill would be the first Thai law to recognize the illegality of torture and enforced disappearances with absolutely no exceptions for political or national security circumstances. However, the government failed to provide a plan or frame for taking action on the matter.

Torture in Thailand has become increasingly severe since the military coup in May 2014, with many reports of individuals being taken into military custody and being tortured or mistreated. Reports allege that individuals have undergone torture through beatings, electric shocks, and near suffocation. Not only has the government vehemently denied these allegations, but it has blamed individuals for making false statements with the intention of damaging the country’s reputation.

Since October 2007, Thailand has been a party to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The Convention requires governments to investigate and prosecute instances of torture and the like. Now, organizations like the UN and Human Rights Watch are urging states to press the Thai government on this issue and protect and enforce fundamental human rights and liberties.

For more information, please see:

Reuters – U.N. says Thailand leaves legal loophole for torture, disappearances – 28 February, 2017

United Nations – UN rights office disappointed with Thai Government's

refusal to criminalize enforced disappearances – 28 February, 2017

Human Rights Watch – World Report: Thailand – 2016

Bangkok Post – The faces of the disappeared – 3 February, 2017

EUROPE DESK

Russia Decriminalizes Forms of Domestic Violence

By Sarah Lafen

January 18, 2017

MOSCOW, Russia — The Duma recently passed a bill which would decriminalize some forms of domestic violence. The bill, also known as the “slapping law,” would eliminate criminal punishments for first offenses, or attacks that occur only once a year in which a woman or child is not “seriously” injured, and does not require hospital treatment or sick leave from work.

Under the bill, the punishment for domestic violence offenders would be limited to a fine or community service, while subsequent offenses can still be considered criminal. The bill passed its first reading at the Duma with a nearly-unanimous 368 out of 370 votes in its favor.

Supporters of the bill claim that current domestic violence penalties are “anti-family” and are a “baseless intervention into family affairs.” The bill was proposed by conservative MP Yelena Mizulina, who is the head of the Duma Committee on Family, Women, and Children's Affairs. Mizulina believes that offenders should not be jailed and deemed a criminal “for a slap” or a “scratch.” According to Mizulina, “battery

carried out towards family members should be an administrative offense.”

Those in favor of the bill cite tradition of parental authority as its source. Mizulina and her fellow supporters believe that because traditional Russian family values are built on the parents' authority, laws should reflect those values and traditions.

Women's rights group claim that the bill will leave domestic abuse victims even more vulnerable than they already are. Olga Yurkova, executive director of Syostri – a recovery center for sexual assault victims – explained to reporters that the proposed “decriminalisation will worsen the situation” of women tolerating domestic violence but not bringing it to public light.

Women's rights activist Alena Popova has started a petition which demands the Duma pass a completely new law dealing with domestic violence, which has received over 174,000 signatures. Journalist Olga Bobrova argued that while domestic violence might not leave a physical mark on the victim's body, such actions still transform “her life into a living hell.” Bobrova also explained that “domestic violence is a normal way of life” in Russia.

Activists recently handed out stories of abuse victims outside of the Duma to spread word of the cause.

For more information, please see:

2017

The Huffington Post — Russia Moves to Decriminalize Several Cases of Domestic Violence — 14 January 2017

BBC — Russia: Anger at Move to Soften Domestic Violence Law — 12 January 2017

CNN — Russia Prepares to Decriminalize Some Domestic Violence — 13 January

Mic — Russia's Proposal to Decriminalize Domestic Violence Earns a Sweeping Parliamentary Victory — 12 January 2017

MIDDLE EAST DESK

Islamic State Retreats from Manbij with Human Shields

By Zachary Lucas

August 23, 2016

DAMASCUS, Syria — After retaking the city of Manbij, rebel forces accused Islamic State (IS) forces of covering their retreat with a caravan of vehicles filled with civilians. Rebel forces stated they didn't fire at IS due to the presence of civilians.

Syrian Democratic Forces (SDF), a United States backed rebel group in Syria, reported that IS forces covered their retreat with approximately 2,000 civilians. SDF, which is an alliance of Kurdish and Arabic fighters, stated they had regained control of most of Manbij, a city in the Aleppo governorate. An SDF spokesperson said that after IS forces had been defeated they abducted approximately 2,000 civilians from the town and took them in vehicles out of the city to Jarabulus.

The SDF claims that the civilians were taken with IS to prevent the SDF from firing at IS vehicles as they retreated. The SDF stated they treated everyone in the vehicles as non-combatants and didn't fire out of fear of hitting civilians. US led airstrikes also didn't target the vehicles after receiving information that civilians were in them

according to Baghdad-based US-led coalition spokesman Col Chris Garver. Following the incident, most of the hostages were freed and returned to the city.

The ouster of IS forces in Manbij comes after a ten-week offensive waged by the SDF with help from US led airstrikes against IS. Manbij had been in IS control since 2014. Following the liberation of Manbij, citizens celebrated in the streets. Citizens celebrated by doing things that weren't allowed under IS authority such as cutting off beards and smoking. According to the Syrian Observatory on Human Rights, the ten-week battle for Manbij claimed the lives of over 400 civilians and 1,200 SDF and IS fighters.

The use of human shields is illegal under international law under the Geneva Convention and its Protocols along with the Rome Statute. IS has been accused of using human shields in previous incidents. After IS forces were pushed out of Fallujah in later June, on ground forces claimed that IS took civilians with them to protect their retreat. There was confusion concerning this situation which led to the IS convoy being fired upon. In May and June of this year, IS forces attempted to slow down Iraqi forces in Fallujah by positioning themselves near civilians trapped in the crossfire.

For more information, please see:

Al Jazeera — Syria war: ISIL flees Manbij with ‘human shields’ — 13 August 2016

BBC — Photos show IS militants fleeing Manbij with ‘human shields’ — 19 August 2016

CNN — Jubilation in Syria’s Manbij as ISIS loses control of key city — 14 August 2016

Guardian — Isis appears to use civilians as human shields to flee Syrian town — 19 August 2016

Air Strike Hit Aid Convoy in Syria Amid Collapse of Ceasefire

By Yesim Usluca

September 26, 2016

DAMASCUS, Syria — On Monday, September 19th, an aid convoy near the Syrian city of Aleppo was struck by an air strike hours after the army declared the end of a U.S.-Russia ceasefire.

The aid convoy was intended to deliver aid to 78,000 individuals in Aleppo. A U.N. spokesperson confirmed that at least 18 of the 31 trucks in the convoy were destroyed. A witness at the scene indicated that the trucks were parked at a Syrian Red Crescent location when they were hit by approximately five missile strikes. The Red Crescent stated that approximately 20 civilians and at least one of its volunteers were killed in the attacks. It has suspended its operations for three days in protest. It further stated that the attack may have “serious repercussions” for its humanitarian work in the area. The U.N. has also suspended all aid convoy movement in Syria.

The Syrian Observatory for Human Rights stated that the attacks were carried out by either Russian or Syrian aircraft. U.S. State Department spokesman John Kirby noted that the destination of the convoy was “known to the Syrian regime and Russian Federation.” He further stated that the aid workers were “killed in their attempt to provide relief to the Syrian people.” The U.N. Aid Chief, Stephen O’Brien, declared that the “callous attack” would amount to a “war crime” if it was found to be deliberate. Russia has denied that its aircraft or those of its Syrian government allies were involved.

The ceasefire between the U.S. and Russia went into effect on September 12th. It was the most recent attempt to bring enough peace to the country to allow political negotiations to begin. A key part of the cessation involved humanitarian aid deliveries to civilians in besieged areas. The agreement further entailed halting fighting between government and rebel forces across Syria. If the ceasefire held, the U.S. and Russia were to set up a joint military cell to target the Islamic State group.

Despite an initial drop in fighting following the ceasefire, violence began to escalate late last week. The deal came under strain on Saturday, September 17th when a coalition strike led by the U.S. hit a Syrian army post near the eastern city of Deir Ezzor. The Syrian Armed Forces General Command issued a statement on Monday, September 19th declaring that the ceasefire had ended. Following this announcement, the Syrian Observatory for Human Rights reported that jets fired strikes, killing and wounding individuals in the Aleppo region. The U.N. Security Council is scheduled to hold a meeting regarding Syria and the ceasefire on Wednesday, September 21st.

For more information, please see:

CNN—Syrian ceasefire: Is it all over?—20 September 2016

Reuters—Russian aircraft believed to hit Syria convoy, U.S. officials say—21 September 2016

BBC News—Syria conflict: US ‘outraged’ over aid convoy attack—20 September 2016

Middle East Eye—UN outraged at ‘callous attack’ on aid convoy, as Syria ceasefire collapses—20 September 2016

NPR—Syrian Cease-Fire Negotiated By U.S., Russia Goes Into Effect—12 September 2016

Ten-Year-Old Iraqi Girl Killed by ISIS Torture Device

By Yesim Usluca

February 12, 2017

BAGHDAD, Iraq — A new group of female-only “ISIS police” have been administering a new torture technique in which women are “ripped to death with ‘metal jaws’” if they violate the strict rules set by the group. Upon breaking one of the rules set forth by the brigade, a ten-year-old Iraqi girl bled to death after being “bitten” by a poison-lined medieval torture device.

The Iraqi girl, Faten, allegedly stepped over the threshold of her home while cleaning. Per the strict rules imposed by ISIS fundamentalists in Mosul, women are not permitted to leave their homes by themselves. In response, the al-Khansaa brigade, ISIS’ female “morality police,”

approached Faten’s mother to ask whether punishment should be administered to her or her daughter. Thinking the punishment would be in the form of a bite delivered by a person, Faten’s mother elected to have her daughter take the penalty instead of herself. Her mother, however, was not aware that the punishment would be administered by a medieval torture device, lined with poison.

The device is described as a “clamp with four ends as sharp as knives, like teeth, which can pierce the skin from both sides when pressed down.” While administering the punishment, the device tore the girl’s flesh in various places. After receiving the “bite,” Faten bled to death from the wounds before the poison could take effect.

The al-Khansaa brigade acts as a religious law enforcer, in which they punish females who violate the strict moral rules set forth by ISIS, including breastfeeding outside, not wearing black socks, wearing high heels, or lifting a full-face veil.

The women of Al-Khansaa have been administering brutal punishment all over Mosul. A woman reportedly died from injuries she sustained after being punished for “slightly” lifting her veil to examine merchandise at a market. She was immediately ordered to sit on the ground by the al-Khansaa and received thirty lashings. A woman who witnessed the death cried out against having to wear a hijab and face veil by stating “[i]t’s like I’m getting into a bag and it’s closed on me so I can’t even breathe”

For more information, please see:

Daily Mail—Iraqi girl, 10, is ‘bitten to death’ with medieval torture device by female ISIS fanatics after her mother was asked to choose if she or the child would be

punished for stepping outside their house—7 February 2017

The Sun—Sick ISIS female jihadis ‘bite Iraqi girl, 10, to death’ with medieval torture device as punishment for stepping outside her house—7 February 2017

Express—Iraqi girl, 10, ‘bitten to death’ for stepping outside house in horror ISIS

torture—7 February 2017

Mirror—Mother’s horror after ISIS female fighters tear daughter to death with metal jaws—7 February 2017

Daily Star—ISIS unleash lady jihadi BITING BRIGADE armed with ‘metal jaws’ to tear women to death—7 February 2017

NORTH AMERICA AND OCEANIA DESK

U.S. Considers Withdrawing from U.N. Human Rights Council

By Sarah Lafen

March 8, 2017

WASHINGTON D.C., United States — The United States is considering leaving the United Nations Human Rights Council. A final decision to withdraw would most likely include Secretary of State Rex Tillerson, U.S. ambassador to the U.N. Nikki Haley, and President Trump.

According to sources connected with current U.S. officials, the council has been accused of being biased against Israel by pushing critical resolutions and issuing “scathing” statements about the country. The council drew criticism in 2012 for inviting a speaker from the Palestinian Hamas terror group to speak at a meeting.

Countries known for human rights violations, including China and Saudi Arabia, are members of the council. Russia was also a member until last year when it lost its seat after the U.N. General Assembly voted to remove it due to Moscow’s role in the Syrian conflict. A former U.S. State Department official commented that there are also questions regarding the council’s

overall usefulness. Tillerson recently expressed skepticism about the council in recent meetings with State Department officials.

Last week, Haley criticized the council for failing to discuss the buildup of illegal Hezbollah weapons, strategies for defeating the Islamic State terrorist organization, and holding Bashar Assad accountable for the deaths of Syrian civilians.

The State Department has not directly commented on the rumored withdrawal, however spokesman Mark Toner told reporters that the “delegation will be fully involved in the work of the HRC session which [started] Monday.”

The website Human Rights Watch issued a statement calling a hypothetical withdrawal by the U.S. from the council “misguided and short-sighted.” U.N. Director of the website, Louis Charbonneau, predicted that the withdrawal might “significantly set back U.N. efforts to protect human rights around the world.” Charbonneau noted the U.S.’s crucial role in encouraging the council to establish commissions that helped uncover violations in North Korea and Syria and commented that withdrawal would hinder the U.S.’s influence in the international community.

Former President George W. Bush refused to join the council after it was created following the termination of the U.N. Human Rights Commission. Former President Barack Obama, however, joined the council once he was elected.

For more information, please see:

The Independent — U.S. ‘Considers Withdrawing from U.N. Human Rights

Council — 27 February 2017

The Nation — U.S. Considers Quitting U.N. Human Rights Council — 27 February 2017

The Times of Israel — U.S. Considering Leaving Human Rights Council – Report — 26 February 2017

Politico — Sources: U.S. Considers Quitting U.N. Human Rights Council — 25 February 2017

SOUTH AMERICA DESK

Thousands March Against Femicide in Peru

By Cintia Garcia

August 22, 2016

LIMA, PERU—An unprecedented number of protestors, more than 50,000, marched on August 13th denouncing violence against women. Protestors in Lima marched to the palace of justice while eight other cities across Peru simultaneously held protests. The march was an outcry against lenient sentences given by the court in two high profiled cases of male perpetrators.

Those among the protestors included the newly elected president, Pedro Pablo Kuczynski and his wife. He announced his plan of combating femicide: “to ask for facilities for women to denounce violence because abuse flourishes in an environment where complaints cannot be made and the blows absorbed in silence and this not how it should be.” Also present was Victor Ticona, the president of Peru’s judicial system, he stated, “Today, the 13th of August, is a historic day for this country because it represents a breaking point and the start of a new culture to eradicate the

marginalization that women have been suffering, especially with violence.” He also announced that a commission of judges would receive the protestors and listen to their demands. Protestors chanted “by touching one, they are touching all of us” and “no more violence nor impunity.”

Peru has experienced a rise in gender violence. According to the Ministry of Women and Vulnerable people, fifty-four women were killed by their partners and another 118 women were victims of femicide attempts. An estimated seven out of ten Peruvian women have been victims of violence. A study conducted by the defender’s office stated that in eighty-one percent of the cases of attempted femicide no measures were taken to protect survivors. Because the state neglected to protect survivors, twenty-four percent of those women were murdered by their male perpetrators. Ana Maria Romero, Peru’s minister of women stated, “our problem is not a lack of legislation, it is how we apply the law. Those in charge of justice need more sensitivity and a better understanding of the rights of the women.”

These protests follow those that have occurred earlier this year in Brazil,

Argentina, and Mexico—all under the slogan “Ni Una Mas” coined by the slain poet and activist Susana Chavez.

For more information, please see:

The Guardian—Women in Peru Protest Against Rising Tide of Murder and Sexual Crime—13 August 2016

Telesur—Tens of Thousands March Against femicide in Peru—13 August 2016

Fox News Latino—#Not One Less: Tens of Thousands March in Peru Protesting Violence Against Women—14 August 2016

The Guardian—50,000 March in Peru Against Gender Violence—14 August 2016

Colombia Faces an Increase in Assassinations of Indigenous Activists

By Cintia Garcia

March 28, 2017

BOGOTÁ, Colombia— Within the past year there has been an increase in murders of indigenous activists by right-wing paramilitaries. The most recent assassinations of prominent activists occurred in Corinto and Medellin.

Javier Oteca, a member of the Nasa tribe and well known indigenous land rights activist was shot to death by right-wing paramilitaries impersonating farm workers, according to witnesses. It is believed that the men that shot Mr. Oteca were private military officers. Although members of the National Army were in the vicinity where Mr. Oteca was shot, they were unable to detain the suspects. But members from Mr. Oteca’s tribe detained six suspects believed to be related to the incident. The tribe has

decided to carry out its own investigation of the murder. The Nasa tribe has experienced an increase in violence. In 2016, Colombia’s Constitutional Court declared the tribe “at risk of extermination.”

In addition to Mr. Oteca’s murder, earlier this month, Alicia Lopez Guisao, a leader of the Asokinchas tribe was murdered in Medellin. Ms. Guisao was shopping at a grocery store when two men stormed the store and shot her. Ms. Guisao worked for the left-wing organization, the People’s Congress, whose objective is to organize indigenous peasants. Ms. Guisao distributed food and land to indigenous groups and afro-descendants through the program, the Agrarian Summit Project. The People’s Congress believe that, “her murder is an example of the fact that the right-wing organizations that operate today in the city of Medellin are the same paramilitaries who have murdered others in recent years.”

The increase in murders of indigenous activists, according to a report released by the Defense of the People, stated that “since the retreat of the FARC from the zones where they previously exercised control has allowed for the entrance of new armed actors who fight for territorial and economic dominance.” It was well known that the FARC and left-wing guerilla groups had defended the indigenous campesino groups and since their retreat these communities are vulnerable to violence. In January and February alone, 3,549 people have been displaced, mostly indigenous and black, according to the United Nations.

For more information, please see:

Telesur—Colombian Paramilitaries Kill Another Indigenous Leader—24 March 2017.

El Colombiano—Desde el Dia D, han Sido
Asesinados 27 Lideres—23 March 2017.

El Espectador—Denucian Aesinato de una
Líder Social en Medellín—3 March 2017.

Telesur—Another Indigenous Human

Rights Activist Killed in Colombia—3

March 2017.