



Syracuse University  
**COLLEGE OF LAW**  
Impunity Watch



***JOURNAL OF GLOBAL RIGHTS AND ORGANIZATIONS***  
**ANNUAL REVIEW**

VOLUME 10

2019-2020

**ARTICLES**

The Duty to Vaccinate: Should it be absolute?

*Costanza Carlone*

What About Me? How Legal Systems Around the Globe Are Failing to Protect Girls and Women From Sexual Violence

*Paul Hanley*

Israel: Conflict Resolution in an Apartheid State

*Brittany Natali*

Aiding and Abetting War Crimes in the Yemeni Civil War: U.S. Involvement

*Fabiana Wells*

**NOTES**

Sophia: The Intersection of Artificial Intelligence and Human Rights

*Maggie Redden*

Infanticide Act: Anachronistic perpetuation of chivalric justice, gender-stereotyping and inequitable treatment of men in England

*Alicia Slate*

**IMPUNITY WATCH ESSAY CONTEST WINNER**

Untitled

*Tommy Strade*



*Impunity Watch* and the *Journal of Global Rights and Organizations (JGRO)* is owned, published, and printed annually by Syracuse University, Syracuse, New York 13244-1030, U.S.A.

The recently renamed *Journal of Global Rights and Organizations* is an annual journal publication run by Syracuse University College of Law students. *JGRO* focuses on human rights as they are practiced and applied in various regional courts around the globe, including the International Criminal Court, Inter-American Court and Commission of Human Rights, European Court and Commission of Human Rights, and African Court and Commission on Human and Peoples' Rights. *JGRO* is a platform for cutting-edge legal scholarship and research; is free to read online at [impunitywatch.com/category/journal](http://impunitywatch.com/category/journal); and the journal may also be found in the U.S. Library of Congress electronic database and HeinOnline.

Founded in 2007 by retired Professor David M. Crane L'80, the founding Chief Prosecutor of the Special Court for Sierra Leone, under the name *Impunity Watch* (2007-2017), in 2018, Professor Cora True-Frost G'01, L'01, assumed leadership of *JGRO* and *Impunity Watch News*. The journal was renamed the *Journal of Global Rights and Organizations* to reflect our renewed focus on exposing critical — sometimes conflicting — and overlooked developments in rights articulation.

*JGRO* and *Impunity Watch News* participate in the annual International Humanitarian Law Dialogues hosted by the Robert H. Jackson Center each summer at the Chautauqua Institution in Chautauqua, New York, and maintain close ties with the Syrian Accountability Project and other human rights organizations.

*JGRO* actively seeks and accepts article submissions from scholars and practitioners in the fields of international law, human rights, political science, history, and other humanitarian law related fields. To submit articles for the upcoming Volume 11, please email the current Lead Articles Editor, Genna Amick, at [giamick@syr.edu](mailto:giamick@syr.edu).

Published works are also available at [www.impunitywatch.com](http://www.impunitywatch.com).

**CONTACT**

Editorial and business offices are located at Syracuse University College of Law, Dineen Hall, Room 346, Syracuse, New York 13244-1030, U.S.A.

For more information, please visit [www.impunitywatch.com](http://www.impunitywatch.com) or contact us at [impunitywatch@gmail.com](mailto:impunitywatch@gmail.com).

**CITATION**

Please cite to the journal as: [Author's Name], [Title], 9 J. GLOB. RTS. & ORGS. [first page of article], [pincite] (2019), [URL if viewed online].

© 2019 *Impunity Watch* and *Journal of Global Rights and Organizations*. All rights reserved. Published by *JGRO* and *Impunity Watch* in conjunction with Syracuse University and the College of Law.

**DISCLAIMER**

The views expressed within are solely those of the authors and do not necessarily reflect the views of *JGRO* or *Impunity Watch News*, its advisors, editors or staff, Syracuse University College of Law, or Syracuse University.



**Syracuse University College of Law**  
***Journal of Global Rights and Organizations and Impunity Watch News***  
**2019 – 2020**

---

**Executive Board**

***Executive Director of News***  
 Natalie Maier

***Editor-in-Chief***  
 Maggie Redden

***Managing Editor***  
 Kaleigh McGraw

***Administrative Editor***  
 Curtis Gilbert

***Technical Director***  
 Jill Tompkins

**Senior Leadership**

***Senior Articles Editors***  
 Curtis Gilbert  
 Justin Furry

***Notes and Comments Editor***  
 Ashley Brush

***Lead Articles Editor***  
 Alicia Slate

***Lead Editor of News***  
 Hannah Gabbard

**Associate Members**

Breanna Leonard  
 Brian Gunderson

**Associate Articles Editors**

Nadia Abed  
 Genna Amick  
 Melissa Berouty  
 Alexandra Casey

Ann Ciania  
 Hannah Gabbard  
 Thomas Harrington  
 Dianne Jahangani

Benjamin Kaufman  
 Michelle Leal  
 Henry Schall  
 Chelsea Simpson

**News Reporters**

Jordan Broadbent

Madison Kenyon

Mujtaba Tirmizey

**Faculty Director**

C. Cora True-Frost G'01, L'01

*Journal of Global Rights and Organizations*  
Annual Review

**Table of Contents**

---

VOLUME 10

2019 - 2020

---

**ARTICLES**

The Duty to Vaccinate: Should it be absolute?	<i>Costanza Carlone</i>	1
What About Me? How Legal Systems Around the Globe Are Failing to Protect Girls and Women From Sexual Violence	<i>Paul Hanley</i>	41
Israel: Conflict Resolution in an Apartheid State	<i>Brittany Natali</i>	66
Aiding and Abetting War Crimes in the Yemeni Civil War: U.S. Involvement	<i>Fabiana Wells</i>	104

**NOTES**

Sophia: The Intersection of Artificial Intelligence and Human Rights.	<i>Maggie Redden</i>	155
Infanticide Act: Anachronistic perpetuation of chivalric justice, gender-stereotyping and inequitable treatment of men in England	<i>Alicia Slate</i>	187

**IMPUNITY WATCH ESSAY CONTEST WINNER**

Untitled	<i>Tommy Strade</i>	225
----------	---------------------	-----



**THE DUTY TO VACCINATE: SHOULD IT BE ABSOLUTE?**  
*Costanza Carlone\**

## Introduction

The following article addresses the subject of compulsory vaccinations, analyzing the International and European legislation concerning the duty to vaccinate. In order to get a global idea that is as comprehensive as possible, the author, first of all, has examined the directives given by the World Health Organization (WHO) on an international level, secondly, the research carried out by specific European Institutions, and, finally, the domestic legislation of four different European countries. The dual aim of the article is, on one hand, to evaluate the real existence of the need of having compulsory vaccinations and, on the other hand, to probe deeper about the validity of new alternatives.

The article originated from the tremendous debate about compulsory vaccinations which is lately polarizing not only the public opinion, but also the experts from all over the world. The major ethical dilemma in speaking about vaccinations stems from the clear necessity to balance, with regard to childhood immunization, between parents' freedom of choice and the benefits that public health receives from mandatory vaccines. Public health always has to be protected, but the State must provide alternatives that respect freedom of choice of individuals.

The article is structured according to the "New Haven Perspective", a policy-oriented perspective on international law which was developed in the "New Haven School" by Professors Myres S. McDougal and Harold D. Lasswell.<sup>1</sup> The New Haven School defines the law as a process of decision that is both authoritative and controlling; it places past decisions in the illuminating light of their conditioning factors, both environmental and attitudinal, and appraises

---

\* LL.M. Candidate (2019) in International Human Rights, St. Thomas University School of Law, Miami, Florida; Master's Degree in Law, Università degli Studi di Siena, Italia; I would particularly like to thank Professor Siegfried Wiessner for his ideas and suggestions regarding this paper.

<sup>1</sup> HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992) (The *locus classicus* of the New Haven School is Lasswell and McDougal's two-volume treatise).

decision trends for their accordance with explicit, given goals; it foresees, as much as possible, alternative future decisions and their consequences; and it provides conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action using the guiding light of a preferred future world public order of human dignity. In order to achieve these goals, the New Haven School uses focal lenses borrowed from the social sciences, a mode of organizing data about various social processes through cultural anthropology's method of phase analysis and an analytical break-down of the actual components of a decision. To help actual decision-making, the New Haven School proposes a praxis of five intellectual tasks: goal formulation, trend description, factor analysis, projection of future decisions, and the invention of alternatives. The public order of human dignity is that one which most approximates the optimum access by all human beings to all things they hold dear: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. "This, in a nutshell, characterizes the contribution the New Haven School has made to the law's academic and policy enterprise."<sup>2</sup>

The author thought it proper to use the New Haven Perspective in this paper since this methodology represents a valid instrument that could facilitate the decision-makers in achieving what is considered to be the goal of the law, namely approximating an ideal order of human dignity maximizing the access by all human beings to the process of shaping and sharing all things human value.

---

<sup>2</sup> Michael W. Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT. LAW 575, 576 (2007).



## I. Delimitation of the problem

According to the Centers for Disease Control,<sup>3</sup> vaccinations are one of the ten greatest public health achievements of the twentieth century.<sup>4</sup> The invention of vaccinations is, without any doubt, one of the most extraordinary achievements of the past century. Vaccines are responsible for many global health successes, such as the eradication or the reduction of many diseases. Since the invention of the vaccine, in fact, the extensive use of immunizations has drastically reduced the incidence of infectious diseases that in the past were lethal for millions of people. Vaccines are comprised of a substance which stimulates an individual's immune system to produce antibodies that attack a specific antigen. In this way, the patient is enabled to develop immunity to the disease without actually being infected. The stimulation works by making the immune system think that it has been infected but, actually, injecting a dead virus, or a weakened version of the real virus, known as "attenuated virus." Those who are vaccinated are protected from the disease and will not become ill, even if they are exposed to the illness long after.

Vaccinations not only directly protect the immunized person, but also protect the community at large. This phenomenon is called "herd immunity" or "community immunity," and it means that when almost all members of a certain community are immunized, infectious diseases cannot spread. In this way, when a high percentage of the population is immune to the disease, the individuals who are not immunized are automatically protected too. Benefits of community immunity apply to everyone, but they are extremely important especially for some segments of the population<sup>5</sup>: children too young to be vaccinated, immunocompromised patients

---

<sup>3</sup> Ctrs for Disease Control and Prevention, *Ten Great Public Health Achievements -- United States, 1990-1999*, 48(12) MMWR 241, 247 (Apr. 2, 1999).

<sup>4</sup> Alison Fernbach, *Parental Right and Decision Making Regarding Vaccinations: Ethical Dilemmas for the Primary Care Provider*, 23 J. AM. ACAD. OF NURSE PRACTITIONERS 336, 337 (2012).

<sup>5</sup> *Vaccines.Gov*, U.S. DEP'T OF HEALTH & HUM. SERV., <https://www.vaccines.gov/index.html> (last visited Feb. 24, 2020).

who cannot be vaccinated, elderly people who cannot mount an optimal immune response to a vaccine, people in whom vaccine-induced immunity has waned, people who have inadequate access to immunizations and people who remain unvaccinated by choice.<sup>6</sup>

While most healthy children and adults, having a strong immune system, can receive vaccinations with low risk, some categories of people cannot be directly immunized. Newborns, elderly people, and immunocompromised individuals are not strong enough to attack the virus present in vaccines, even if it is in an attenuated version. They could develop illness after having been exposed to the virus; for this reason, they cannot get vaccinated. Thanks to the herd immunity, it is not necessary that everyone in the community is vaccinated to avoid the spread of the disease. When a high enough percentage of the population is immune, the majority protects the few non-immune people. Obviously, in order to work, this mechanism needs a high number of people to get vaccinated. For most diseases, herd immunity is reached when the proportion of the population vaccinated is at least ninety percent. So, when a healthy child or adult refuses to get vaccinated, he puts other individuals at risk and makes it much more difficult to completely eradicate the disease.<sup>7</sup> The more people refuse vaccinations, the fewer possibilities the community has to reach herd immunity. Who loses out, by the spreading of the disease, are not only those who individuals who have personally chosen not to vaccinate, but also those who have not made any choice, but who just cannot receive vaccinations.

The reason why people started to refuse vaccinations is rooted in 1998, when a British medical journal, *The Lancet*, published a study by Dr. Andrew Wakefield that claimed that measles-mumps-rubella (MMR) vaccine caused autism, a cognitive and neurobehavioral

---

<sup>6</sup> See Cody H. Meissner, *Why is Herd Immunity so Important?*, 36 OFFICIAL NEWSMAGAZINE AM. ACAD. OF PEDIATRICS 36, 36 (April 2015).

<sup>7</sup> See High School Bioethics Project, *Ethics of Vaccinations*, N.Y.U. SCH. OF MED. (2015).

disorder. The study analyzed only twelve children, but it received a lot of publicity. At the same time, there was a rapid increase in the number of children diagnosed with the condition. After that paper, other doctors did their own research into the link between the MMR vaccine and autism. At least twelve studies followed the first one, and none was able to recognize any evidence of the link between vaccinations and autism. A 2002 study, which looked at 537,303 children born in Denmark, provided strong evidence against the hypothesis that MMR vaccination causes autism.<sup>8</sup> Furthermore, in 2010, after an investigation into Dr. Wakefield's scientific methods and financial conflicts, The Lancet withdrew the paper. Despite the end of the incident and the existence of all the other following studies, Dr. Wakefield's research had a strong impact on many parents. Finally, more recently a new decade-long study of more than half a million people proved that the measles vaccine does not increase the risk of autism further reinforcing what the medical community has long been affirming about preventative vaccinations. The research is funded by Novo Nordisk, a producer of insulin and the Danish Ministry of Health. Researchers from Denmark looked at a Danish population registry of 657,461 children, some of whom were vaccinated with MMR vaccine and some who were not. After over a decade of follow-up, 6,517 were diagnosed with autism. There was no increased risk of autism in children who had the MMR vaccine and no evidence that it triggered autism in susceptible children.<sup>9</sup>

However, the correlation between vaccines and autism is not the only reason that led many parents to refuse to get their children vaccinated. There are also many other opinions regarding a hypothetical link between vaccinations and other serious diseases, such as tumors or

---

<sup>8</sup> Kreesten Meldgaard Madsen et al., *A Population-Based Study of Measles, Mumps, and Rubella Vaccination and Autism*, 347 NEW ENG. J. MED. 1477, 1477 (2000).

<sup>9</sup> See Anders Hviid et. al., *Measles, Mumps, Rubella Vaccination and Autism: a Nationwide Cohort Study*, 170(8) ANNALS OF INTERNAL MED. 1 (Mar. 5, 2019), <https://annals.org/aim/article-abstract/2727726/measles-mumps-rubella-vaccination-autism-nationwide-cohort-study>.

allergies. According to prominent opinions, vaccines are victims of their own success: “Thanks to them, vaccine-preventable diseases have declined or even disappeared, but this can lead to the perception that these infections are of a low risk, causing complacency, which is a factor in vaccine hesitancy and refusal.”<sup>10</sup> If the importance of immunization-preventable diseases is underestimated, then this could reduce the number of immunized people. Since the rates of many immunization-preventable diseases are very low, parents may consider these diseases uncommon or insignificant.<sup>11</sup>

The major ethical dilemma in speaking about vaccinations stems from the clear necessity to balance, with regard to childhood immunization, between parents’ choice whether or not to vaccinate their children and the benefits that public health receives from mandatory vaccines.<sup>12</sup> The moral issue regarding children’s vaccinations involves many public health areas, such as those of legislators, clinicians, and other professionals.<sup>13</sup> Who decides whether the child has to be immunized? Due to parental authority, surely parents cannot be excluded from the decision process; however, they do not have full autonomy when it comes to vaccinating their children.<sup>14</sup>

---

<sup>10</sup> Giovanni Rezza, *Mandatory Vaccinations in Italy – Scientific Evidence and Political Controversies*, BMJ OP. (Aug. 21, 2018), <https://blogs.bmj.com/bmj/2018/08/21/giovanni-rezza-mandatory-vaccinations-in-italy-scientific-evidence-political-controversies/>.

<sup>11</sup> See Victoria P. Niederhauser & Malama Markowitz, *Barriers to Immunizations: Multiethnic Parents of Under- and Unimmunized Children Speak*, 19 J. AM. ACAD. NURSE PRACTITIONERS 15 (2007).

<sup>12</sup> See Nicoletta Vettori, *Le decisioni in materia di salute tra precauzione e solidarietà. Il caso delle vaccinazioni*, DIRITTO PUBBLICO 181 (Jan. – April).

<sup>13</sup> See Kristin S. Hendrix et. al., *Ethics and Childhood Vaccination Policy in the United States*, 106 AM. J. PUB. HEALTH 273 (2016).

<sup>14</sup> See Paul Baines, *Medical Ethics for Children: Applying the Four Principles to Pediatrics*, 34 J. MED. ETHICS 141 (2008).

The main question, shared by the majority of the States, is whether it is ethically acceptable to impose compulsory vaccinations, even when parents or individuals refuse them<sup>15</sup>; what is the role of law with regard to public health and individual liberty and autonomy?<sup>16</sup>

## II. Conflicting Claims, Claimants, Perspectives, Identification, and Bases of Power

### A. Anti-Vaccination movements against coercive measures

Anti-Vaccination movements are widespread all over the world, especially in the developed countries.<sup>17</sup> They fight against the idea of mandatory vaccinations. These movements are usually composed primarily of younger adults, who have less confidence than older people in the safety and importance of vaccinations.<sup>18</sup> In Europe there are big pockets of resistance, while a huge majority of Americans (82%) support mandatory measles, mumps and rubella vaccines for all healthy schoolchildren, and 88% are convinced that the benefits of these vaccinations outweigh the risks.<sup>19</sup> In Europe, an increasing number of people believe that vaccinations, especially the MMR vaccine, are neither safe nor important. “Austria, Denmark, Germany, the Netherlands, and the UK have had measles outbreaks associated with alternative views on lifestyle, education, and medicine, as well as among some religious groups.”<sup>20</sup> It is clear how

---

<sup>15</sup> See Lorenzo Chieffi, *Trattamenti immunitari e rispetto della persona*, POLITICA DEL DIRITTO 169 (Dec. 1997).

<sup>16</sup> Without prejudice to the absolute necessity of vaccinations in case of emergency, at the conclusion of this paper, the author examines other existing methods of fighting against the spread of the diseases. Furthermore, it is important to anticipate also here the fundamental necessity of funding and supporting research on this subject.

<sup>17</sup> See Francesco Biondo, *Obiezione di coscienza e vulnerabilità: Il lato oscuro dei movimenti di resistenza alle vaccinazioni obbligatorie*, 52 RAGION PRATICA 169 (2019).

<sup>18</sup> Heidi Larson et. al., *State of Vaccine Confidence in the EU 2018* (2018), [https://ec.europa.eu/health/sites/health/files/vaccination/docs/2018\\_vaccine\\_confidence\\_en.pdf](https://ec.europa.eu/health/sites/health/files/vaccination/docs/2018_vaccine_confidence_en.pdf).

<sup>19</sup> Pew Research Center, *Vast Majority of Americans Say Benefits of Childhood Vaccines Outweigh Risks* (Feb. 2, 2017), <http://www.pewresearch.org/science/2017/02/02/vast-majority-of-americans-say-benefits-of-childhood-vaccines-outweigh-risks/>.

<sup>20</sup> Larson et. al, *supra* note 18.

nowadays in Europe, as well as in other regions, vaccination is strongly related to politics, lifestyles, principles, and trust of authority.

Anti-Vaccination movements that have developed throughout Europe contributed to turning vaccines into an international talking point, making mandatory vaccinations a determinant political question that is able to divide voters. In 2018, during the election campaign in Italy, the vaccine mandate became a political issue capable of polarizing the social debate. The Italian “Free-Vax” movement, which has grown exponentially in recent years, attracted a huge number of people protesting against mandatory vaccinations and calling on the principle of individual freedom. The movement favored vaccinations, but it opposed a law to establish mandatory vaccinations as coercive measures.<sup>21</sup>

Within the Anti-Vaccination movements one can find constituent claimants, such as parents, who wield and defend their parental authority; religious communities, such as the Christian Reformed Church, which do not accept that human acts can interfere with God’s will<sup>22</sup>; anthroposophical societies, which are associations of people who do not trust traditional medicine, but who are convinced that some illnesses (including the measles) are essential for the development of the child<sup>23</sup>; and activist groups that fight against the power of pharmaceutical companies and protest against the presence of toxic substances in the vaccinations.

The claims of those claimants are almost identical: they want to be free to choose to vaccinate their children, invoking the principle of autonomy and of freedom of choice. There are several reasons that lead claimants to oppose mandatory vaccinations: supposed correlation

---

<sup>21</sup> See Rezza, *supra* note 10.

<sup>22</sup> See Home, NETHERLANDS REFORMED CHURCH RESOURCE WEB SITE, <http://www.nrcrws.org/> (last visited April 17, 2020); Wilhelmina LM Ruijs, et. al., *Religious Subgroups Influencing Vaccination Coverage in the Dutch Bible Belt: an Ecological Study*, BMC PUB. HEALTH (Feb. 14, 2011), <https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-11-102>.

<sup>23</sup> *La medicina antroposofica*, SOCIETÀ ITALIANA DI MEDICINA ANTROPOSOFICA (2016), <https://www.medicinaantroposofica.it/la-medicina-antroposofica/>.

between vaccinations and autism, lack of confidence in the government's decisions, and various ideological and religious convictions holding alternative views of natural lifestyles without the use of traditional medicine.

The anti-vaccine issue is common to several different religions.<sup>24</sup> Catholics, for example, often refuse to be inoculated because vaccinations can be composed of abortion-derived tissue.<sup>25</sup> Some Catholic pro-lifers have argued that it cannot be acceptable to use vaccines made with human cell lines derived from tissues obtained from aborted babies, even from decades ago. However, moral theologians have concluded that use of such vaccines, when there are no more ethical vaccines made without abortion-derived tissue available, is not always prohibited.

The Congregation for the Doctrine of the Faith's new instruction on bioethics, *Dignitas Personae*, dedicated an entire section to "[t]he use of human 'biological material' of illicit origin."<sup>26</sup> It concluded that all new research that contemplates the killing of embryos constitutes abortion and therefore represents "a grave moral disorder." However, using vaccines created with cell lines obtained from tissues derived from long-ago abortions is a different matter. Parents who allow such vaccinations for their children do not "cooperate" personally with abortion.

---

<sup>24</sup> See Marie Killmond, *Why is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 913 (2017).

<sup>25</sup> In 2003, a Floridian woman who in 2003 asked Cardinal Joseph Ratzinger if she should vaccinate her children even though she knew the controversial origin of some vaccines. Two years later the Pontifical Academy for Life issued a press release establishing that Christians have the responsibility to look for alternative vaccines to replace those that pose moral problems and that, in the absence of alternatives, it is allowed to resort to these vaccines when not to do so involves greater risk. Antonio Villareal, *Quanto Conta la Religione nella Scelta di non Vaccinarsi? [Which Is the Role of Religion in the Choice of Not Getting Vaccinated?]*, POST (Jan. 22, 2009), <https://www.ilpost.it/2019/01/22/religione-vaccini/>.

<sup>26</sup> *Instruction Dignitas Personae on Bioethical Issues*, CONGREGATION FOR THE DOCTRINE OF THE FAITH (Dec. 12, 2008), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_it.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_it.html).

“Grave reasons may be morally proportionate to justify the use of such ‘biological material,’” *Dignitas Personae* affirms. “Thus, for example, danger to the health of children could permit parents to use a vaccine which was developed using cell lines of illicit origin, while keeping in mind that everyone has the duty to make known their disagreement and to ask that their healthcare system make other types of vaccines available.”<sup>27</sup>

However, Catholics are not alone in having bioethical issues with vaccinations. Muslims, for example, cannot eat all types of food, but only *halal* ones, that is, made in accordance with the Koranic norms. Since vaccines often contain animal-based jelly, for a long time they have represented a problem for many Muslims. The issue has been resolved by recognizing that because vaccines are not part of the diet, they cannot be identified as food and, moreover, vaccinations protect life, in accordance with the precepts of protecting from damage and guaranteeing the public interest (*maslahat al ummah*).<sup>28</sup>

The goal of the New Haven Perspective, used in this paper, consists of approximating an ideal order of human dignity. The ideal order of human dignity represents the maximization of access by all to the process of shaping and sharing all things humans value. Human dignity is defined as shared values. The eight values to which humans aspire are: power, enlightenment, wealth, well-being, skills, affection, rectitude, respect. There is not hierarchy among the values and the list is not exhaustive, other values can be added. Every human being can choose autonomously his aspirations among this value.<sup>29</sup>

All the claims of the different members of Anti-Vaccination movements that almost all the claimants share: well-being, for their children and themselves; power, since they want to be

---

<sup>27</sup> See, e.g., CHILDREN OF GOD FOR LIFE (2015), <https://cogforlife.org/>.

<sup>28</sup> See Villareal, *supra* note 25.

<sup>29</sup> Reisman et al., *supra* note 2, at 575-76.



able to take their own decisions; and rectitude, for what concerns the religious and the anthroposophical communities.

The claimants very often also receive the endorsements of some big celebrity names, who use their fame and influence to encourage parents not to vaccinate their children. The Anti-Vaccination movements organize protests and make extensive use of social networks,<sup>30</sup> platforms, and websites, where they collect data and share experiences, in order to inform parents about government's lies and vaccinations' risks.<sup>31</sup>

Parents of minors have a certain limited base of power because they have the right to parental authority which enables them to decide whether or not their children get vaccinated. The base of power of the communities is their own strong bonds and beliefs, where they find their limited autonomy. Finally, since in many countries some members of Anti-Vaccination movements have achieved a political role,<sup>32</sup> both the activist groups and the movements themselves have gained important bases of power, now having a role in the law-making process.

***B. "Pro-Vaccinations" movements that prioritize community protection***

In a country where recommendations to get vaccinated are not enough to reach a high percentage of the immunized population, usually the next step is mandatory vaccinations to keep the level of community immunization high. There are several movements which fight to have mandatory vaccinations established by law. Their fundamental purpose is to prioritize community good and protection.<sup>33</sup>

---

<sup>30</sup> See Eleonora D'Andrea, Pietro Ducange, Alessio Bechini, Alessandro Renda, Francesco Marcelloni, *Monitoring the Public Opinion about the Vaccination Topic from Tweets Analysis*, 116 EXPERT SYSTEMS WITH APPLICATIONS 209, 209-11 (Feb. 2019).

<sup>31</sup> See *Vaccines.Gov*, *supra* note 5.

<sup>32</sup> See, e.g., the Italian "Movimento 5 Stelle," the first ruling party after the 2018 general elections, of which the majority of the members stood up against mandatory vaccines. The Editorial Board, *Populism, Politics and Measles*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/2017/05/02/opinion/vaccination-populism-politics-and-measles.html>.

<sup>33</sup> Rezza, *supra* note 10.

Most relevant evidence of the positive results of compulsory vaccinations comes from the United States.<sup>34</sup> The U.S. required school entry immunization mandates in the 1800s, and since then immunizations have increased. Mandatory vaccinations have generally led to increased short-term and long-term rises in the percentage of the population, subject to the mandate.<sup>35</sup> As shown by the recent events in California, stricter school entry immunization requirements are directly connected to a rapid increase in vaccination coverage.<sup>36</sup>

The evidence that immunization rates increase with mandates has led the majority of civil society to support the idea of mandatory vaccinations.<sup>37</sup> Pro-Vaccination movements emphasize that governments have had to take coercive measures to react to the drop in vaccination coverage in several countries, which led to the immunization rate of the most significant vaccines, such as the MMR, to be reduced to not more than 85%.<sup>38</sup>

The movements argue that mandatory vaccination is the most effective, and often the only way, to be sure to protect vulnerable people from potentially dangerous, infectious diseases.<sup>39</sup> Supporters of mandatory vaccinations claim that parents' immunization decisions have consequences not only for their own children but also for other children, especially for those who are too young to get vaccinated or who cannot be vaccinated for health reasons. Pro-Vaccination movements claim that the stakes are too high to leave this decision to the discretion

---

<sup>34</sup> See Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 (3) NORTHWESTERN UNIV. L. REV. 589, 589 (2016).

<sup>35</sup> Cecilia Lee & Joan L. Robinson, *Systematic Review of the Effect of Immunization Mandates on Uptake of Routine Childhood Immunizations*, 72 J. INFECTION 659, 659 (2016).

<sup>36</sup> See 2017-2018 Kindergarten Immunization Assessment – Executive Summary, CAL. DEP'T PUB., IMMUNIZATION BRANCH (2018), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Immunization/2017-2018KindergartenSummaryReport.pdf>.

<sup>37</sup> See Jessica Flanigan, *A Defense of Compulsory Vaccination*, 26 HEC FORUM, SPRINGER NATURE 5, 25 (2014).

<sup>38</sup> Italy: WHO and UNICEF estimates of immunization coverage: 2018 revision, WHO (Jul. 2, 2019), [https://www.who.int/immunization/monitoring\\_surveillance/data/ita.pdf](https://www.who.int/immunization/monitoring_surveillance/data/ita.pdf).

<sup>39</sup> See Paul A. Offit, *Should Childhood Vaccination Be Mandatory?*, BMJ OP., May 6, 2012, at 18.

of the parents. The principle of freedom and autonomy cannot override the benefit of public health.<sup>40</sup>

According to Dr. Paul Offit, mandatory vaccinations are necessary to fight against Anti-Vaccination movements: “Someday we may live in a world that doesn’t scare patients into making bad health decisions. Until then, vaccine mandates are the best way to ensure protection from illnesses that have caused so much needless suffering and death,” he says. Education about vaccinations is necessary to let society understand that although vaccines are not free of risk, their benefits outweigh their risks.

Within Pro-Vaccination movements, it is possible to find several constituent claimants: first, people who cannot receive vaccinations, such as newborns, elderly people, and immunocompromised individuals, with their families; second, national and international organizations and the majority of civil society, which want to provide every individual with a decent quality of life; third, professional figures such as doctors, nurses, and others, the National Institutes of Health and the Medical Research Institutes, which invoke the necessity of a high rate of herd immunity; and, fourth, the majorities of the governments, which support the presence of mandatory vaccinations for the benefit of public health.

The claims, especially those of the families of immunocompromised children, consist of the request to society to let their children have a normal life. Because of the weakness of their immune systems, immunocompromised individuals are permanently exposed to risks; these risks increase when healthy people, that they meet everywhere, every day, in their ordinary life, are not immunized. People who cannot receive vaccinations and their families ask for community

---

<sup>40</sup> See Arthur L. Caplan, *The Battle Over Compulsory Vaccination in the U.S.*, 108 AM. J. OF PUB. HEALTH 424, 424 (2018).

protection in order to lead a normal life.<sup>41</sup> The claims of the majority of civil society, who share the belief in mandatory vaccinations, support the needs of those families, in order to raise the level of public health. This claim reflects, in the majority of cases, the government's claim, which has the goal of protecting public health. Professional figures claim the need for a good education about vaccines too, in order to prevent the dissemination of false and misleading information.

Those claims are reflected in different values. One value shared by all the claimants is well-being, requested not only for the non-immunized population but also as a benefit for the whole of society. The second important shared value is respect, seen as respect for the community and for all of its members. The final value is enlightenment, with regard to the necessity of spread true information about the matter.

The claimants share their information mostly using reports and studies. They publish authoritative research in specialist journals, reviews, and internet sites. They fight against "Anti-Vaccination" movements through awareness and information campaigns.

In these cases, non-immunized people and their families do not have a base of power since they have no choice but to avoid vaccinations. Neither medical figures nor civil society have any base of power since it lies with the government, which expresses it in the role of decision-maker.

---

<sup>41</sup> *Italy Bans Unvaccinated Children from School*, BBC (Mar. 12, 2019), <https://www.bbc.com/news/world-europe-47536981> (In Italy there have been several cases of children with serious diseases, unable to get vaccinated, withdrawn from school because of the high presence of non-immunized schoolmates).

### III. Past trends in Decision and Conditioning Factors

#### *A. International Law*

##### **a) WHO Global Vaccine Action Plan 2011-2020**

The World Health Organization has always been extremely concerned about global immunization. The 65th session of the World Health Assembly took place in Geneva during May 21–26 2012. At this session, the World Health Assembly discussed the eradication of various diseases. The World Health Assembly endorsed the Global Vaccine Action Plan (GVAP) as “a commitment to ensure that no one misses out on vital immunization by 2020.”<sup>42</sup> The GVAP goal is to prevent millions of deaths by 2020 through more equitable access to vaccines for people in all communities.

GVAP was the product of the Decade of Vaccines Collaboration, which gathered development, health, and immunization experts with stakeholders. All the governments of the member states were called to achieve the goal set by the GVAP.<sup>43</sup>

Unfortunately, until now, progress towards the GVAP targets is still far from being achieved. In 2015, more than 19 million children had not received basic immunizations, and overall global immunization coverage had stagnated.<sup>44</sup> The 2017 World Health Assembly resolution encourages member states to strengthen their management of national immunization programs and improve monitoring and supervision of health policy in order to optimize its effectiveness. It also urges countries to enlarge immunization services, exploit their internal resources, and strengthen international cooperation to achieve GVAP goals.

---

<sup>42</sup> *World Health Assembly Endorsed Resolution to Strengthen Immunization*, WHO (May 29, 2017), <https://www.who.int/mediacentre/events/2012/wha65/en/>.

<sup>43</sup> *Global Vaccine Action Plan 2011-2020 (GVAP)*, WHO (2012), [https://www.who.int/immunization/global\\_vaccine\\_action\\_plan/GVAP\\_doc\\_2011\\_2020/en/](https://www.who.int/immunization/global_vaccine_action_plan/GVAP_doc_2011_2020/en/).

<sup>44</sup> *Dr. Tedros Adhanom Ghebreyesus Elected WHO Director-General*, WHO (2019), <https://www.who.int/wer/en/>.

The resolution underlined the importance of the understanding of vaccines' value and asked the WHO Secretariat to continue to support countries to achieve regional and global vaccination goals. Member states recognized the great importance that the GVAP has for the development of Public Health, and they acknowledged WHO's fundamental role in facilitating the GVAP's implementation to ensure complete coverage of vital immunization all over the World.

#### **b) WHO Position Paper 2017, Weekly Epidemiological Record**

The Weekly Epidemiological Record is an essential instrument for the rapid and accurate dissemination of epidemiological information on cases and epidemics of diseases under the International Health Regulations, and on other contagious diseases of public health importance, including new or returning infections.<sup>45</sup> Within the Weekly Epidemiological Record, in accordance with its mandate to provide guidance to member states on health policy matters, WHO regularly issues a series of position papers on vaccines, and combinations of vaccines, against diseases that have a global effect on public health. The position papers focus primarily on the impact of the large-scale immunization program, summarizing essential information about diseases' spread, and concluding with the WHO position regarding the ongoing global situation.

The 2017 WHO position paper on measles vaccines affirms that, despite the availability of safe and cost-effective vaccines, measles still remains one of the significant global causes of death among children under five years old. In September 2016, the American region declared to have eradicated this disease, becoming the first region in the world to achieve this goal. The World Health Organization European Region has seen an important reduction of measles and

---

<sup>45</sup> *Weekly Epidemiological Record*, WHO (2019), <https://www.who.int/wer/en/>.

rubella cases in recent years. Nevertheless, occasional outbreaks continue, recently affecting mainly adolescents and young adults who are not completely immunized.<sup>46</sup>

Moreover, in June 2017, the WHO Regional Office for Europe expressed its concern about the current situation and the spread of measles and other vaccine-preventable diseases in Italy. It appreciated Italy's effort to immediately adopt concrete measures to stop the transmission of the disease and improve its vaccination coverage rate to achieve the elimination of the disease.

The WHO position paper on measles vaccination recommends a school vaccination requirement for children, since such vaccinations have been shown to play a significant role in the high coverage achievement, also it prevents the spread of the disease in schools. Nevertheless, according to the WHO European Region, education has an essential role in mitigating the adverse impact of misinformation and raising awareness. Precise and evidence-based information leads individuals to make the right choice.

## ***B. European Legislation***

### **a) European Commission and Council of the European Union**

In April 2018, the European Commission issued a set of recommendations for how the EU can strengthen cooperation in the fight against diseases that can be prevented by vaccines. These recommendations followed President Juncker's call in his 2017 State of the Union address, for action to increase vaccination coverage and to ensure that everyone in the EU has access to vaccines.<sup>47</sup> The proposal of the Commission was based on three main pillars for action:

---

<sup>46</sup> Siddharta Sankar Datta, *Progress and Challenges in Measles and Rubella Elimination in the WHO European Region*, 36 VACCINE 5408, 5409 (2018).

<sup>47</sup> President Jean-Claude Juncker, State of the Union Address at the European Commission (Sep. 13, 2017), [http://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm) ("In a Union of equals, there can be no second-class citizens. It is unacceptable that in 2017 there are still children dying of diseases that should long have been eradicated in Europe. (...) No ifs, no buts. (...) Avoidable deaths must not occur in Europe.").

opposing vaccine hesitancy<sup>48</sup> and improving vaccination coverage; sustainable vaccination policies in the EU; and EU coordination and cooperation in global health.<sup>49</sup> The proposal calls for twenty concrete actions by the Commission and Member States, which include the development and implementation of the national and/or regional vaccination plans by 2020, with a target of at least ninety-five percent vaccination coverage for measles; the introduction of routine checks of vaccination status; the establishment of a European vaccination information portal by 2019 to provide online objective, transparent and updated evidence on the benefits and safety of vaccines; and the strengthening partnerships and collaboration on vaccination with international partners.

According to the most recent data collected by the European Centre for Disease Prevention and Control (ECDC), measles cases continue to grow in EU and EEA countries. In the twelve-month period between March 1, 2017 and February 28, 2018, 14,813 cases of measles were reported through the European Surveillance System. Of these cases, where vaccination status was known, eighty six percent were not vaccinated. Moreover, the ECDC concluded that at least 40,000 people annually die from influenza, in part because of too-low vaccination coverage.

In 2018, the European Commission adopted a report on “The State of Confidence in Vaccines in the EU” in order to monitor attitudes towards vaccinations in the context of the State

---

<sup>48</sup> Karafillakis E., *Vaccine Hesitancy Among Health Care Workers in Europe: A Qualitative Study*, NCBI (Sep. 26, 2016), <https://www.ncbi.nlm.nih.gov/pubmed/27576074>.

<sup>49</sup> The Commission's recommendations on vaccine-preventable diseases build on a number of existing EU policies and projects in the area of vaccination. These include the Council Recommendation 2009/1019 of Dec. 22, 2009, on Seasonal Influenza Vaccination, the Joint Procurement Agreement, established by the serious cross-border health threats Decision 1082/2013 (EU) of the European Parliament and of the Council of Oct. 22, 2013 on Serious Cross-Border Threats to Health, and a Joint Action on vaccination co-funded by the Health Program 2014-2020, EUR PAR. REG. 282/2014 (Mar. 11, 2014) (on the Establishment of a Third Programme for the Union's Action in the Field of Health (2014-2020), which addresses vaccine hesitancy amongst other topics).



of Health in the EU process.<sup>50</sup> “The study presented in the report was commissioned and financed by the European Commission to compare confidence rates between those reported in the 2016 VCP confidence report and those in 2018 and to extend the survey to all twenty eight EU member states.”<sup>51</sup> Vaccine confidence is composed of the trust in the healthcare system and the belief that vaccinations are effective and safe. It refers to the conviction that vaccination is essential for the best health interests of the public and its components.<sup>52</sup>

While public confidence in vaccination is fundamental for guaranteeing high vaccination spread, so are provider and political confidence. In order to understand the drivers of confidence in vaccines when supply, access, and information are available it is necessary to understand belief-based factors, which usually have strong local and contextual roots and differ over time and by vaccine. The survey was conducted across all the sixty-seven countries by the Vaccine Confidence Project (VCP)<sup>53</sup> in 2016 found that the European region had lower confidence in the safety of vaccines than other world regions.

Additionally, in the European region are seven of the ten countries with the lowest levels of safety-based confidence issues,<sup>54</sup> four of which (France, Greece, Slovenia, and Italy) are part of the EU. Vaccine refusal has been growing in many EU member states: between 2000 and 2017, routine immunization coverage of the first dose of a measles-containing vaccine, typically measles-mumps-rubella (MMR), has decreased in nine EU member states and since 2010, it has increased in twelve.<sup>55</sup> In 2017, the number of confirmed measles cases reached its highest levels

---

<sup>50</sup> See Larson et al., *supra* note 18.

<sup>51</sup> In the 2016 study, only twenty EU member states were surveyed. *Id.* at 9.

<sup>52</sup> Heidi Larson & Will Schulz, *The State of Vaccine Confidence*, LONDON SCH. HYGIENE & TROPICAL MED. (2015), [https://static1.squarespace.com/static/5d4d746d648a4e0001186e38/t/5d75156b63cb4f265725de12/1567954291535/VCP\\_The-State-of-Vaccine-Confidence\\_2015.pdf](https://static1.squarespace.com/static/5d4d746d648a4e0001186e38/t/5d75156b63cb4f265725de12/1567954291535/VCP_The-State-of-Vaccine-Confidence_2015.pdf), at 13.

<sup>53</sup> *Id.*; see Larson et al., *supra* note 18, at 8.

<sup>54</sup> *Id.* at 37.

<sup>55</sup> WHO-UNICEF COVERAGE ESTIMATES, WHO (2017), [https://apps.who.int/immunization\\_monitoring/globalsummary/timeseries/tswucoveredtp3.html](https://apps.who.int/immunization_monitoring/globalsummary/timeseries/tswucoveredtp3.html).

since 2010. Of the 9,420 cases recorded in 2010, eighty-six percent were recorded in France, Greece, Italy, Romania, or the UK;<sup>56</sup> countries whose first-dose measles immunization percentages are below the threshold required to reach herd immunity (ninety- three to ninety-five percent).<sup>57</sup> In 2018, the measles vaccination rates of seventeen EU Member States have dropped below these herd immunity levels. However, eight of these countries (Bulgaria, Finland, Greece, Lithuania, Poland, Slovakia, and Spain) have seen the immunization rates decreasing since 2010.

Furthermore, the report emphasized that “it is not only measles which carries a large disease burden across the EU: between four to fifty million cases of seasonal influenza are reported every year in the EU/EEA, with 5,000-17,000 deaths (annually) as a result of flu infection.”<sup>58</sup> Despite this data, seasonal influenza vaccination’s coverage is low across the EU, even within the high-risk group of people over sixty-five years of age. However, in this case, it is conceivable that economical and access barriers may impede optimum seasonal influenza vaccine uptake (a flu vaccine in Austria, Estonia, Poland or Slovenia would have a full cost, whereas in Latvia the vaccine is partially funded).<sup>59</sup>

Across the twenty-eight EU Member States, public perception towards vaccines is largely positive. The majority of the European population, in fact, agree (strongly or tend to agree) that

---

<sup>56</sup> WHO-UNICEF Disease Incidence Data, WHO (2017),

[http://apps.who.int/immunization\\_monitoring/globalsummary/timeseries/tsincid encemeasles.html](http://apps.who.int/immunization_monitoring/globalsummary/timeseries/tsincid encemeasles.html).

<sup>57</sup> Sebastian Funk, *Critical Immunity Thresholds for Measles Elimination*, CTR. MATHEMATICAL MODELING OF INFECTIOUS DISEASES, LONDON SCH. HYGIENE & TROPICAL MED. (Oct. 19, 2017), [http://www.who.int/immunization/sage/meetings/2017/october/2.\\_target\\_immu nity\\_levels\\_FUNK.pdf](http://www.who.int/immunization/sage/meetings/2017/october/2._target_immu nity_levels_FUNK.pdf).

<sup>58</sup> See Larson et al., *supra* note 18, at 8.

<sup>59</sup> See Jolita Mereckiene, Suzanne Cotter, Angus Nicoll, Teymur Noori, J. Todd Weber, Pier Luigi Lopalco, Fortunato D’Ancona, Daniel Lévy-Bruhl, Luca Dematte, Cristina Giambi, Palle Valentinier-Branth, Iwona Paradowska-Stankiewicz, Ester Appelgre & Darina O’Flanagan, *Seasonal Influenza Immunization in Europe: Overview of Recommendations and Vaccination Coverage for Three Seasons: Pre-Pandemic 50 (2008/09), Pandemic (2009/10) and Post-Pandemic (2010/11)*, 19 (16) EUROSURVEILLANCE (April 24, 2014), <https://www.eurosurveillance.org/content/10.2807/1560-7917.ES2014.19.16.20780>; Pernil Jorgensen, Jolita Mereckiene, Suzanne Cotter, Kari Johansen, Svetla Tsolova & Caroline Brown, *How Close are Countries of the WHO European Region to Achieving the Goal of Vaccinating 75% of Key Risk Groups Against Influenza? Results From National Surveys on Seasonal Influenza Vaccination Programs, 2008/2009 to 2014/2015*, SCIENCE DIRECT (Jan. 25, 2014), <https://www.sciencedirect.com/science/article/pii/S0264410X17317620?via%3Dihub>.

vaccines are important (90.0%), safe (82.8%), effective (87.8%), and compatible with religious beliefs (78.5%). The majority of the EU public also agree that MMR and seasonal influenza vaccines are important and safe. The MMR vaccine is much more likely than the seasonal flu vaccine to be perceived as important (83.8% versus 65.2%) and safe (81.7% versus 69.4%); however, there are important differences in perceptions towards vaccine importance, safety, and effectiveness among the Member States.

The Commission's proposal for a Council recommendation was discussed and adopted by the Council of EU in December 2018.<sup>60</sup> The Council emphasized that vaccination is one of the most powerful and effective public health measures developed in the 20th century and that it continues to be the most important instrument for primary prevention of communicable diseases. Vaccination programs should go further than childhood, taking a lifetime approach to address epidemiological changes when it comes to vaccine-preventable diseases. Furthermore, vaccination can be an important tool for dealing with antimicrobial resistance. Pascale Maura, President of Vaccines Europe, said that the Recommendation represents a major step towards addressing the different vaccines and vaccination-related challenges faced by the EU Member States such as increasing vaccination hesitancy, low vaccine uptake. Implementing the Recommendation will require stronger collaboration between all relevant stakeholders, in particular, national public health authorities and the European Commission. At Vaccines Europe we are looking forward to collaborating and supporting the implementation of the EU Council Recommendation in order to secure full protection of all EU citizens against vaccine-preventable diseases.<sup>61</sup>

---

<sup>60</sup> Council Recommendation C 466/01 of Dec. 28, 2018, Strengthened cooperation against vaccine-preventable diseases, 2018 O.J. (L 61) 1.

<sup>61</sup> Vaccines Europe, *Vaccines Europe Statement on the Adoption of the EU Council Recommendation on Strengthened Cooperation Against Vaccine-Preventable Diseases*, VACCINES EUR. (Dec. 7, 2018),

### **b) ECDC's Annual Epidemiological Report**

The European Centre for Disease Prevention and Control (ECDC) was created in 2005,<sup>62</sup> but the project of creating a European public health agency had already come out in 2003 after the SARS outbreak produced a serious threat to Europe. It became evident that there was an urgent necessity of having more efficient coordination of the Member States' response to the outbreak and scientific advice on options to react against such an outbreak at the EU level.<sup>63</sup> The main role of the ECDC as an agency of the EU is to reinforce Europe's defenses against communicable diseases. Since its creation, ECDC has been cooperating together with all EU/EEA countries to react to public health threats and emerging diseases. One of the biggest achievements has been to make Europe-wide data available to all stakeholders, with the creation of the European Surveillance System (TESSy), which collects, analyzes, and disseminates data on communicable diseases.

The European Centre for Disease Prevention and Control also conducts both indicator- and event-based surveillance of measles. The European Surveillance System has been used also to conduct indicator-based surveillance. Surveillance reports on measles and rubella are presented monthly<sup>64</sup>; annually<sup>65</sup>; and through ECDC's online Surveillance Atlas of Infectious

---

<https://www.vaccines-europe.eu/media-center/vaccines-europe-statement-on-the-adoption-of-the-council-recommendation-on-strengthened-cooperation-against-vaccine-preventable-diseases/>.

<sup>62</sup> Regulation (EC) No 853/2004 of the European Parliament and of the Council of Apr. 21, 2004, Establishing a European Centre for Disease Prevention and Control, 2004 O.J. (L 142) 1.

<sup>63</sup> *ECDC 10 Years – 10 highlights of ECDC's work*, EUR. CTR. FOR DISEASE PREVENTION & CONTROL (May 20, 2015), <https://www.ecdc.europa.eu/en/ecdc-10-years-event>.

<sup>64</sup> *Monthly measles & rubella monitoring reports*, EUR. CTR. FOR DISEASE PREVENTION & CONTROL, <https://www.ecdc.europa.eu/en/measles/surveillance-and-disease-data/monthly-measles-rubella-monitoring-reports> (last visited March 3, 2020).

<sup>65</sup> *Bi-Annual Measles and Rubella Monitoring Reports*, EUROPEAN CENTER FOR DISEASE PREVENTION AND CONTROL, <https://www.ecdc.europa.eu/en/measles/surveillance-and-disease-data/biannual-measles-rubella-reports> (last visited Feb. 25, 2020).

Diseases, which is updated monthly.<sup>66</sup> ECDC also monitors measles and rubella outbreaks in Europe through epidemic intelligence, publishing the most recent updates in the Communicable Disease Threats Report (CDTR).<sup>67</sup> As outbreaks or public health events develop, ECDC may conduct rapid risk assessments to help the Member States and the European Commission to be ready to respond to public health threats. In March 2017, the ECDC published a rapid risk assessment on the measles outbreak in Romania,<sup>68</sup> and, one year later in March 2018, a rapid risk assessment on outbreaks throughout the EU/EEA in 2017–2018 was published.<sup>69</sup>

In this report, the ECDC emphasized that measles cases in the EU/EEA countries principally occur in unvaccinated populations in both adults and children. Large outbreaks with fatalities are happening in countries that had previously eliminated or interrupted endemic transmission. Vaccination coverage and incidence of cases are different within countries and communities. Even if a country has reached an overall coverage rate of 95%, outbreaks can still occur within the country in communities with low coverage rates (i.e. they may be delimited either geographically or socio-demographically). According to the ECDC, the high percentage of cases that occurred among young adults with unknown vaccination status (13% among 25–29-year-old) underlines the importance of registration tools, electronic registers in particular, to document the vaccination status of individuals. Such registers, in fact, are able to provide timely

---

<sup>66</sup> *Surveillance Atlas of Infectious Diseases*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <https://atlas.ecdc.europa.eu/public/index.aspx?Dataset=27&HealthTopic=35&GeoResolution=2&TimeResolution=Month&FixDa%20taset=1&FixHealthTopic=0?Instance=MeaslesMonthlyAtlas%20> (last visited Feb. 25, 2020).

<sup>67</sup> *Weekly Threat Reports (CDTR)*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, [http://ecdc.europa.eu/en/publications/surveillance\\_reports/Communicable-Disease-Threats-Report/Pages/default.aspx](http://ecdc.europa.eu/en/publications/surveillance_reports/Communicable-Disease-Threats-Report/Pages/default.aspx) (last visited Feb. 25, 2020).

<sup>68</sup> *Rapid risk assessment: ongoing outbreak of measles in Romania, risk of spread and epidemiological situation in EU/EEA countries*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL (Mar. 3, 2017), <https://www.ecdc.europa.eu/en/publications-data/rapid-risk-assessment-ongoing-outbreak-measles-romania-risk-spread-and#no-link>.

<sup>69</sup> *Rapid risk assessment: Risk of measles transmission in the EU/EEA*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL (Mar. 21, 2018), <https://ecdc.europa.eu/en/publications-data/rapid-risk-assessment-risk-measles-transmission-eueea>.

vaccination coverage data, even at the subnational level, although this is lacking in a number of the Member States. The increasing number of cases among adults also highlights the necessity of considering catch-up campaigns; for this reason, the ECDC encouraged Member States to identify existing immunity gaps in specific population groups to facilitate supplementary immunization activities (SIAs).

Finally, the report noted the high incidence of measles cases among healthcare workers in several EU/EEA countries. In the ECDC's opinion, this is a matter of concern and Member States may consider specific interventions such as ensuring that all healthcare workers are immune to measles, requiring proof/documentation of immunity, or immunization as a condition of enrollment into training and employment. The ECDC concluded that, given the current extent of measles circulation in the EU/EEA, the trend in recent years, and the fact that vaccination coverage for the first and second dose is suboptimal, there still is a high risk of continued measles transmission with mutual exportation and importation between EU/EEA Member States and third countries.

Lately, the ECDC<sup>70</sup> has collaborated with the World Health Organization (WHO)<sup>71</sup> to inform the population about measles and rubella vaccines and to respond to the threat to public health posed to the European Union by the outbreak of measles in several countries among the Member States.

---

<sup>70</sup> See *Factsheet about measles*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <https://ecdc.europa.eu/en/measles/facts/factsheet> (last visited Apr. 14, 2018); see also *Factsheet about rubella*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <https://ecdc.europa.eu/en/rubella/factsheet> (last visited Apr. 14, 2018); see also *Vaccine Scheduler*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <http://vaccine-schedule.ecdc.europa.eu/Pages/Scheduler.aspx> (last visited Apr. 14, 2018); see also *Immunization and vaccines*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, <https://ecdc.europa.eu/en/immunisation-and-vaccines> (last visited Apr. 12, 2018).

<sup>71</sup> *Measles and rubella*, WHO REG'L OFFICE FOR EUR., <http://www.euro.who.int/en/health-topics/communicable-diseases/measles-and-rubella> (last visited Apr. 2018); *Centralized Info. Sys. for Infectious Diseases (CISID)*, WHO REG'L OFFICE FOR EUR., <http://data.euro.who.int/cisid/?TabID=455361> (last visited Apr. 12, 2018).

### *C. Domestic Law; Duties and Exceptions*

Although the European Commission is responsible for supporting European countries in coordinating their national policies and programs, the policy on vaccine falls within the competence of the national authorities.<sup>72</sup> A comparative survey on the implementation of vaccination programs on twenty-seven EU countries (plus Iceland and Norway), conducted by Venice (Vaccine European New Integrated Collaboration Effort project) in 2010 and published in the *Eurosurveillance* magazine in 2012,<sup>73</sup> showed that in total fifteen European countries do not have compulsory vaccinations, while the remaining fourteen countries have at least one mandatory vaccination included in their vaccination programs. The fifteen European countries that do not have any mandatory vaccination are Austria, Denmark, Estonia, Finland, Germany, Ireland, Iceland, Lithuania, Luxembourg, Norway, Portugal, Spain, Sweden, and United Kingdom. Several differences have also been recorded in the choices of vaccinations which have been made mandatory. Analyzing the data collected by the 2012 *Eurosurveillance* study, it can be observed that vaccination against polio is mandatory for every child in twelve European countries. On the contrary, vaccination against diphtheria and tetanus are mandatory in eleven countries while vaccination against hepatitis B is mandatory only in ten.

On 21 June 2017, the Court of Justice of the European Union (ECJ) ruled on a request for a preliminary ruling from the French Supreme Court (*Court de Cassation*) on the burden of proof faced by patients who have suffered harm from a defective vaccine. For the first time, the ECJ decided that the defect of a vaccine and the causal link between this defect and the disease

---

<sup>72</sup> See Simone Penasa, *Obblighi vaccinali: un itinerario nella giurisprudenza costituzionale comparata*, 1 QUADERNI COSTITUZIONALI 47 (2018).

<sup>73</sup> Manon R. Haverkate, Fortunato D'Ancona, Cristina Giambi, Kari Johansen, Pier Luigi Lopalco, Vanessa Cozza & Ester Appelgren, *Mandatory and Recommended vaccination in the EU, Iceland, and Norway: results of the VENICE 2010 survey on the ways of Implementing National Vaccination programmes*, *EUROSURVEILLANCE* (May 2012), <http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=20183>.

caused can be demonstrated by serious, specific and consistent evidence, in the absence of scientific consensus about a causal relationship.<sup>74</sup>

### a) France

In the European continent, the policy regarding vaccines changes from State to State.<sup>75</sup> France is the European country with the highest rate of “vaccine hesitancy,” since the population has a significant lack of confidence in health-care institutions, according to the information from government and scientists.<sup>76</sup> This led to one of the biggest issues that France faces, the often poor follow-through of booster shots. Health data show that only eight in ten babies get the MMR booster (for mumps, measles, and rubella) due at eighteen months of age—a lower rate than in many other countries; that represents a problem since it weakens herd immunity in the population. There is no doubt that the refusal of the MMR vaccine contributed to a slight recrudescence of measles in the country, with a few dozen to a few hundred cases annually and, in particular, an epidemic of several thousand cases in 2010 and 2011.<sup>77</sup>

In order to respond to this epidemic, the French government approved the new law, entered into force on January 1, 2018, which requires all children born January 2018 or later to receive eleven mandatory vaccines.<sup>78</sup> The introduction of the new law has been justified by reasons of public health.<sup>79</sup> The norm increased the number of mandatory vaccines from three to

---

<sup>74</sup> Cour de cassation, [Cass.] [Cassation Court], Second Chamber, June 21, 2017, Case C-621/15, N.W. L.W en C.W v. Court Reports – general, 2017.

<sup>75</sup> For freedom of choice and differences between the European countries, see *Europe – Vaccination Status*, EUR. FORUM FOR VACCINE VIGILANCE (2020), <https://www.efvv.eu/map-of-vaccination-status-by-country/>.

<sup>76</sup> Heidi Larson, Alexandre de Figueiredo, Emili Karafillakis, & Mahesh Rawal, *State of Vaccine Confidence in the EU 2018*, LONDON SCH. OF HYGIENE & TROPICAL MED., VACCINE CONFIDENCE PROJECT (2018), [https://ec.europa.eu/health/sites/health/files/vaccination/docs/2018\\_vaccine\\_confidence\\_en.pdf](https://ec.europa.eu/health/sites/health/files/vaccination/docs/2018_vaccine_confidence_en.pdf).

<sup>77</sup> *Laws are not the only way to boost immunization*, NATURE (Jan. 17, 2018), <https://www.nature.com/articles/d41586-018-00660-y>.

<sup>78</sup> Décret 2018-42 du 25 Janvier 2018 Relatif à la Vaccination Obligatoire [Decree 2018-42 of January 25, 2018 on Mandatory Vaccination], J. OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] 25 (Jan. 26, 2018), <https://www.legifrance.gouv.fr/eli/decret/2018/1/25/SSAP1732098D/jo/texte>.

<sup>79</sup> French Prime Minister Édouard Philippe announced on July 4 that prevention would have been the cornerstone of the French health strategy. *Édouard Philippe's General Policy Statement: Key Points at a Glance*, GOUVERNEMENT:



eleven. The law requires eleven mandatory vaccinations for the admission of children into the school community (daycare and compulsory schooling). Before 2018, only vaccinations against diphtheria, tetanus and poliomyelitis (and against yellow fever in Guyana district) were mandatory; now, vaccinations against polio, pertussis, measles, mumps, rubella, hepatitis B, *Haemophilus influenzae* bacteria, pneumococcus, and meningococcus C are also mandatory. A specific sanction is imposed on parents who fail to get their children immunized.<sup>80</sup>

The trivalent DTPolio vaccine is no longer available, so to meet the requirements children have to be inoculated with the hexavalent (Infanrix Hexa) or pentavalent vaccines, which consist of the legally required vaccines along with other non-legally required vaccines. The law accepts contraindication certificates. Other vaccinations are mandatory for some medical professions.

#### **b) United Kingdom**

The UK Department of Health (DOH) recommends that parents give routine vaccines. These are identified in the immunization schedule presented by health visitors to all newborns. The DOH has set targets for vaccine uptake.<sup>81</sup> The purpose is that by the age of two, 95% of children will be immunized against diphtheria, tetanus, polio, pertussis, Hib, measles, mumps and rubella. However, United Kingdom policy does not provide for mandatory vaccines.<sup>82</sup> Unvaccinated children in the United Kingdom are allowed to attend daycares, kindergartens and all school grades and exams.

---

LIBERTÉ ÉGALITÉ FRATERNITÉ (Jul. 5, 2017), <https://www.gouvernement.fr/en/edouard-philippe-s-general-policy-statement-key-points-at-a-glance>.

<sup>80</sup> M. Haverkate, D. D'Ancona, C. Giambi, K. Johansen, P. L. Lopalco, V. Cozza, E. Appelgren, *EUROSURVEILLANCE* (Oct. 18, 2011), <https://www.eurosurveillance.org/images/dynamic/EE/V17N22/art20183.pdf>. (the sanction imposed provides for up to six months in prison and a fine of €3,750).

<sup>81</sup> *Vaccinations*, N.H.S. (Mar. 3, 2019), <https://www.nhs.uk/conditions/vaccinations/>.

<sup>82</sup> *Vaccinations*, MINISTRY OF ETHICS (2014), <http://ministryofethics.co.uk/index.php?p=9&q=2>.

Although parents have a duty to act in the best interests of their children, they are free to decide autonomously if they want to vaccinate them. Under ordinary circumstances, vaccination cannot be enforced when both parents are in agreement. However, when parents cannot agree, courts are required to make welfare decisions.

### c) Germany

In Germany, vaccinations are voluntary. There are no school or daycare requirements regarding immunization, either nationally or in any state. Immunization status is checked at school entry mandatorily. These data have to be delivered to the *Robert Koch Institut* (RKI).<sup>83</sup> The Institute is responsible for measuring vaccine coverage at the national level. Big differences have been found regarding vaccine coverage from *Länder* to *Länder* and between the areas within the same *Länder*.

The *Ständige Impfkommision* (STIKO) is the major federal commission involved in vaccination issues. The immunization schedule recommended by STIKO is published by the *Robert Koch Institut*, which provides STIKO with all administrative support. Even if STIKO vaccine recommendations are limited to vaccinations licensed in Germany, the recommendations have no legal authority, they are not binding, and do not need approval from the Ministry of Health. Therefore, there is no governmental recommendation, but the federal states, which make their own official recommendations for the population within their geographical jurisdiction, usually follow STIKO recommendations strictly, sometimes more expansively. In fact, although the vaccination plan is recommended at the national level, each *Länder* is free to include in the plan vaccinations against different diseases, according to the current epidemiological situation.

---

<sup>83</sup> Nationwide data are available at the RKI home page. See *RKI – The Institut*, ROBERT KOCH INST., [www.rki.de](http://www.rki.de); see, e.g., *ESTICOM*, EUR. UNION HEALTH PROGRAMME 2014-2020 (2017), [https://www.esticom.eu/Webs/ESTICOM/EN/about-project/consortium-partners/About\\_RKI.html?nn=8612506](https://www.esticom.eu/Webs/ESTICOM/EN/about-project/consortium-partners/About_RKI.html?nn=8612506) (last visited April 17, 2020).

In 1998, a national plan for the elimination of measles was launched and, as a result of the campaign, the MMR vaccination rate increased in the following years. However, in recent years, a measles epidemic has spread across Germany. German health minister Hermann Groeche affirmed that “nobody can be indifferent to the fact that people are still dying of measles, that’s why we are tightening up regulations on vaccination.”

Since 2015, parents in Germany must present proof that they have received medical vaccination advice to childcare centers, but the center is not allowed to refuse a child a place if they have not done so, as parents have a legal right to one. Until 2017, it was up to the childcare centers to decide whether to report those parents without proof of consultation to health authorities, but starting from June 1, 2017, notification is mandatory.<sup>84</sup> According to the law, children of parents who fail to seek vaccination advice could be expelled from their daycare center. Moreover, parents in Germany who fail to seek medical advice on vaccinating their children could face fines of up to €2,500.<sup>85</sup>

#### **d) Italy**

Immunization coverage in Italy had decreased alarmingly over the last five years—a fall of 5.3% in 2011–15 for the measles vaccine, for example. Italy was subsequently ranked sixth highest worldwide for measles cases in 2017.<sup>86</sup> As a result, vaccination was swiftly made mandatory.<sup>87</sup>

---

<sup>84</sup> Susan Scutty, *How Countries Around the World Try to Encourage Vaccinations*, CNN (Jan. 2, 2018, 3:32 PM), <https://www.cnn.com/2017/06/06/health/vaccine-uptake-incentives/index.html>.

<sup>85</sup> *Germany Moves to Improve Child Vaccination Rate*, DW (May 26, 2017), <https://www.dw.com/en/germany-moves-to-improve-child-vaccination-rate/a-39004792>.

<sup>86</sup> In 2017 Italy reported 1,620 measles cases in six months. *Number of Reported Measles Cases (6M Period)*, WHO (2018), [https://www.who.int/immunization/monitoring\\_surveillance/burden/vpd/surveillance\\_type/active/big\\_measles\\_reportedcases6months.png?ua=1](https://www.who.int/immunization/monitoring_surveillance/burden/vpd/surveillance_type/active/big_measles_reportedcases6months.png?ua=1).

<sup>87</sup> See Carlo Signorelli, *Quarant’anni (1978-2018) di politiche vaccinali in Italia*, ACTA BIO MEDICA: ATENEI PARMENSIS, 127 (2019).

In 2017, the Italian Government introduced a new law which brought the number of mandatory vaccinations in childhood and adolescence in our country from four to ten.<sup>88</sup> It became compulsory in Italy to vaccinate infants (up to sixteen years old) against ten diseases: *Haemophilus influenzae* type b, measles, mumps, rubella, varicella and whooping cough (pertussis), as well as those that were already mandated (diphtheria, tetanus, polio, and hepatitis B). The objective of the law was to reverse the progressive decrease in vaccinations, both mandatory and recommended, in place since 2013, which led to the Italian rate of vaccination coverage falling below 95%, the threshold recommended by the WHO to provide the population with the so-called “herd immunity.”

Furthermore, the law should let the country reach the priority goals posed by the “National Plan on Vaccinations 2017-2019,”<sup>89</sup> established between the government and the regions, and respect the obligations undertaken at the European and International level.<sup>90</sup>

Before the introduction of the law, pilot schemes were applied in the Veneto region (five million inhabitants). This proved that alternative strategies were not feasible. The schemes suspended the formerly mandated vaccinations and invested in health education to promote voluntary vaccine uptake. This led to a decline in coverage for polio vaccine in 2006–16, for example: by 5.2% in Veneto compared with 3.3% nationwide.<sup>91</sup>

---

<sup>88</sup> Decreto- Legge 07 giugno 2017, n. 73, in Disposizioni urgenti in materia di prevenzione vaccinale, June 7, 2017, then modified in Legge 31 Luglio 2017, Conversione in legge, con modificazioni, del Decreto Legge 7 giugno 2017, n. 73, recante disposizioni urgenti in materia di prevenzione vaccinale, 182 G.U. (Aug. 5, 2017); [https://www.gazzettaufficiale.it/eli/id/2017/08/05/17G00132/sg.-legge 07 Giugno 2017, n.](https://www.gazzettaufficiale.it/eli/id/2017/08/05/17G00132/sg.-legge%2007%20Giugno%202017,n.73)

<sup>89</sup> Piano Nazionale Prevenzione Vaccinale 2017-2019 (Global Plan on Vaccine Preventable Diseases), [http://www.salute.gov.it/imgs/C\\_17\\_pubblicazioni\\_2571\\_allegato.pdf](http://www.salute.gov.it/imgs/C_17_pubblicazioni_2571_allegato.pdf).

<sup>90</sup> *Legge Vaccini [Law on Vaccine Law]*, MINISTRY OF HEALTH (Jan. 18, 2018), <http://www.salute.gov.it/portale/vaccinazioni/dettaglioContenutiVaccinazioni.jsp?lingua=italiano&id=4824&area=vaccinazioni&menu=vuoto>.

<sup>91</sup> Carlo Signorelli et al., *Infant Immunization Coverage in Italy (2000- 2016)*, 53 ANN. INST. SUP. SANITÀ 231, 234 (2017).

Compliance with vaccination obligations constitutes a requirement for admission to kindergarten and nursery school. Children who have not been inoculated with mandatory vaccinations cannot be enrolled in nursery schools and public and private preschools. In this case, the dean has to report the name of the child to the competent health authority within ten days in order to fulfill the vaccination requirement. For the first two school years following the entry into force of the national law, the latter provided parents with the option to self-certify the vaccination and subsequently submit a copy of the booklet.

Children and young people who have already been immunized as a result of a natural illness are exempted from the obligation. The same is true in cases of children who have specific clinical conditions that represent a permanent and/or temporary contraindication to vaccination. Minors who cannot be vaccinated for health reasons are normally included by the dean in classes in which there are no other unvaccinated or non-immunized children, in order to protect their health.

The law establishes different rules starting from primary school. In this case, in fact, children and youngsters can still access to school, but, if the obligations have not been respected, a vaccination recovery path is activated by the public health authorities and it is possible to be subject to administrative fines.<sup>92</sup>

According to the preliminary data, the new law seems to be achieving its goal. It has been found that almost one-third of the previously unvaccinated children born in 2011–15 have now been immunized. Polio and measles vaccine uptake has increased by 1% and 2.9%, respectively, and by even more in selected regions.<sup>93</sup>

---

<sup>92</sup> *Freedom of Choice in Vaccination for all Europeans*, *supra* note 75 (the law provides for administrative fines up to €500).

<sup>93</sup> See Carlo Signorelli et al., *The Imperative of Vaccination Put into Practice*, 18(1) LANCET 26 (2018), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(17\)30696-5/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(17)30696-5/fulltext) (discussing differences among

As a result of the broad debate opened in Italy about the vaccines policy, many cases have been brought before the Italian courts. In 2012, the Court of Rimini adopted a clamorous decision, widely criticized by the medical community, affirming that, under certain conditions, the measles-mumps-rubella (MMR) vaccine can cause autism.<sup>94</sup> The Court ordered the Ministry of Health to compensate the applicant for the damage caused by the vaccine. In 2015, the Court of Appeal of Bologna adopted the opposite decision,<sup>95</sup> establishing that there is no link between the MMR vaccine and autism.

Shortly after, in July 2015, the Italian Supreme Court (*Corte di Cassazione*) declared inadmissible the appeal presented by a father against the sentence of the Court of Appeal of Salerno that had denied compensation for the damage, excluding the existence of a causal relationship between the child's syndrome (an immunomediated encephalopathy with syndrome autistic arisen after the vaccine) and the inoculation of the polio vaccine.<sup>96</sup>

#### IV. Predictions

Universal vaccination programs have greatly reduced the impact of infectious diseases in both developing and developed countries.<sup>97</sup> In the 1960s and 1970s, these reductions led to the optimistic thought that the battle against infectious diseases could be won. Unfortunately, even if

---

Italian regions); *see also* Donato Messineo, *Problemi in tema di discipline regionali sui trattamenti sanitari: il caso dei vaccini*, LE REGIONI, 331 (Mar. 2009).

<sup>94</sup> Tribunale di Rimini, Sez. Lavoro, Sentenza n. 2010\148, 15 Marzo 2012, <https://www.altalex.com/~media/Altalex/allegati/2015/03/05/70614%20.pdf>.

<sup>95</sup> Corte di Appello di Bologna, Sez. Lavoro, Sentenza n. 1767, 13 Febbraio 2015, <https://www.altalex.com/~media/Altalex/allegati/2015/03/05/70613%20.pdf>.

<sup>96</sup> Cass., sez. un., 25 luglio 2017, n. 18358, VI Civile (It.), <https://sentenze.laleggepertutti.it/sentenza/cassazione-civile-n-18358-del-25-07-2017>.

<sup>97</sup> Mitchell L. Cohen, *Changing Patterns of Infectious Disease*, 406 NATURE 762 (2000); *see* Jenifer Ehreth, *The Global Value of Vaccination*, 21 VACCINE 596, 599 (2003); *see* Maarten van Wijhe, Scott A. McDonald, Hester E. de Melker, Marteen J. Postma & Jacco Waalinga, *Effect of Vaccination Programmes on Mortality Burden Among Children and Young Adults in the Netherlands During the 20th Century: a Historical Analysis*, 16(5) LANCET 592 (2016), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(16\)00027-X/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(16)00027-X/fulltext).

the benefits of most childhood vaccinations have been scientifically proven, vaccination coverage rates are far from 100% in many countries and show substantial variation. It is fundamental to identify the actual and future trends and improve the understanding of underlying mechanisms to be able to improve vaccination policies and be ready to answer to social fears and concerns.

An important study,<sup>98</sup> using WHO-UNICEF coverage estimates of three doses of diphtheria, tetanus, and pertussis (DTP3) vaccination, analyzed trends in vaccine coverage and a suite of socioeconomic and demographic factors across 190 countries over 30 years, in order to determine where and when vaccination coverage might fall below levels that are safe for prevention of epidemic transmission and to correlate such decreases with underlying socioeconomic and demographic factors.

The results of the study showed that vaccination coverage will be at a safe level (90%) in the near future; the analyses provide some interesting results accompanied by the basic fact that worldwide coverage has increased. For instance, in Eastern Mediterranean countries between 1980 and 2010, gross domestic product (GDP) and government health spending were most strongly linked with vaccination coverage, whereas primary school attendance is most strongly linked with vaccination coverage in Africa (more so than GDP). The analyses also provide a list of countries with high to low vaccine performance indices, showing that many of the countries at the low end of the list are in sub-Saharan Africa, the Indian subcontinent, and southeast Asia.

This list is extremely important in order to think about future strategies from a global public health perspective since it gives an objective measure that can be used to prioritize

---

<sup>98</sup> Alexandre de Figueiredo, Iain G. Johnston, David M. D. Smith, Sumeet Agarwal, Heidi J. Larson, & Nick S. Jones, *Forecasted Trends in Vaccination Coverage and Correlations with Socioeconomic Factors: a Global Time-Series Analysis Over 30 Years*, THE LANCET GLOB. HEALTH (2016), [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(16\)30167-X/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(16)30167-X/fulltext).

countries or regions where efforts to increase vaccination coverage are expected to be most efficient. It is significant to note that, although vaccination coverage is well linked with GDP and schooling in many regions of the world, this is not the case of Europe and, to a lesser extent, North America, anymore. In the two developed continents, in fact, no socioeconomic factors correlated with high coverage, and the main explanation could be that once the basic necessities of life are available, other factors such as social attitudes towards vaccination might become more important.<sup>99</sup>

Overall, the study has conducted a laudable analysis of the link between vaccination coverage rates and demographic and socioeconomic factors at the global scale. Thanks to the overview of trends and potential explanations offered by this research, it is possible now to think about the elements that are able to determine vaccination coverage now and in the future.<sup>100</sup>

However, in order to identify future trends and predictions, it is also essential to emphasize that future immunization methods may be quite different from what we use today. Inhaled vaccines, for example, are already used in some cases: influenza vaccines have been made in the form of a nasal spray.<sup>101</sup> One of these vaccines is available every year for seasonal flu. Other alternatives include a patch application, where the classic use of a syringe is replaced by a patch comprising a matrix of extremely tiny needles. This method of delivery could play a vital role in remote areas since its application would not need delivery by a trained medical person, which is generally required for vaccines delivered as a shot by syringe.

---

<sup>99</sup> See Helena Milton & Hugo Mercier, *Cognitive obstacles to Pro-Vaccination Beliefs*, 19 SCI. & SOC'Y 633, 634 (2015); see Els Geelen, Hans van Vliet, Pieter de Hoogh & Klasien Horstmann, *Taming the Fear of Voice: Dilemmas in Maintaining a High Vaccination Rate in the Netherlands*, 153 SOC. SCI. & MED. 12, 17 (2018).

<sup>100</sup> Michiel van Boven & Alies van Lier, *Global Trends in Vaccination Coverage*, THE LANCET GLOB. HEALTH, (2016), [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(16\)30185-1/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(16)30185-1/fulltext).

<sup>101</sup> See *The History of Vaccines: The Future of Immunization*, COLL. PHYSICIANS PHILA. (Jan. 10, 2018), <https://www.historyofvaccines.org/content/articles/future-immunization>.



Another issue that researchers are trying to resolve is the so-called “cold chain” problem. Many vaccines require cool storage temperatures in order to be still usable. Unfortunately, in many parts of the world where vaccination is essential for disease control, temperature-controlled storage is often unavailable. One of the reasons why smallpox eradication was successful was that the smallpox vaccine could be stored at relatively high temperatures and remain usable for longer periods of time; some contemporary vaccines, however, cannot resist such temperatures.

The researchers also showed that the vaccine material could be put in a holder designed to attach to a syringe, allowing a vaccinator to prepare the vaccine material and inoculate the vaccine almost at the same moment. Although this research is still in an initial phase, it offers optimistic new perspectives for vaccine storage and delivery, showing how the future of vaccines can be different. With a new stabilization method like this one, for example, broad vaccination campaigns would be possible in areas that until now have been difficult or impossible reach.<sup>102</sup>

Therefore, there are two main factors which will influence the future trends: first of all, the current increase of mandatory vaccines policies all around the world (especially in the European continent), and second, the development of technology also in the medical/scientific area. The first element will lead to an increase in the herd coverage rate, the second to an improvement of the vaccines’ quality which will lead to having more safe vaccines. As a consequence, there will be growing confidence of society in health-care institutions and in the information coming from government and scientists.

---

<sup>102</sup> Robert Alcock, Matthew G. Cottingham, Christine S. Rollier, Julie Furze, Samodh D. De Costa, Marian Hanlon, Alexandra J. Spencer, Jared D. Honeycutt, David H. Wyllie, Sarah C. Gilbert, Migena Bregu & Adrian V. S. Hill, *Long-Term Thermostabilization of Live Poxviral and Adenoviral Vaccine Vectors at Supraphysiological Temperatures in Carbohydrate Glass*, 2 SCI. TRANSNAT’L MED. 12, 19 (2010).

As a final result, it will not be necessary anymore to adopt mandatory vaccination policies in order to protect the public health, and more permanent legislation on freedom of choice will be introduced. Finally, thanks to the efforts made by WHO and other international organizations, an uptake of vaccines with no hesitancy is expected to be increasingly shared in the future all around the world.

## **V. Appraisal, Invention of the Alternatives, Recommendation**

The different policies adopted to address this matter are not completely working. Even when they manage to achieve the goal of a high rate of the herd-immunity with mandatory vaccines, they do not deal with the issue of social lack of confidence in governments and social health institution.

In a time of epidemic emergency, when infectious diseases have spread all across the world the uptake of mandatory vaccines, where possible, was the only practicable solution. There is evidence that policies requiring mandatory vaccinations were already starting to improve vaccination rates. For these reasons, it would be wise to keep the mandate until herd immunity for measles and high coverage for the other vaccines are ensured.<sup>103</sup>

The problem is that this kind of solutions, which restrict human freedom, can work only for a short period since they constitute exceptional arrangements that can be adopted only for a limited time until the emergency is over.

Public health constitutes a fundamental human right that each State has to protect but evaluating the drawbacks of mandates on vaccine coverage is a topic of critical importance too, which is closely related to the right of freedom of choice.

---

<sup>103</sup> Rezza, *supra* note 8.

Without any doubt, the ideal solution would be maintaining high vaccine coverage without mandates. With the enforcement of policies regarding mandatory vaccination, in fact, it is impossible to totally reach and maximize the public order of human dignity.

According to the New Haven Perspective, the goal of the law is to approximate the ideal order of human dignity maximizing the access by all human beings to the process of shaping and sharing all things human value.<sup>104</sup>

On one hand, public health has always to be protected; on the other hand, in order to look for solutions which prioritize human dignity, the State must provide alternatives that respect freedom of choice of individuals.

It is important to emphasize that a study comparing different European countries suggested that mandatory vaccination is not a determinant of the level of vaccination coverage,<sup>105</sup> and for this reason, several alternatives have been suggested. These latter solutions involve breastfeeding, which has a notable value since it enables to provide “passive immunity,” which can protect the baby from some infectious diseases, probiotics, and food. The last element constitutes a fundamental factor. More and more people are fighting for a total change of modern lifestyle which has to start with the food that we are used to eating every day. In their opinion, once society adopts a healthy lifestyle, the need for vaccinations will end. In order to achieve this goal, we strongly need educational and awareness campaigns to make society informed about the urgent and necessary change of habits.

“Therefore, everything from lifestyle modification to education to sanitation to universal access to high quality medical care can potentially be an alternative to particular uses of

---

<sup>104</sup> Reisman et al., *supra* note 2, at 575, 580.

<sup>105</sup> *Compulsory Vaccinations and Rates of Coverage Immunization In Europe*, ASSET REPORTS (Sep. 10, 2016), <http://www.asset-scienceinsociety.eu/reports/page1.html>.

particular vaccines.”<sup>106</sup> Vaccination does not always represent the safest, most effective, or most appropriate way to reduce morbidity or mortality. However, it definitely is the most rapid way to protect public health in case of epidemic emergency, since it can also be imposed on people.

Moreover, instead of preemptive exposure, preventing exposure can be made a priority. Some problems can be totally eliminated also through prevention alone. Since this method often involves complex, costly, or customized social programs and infrastructure, vaccination is often easier, cheaper, and better-accepted. In short, current programs commonly rely on compromising some safety and efficacy for feasibility, but an alternative, consistent with human dignity, is definitely possible.

Furthermore, not everything we vaccinate against is incurable, or untreatable. Using or creating cures is a valid solution, but it requires important investments, and it could be risky too. A multifaceted approach could put together the strengths of a variety of methods while collaboratively reducing their risks, but only at a social and financial cost.

In my opinion, it is much more convenient for international society to think about solutions applicable at an international level. Diseases and vaccinations, in facts, constitute a global matter that goes beyond the States.

The WHO should adopt an international policy which establishes the uptake of mandatory vaccines only in case of emergency, when other effective solutions are not applicable. Even when a coercive approach is adopted, this must be accompanied by a study to reduce the social impact that it will have. All the policies regarding mandatory vaccination must be revised after the period of emergency.

---

<sup>106</sup> Mark Dunn, *What are Some Alternatives to Vaccines?*, QUORA (Jan. 2, 2018), <https://www.quora.com/What-are-some-alternatives-to-vaccines>.

In the meantime, States must implement their efforts and work on different solutions which respect the freedom of choice of everyone. They should create national programs to implement research and technology, in order to control and eradicate the causes of infectious diseases as much as possible.

Furthermore, the States have to organize local educational campaigns to inform communities about the benefits and risks of vaccinations. The relation between States and local communities is extremely important; the State has to be present on the territory and be aware of the issues that the communities have regarding the vaccinations.

However, it is important that the decisions to adopt a non-coercive approach are always accompanied by plans for a cost-benefit evaluation. The success of different vaccination strategies depends on the geographical and cultural context of where they are used, and such evaluations should be country specific.

In any case, all the decision taken by the States should be guided by scientific evidence, supported by adequate investments, and cautiously evaluated. It is always extremely important to avoid the emergency, and, in the worst case, to face it with a well-structured plan already organized, because being rushed through the emergency could obviously lead to loss of social confidence in governments and health care institutions.

**WHAT ABOUT ME?**  
**HOW LEGAL SYSTEMS AROUND THE GLOBE ARE FAILING TO PROTECT GIRLS AND WOMEN**  
**FROM SEXUAL VIOLENCE**  
*Paul Hanley\**

*"While walking home from her grandfather's funeral in Busia County in June 2013, 16-year-old Liz was brutally gang-raped by six men and dumped unconscious into a pit latrine. Liz was rescued and the attack was reported. The Inspector General of Police, however, questioned the legitimacy of Liz's story, stating that the time span between Liz's screams and the response time for villagers was 'too short for six assailants to have gang-raped her'. He also attacked Liz's credibility by questioning the timeframe it took for Liz to tell her family and medical professionals that she had been raped. Though three of the suspects were apprehended, they were initially only charged with assault rather than sexual assault and as a result, they faced a lesser punishment. They were tasked with cutting the grass outside the police station as their punishment and then released from custody."*<sup>1</sup>

Liz's case is, tragically, all too common in certain jurisdictions around the globe, where laws are failing to protect women and girls from sexual violence and are allowing perpetrators of such violence to avoid punishment. The World Health Organization (WHO) estimates that 35% of women worldwide have experienced some form of sexual violence.<sup>2</sup> WHO also reports that most of the violence is "intimate partner violence" and estimates that one-third of all women who have been in a relationship say they have experienced some form of physical or sexual violence by their partner.<sup>3</sup> Moreover, UNICEF estimates that at some point in their lives, approximately 120 million girls will experience "forced intercourse or other forced sexual acts".<sup>4</sup> A 2018 report by the United Nations found that "[w]omen and girls together account for 72 percent, with girls representing nearly three out of every four child trafficking victims. Nearly three out of every four trafficked women and girls are trafficked for the purpose of sexual exploitation."<sup>5</sup>

---

\* Paul Hanley is a graduate, *magna cum laude*, of the University of Notre Dame Law School. He is an Assistant Professor of Law at Keimyung University in the Republic of Korea, where he teaches courses in international law and human rights.

<sup>1</sup> Yasmeen Hassan, *The World's Shame: The Global Rape Epidemic*, EQUALITY NOW (2017), at 41 [hereinafter "The Report"].

<sup>2</sup> *Violence Against Women*, WHO (Nov. 29, 2017), <https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women>.

<sup>3</sup> *See id.*

<sup>4</sup> 2017 UNICEF Report, *Facts and figures: Ending violence against women*, UN WOMEN (Nov. 17, 2019) <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

<sup>5</sup> *UN Women: Facts and figures: Ending violence against women*, UN WOMEN (Nov. 17, 2019) <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

A 2017 report by Equality Now (the “Report”) reviewed the sexual violence laws of 82 countries (including 73 United Nations member States) and revealed a number of very troubling findings.<sup>6</sup> For example, a number of jurisdictions surveyed treat rape as a moral rather than a violent crime. And in others, marital rape is not even considered a crime.<sup>7</sup> A rapist can also escape punishment in some jurisdictions if he marries the victim or if a settlement is reached with the family.<sup>8</sup> The report additionally noted burdensome evidentiary corroboration laws in a number of jurisdictions requiring, for example, a medical examiner’s report and/or witness testimony before the burden of proof can be discharged.<sup>9</sup>

By failing to protect girls and women and by allowing offenders to escape punishment, these jurisdictions violate international law. A long-standing premise of international law is that States are bound to exercise “due diligence” to prevent, investigate, punish and provide remedies for human rights violations, regardless of whether the violations were committed by state or non-state actors.<sup>10</sup>

Part one of this paper analyzes the findings of the Report, highlighting the problem of marital rape, legal loopholes which allow perpetrators to evade punishment, the effect of treating rape as a crime of morality rather than one of violence and how prosecutors of sex crimes face burdensome evidentiary requirements in order to prove their cases. Part two analyzes the findings of the Report under international law. Part three concludes with a number of recommendations that States must follow in order to fulfill their obligations under international law to protect girls and women from sexual violence.

---

<sup>6</sup> See The Report, *supra* note 1.

<sup>7</sup> See The Report, *supra* note 1, at 25 (at least 10 countries do not criminalize marital rape).

<sup>8</sup> The Report, *supra* note 1, at 17-19 (identifying at least 9 jurisdictions that allow for marital exoneration).

<sup>9</sup> The Report, *supra* note 1, at 17-19 (noting at least 20 countries surveyed reported laws which allow for settlement and/or forgiveness in cases of sexual violence).

<sup>10</sup> Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women’s Human Rights and International Law*, 41 BROOK. J. INT’L L. 153, 166 (2015).



## I. Sexual Violence and Domestic Legal Systems

Domestic laws in a number of jurisdictions are failing to protect women and girls from sexual violence; namely, jurisdictions where marital rape is legal, where loopholes in the law allow offenders to escape punishment and legal systems which treat rape as an issue of morality rather than one of violence against the bodily integrity and autonomy of the person.<sup>11</sup> These legal loopholes violate the “due diligence” standard, which has become the accepted norm for combating violence against women under treaties, customary law and decisions rendered by international courts.<sup>12</sup>

A case on point is *Velasquez-Rodriguez v. Honduras*,<sup>13</sup> where the Inter-American Court of Human Rights held:

[i]f the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.<sup>14</sup>

The Court further found that illegal acts “which violates human rights and which is initially not directly imputable to a State” may nonetheless create “international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention on Human Rights.”<sup>15</sup>

---

<sup>11</sup> See the Report, *supra* note 1, at 21.

<sup>12</sup> Randall & Venkatesh, *supra* note 10, at 168.

<sup>13</sup> *Velasquez-Rodriguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 7920, ¶ 176 (July 29, 1988), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf); see also *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01 ¶ 55 (2001) <https://www.womenslinkworldwide.org/en/files/2923/gjo-icmhr-540112051-en-pdf.pdf> (holding that Brazil is bound by the due diligence standard, stating: “The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband... that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women”).

<sup>14</sup> *Velasquez-Rodriguez*, No. 4, Case 7920 at ¶ 176.

<sup>15</sup> *Velasquez-Rodriguez*, No. 4, Case 7920 at ¶ 172.

Another case from the Inter-American Court of Human Rights affirmed the due diligence standard as the accepted measure of State obligations as it pertains to violence against women.<sup>16</sup>

The Court observed:

There is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence. This consensus is a reflection of the international community's growing recognition of violence against women as a human rights problem requiring State action.<sup>17</sup>

### A. Marital Rape

One of the most vulnerable groups for sexual violence are married women. According to the World Bank Group, more than half the countries around the globe have not explicitly criminalized sexual assault in marriage.<sup>18</sup> In fact, marital rape is legal in 27 countries.<sup>19</sup>

Ghana, for example, exempts marital rape from its law governing sexual assault stating: “The use of force against a person may be justified on the ground of his consent, but a person may revoke any consent which he has given to the use of force against him and his consent when so revoked shall have no effect for justifying force; save that the consent given by husband or wife at marriage, for the purposes of marriage, cannot be revoked until the parties are divorced or separated by a judgment or degree of a Competent Court”.<sup>20</sup>

---

<sup>16</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 ¶ 119., <https://www.oas.org/en/iachr/decisions/2011/USPU12626EN.DOC>; *see also* *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), <http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf>; *see also* *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CASE%20OF%20OPUZ%20v%5B1%5D.%20TURKEY.pdf>.

<sup>17</sup> *Lenahan*, Case 12.626 at ¶ 119.

<sup>18</sup> *See* Alena Sakhonchik et al., *Closing the Gap—Improving Laws Protecting Women from Violence*, WBG (April 1, 2015), <http://wbl.worldbank.org/data/exploretopics/protecting-women-from-violence>, at 5; *see also* Randall & Venkatesh, *supra* note 10.

<sup>19</sup> *See* Sakhonchik et al., *supra* note 18.

<sup>20</sup> Ghana: Act No. 29 of 1960, Criminal Offences Act, Section 42(g).

Other jurisdictions have similar laws which either explicitly or in practice, allow men to rape their wives. For example, the Indian penal code provides that sexual intercourse or sexual acts by a man with his wife is not rape provided the wife is not under fifteen years of age.<sup>21</sup>

Nigerian law provides that “sexual intercourse” by a man with his own wife is not rape if she has attained puberty.<sup>22</sup>

In Singapore, a married man cannot commit the offence of rape against his wife unless she is under 13 years old or was living apart from him.<sup>23</sup> Singaporean law also requires that judicial proceedings for “divorce, nullity or judicial separation” must have been instigated in order to prosecute a husband.<sup>24</sup> Tanzania is another jurisdiction that allows marital rape under Section 130(2) of the Tanzania Penal Code, which provides that forcible sexual acts by a husband against his wife are only a criminal offence if the marriage persists, but the couple is separated.<sup>25</sup>

Sri Lankan law only allows a husband to be found guilty of rape if he is judicially separated from his wife although he can be charged with domestic violence. Specifically, the law provides: “A man is said to commit rape who has sexual intercourse with or without her consent when she is under sixteen years of age unless the woman is his wife who is over twelve years of age and is not judicially separated from him.”<sup>26</sup>

---

<sup>21</sup> Central Act, No. 45 of 1860, PEN. Code, sec. 375, (IPC) (although marital rape is not a crime under Indian law, under Section 498A of the IPC, a husband can be charged with subjecting a woman to cruelty. Section 376B of the Code provides that forced sexual intercourse by a man with his wife who is living separately is a criminal offence). See also Surya Rajkumar, *International Law, Right to Privacy and Marital Rape in India*, OXFORD HUM. RTS. HUB (Feb. 25, 2018), <http://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india/> (noting that although marital rape is not criminalized under Indian law, the Indian Supreme Court has held that sexual intercourse with a minor wife is rape).

<sup>22</sup> The Report, *supra* note 1, at 25.

<sup>23</sup> Penal Code (Cap 224, 2008 Rev Ed) (Singapore) s 375(4).

<sup>24</sup> *Id.*

<sup>25</sup> *Tanzania: Act No. 4 of 1998, Sexual Offences Special Provisions Act, 1998*, REFWORLD (July 1, 1998) <https://www.refworld.org/docid/3ae6b5098.html>.

<sup>26</sup> Penal Code Ordinance, No. 29 of 1998, art. 363(e) (Sri Lanka). See Prevention of Domestic an Aggrieved Violence Act, No. 34 of 2005 (Sri Lanka). (The Report noted that “in Sri Lanka, Muslim girls are allowed to be

## **B. Legal Loopholes for Perpetrators**

In some jurisdictions, there are a number of legal loopholes which allow sex offenders to avoid punishment. For example, there are jurisdictions which allow rapists to avoid prosecution if they marry the survivor.<sup>27</sup> Other jurisdictions allow the victim to “forgive” their rapist or enter into settlement agreements where the case against the perpetrator is almost always dismissed.<sup>28</sup>

### **i. Marriage**

As noted in the Report, some countries allow for marital exoneration; meaning, a man can avoid punishment altogether if, after the rape, he marries the victim.<sup>29</sup>

For example, in Iraq, if the perpetrator lawfully marries the victim, any legal action becomes void and any investigation or other procedure is discontinued.<sup>30</sup> Moreover, even if a sentence has been handed down by the court, in the event of marriage, it will be quashed.<sup>31</sup> Legal proceedings against the offender will, however, resume or the sentence reinstated if the offender divorces the victim without legal justification within three years of the crime.<sup>32</sup>

Marriage as settlement is permitted by law in Jordan unless the perpetrator divorces the survivor without just cause within five years of the offence, in which case the punishment for the crime will be enforced.<sup>33</sup>

---

married off at 12, although the minimum age of marriage is 18. There is no indication in this law that any child “bride”, Muslim or otherwise, over the age of 12 is protected from rape by the Penal Code”).

<sup>27</sup> The Report, *supra* note 1, at 18.

<sup>28</sup> *Id.* at 18-19.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> The Report, *supra* note 1, at 18.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

In Tunisia, attempted or actual sexual crimes against women under 20 years old can be settled by marriage, but the prosecution is reinstated if a divorce is initiated at the request of the husband within two years.<sup>34</sup>

Kuwaiti law places the settlement decision in the hands of the victim's guardian, by allowing marital exoneration if the offender marries the victim with the permission of her guardian and the guardian asks the court to refrain from enforcing the sentence.<sup>35</sup>

Regarding statutory rape, Russian law exempts a perpetrator from punishment if he marries the victim.<sup>36</sup> Serbia has a similar law which prohibits "cohabiting with a minor" but provides for an exception "[i]f a marriage is concluded, prosecution shall not be undertaken and if undertaken it shall be discontinued".<sup>37</sup> Thailand statutory rape law allows marriage as settlement where the perpetrator is over 18 and the victim is older than 15 years old if: "(i) the survivor "consented" to such offence at the time of the offence; and (ii) the court has granted permission for marriage."<sup>38</sup>

## ii. Settlement

A number of jurisdictions allow for sexual offenders to avoid prosecution for their crimes if they reach a settlement with the victim.

In Singapore, for example, settlement is allowed by law where the perpetrator "assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person."<sup>39</sup>

---

<sup>34</sup> The Report, *supra* note 1, at 18.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> CRIMINAL CODE sec. 227 (Thai.).

Thai law allows settlement for the crimes of sexual assault and “forced” sexual intercourse in the following circumstances: (1) if the survivor is over 15 years old; (2) the survivor is not the offender’s descendant, a pupil under his or her care, a person under the control in the execution of his or her duty, or a person under his or her guardianship, custodianship or legal care; (3) such offence did not occur in public; and (4) such offence did not cause grievous bodily harm or death to the alleged survivor.<sup>40</sup>

Prosecutors in Belgium have the discretion to propose a settlement with the perpetrator that protects him from prosecution for the offence as long as he admits guilt.<sup>41</sup> The victim, however, still has the right to lodge a civil claim for damages.<sup>42</sup>

In Russia, offenders may be exempt from punishment due to a settlement between the perpetrator and the victim if the crime is classified by the Criminal Code as one of “little or average gravity” and the perpetrator is a first time offender.<sup>43</sup> The Code defines the following sex offences as crimes of little or average gravity: “sexual coercion,” “sexual intercourse and other actions of a sexual character with a person who has not reached the age of sixteen years” and “depraved actions.”<sup>44</sup>

### iii. Forgiveness

Other jurisdictions allow perpetrators of sex crimes to avoid prosecution if the complainant “forgives” the offender.<sup>45</sup> For example, in the Philippines, if the perpetrator is married to his victim, he can avoid punishment if his wife forgives him.<sup>46</sup> While in Serbia,

<sup>40</sup> See CRIMINAL CODE sec. 227 (Thai.).

<sup>41</sup> See CODE D’INSTRUCTION CRIMINELLE [C.I.Cr.] art. 216bis; see also Nathalie Colin et al., *Belgian legislator adapts the legal framework for criminal settlements*, WHITE & CASE: PUBL’NS & EVENTS (Sept. 20, 2018), <https://www.whitecase.com/publications/alert/belgian-legislator-adapts-legal-framework-criminal-settlements>.

<sup>42</sup> See CODE D’INSTRUCTION CRIMINELLE [C.I.Cr.] art. 216bis.

<sup>43</sup> See UGOLOVNO KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 15.

<sup>44</sup> See *id.* at art. 131.

<sup>45</sup> The Report, *supra* note 1, at 19.

<sup>46</sup> *Id.*

forgiveness of the offender by the survivor will likely lead the prosecutor to dismiss the case, if such a request is made by the parties.<sup>47</sup>

In addition to allowing settlement, Thai law allows some sexual violence cases to be withdrawn by the victim.<sup>48</sup> However, if a case is particularly “violent or offensive to the public,” the prosecutor is allowed to continue a case even if it has been withdrawn.<sup>49</sup>

Turkish law provides for the victim to waive her right to justice by forgiving the offender, thus ending the prosecution.<sup>50</sup> The law states, however, that if a survivor provides a waiver after final judgment, the sentence will be enforced.<sup>51</sup>

### **C. Rape as a Violation of Morality Rather Than an Act of Violence**

In several jurisdictions, rape is classified not as a violation of the bodily integrity of a person, but as a violation of morality or an indecent act committed against society as a whole.<sup>52</sup> This violates the rights of the victim because it shifts the focus from the offender to the victim.<sup>53</sup> A case on that point is that of an Ethiopian girl named Makeda:

Makeda was 13 years old in 2001 when she was abducted and raped in Ethiopia by Aberew Negussie, a man who wanted to marry her. Such action was common in Ethiopia where the law previously exempted the perpetrator from rape if he married his victim. Normally the families come together and agree to the marriage to preserve the so-called honour of the girl and her family. Unusually, Makeda, with the support of her father, rejected the marriage. Aberew and his accomplices were tried. During the trial, the prosecutor argued that since there was no evidence Makeda had been a virgin, no crime of rape had been committed even though virginity was, appropriately, not an element of the crime in Ethiopia.<sup>54</sup>

---

<sup>47</sup> The Report, *supra* note 1, at 19.

<sup>48</sup> See CRIMINAL CODE sec. 277 (Thai.).

<sup>49</sup> See *id.*

<sup>50</sup> See CRIMINAL CODE art. 73 (Turk.).

<sup>51</sup> *Id.*

<sup>52</sup> Criminal Offences Act of Ghana, *supra* note 20.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Makeda appealed her case to the African Commission on Human and Peoples' Rights, which found that Ethiopia breached the African Charter for failing to make sufficient effort to prevent the rape, and for failing to adequately respond after Makeda made a criminal complaint against her rapists.<sup>55</sup> The Commission also ordered Ethiopia to compensate Makeda and to increase its efforts in eliminating forced marriages by vigorously prosecuting and punishing offenders, while also training judges how to handle cases regarding sexual violence against girls and women.<sup>56</sup> By framing sexual offences with terms such as "honour" or "morality," the law virtually ensures the denial of justice to victims and creates a hierarchy of survivors. It also fosters an environment which exonerates perpetrators of sexual violence against women and girls and creates an atmosphere where offenders can act with impunity.

#### **D. Burdensome Evidentiary Requirements**

Overly burdensome evidentiary standards create another hurdle to achieving justice for victims of sexual violence. These hurdles include requiring medical evidence and/or eyewitness testimony of the attack in order to secure a conviction against a perpetrator of sexual violence.<sup>57</sup> Other jurisdictions put the burden of proof on the prosecution to show a lack of consent or that the offender used force to assault the victim.<sup>58</sup>

---

<sup>55</sup> Criminal Offences Act of Ghana, *supra* note 20.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* Regarding the medical examination required by some jurisdictions, the Report found: "Of the 43 jurisdictions in which a medical examination must be performed by designated or accredited personnel, this examination is free in 20, but there is a fee in 16 ... Of the jurisdictions in which a medical examination need not be carried out by designated or accredited personnel, an examination is nonetheless available free of charge in 14 jurisdictions, but there is a fee in 21." See The Report, *supra* note 1, at 47. Jurisdictions put the burden of proof on the prosecution to show a lack of consent or that the offender used force to assault the victim.

<sup>58</sup> See e.g., Criminal Code of the Kingdom of Spain, Art. 178, <https://www.legislationline.org/documents/section/criminal-codes/country/2/Spain/show>. See also *No sexual consent means rape, Spain told by legal panel*, BBC (Dec. 14, 2018), <https://www.bbc.com/news/world-europe-46566754> (reporting on the Spanish "wolf pack" case and noting that violence or intimidation must be proven in order for a case to be treated as "rape" under current Spanish law). See also *Denmark: Pervasive "rape culture" and endemic impunity for rapists exposed*, AMNESTY INT'L (March 5, 2019),



A number of jurisdictions require a medical report in order to prosecute rape.<sup>59</sup> For example, Lebanon and Malawi's evidentiary requirements include a medical examiner's report.<sup>60</sup> Pakistani law requires a statement by the complainant which "inspires confidence," which is a standard met if the victim's claim is supported by medical evidence.<sup>61</sup> Peru's standard is even more stringent insofar as it requires an assessment by a physician, who is also a legal expert, in order for the prosecution to satisfy its burden of proof.<sup>62</sup> Yemen's standard trumps that of Peru in that it requires both witness testimony and medical evidence in order for the prosecution to discharge its burden of proof.<sup>63</sup> The Report found other jurisdictions apply a different standard with regard to requiring witness testimony and medical exams in judicial practice, as opposed to what is actually mandated by law. For example, although Afghanistan does not mandate medical evidence as proof of the crime, in the experience of those appearing before Afghan judges, courts often require medical confirmation, eyewitness corroboration, and/or a confession from the perpetrator in order to obtain a conviction.<sup>64</sup>

An illustration of how evidentiary standards impede justice is found in *M.C. v. Bulgaria*.<sup>65</sup> In this case, a woman alleged that she was raped by two men when she was fourteen years old.<sup>66</sup> She claimed that after meeting the men at a bar, she was driven to a deserted place where one of them raped her. She was then taken to a house where she was

---

<https://www.amnesty.org/en/latest/news/2019/03/denmark-rape-culture-exposed/> (reporting that "Danish law still does not define rape on the basis of lack of consent. Instead, it uses a definition based on whether physical violence, threat or coercion is involved or if the victim is found to have been unable to resist").

<sup>59</sup> *Protecting Women from Violence*, *supra* note 18; Randall & Venkatesh, *supra* note 10; *UN Women, Facts and Figures*, *supra* note 5.

<sup>60</sup> *Protecting Women from Violence*, *supra* note 18; Randall & Venkatesh, *supra* note 10; *UN Women, Facts and Figures*, *supra* note 5.

<sup>61</sup> PAK. PENAL CODE (1860),

<http://www.ahmedandqazi.com/actsandregulations/criminal/Pakistan%20Penal%20Code.docx>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *M.C.*, App. No. 39272/98, Eur. Ct. H.R. (2003), <https://www.refworld.org/cases,ECHR,47b19f492.html>.

<sup>66</sup> *Id.*

raped a second time.<sup>67</sup> Her mother filed a complaint against the men launching a criminal investigation. The men claimed the girl had consented to sexual intercourse with both of them, while the girl asserted that she had been too scared and embarrassed to resist violently.<sup>68</sup> The prosecution abandoned the investigation due to lack of evidence of “active physical resistance” by the applicant.<sup>69</sup> Although Bulgarian law did not require active physical resistance, judges regularly factored whether the victim resisted into their judicial analysis.<sup>70</sup> The case was appealed to the *European Court of Human Rights*, which analyzed the Complaint under Articles 3 and 8 of the European Convention on Human Rights.<sup>71</sup> The Court noted that each of these articles imposes positive obligations on States: (1) under Article 3 a duty to take protective measures against ill-treatment; and (2) under Article 8 a duty to prevent grave violations of essential aspects of private life.<sup>72</sup> The Court further held that these obligations compel States to enact and apply criminal sanctions and ensure effective investigations are conducted in the case of rape.<sup>73</sup>

## II. International Law

The rights of women and girls are enshrined under the international legal regime, which oblige States to protect girls and women from sexual violence and to ensure that adequate investigations are conducted, and offenders are prosecuted and punished.<sup>74</sup> Rape has been

---

<sup>67</sup> M.C., App. No. 39272/98, Eur. Ct. H.R. (2003), <https://www.refworld.org/cases,ECHR,47b19f492.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> M.C., App. No. 39272/98, Eur. Ct. H.R. (2003), <https://www.refworld.org/cases,ECHR,47b19f492.html>.

<sup>71</sup> *See id.* at 19 (Article 3 of the European Convention on Human Rights prohibits torture, and “inhuman or degrading treatment or punishment.” Article 8 of the provides a right to respect for one’s “private and family life, his home and his correspondence,” subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society.”).

<sup>72</sup> *See id.* at para. 187.

<sup>73</sup> *See id.* at para. 186.

<sup>74</sup> *See e.g.*, G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993), <http://www.un.org/documents/ga/res/48/a48r104.htm> (urging States to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”); Human Rights Council Res. 14/12 (2010),

recognized as a form of torture if the offender is a state agent regardless of whether the conduct is perpetrated in a custodial setting.<sup>75</sup> Moreover, other actors who are “acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law.”<sup>76</sup> States also have an obligation to “exercise due diligence to prevent, investigate, prosecute, and punish acts of torture and other ill-treatment committed by non-state or private actor” and the failure to do so means that States are “consenting to or acquiescing in such impermissible acts.”<sup>77</sup> The failure of the state to exercise due diligence to intervene, to stop, sanction, and provide remedies to victims of torture, facilitates and enables non-state actors to commit such acts with impunity.<sup>78</sup> Furthermore, state indifference and inaction provides a form of encouragement or de facto permission for such acts.<sup>79</sup> This principle has been applied to states’ failure “to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”<sup>80</sup>

In *Aydin v. Turkey*,<sup>81</sup> the Petitioner, Sukran Aydin was 17 years old when a group of village guards arrested her and her family on the suspicion that they were associate with

---

<http://www.un.org/en/ecosoc/docs/2010/res%202010-15.pdf>, (“*Stressing* that States have the obligation to promote and protect all human rights and fundamental freedoms for all, including women and girls, and must exercise due diligence to prevent and investigate acts of violence against women and girls and punish the perpetrators, eliminate impunity and provide protection to the victims and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.”).

<sup>75</sup> See *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. para. 74-76, 86. See also *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 160, para. 310-312 (Nov. 25, 2006). See, e.g., *V. L. v. Switzerland*, U.N. Committee Against Torture, CAT/C/37/D/262/2005 para. 8.10; *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 215, para. 128 (Aug. 30, 2010); *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. para. 205-11 (2012); *Raquel Martí de Mejía v. Peru*, Case 10.970, Inter-Am. Comm’n H.R. Report No. 5/96 (Mar. 1, 1996); U.N. Committee Against Torture (CAT), General Comment No. 2, para. 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

<sup>76</sup> G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R.

members of the Kurdistan Workers Party.<sup>82</sup> Upon arrival at the police station, Sukran was separated from her family, tortured and raped by the authorities.<sup>83</sup>

When Sukran returned to her village, she visited the office of the public prosecutor and reported what happened to her.<sup>84</sup> The prosecutor sent Sukran to see a doctor to determine whether she was a virgin and to document any marks showing physical violence and/or injury.<sup>85</sup> The doctor reported that Sukran's hymen was torn and there was widespread bruising around her thighs.<sup>86</sup> However, the doctor could not establish when the hymen was torn.<sup>87</sup> Then, the prosecutor sent Sukran for two additional medical examinations by separate doctors to try and determine if, and when, she had lost her virginity.<sup>88</sup> The European Court of Human Rights held that Sukran's rape and ill-treatment while in police custody constituted torture under Article 3 of the European Convention on Human Rights.<sup>89</sup> The Court further held that the prosecutor failed to conduct a proper investigation which was a violation of Article 13, "ensuring an effective remedy by national authorities."<sup>90</sup>

#### A. CEDAW

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was established in September 1981 and has been adopted by 189 countries.<sup>91</sup> It mandates that States take measures to "eliminate discrimination against women by any person, organization or enterprise" and "modify or abolish existing laws, regulations,

---

<sup>82</sup> See *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. at 4.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. at 7.

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 25.

<sup>90</sup> *Id.*

<sup>91</sup> Convention on the Elimination of All Forms of Discrimination Against Women, art. 27(1), Dec. 18, 1979, 1249 U.N.T.S. 513

customs and practices which constitute discrimination against women.”<sup>92</sup> Importantly, the obligation to eliminate discrimination and violence against girls and women is subject to immediate realization, and delays based on economic, cultural or religious grounds are not justified.<sup>93</sup>

Under CEDAW, States must also exercise “due diligence” in the prevention of and prosecution for gender-based violence by state actors and importantly, obliges States “to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-state actors which result in gender-based violence against women.”<sup>94</sup>

*A.T. v. Hungary* involved a claim by a woman whose husband subjected her to continued domestic violence that resulted in her hospitalization.<sup>95</sup> Hungarian law did not provide for A.T. to obtain a protection order against her husband so A.T. filed a motion for injunctive relief for her exclusive right to the family apartment.<sup>96</sup> The Budapest Regional Court denied their motion and held that A.T.’s husband had a right to return and use the apartment, stating that A.T.’s battery claims against him lacked substantiation and that the Court could not infringe on her husband’s right to property.<sup>97</sup>

---

<sup>92</sup> G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 2 (Dec. 18, 1979).

<sup>93</sup> *Id.* at art. 2; see also U.N. Office of the High Commissioner on Human Rights, *Women’s Rights are Human Rights*, at 7 (2014), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi34f7jw6LpAhXOB80KHQ51C3gQFjAAegQIAhAB&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FEvents%2FWHRD%2FWomenRightsAreHR.pdf&usg=AOvVaw3rNer6OwAVgzPhh0ydnqHR>.

<sup>94</sup> See Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, at 9 (11<sup>th</sup> Session, 1992); see also Rebecca H. Rittenhouse, *The Due Diligence Obligation to Prevent Violence Against Women: The Case of Pakistan*, HUM. RTS. FOUND., Dec. 22, 2011.

<sup>95</sup> *A.T. v. Hungary*, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2003, at 2.1-2.4 (2005).

<sup>96</sup> See *id.* at 2.1-2.5.

<sup>97</sup> See *id.* at 2.4.

A.T. then filed a complaint with the CEDAW Committee alleging violations of Article 5, paragraph 1 of CEDAW's Optional Protocol.<sup>98</sup> The Committee held that Hungary's domestic violence jurisprudence was deeply entrenched in gender stereotypes and was a violation of Hungary's obligation under Article 2 of CEDAW to promote gender equality through appropriate legislation.<sup>99</sup> Further, the Committee found Hungary's lack of specific legislation to combat domestic and sexual violence was both a violation of its Article 5 obligation to eliminate prejudices and customs grounded in female inferiority and its Article 16 obligation to end discrimination against women in matters relating to marriage and the family.<sup>100</sup>

Finally, the Committee recommended that Hungary enact domestic and sexual violence legislation and allow victims to apply for protection and exclusion orders which forbid the abuser from entering or occupying the family home.<sup>101</sup>

Another CEDAW case of note which addressed the issue of sexual violence is *Vertido v. the Philippines*.<sup>102</sup> In this case, the applicant, Karen Tayag Vertido, was raped in a hotel room by a work contact, who she thought had a gun.<sup>103</sup> He was acquitted by a judge who held that the victim had failed to take reasonable opportunities to escape and thus must have consented to sexual contact.<sup>104</sup>

---

<sup>98</sup> A.T. v. Hungary, Communication No. 2/2003, *supra* note 95, at 4.1.

<sup>99</sup> *See id.* at 9.3.

<sup>100</sup> *See id.*

<sup>101</sup> *See id.* at v.

<sup>102</sup> Karen Tayag Vertido v. the Philippines, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (2010). *See also* A.T. v. Hungary, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2003 (2005) (finding that states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation); Fatima Yildirim v. *Austria* Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (2010) (holding that Austrian authorities knew or should have known that the victim's husband was a danger to the victim and thus failed to fulfill their due diligence obligation).

<sup>103</sup> *Id.*

<sup>104</sup> *See id.*

In finding violations of articles 2(f) and 5(a), the Committee affirmed that CEDAW requires States parties to “take appropriate measures to modify or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women.”<sup>105</sup>

The CEDAW Committee found that the trial judge’s decision contained several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim and many of the judge’s comments focused on the personality and behavior of the applicant, even though these issues are not part of the definition of the crime of rape, stating:

. . . stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim...<sup>106</sup>

## **B. Regional Conventions**

There are three regional human rights conventions on violence against women: (1) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted in 1994; (2) the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), adopted in 2003; and (3) the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which entered into force in 2014.

### **i. Inter-American Convention**

---

<sup>105</sup> *Id.*

<sup>106</sup> *Karen Tayag Vertido v. the Philippines*, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (2010). See also *A.T. v. Hungary*, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2003 (2005) (finding that states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation); *Fatima Yildirim v. Austria* Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (2010) (holding that Austrian authorities knew or should have known that the victim’s husband was a danger to the victim and thus failed to fulfill their due diligence obligation).

The Inter-American Convention avows to protect women from violence, including sexual violence and obliges States Parties to apply due diligence to prevent, investigate and impose penalties for violence against women.<sup>107</sup> They also must pass laws needed to prevent, punish and eradicate violence against women and if necessary amend or repeal existing laws and modify legal and/or customary practices, “which sustain the persistence and tolerance of violence against women.”<sup>108</sup>

Finally, States Parties must establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures.<sup>109</sup>

Importantly, the Convention established a tribunal that allows individuals to file complaints against their countries for violations of their rights under the treaty.<sup>110</sup>

ii. Maputo Protocol

The Maputo Protocol to the African Convention became effective November 25, 2005, and has been adopted by 37 countries.<sup>111</sup> It guarantees equal rights to women including the right to social and political equality with men, autonomy in making reproductive health decisions, an end to female genital mutilation and the right to be free from physical and sexual violence.<sup>112</sup>

---

<sup>107</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) art. 7, June 9, 1994, 33 I.L.M. 1534.

<sup>108</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) art. 7, June 9, 1994, 33 I.L.M. 1534.

<sup>109</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 105.

<sup>110</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 105.

<sup>111</sup> See General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, available at [http://www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comment2\\_rights\\_of\\_women\\_in\\_africa\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf).

<sup>112</sup> See *id.*



The Protocol provides: “States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”<sup>113</sup> It also mandates that States take “appropriate and effective measures” to pass and enforce laws that “prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.”<sup>114</sup>

To date, only one case, *Dorothy Njemanze & 3 Ors V Federal Republic of Nigeria*, dealing, in part, with the issue of sexual violence under the Protocol, has been adjudicated.<sup>115</sup> In this case, four women allege they were abducted and assaulted sexually, physically, verbally and unlawfully detained at different times by state authorities, including the police and the military.<sup>116</sup>

Human rights groups filed suit in the Economic Community of West African States (ECOWAS) Court of Justice on behalf of the victims. The Court found in favour of the plaintiffs, awarding damages in the amount of 6,000,000 Naira (approximately \$16,500 USD).<sup>117</sup> In its judgment, the Court found the arrest of the Plaintiffs was unlawful and in violation of their right

---

<sup>113</sup> See General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, available at [http://www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comment2\\_rights\\_of\\_women\\_in\\_africa\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf), at art. 3, para. 4.

<sup>114</sup> *Id.* at art. 4, para. 2.

<sup>115</sup> ECOWAS Court makes the first pronouncement on Maputo Protocol: Rules in favour of plaintiffs in case of *Dorothy Njemanze & 3 Ors V Federal Republic of Nigeria*, INST. FOR HUMAN RIGHTS & DEV. IN AFRICA (Oct. 12, 2017), <https://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/>.

<sup>116</sup> *Synopsis of the case of Dorothy Njemanze & 3 Others v. The Federal Republic of Nigeria*, INST. FOR HUMAN RIGHTS & DEV. IN AFRICA, (Oct. 16, 2017), <https://www.ihrda.org/2017/10/synopsis-of-the-case-of-dorothy-njemanze-3-others-v-the-federal-republic-of-nigeria/>.

<sup>117</sup> The Court specifically found violations of “1, 2, 3 and 18 (3) of the African Charter on Human and Peoples’ Rights; articles 2, 3, 4, 5, 8 and 25 of the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol); articles 2, 3, 5 (a) and 15(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW); articles 2(1), 3, 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR); articles 10, 12, 13 and 16 of the Convention against Torture (CAT); and articles 1, 2, 5, 7 and 8 of the Universal Declaration of Human Rights (UDHR).” *Id.*

to freedom of liberty.<sup>118</sup> The Court further held that the Plaintiff's arrest violated their right to be free from cruel, inhuman or degrading treatment and amounted to gender-based discrimination.<sup>119</sup>

### iii. Istanbul Convention

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention, entered into force August 1, 2014, and has been ratified by 46 European Union countries.<sup>120</sup> The Convention sets forth a comprehensive framework at ameliorating gender-based violence.”<sup>121</sup> Adoption of the Convention means accepting the authority of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which is a panel of 15 independent experts who monitor Convention compliance.<sup>122</sup>

The Convention requires that state parties criminalize all sexually violent and non-consensual sexual acts.<sup>123</sup> It also obliges States to treat sexual violence as crimes against the

---

<sup>118</sup> The Court specifically found violations of “1, 2, 3 and 18 (3) of the African Charter on Human and Peoples’ Rights; articles 2, 3, 4, 5, 8 and 25 of the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol); articles 2, 3, 5 (a) and 15(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW); articles 2(1), 3, 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR); articles 10, 12, 13 and 16 of the Convention against Torture (CAT); and articles 1, 2, 5, 7 and 8 of the Universal Declaration of Human Rights (UDHR).” *Synopsis of the case of Dorothy Njemanze & 3 Others v. The Federal Republic of Nigeria*, INST. FOR HUMAN RIGHTS & DEV. IN AFRICA, (Oct. 16, 2017), <https://www.ihrda.org/2017/10/synopsis-of-the-case-of-dorothy-njemanze-3-others-v-the-federal-republic-of-nigeria/>.

<sup>119</sup> *Synopsis of the case of Dorothy Njemanze & 3 Others v. The Federal Republic of Nigeria*, INST. FOR HUMAN RIGHTS & DEV. IN AFRICA, (Oct. 16, 2017), <https://www.ihrda.org/2017/10/synopsis-of-the-case-of-dorothy-njemanze-3-others-v-the-federal-republic-of-nigeria/>.

<sup>120</sup> Chart of signatures and ratifications of Treaty 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, (Status as of March 31, 2019), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

<sup>121</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, Jan. 8, 2011, CETS No. 210.

<sup>122</sup> *Id.* at art. 66.

<sup>123</sup> *Id.* at art. 36. *See also*; *Right To Be Free From Rape – Overview of Legislation And State of Play In Europe And International Human Rights Standards*, AMNESTY INT’L (Nov. 24, 2018), <https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF>, at 28 (noting that the decision has been affirmed in national courts such as the High Court of Justice of England and Wales in *R v. DPP and “A”* [2013] EWHC (QB) 945 (Admin), [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-vdpp-](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-vdpp-)

bodily integrity and sexual autonomy of a person, as opposed to crimes against morality, public decency, honour or the family and society.<sup>124</sup> Moreover, Article 36 of the Convention defines sexual violence as: “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object...engaging in other non-consensual acts of a sexual nature with a person...causing another person to engage in non-consensual acts of a sexual nature with a third person.”<sup>125</sup> With respect to the issue of consent, it must be given voluntarily and be the result of a person's free will which is “assessed in the context of the surrounding circumstances.”<sup>126</sup> Imposing a consent-based definition of rape is important given that, according to Amnesty International, “only 8 out of 31 European countries [analyzed] by Amnesty International have consent-based legislation in place.”<sup>127</sup> States are also obliged to criminalize marital rape.<sup>128</sup>

Regarding enforcement of domestic laws, States are required to “ensure that law enforcement agencies respond to all forms of violence promptly and appropriately, and engage adequately in the prevention and protection against all forms of violence, including the employment of preventive operational measures and the collection of evidence.”<sup>129</sup> To this end, States must establish training programs for relevant professionals dealing with victims or

---

judgment.pdf and the Supreme Court of California in *In re: John Z.*, 29 Cal. 4th 756, 60 P.3d 183, 128 Cal. Rptr. 2d 783, (2003), <http://caselaw.findlaw.com/ca-supreme-court/1330844.html>).

<sup>124</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 42(1).

<sup>125</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 36, para. 1.

<sup>126</sup> *Id.* at art. 36, para. 2.

<sup>127</sup> *Denmark: Pervasive ‘Rape Culture’ and Endemic Impunity for Rapists Exposed*, AMNESTY INT’L (Mar. 5, 2019), <https://www.amnesty.org/en/latest/news/2019/03/denmark-rape-culture-exposed/> (The report identifies Sweden, the UK, Ireland, Luxembourg, Germany, Cyprus, Iceland and Belgium as having consent-based rape laws).

<sup>128</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 4(3).

<sup>129</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 50.

perpetrators of all acts of violence in the prevention and detection of such violence.<sup>130</sup>

Authorities must also prioritize the needs and rights of victims in order to avoid “secondary victimization”.<sup>131</sup>

Addressing the issue of forgiveness and compensation as a means of allowing offenders to avoid prosecution, the Convention obliges states to ensure investigations into or the prosecution of sexual violence offences, “shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.”<sup>132</sup>

Article 42 prohibits State Parties to allow transgression of social, cultural, and religious norms as justification for sexual violence against women, mandating they take the “necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honor” shall not be regarded as justification for such acts.”<sup>133</sup>

Finally, the Convention compels States to ensure primary responsibility for initiating prosecutions in cases of violence against women is with police and other prosecutorial authorities.<sup>134</sup>

---

<sup>130</sup> Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 15.

<sup>131</sup> *Id.* at art. 18, para. 3.

<sup>132</sup> *Id.* at art. 55, para. 1.

<sup>133</sup> *Id.* at art. 42, para. 1.

<sup>134</sup> *See id.* art. 42, para. 1.

### III. Conclusion

Antonia Kirkland, head of Equality Now's legal equity program stated that the purpose behind the Report was to highlight the epidemic of sexual violence against women and to encourage governments around the globe to transform their laws to conform with their international legal obligations.<sup>135</sup>

In order to satisfy these obligations, States around the globe must immediately amend their laws, starting with the way rape is defined.<sup>136</sup> Governments must adopt a consent-based definition of sexual violence like that of Article 36(2) of the Istanbul Convention and define acts of sexual violence not as crimes against morality, public decency or honor but as crimes against the physical and mental integrity and sexual autonomy of the victim.<sup>137</sup> Further, criminal laws should enable the effective prosecution of any perpetrator for acts of sexual violence without exemptions, such as the one for marriage, which assumes married women automatically consent to sexual contact with their husbands.

Additionally, the due diligence standard, which is the generally accepted measure of State obligations, requires closing all legal loopholes which allow sex offenders to avoid punishment. States must amend their laws to prohibit settlement between the victim or her family and the

---

<sup>135</sup> Emma Batha, *Bad laws underpin global "rape epidemic", lets rapists off the hook: report*, REUTERS (March 6, 2017), <https://www.reuters.com/article/us-global-rape-lawmaking-idUSKBN16D01C>.

<sup>136</sup> See Convention on Preventing and Combating Violence Against Women and Domestic Violence, *supra* note 121, at art. 42(1). See also *Definitions of Crimes of Sexual Violence in the ICC (Elements of Crimes Annex and the Rome Statute)*, WOMEN'S INITIATIVES FOR GENDER JUSTICE, <http://www.iccwomen.org/resources/crimesdefinition.html> (The International Criminal Court has adopted the following definition of rape: "[t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.").

<sup>137</sup> See *Right to be Free from Rape*, *supra* note 123, at 28.

perpetrator and end burdensome evidentiary corroboration laws which require medical proof and/or witness testimony before the burden of proof can be discharged.

With regard to the rights of the complainant during legal proceedings, the United Nations has made a number of recommendations that States should adopt.<sup>138</sup> First, victims should be allowed to submit evidence by alternative means, such as by affidavit or *via* taped testimony. Second, when appearing in court, States should allow the complainant to give evidence in a way that protects her from having to confront the defendant, such as the use of in-camera proceedings, witness protection boxes, closed-circuit television, and video links.<sup>139</sup> Third, courts need to provide the victim protection within its facilities, including separate waiting and entrance areas for complainants and defendants, as well as providing a police escort to the complainant. Finally, the UN recommended that courts issue gag orders on publicity regarding individuals in cases involving violence against women and girls and provide remedies for non-compliance.

If governments fail to overhaul their criminal laws, both substantively and procedurally or to implement protections for the victims of abuse, the worldwide epidemic of sexual violence against girls and women will continue unabated.

---

<sup>138</sup> See Handbook for Legislation on Violence against Women, UNITED NATIONS (2012), <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>, at 40.

<sup>139</sup> The Report notes that 23 jurisdictions provide for in-camera testimony, with 22 jurisdictions protecting the identity of the victim. *See id.* at 61.

**ISRAEL: CONFLICT RESOLUTION IN AN APARTHEID STATE**  
*Brittany Natali\**

## I. Introduction

“Israel is not a state of all its citizens . . . [Israel is the] nation-state of the Jewish People and them alone.”<sup>1</sup> This statement, from Israel’s Prime Minister Benjamin Netanyahu, bears a striking resemblance not only to the ideation and sentiments of apartheid South Africa, but also of Nazi Germany. This article will demonstrate how the laws in Israel are strikingly similar to that of Apartheid South Africa. Further, it will dissect Israel’s laws that are based on religious discrimination, the world’s response and the effect it has on the native Muslim and Christian Palestinian people.

Nazi Germany began its regime by implementing the Nuremberg Race Laws; two of which were: “The law for the Protection of German Blood and German Honor” and “The Reich Citizenship Law.” These laws effectively designated the Jews in Europe as “subjects.”<sup>2</sup> Similar to the segregation in South Africa, the Afrikaner National Party passed a wide variety of apartheid laws intending to ensure racial separation within the political, social, and economic

---

\* Brittany Natali is a first-generation Palestinian American who has seen the direct effects the Israeli apartheid has had on her family and those in and outside of the Palestinian/Middle Eastern community. Ms. Natali is a true advocate for human and civil rights. Beginning in her master’s program at Columbia University, Ms. Natali was an active member of different organizations like ‘Students for Justice in Palestine’ and ‘Jewish Voice for Peace.’ She is also the Co-founder of the ‘Middle Eastern Caucus,’ which created a space for those who identify as Middle Eastern or who wanted to learn more about the culture could come together. Ms. Natali believes that the more access to education and resources people have, the more confidence they will build to join her in taking a stance against injustice.

A note from Brittany: My deepest and most heartfelt appreciation goes to everyone who assisted me in the preparation of this article. I am indebted to my family for supporting and encouraging me in my writing. I owe a special thank you to Christopher Gazaleh - your guidance, knowledge, and equal fight for justice has inspired the educator in me. Ross Keiser’s skill in challenging my perspective was invaluable in this project. Finally, I would like to thank everyone who were opposed that I write this article - seeing the objection in spreading my message further motivated me.

<sup>1</sup> Kasrils Ronnie, *I Fought Sought African Apartheid. I See The Same Brutal Policies In Israel*, THE GUARDIAN, (Apr. 3, 2019), [https://www.theguardian.com/commentisfree/2019/apr/03/israel-treatment-palestinians-apartheid-south-africa?fbclid=IwAR1WpDiZIEZcGnFnR\\_2mEirSHGK\\_Gyec\\_pa6byWHflsnBvXlwMwtIblxwg4](https://www.theguardian.com/commentisfree/2019/apr/03/israel-treatment-palestinians-apartheid-south-africa?fbclid=IwAR1WpDiZIEZcGnFnR_2mEirSHGK_Gyec_pa6byWHflsnBvXlwMwtIblxwg4)

<sup>2</sup> *The Nuremberg Race Laws*, THE HISTORY PLACE, <http://www.historyplace.com/worldwar2/holocaust/h-nurem-laws.htm> (last visited Apr. 3, 2019).



life.<sup>3</sup> For instance, the 1913 Land Act marked territorial segregation by forcing the Black South Africans to live in reserves; and outside of the reserves, the Black South Africans were referred to as foreigners.<sup>4</sup> There was political segregation between Blacks and Whites, the Representative of Natives Act of 1936 removed black voters from the common electoral roll.<sup>5</sup> In one instance, the ruling government forcibly removed Black South Africans from their homes and employment and those areas were reclassified as “rural white areas.”<sup>6</sup>

Further, Black South Africans were also subject to power blackout regulations and passbook requirements; those without the passbook were subject to arrest and detention.<sup>7</sup> The movement of Black South Africans to and between other parts of South Africa was strictly regulated; the locations of residence or employment were also restricted and “entry was only allowed if people were permitted to work there.”<sup>8</sup>

Death, destruction, and discrimination have been longstanding parts of global history, which is mostly felt by minority racial and religious groups; carrying episodes of genocide, apartheid, and the like, for too long. People from all backgrounds have faced discrimination, and in every instance, the struggle is more catastrophic.

Discrimination against Jews date back many centuries, beginning in ancient, Pre-Christian Greece and Rome, then followed into the Middle Ages, where Jewish people faced discrimination from Christians.<sup>9</sup> During the Enlightenment era, Jewish discrimination was prevalent in politics, societal customs, and the economy.<sup>10</sup> The centuries-old build-up of hatred

---

<sup>3</sup> *The History of Separate Development in South Africa*, SOUTH AFRICAN HISTORY ONLINE: TOWARDS A PEOPLE’S HISTORY, <https://www.sahistory.org.za/article/history-separate-development-south-africa> (last visited Apr. 3, 2019).

<sup>4</sup> *The History of Separate Development in South Africa*, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> JEROME A. CHANES, ANTISEMITISM: A REFERENCE HANDBOOK 5 (2004).

<sup>10</sup> *Id.*

and hostility towards Judaism became more prevalent in the 20<sup>th</sup> century during the Holocaust.<sup>11</sup> The Nazis used propaganda to gain influence in Germany.<sup>12</sup> This propaganda contributed to Hitler's full control of the Reichstag, the German parliament.<sup>13</sup> Once Hitler consolidated his power into a dictatorship, the Nazis began isolating Jews from society.<sup>14</sup> Hitler's laws promoted the burning of books written by Jews, removing Jews from their professions and public events, and confiscating their property.<sup>15</sup> Eventually, the Jews were confined to specific locations or concentration camps where they were killed by the thousands, leading to the killing of six million people.<sup>16</sup>

The concentration camps were gradually liberated by the allies and at the end of the war, the Jewish survivors were living in three zones occupied by the Americans, the British, and the Soviets.<sup>17</sup> Although discrimination against Jews dates back centuries, it was furthered through European rule. The common parlance for discrimination against Jews is known as anti-Semitism, but to not confuse the reader, Semitic folks are both classes of Middle Eastern Jews and those Middle Easterners of non-Jewish descent related to a family of languages including Hebrew, Arabic, and Aramaic.<sup>18</sup>

After being expelled to all corners of Europe and after the emancipation of the Jews from under the Nazi regime, the European states did not offer any of their territories to those who survived the Holocaust. European religious discrimination against Jews in the 20<sup>th</sup> century was

---

<sup>11</sup> *The Holocaust: An Introductory History*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/an-introductory-history-of-the-holocaust> (last visited Feb. 3, 2020).

<sup>12</sup> *The Holocaust: An Introductory History*, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *The Holocaust: An Introductory History*, *supra* note 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Semitic*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/semitic> (last visited Apr. 3, 2019).

still high even after the Holocaust. Europe wanting to further expel those who practiced Judaism from the European states led to an ongoing conflict that has lasted over 70 years, the declaration of Israel becoming a state in 1948.<sup>19</sup> This Middle Eastern region was unaffected by and foreign to the World Wars of the 20<sup>th</sup> century.

Given the longstanding institutional discrimination, it is understandable why European Jews, or Ashkenazi Jews, would want to have their own state, to protect them from further persecution. But what they experienced does not give them the legal right to forcibly take the land of another people and subject them to the same institutional discrimination they once faced.

This conflict has grown into an international humanitarian crisis. Since the announcement of Israel becoming a state, the conflict has been continuous. Israel's violation of international law, continuous illegal occupation, and settlement of Palestinian territory has subjected the native people to traumatic displacement and segregation with the support of many powerful allies has led to fights on both sides.

The aid provided by these allies is not limited to land confiscation but extends to legislative policies which perpetuate religious segregation. Israel, in its efforts to preserve a sanctuary for Jews, has engaged in systematic discrimination based on nationality and religion. Israel has continued its illegal occupancy through cultural appropriation and violations of international law. European Jews can be likened to the Europeans that colonized South Africa through the colonization and implementation of segregating laws. Although the apartheid in South Africa was solely based on racial classifications, what Israel is doing today can be considered new age apartheid because the segregation is not based on race, but religion.

---

<sup>19</sup> *Creation of Israel, 1948*, THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/creation-israel> (last visited Jan. 23, 2020).

Apartheid is defined as “racial segregation; specifically, a comprehensive governmental policy of racial discrimination and segregation.”<sup>20</sup> The term apartheid was translated from the Afrikaans which meant ‘apartness’ and it was an ideology supported by the National Party government that was used for the separate development of the different racial groups in South Africa.<sup>21</sup> Today, the term is used as a synonym for segregation on racial classes or religions and discriminatory policies enacted by a government against a section of its own people.<sup>22</sup>

The immigration of the European Jewish population caused a division between religions in the Middle Eastern region that was not impactful until the immigrating population came and changed state law to reflect the division. The European imperialism that was seen in South Africa is seen again today through European imperialism in what was once Palestine.

## **II. Birth of Israel: Start of Displacement**

### **a. British Mandate for Palestine**

During World War I, Chaim Weizmann, an established scientist, created a useful weapon of cordite (an explosive) for Britain in exchange for naming Palestine as a national home for the Jewish people.<sup>23</sup> Arthur Balfour was the British Foreign Secretary and signed over a document, known as the Balfour Declaration, in hopes of rallying Jewish opinion to the side of the Allied powers during World War I.<sup>24</sup> The Balfour Declaration also intended to protect the approaches to the Suez Canal and ensure communications with British colonial possessions in India.<sup>25</sup>

---

<sup>20</sup> *Apartheid*, BLACK’S LAW DICTIONARY (10th ed. 2015).

<sup>21</sup> SOUTH AFRICAN HISTORY ONLINE, *A History of Apartheid in South Africa* (May 6, 2016), <https://www.sahistory.org.za/article/history-apartheid-south-africa>.

<sup>22</sup> *Apartheid*, *supra* note 20.

<sup>23</sup> *Balfour Declaration*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Balfour-Declaration>, (last updated Jan. 8, 2020).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

The Balfour Declaration was endorsed by the Allied powers and included in the British Mandate for Palestine.<sup>26</sup> The League of Nations instituted the Mandate for Palestine in 1922, which provided the degree of authority, control, and administration to be exercised by the British Monarch.<sup>27</sup> This document laid out the plan to gift the land of Israel from the English imperialized colony of Palestine to create a national home for European Jews. At the time, the demographics of Palestine consisted of 80 percent Muslim Arabs, 11 percent Jewish Arabs, and 9 percent Christian Arabs.<sup>28</sup> Although there was already an Arab-Jewish population in Palestine, the Mandate created a pathway for Europeans to colonize Palestine, creating an international Zionist national home for Jewish people from Europe, a long hope for Jewish people. Zionist is defined by Google as: “a supporter of Zionism; a person who believes in the development and protection of a Jewish nation in what is now Israel.”<sup>29</sup>

Upon the enactment of the Mandate, the Jewish population in Palestine steadily increased. It was not until the beginning of 1930, with the world depression and increasing Jewish discrimination in Poland and Germany, that Jewish immigration to Palestine significantly increased.<sup>30</sup> With the increase of Jewish immigration, the Mandate enacted Article 2 which states: “[the] Mandat[ate] shall be responsible for placing the country under such political, administrative and economic conditions... and safe[guard] the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.”<sup>31</sup> This Article was added to ensure the

---

<sup>26</sup> *Balfour Declaration*, *supra* note 23.

<sup>27</sup> League of Nations Mandate for Palestine art. 25, Aug. 12, 1922.

<sup>28</sup> *Factsheet: Demographics of Historic Palestine prior to 1948*, CANADIANS FOR JUSTICE AND PEACE IN THE MIDDLE EAST (July, 2004), [http://www.cjpme.org/fs\\_007](http://www.cjpme.org/fs_007).

<sup>29</sup> *Zionist*, GOOGLE DICTIONARY, <https://www.google.com/search?q=%20define+%20zionist&rlz=1C1GCEV> (last visited Jan. 24, 2020).

<sup>30</sup> *British Mandate for Palestine*, ENCYCLOPEDIA OF THE MIDDLE EAST, [http://www.mideastweb.org/Middle-East-Encyclopedia/british\\_mandate\\_palestine.htm](http://www.mideastweb.org/Middle-East-Encyclopedia/british_mandate_palestine.htm) (last visited Jan. 24, 2020).

<sup>31</sup> League of Nations Mandate for Palestine, *supra* note 27, at art. 2.

immigration did not turn into what it has today and set forth the protection of the native inhabitants of Palestine, regardless of religious practices.

**b. Arab Revolt; Israel's Response; Europe's Resolution.**

By 1936, the Palestinians declared a national strike through the Arab Higher Committee (AHC) and wanted three specific demands: (i) cessation of the Jewish immigration, (ii) ending further land sales, and (iii) establishment of an Arab national government; none of any of the demands were met.<sup>32</sup> The first of many proposed resolutions was the Peel Commission which was recommended as a partition describing the Arab and Zionist positions, and the British obligation to each, as “irreconcilable” and “unworkable.”<sup>33</sup> This was the first instance where a state solution was recommended. Subsequently, the United Nations General Assembly passed a partition known as UN Resolution 181 which stated Palestine was to be split into a Jewish state and an Arab state. A retained British Mandate was maintained over Nazareth, Bethlehem, Jerusalem and a corridor from Jerusalem to the coast.<sup>34</sup>

The Arab Revolt in 1936 sparked the consideration for the British White Paper of 1939.<sup>35</sup> In 1939, the British government amended its policy in a White Paper recommending a limit of 75,000 further immigrants and an end to the immigration of European Jews by 1944.<sup>36</sup> With the amount of immigration of European Jews, and the financial and military support from Britain, the native Palestinians were removed from their homes, their jobs, their government, and relocated into specified areas of the land.<sup>37</sup> Strikes and attacks from the remaining Arab

---

<sup>32</sup> *Pre-State Israel: The Arab Revolt (1936-1939)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/the-1936-arab-riots>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> ENCYCLOPEDIA OF THE MIDDLE EAST, *supra* note 30.

<sup>36</sup> *The British White Paper of 1939*, MID EAST WEB HISTORICAL DOCUMENTS, <http://www.mideastweb.org/1939.htm>

<sup>37</sup> *Origins and Evolution of the Palestine Problem: 1917-1947 (Part I)*, U.N., <https://www.un.org/unispal/history/origins-and-evolution-of-the-palestine-problem/part-i-1917-1947/>.

population began due to the frustration at the continuation of European rule, illegal immigration, and occupation.<sup>38</sup>

The UN formed the Special Committee on Palestine (UNSCOP) in 1947.<sup>39</sup> 11 member countries participated in this organization forming this committee.<sup>40</sup> The committee came up with two possible solutions: (i) two separate states joined economically or (ii) the formation of a single binational consisting of both European Jewish and Palestinian areas.<sup>41</sup> The resolution of two separate states was passed with 33 votes in favor, 13 against and 10 abstentions.<sup>42</sup>

Considering the circumstances, UNSCOP carried potential, but there was no agreement between the Jewish and non-Jewish Nation. Additionally, the Twentieth Zionist Congress rejected the proposed boundaries.<sup>43</sup> The British government then sent a group known as the Woodhead Commission to Israel to create a proposal for possible partition locations but determined the partition was impracticable because of insurmountable political, administrative, and financial difficulties.<sup>44</sup> Again, the Palestinians revolted, leading to the British shut down of the AHC and deportation of many Palestinian leaders in attempts to end the revolts.<sup>45</sup>

With Palestinian leaders being outside of Palestine, the Palestinians in Israel were no match against the Zionists who maintained British military and financial support.<sup>46</sup> The second Palestinian revolt reinforced British military support for the Zionists with an even stronger defense network although, because the Arabs refused to permit settlers through ceasing

---

<sup>38</sup> *Origins and Evolution of the Palestine Problem*, *supra* note 37.

<sup>39</sup> *U.N. Resolution 181: Israeli-Palestinian History*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/United-Nations-Resolution-181>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Pre-State Israel: The Arab Revolt (1936-1939)*, *supra* note 32.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *U.N. Resolution 181: Israeli-Palestinian History*, *supra* note 39.

agricultural development, the Jewish economy became even more independent from British financial support.<sup>47</sup> To exemplify the effects of having a governmental and military power imbalance, the Arab revolts and strikes between the period of 1936-1939 left 415 Jews dead and 198 injured, while the toll of death on Arabs was 5,000 dead, 15,000 wounded and 5,600 imprisoned.<sup>48</sup>

### III. Seventy Continuous Years of Israeli Occupation

#### a. Israel's Attempt at Complete Occupancy.

The United Nations is notable for respecting human rights even during the vicissitudes of war. However, it is no match for Zionists power. After the 1948 war, many Palestinians fled as refugees to Syria and Jordan.<sup>49</sup> From 1949 to 1956, thousands of Palestinians attempted to return to their homes and/or look for their relatives, but Israeli forces shot dead between 2,000 and 5,000 of those who tried to cross the borders of Syria and Jordan back into the occupied land.<sup>50</sup> The Israeli attacks on Palestinians were increasing in ferocity. In 1953, Israel blew up 45 houses in the village of Qibya as retaliation for Palestinian resistance.<sup>51</sup>

Since the Zionists were unsuccessful in obtaining all of Palestine in 1948, the 1967 War was Israel's attempt at complete occupancy and colonization over the people in the state. Israel was notified of mobilization of the neighboring Arab countries and with the growing tensions between the Arabs and the new Jewish population, the pulls escalated into war with an Israeli

---

<sup>47</sup> *U.N. Resolution 181: Israeli-Palestinian History*, *supra* note 39.

<sup>48</sup> *Id.*

<sup>49</sup> Zena Tahhan, *The Naksa: How Israel Occupied the Whole of Palestine in 1967*, ALJAZEERA (June 4, 2018), <https://www.aljazeera.com/indepth/features/2017/06/50-years-israeli-occupation-longest-modern-history-170604111317533.html>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



surprise attack on Egyptian airbases that destroyed the vulnerable Egyptian air force.<sup>52</sup> On the eve of the attack, Israeli minister Yigal Allon stated: "In ... a new war, we must avoid the historic mistake of the War of Independence [1948] ... and must not cease fighting until we achieve total victory, the territorial fulfillment of the Land of Israel."<sup>53</sup> This quote demonstrates the militant mind of occupying all of the territories with no intention of following the two-state solution that was previously agreed to under UNSCOP in 1947.

Just a day later, June 7, 1997, Israel had seized major West Bank cities, the Sinai Peninsula, the Gaza Strip, Old City of Jerusalem, and the Golan Heights.<sup>54</sup> This act forced 12,000 Palestinians out of the city of Qalqilya alone.<sup>55</sup> This capture became another increased point of tension between the Arabs and Israelis in the region. Because of the terror Israel was inflicting in occupying these areas, the UN General Assembly issued Resolution 2252, which established to provide humanitarian assistance to those displaced, mainly Palestinians, in the 1967 War.<sup>56</sup> This Resolution was issued to protect the innocent Palestinians caught in the crossfires. It called upon the Israeli government to ensure safety, welfare, and security of areas where the military operations had taken place and facilitate the return of those who had fled the area due to the war.<sup>57</sup> Additionally, it requested support from the United Nations Relief and Works Agency for the Palestinian refugees to ensure the safety and respect of those affected.<sup>58</sup>

---

<sup>52</sup> Tahhan, *supra* 49.

<sup>53</sup> *Id.*

<sup>54</sup> The Editors of the Encyclopedia Britannica, *Six-Day War*, ENCYCLOPEDIA BRITANNICA (Dec. 6, 2019), <https://www.britannica.com/event/Six-Day-War>.

<sup>55</sup> *U.N. Resolution 181: Israeli-Palestinian History*, *supra* note 39.

<sup>56</sup> G.A. Res. 2252 (ES-V) (Jul. 4, 1967).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Since the 1948 war until now, approximately 7 million Palestinians are displaced and are refugees are not allowed to return.<sup>59</sup>

**b. Ignored Resolutions.**

The Israeli government ignored the UN Resolution regarding humanitarian assistance. This led to the 1968 UN establishment of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (SCHR).<sup>60</sup> This Resolution called upon the Israeli Government to (i) facilitate the return of those who fled the area due to military operations, (ii) desist immediately from destroying the homes of Arab populations, and (iii) respect and implement the Universal Declaration of Human Rights and the Geneva Conventions.<sup>61</sup> The General Assembly also expressed its grave concern at the violation of human rights in Arab territories occupied by Israel.<sup>62</sup> The General Assembly further affirmed that those who have left their homes as a result of hostilities in the region have the right to return and recover their home and property.<sup>63</sup>

The General Assembly established the SCHR with the intent to protect and respect faultless human lives.<sup>64</sup> However, nothing came of it. The UN has continued to create resolutions and guidelines, but from 1968-2002, “Israel has violated 32 resolutions that included condemnation or criticism of the governments’ policies and actions.”<sup>65</sup> Further, in the last eight years, Israel has violated 58 UN Resolutions concerning Palestinian human rights.<sup>66</sup>

---

<sup>59</sup> *Palestinian Refugees and the Right of Return*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/resource/palestinian-refugees-and-right-return> (last visited Jan. 27, 2020).

<sup>60</sup> G.A. Res. 2443 (Dec. 19, 1968).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Shlomo Shamir, *Study: Israel Leads in Ignoring Security Council Resolutions*, HAARETZ (Oct. 10, 2002 12:00 AM), <https://www.haaretz.com/1.5127043>.

<sup>66</sup> U.N., HUM. RTS. COUNCIL’S RESOLUTIONS (n.d.); please see Appendix 1 for a list of violated Resolutions.

Additionally, from 1949 to 1956, an official Israeli government policy, named Plan Dalet, focused on the depopulation and destruction of Palestinian communities.<sup>67</sup> The Plan outlines an explicit strategy for taking over Palestinian land, stating that:

"operations can be divided into four categories: the destruction of villages (setting fire to, blowing up, and planting mines and debris), especially those population centers which are difficult to control continuously... in the event of resistance, the armed forces must be wiped out and the population must be expelled outside the borders of the state."<sup>68</sup>

The implementation of this plan shows a blatant disregard for human life. Israel is so focused on occupying the entire land, it has forgotten the basic principles of Judaism which is to show love and respect to everyone. Israel implements plans like these because it fears that the Palestinian presence will threaten the maintenance of a sustainable Jewish demographic in a new state. Thus, after the displacement, no Palestinians were allowed to return.

In 1969, the UN General Assembly issued Resolution 2546,<sup>69</sup> condemning Israel's violation of human rights and fundamental freedoms in the occupied territories.<sup>70</sup> Although there have been over two hundred UN resolutions regarding the aid of Palestinian people and the investigation on Israel's practices, there has been no reprieve. As recent as 2016, the Security Council adopted Resolution 2334, which condemned Israel's persistence in altering the demographic land of the Palestinian territory and recalling Israel's obligation to follow the Geneva Convention from 1949.<sup>71</sup> There is substantial support from Israel's allies that have participated in the racial segregation of Palestinians in Israel. The United States alone has used its veto power 43 times against Israel-related UN Security Council draft resolutions.<sup>72</sup>

---

<sup>67</sup> Walid Khalidi, *Plan Dalet: Master Plan for the Conquest of Palestine*, 18 J. PALESTINE STUD. 4, 7-8 (1988).

<sup>68</sup> Khalidi, *supra* note 67, at 29.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> S.C Res. 2334 ¶ 4 (Dec. 23, 2016).

<sup>72</sup> MEE Staff, *The 43 Times US has Used Veto Power Against UN Resolutions on Israel*, MIDDLE EAST EYE (Dec. 18, 2017), <https://www.middleeasteye.net/news/43-times-us-has-used-veto-power-against-un-resolutions-israel>.

**c. Palestinian People Exist.**

The infamous words of Golda Meir are representative of the effects of the Israeli occupation. After Palestinian Arabs claimed they were the distinct people from the region, Golda Meir responded that there is no such thing as Palestinian people.<sup>73</sup> This reoccurring claim has plagued many minds in recognizing Palestine as a State or even as a people. The propaganda used to convince the public that both Palestine and the people never existed is so severe that the UN General Assembly issued Resolution 2003 to combat that notion, reaffirming the right of the Palestinian people to self-determination including the right to their independent State of Palestine.<sup>74</sup>

Palestine is severely underrepresented; their government does not have the funds nor the allies that Israel has. The Palestinian Authority (PA) is the de facto government of the Palestinian people, located in the West Bank and Gaza. The PA was created by the Oslo Peace Accords in 1993.<sup>75</sup> Its purpose was to legitimize the Palestinian people for the Palestinians and Israel, and it governed most of the Gaza Strip and the town of Jericho.<sup>76</sup> This establishment was the first step in the implementation of arranging for Israeli withdrawal from regions in the West Bank and Gaza Strip.<sup>77</sup> It has advocated for permanent status talks on the issues between the two nations.<sup>78</sup> Among agreements on education, health, culture, social welfare, taxation, and tourism, it has also agreed with Israel that the Israeli State would “retain overall authority for security and defense.”<sup>79</sup> In exchange of cessation of building illegal settlements in Palestinian territories, such

---

<sup>73</sup> Kenneth Levin, *What Golda Meir Said About Palestinians*, N.Y. TIMES (Oct. 12, 1993), <https://www.nytimes.com/1993/10/12/opinion/1-what-golda-meir-said-about-palestinians-766493.html>.

<sup>74</sup> G.A. Res. 58/163 ¶ 7 (Dec. 22, 2003).

<sup>75</sup> *Id.*

<sup>76</sup> *The Palestinian Authority: History & Overview*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/palestinian-authority-history-and-overview>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

as Hebron and the West Bank, the Palestinians would cease resisting through acts of violence.<sup>80</sup> However, Israel did not follow through on its commitments.<sup>81</sup> As a result, the PA's President, Mahmoud Abbas, addressed the UN General Assembly stating they would no longer be bound to a unilateral agreement.<sup>82</sup>

#### **d. Attempted Foreign Aid to Palestine.**

Desperate for infrastructure and economic development in the Palestinian territories, the PA relied on external financial dependence.<sup>83</sup> The U.S., Canada, the European Community, and Japan met at the World Bank to give financial aid to the PA.<sup>84</sup> By 1993, the total amount of pledges came to \$3.86 billion.<sup>85</sup> In comparison, the total U.S. aid alone to Israel between 1946 to 2017 has totaled \$134.7 billion.<sup>86</sup> There is also a new 10-year Memorandum of Understanding (MOU) on U.S. military aid to Israel, pledging \$43 billion in Foreign Military Financing grants which includes \$5 billion for missile defense.<sup>87</sup> Unfortunately, there were problems with the PA receiving the money and the Palestinian population's ability to pay taxes to the PA because of external economic circumstances, such as the Israeli curfews, roadblocks, and the closing of Palestinian cities.<sup>88</sup> Thus, most of the aid was spent towards the Palestine Liberation Organization's (PLO), which was the only organized resistance group of Palestine, deficits and in response, the donor nations stopped funding the PA.<sup>89</sup> These obstacles paused economic

---

<sup>80</sup> *The Palestinian Authority: History & Overview*, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> Carol Morello & William Booth, *Palestinian Leader Disavows Agreements Signed with Israel*, THE WASH. POST (Sep. 30, 2015), [https://www.washingtonpost.com/world/national-security/palestinian-leader-disavows-agreements-signed-with-israel/2015/09/30/ce2b0d24-6790-11e5-9ef3-fde182507eac\\_story.html](https://www.washingtonpost.com/world/national-security/palestinian-leader-disavows-agreements-signed-with-israel/2015/09/30/ce2b0d24-6790-11e5-9ef3-fde182507eac_story.html).

<sup>83</sup> *The Palestinian Authority: History & Overview*, *supra* note 76.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Jeremy M. Sharp, *U.S. Foreign Aid to Israel*, CONG. RES. SERV. (2018), <https://www.hsdl.org/?view&did=809504>.

<sup>87</sup> *Id.*

<sup>88</sup> *The Palestinian Authority: History & Overview*, *supra* note 76.

<sup>89</sup> *Id.*

development and essentially stopped the Oslo process.<sup>90</sup> As a result of the lack of funding and support, the PA was quickly losing legitimacy to the world.

In 2002, there was an increase in the fighting between the nations and, in response, Israel withheld more funding from the PA under the belief that the money was being used to support terrorism, since the PA was connected to the PLO.<sup>91</sup> The propaganda, depicting the PA as funding terrorist families, spread internationally and thus the Australian government reneged on their agreement to provide aid to the PA as well.<sup>92</sup> On July 2, 2018, the Israeli Knesset passed a bill that withheld tax transfers to the PA, by a vote of 87-15.<sup>93</sup> Israel's withholding of the PA's funds prevented Palestine from providing aid and educational needs to its people, effectively preventing Palestine from acting as a legitimate sovereign.

Under international humanitarian, human rights, and refugee law, displaced people have a right to return to their native lands.<sup>94</sup> The United Nations High Commission for Refugees (UNHCR) states that the right of return is recognized as a basic underpinning of international law and has been included in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Fourth Geneva Convention.<sup>95</sup> The United Nations has continuously condemned, expressed, and reaffirmed the messages it has sent to Israel over the past seven decades, but the UN lacks enforcement capacities.

---

<sup>90</sup> *The Palestinian Authority: History & Overview*, *supra* note 76.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Palestinian Refugees and the Right of Return*, *supra* note 59.

<sup>95</sup> *Id.*

#### IV. Examination of Israel's Apartheid Regime over Palestinian People

The UN treaty 14861 labeled Apartheid as a crime against humanity.<sup>96</sup> Since 1973, the Members of the United Nations have collectively pledged to attempt to achieve “universal respect for... human rights and fundamental freedoms for all without distinction to race, sex, language or religion.”<sup>97</sup> “Inhuman acts resulting from the policies and practices of apartheid...are crimes violating ... international law... and constit[ute] a serious threat to international peace and security.”<sup>98</sup> Israel's laws are unashamedly against humanity and peace in the region. For instance, Israel's Jewish Agency Law, enacted in 1952 states “[t]he State of Israel regards itself as the creation of the entire Jewish people, and its gates are open, following its laws, to every Jew wishing to immigrate to it.”<sup>99</sup> Unlike in the U.S. where citizenship is not conditioned on ethnic or religious origins and every citizen has the same rights and responsibilities, Israeli citizenship is more complicated.

##### a. Who Can Legally Immigrate to Israel

If you are of Jewish descent, you are allowed to immigrate to Israel and become a citizen immediately under the Law of Entry to Israel and the Law of Return.<sup>100</sup> However, these laws are in and of themselves religion-specific and are discriminatory in practice. Jews, anywhere in the world, wanting to immigrate to Israel, get automatic citizenship.<sup>101</sup> It is very difficult to become an Israeli citizen if you are not of Jewish descent. Those who are born in East Jerusalem, which

---

<sup>96</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

<sup>97</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 96.

<sup>98</sup> *Id.* at art. 1.

<sup>99</sup> World Zionist Organization- Jewish Agency (Status) Law, 5713-1952, SH No. 112 p. 3-4 (Isr.).

<sup>100</sup> *Immigration to Israel and Israeli Citizenship*, DC LAW OFFICES: RELOCATION & IMMIGRATION, <https://www.visa-law.co.il/immigration-to-israel-and-israeli-citizenship/> (last visited Feb. 1, 2020).

<sup>101</sup> *The Law of Return*, THE JEWISH AGENCY FOR ISRAEL, <http://www.jewishagency.org/first-steps/program/5131> (last visited Feb. 1, 2020).

is in Israel, are conditional residents, not citizens.<sup>102</sup> They are allowed to apply for citizenship but those “who have had their permanent residency revoked by the Israeli government since 1967 is as large as the number who have been successful in attaining citizenship.”<sup>103</sup> Because of this, Palestinians living in East Jerusalem are in constant fear of losing their right to simply live in their homes.

Citizenship in Israel has been divided into classes as seen in the Nationality Bill passed in 2018.<sup>104</sup> The Bill defines Israel as the nation-state of the Jewish people with measures setting the development of Jewish settlements nationwide as a national priority and downgrades the status of Arabic from an official language to one with “special status.”<sup>105</sup> The Bill also set into the law the constitutional status of the Jewish calendar as the state’s official calendar.<sup>106</sup> Additionally, the Law of Return, Israel’s statute which has been active since 1950, allows every Jewish person to immigrate to Israel and automatically become a citizen of the state.<sup>107</sup> The only non-Jewish people granted automatic citizenship are children, grandchildren, and spouses.

Further, the Citizenship Law was enacted in 1952. The Citizenship Law regulates who is and who can become a citizen of Israel.<sup>108</sup> The Citizenship Law rests on two statutes. Particularly, the Law of Return which allows every Jew to immigrate to Israel.<sup>109</sup> Article III of the Law of Return deprives Palestinians who were residents of Palestine before 1948 the right to

---

<sup>102</sup> Daniel Sokatch & David N. Myers, *Israel’s dilemma: Who can be an Israeli?*, LOS ANGELES TIMES (Jan. 14, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-myers-israel-citizenship-arabs-20140114-story.html>.

<sup>103</sup> *Israel’s dilemma: Who can be an Israeli?*, *supra* note 102.

<sup>104</sup> Mark Weiss, *Israel approves controversial Jewish Nationality Law*, THE IRISH TIMES (Jul. 19, 2018, 1:14 PM), <https://www.irishtimes.com/news/world/middle-east/israel-approves-controversial-jewish-nationality-law-1.3570017>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Law of Return, 5710-1950, SH No. 5714 p. 198 (Isr.).

<sup>108</sup> Yossi Happaz & Ben Herzog, *Report on Citizenship Law: Isr.* (2018), [https://cadmus.eui.eu/bitstream/handle/1814/56024/RSCAS\\_GLOBALCIT\\_CR\\_2018\\_02.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/56024/RSCAS_GLOBALCIT_CR_2018_02.pdf?sequence=1&isAllowed=y).

<sup>109</sup> *Id.*



gain citizenship or residency status unless they register as an "inhabitant."<sup>110</sup> Under the 9th Amendment of this law, Israel has the authority to revoke citizenship due to a breach of trust or loyalty.<sup>111</sup> A breach of trust is broadly defined as: "[a person] has committed an act of disloyalty towards the State of Israel, a District Court may, upon the application of the Minister of the Interior, revoke such person's naturalization;" and includes having permanent residency status in one of nine Arab and Muslim states, including the Gaza Strip.<sup>112</sup> This Bill, as described by Arab Knesset members, is discriminatory against Arabs, who make up 20 percent of Israel's 9 million population, and is also racist.<sup>113</sup> In Israel, there is no law akin that guarantees the rights of Palestinians to immigrate or receive citizenship, even if they were born in Israel.<sup>114</sup> This Bill etches into history that Arabs have an inferior status in Israel.

**b. Can Persons Who Are Not Arab or Jewish Migrate to Israel?**

Moreover, migrant workers in Israel who come from places like Thailand and the Philippines are not eligible for citizenship even though their children speak Hebrew, attend Israeli schools, and are a part of military services.<sup>115</sup> African refugees in Israel do not have a path to citizenship nor access to social benefits such as healthcare or work permits.<sup>116</sup> Israel, as quoted by Binyamin Netanyahu, seeks to keep Israel "the state of the Jews."<sup>117</sup> This statement is problematic and is based on racism.

---

<sup>110</sup> Law of Return, *supra* note 107, at art. III.

<sup>111</sup> *Id.*

<sup>112</sup> Founds of Law, 5740-1980, SH No. 978 p. 50-3 (Isr.).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Weiss, *supra* note 104.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

### c. Israel's Discriminatory Laws

Part of Israel's control over the Palestinian people is based on a system of color-coded ID cards in the occupied territories.<sup>118</sup> The color-coded system is a strict monitoring device of non-Jewish/non-Israeli people. After the Six Day War, the Israel Defense Force (IDF) declared the occupied territories to be “closed areas,” making it mandatory for Palestinians to obtain permits to enter or exit from behind the Western Wall.<sup>119</sup> No Palestinian can leave the Western Wall or pass any checkpoint without an ID card.<sup>120</sup> This rule is very similar to the passbook law in apartheid South Africa. Only Palestinians are registered to have an ID card, the Palestinians in the West Bank and the Gaza Strip have green cards, while those in East Jerusalem and Israeli territories have blue cards.<sup>121</sup> The card system affects the freedom of movement of individuals and families.<sup>122</sup> The card system heavily impedes family unification. If a husband and wife hold different ID cards, they are physically restricted from living with each other because neither is allowed to move out of their territory.<sup>123</sup>

Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid mentions the crime of apartheid applies to acts of one racial group maintaining domination over another.<sup>124</sup> Specifically, the multilateral agreement between the member countries emphasizes legislative measures created to prevent a racial group from participation in the political, social, economic, and cultural life of the country. This is a crime of apartheid.<sup>125</sup>

---

<sup>118</sup> Linah Alsaafin, *The Colour-Coded Israeli ID System for Palestinians*, ALJAZEERA (Nov. 17, 2017), <https://www.aljazeera.com/news/2017/11/colour-coded-israeli-id-system-palestinians-171115164848669.html>.

<sup>119</sup> Alsaafin, *supra* note 118.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at para. 4.

<sup>123</sup> *Id.*

<sup>124</sup> Int'l Convention on the Suppression & Punishment of the Crime of Apartheid, U.N. Doc. A/9030 (1974), at 75.

<sup>125</sup> *Id.*

One of the most prominent laws of Israel showing their overarching military power and control over all Palestinian territory is the Defense Regulation 125- Area Closures.<sup>126</sup> This law authorizes the IDF to declare any region of the state closed, barring anyone from entering it.<sup>127</sup> The regulation states, “no one is allowed in or out without permission from the Israeli Military.”<sup>128</sup> “This regulation has been used to exclude a landowner from his own land so that it could be judged as unoccupied and then expropriated.”<sup>129</sup> In practice, this regulation prevents the residents of Palestinian villages who were uprooted during the war from returning to their land.<sup>130</sup>

Israel not only prevents Palestinians from returning to their homes in the occupied territories, but it makes sure that Palestinians who remain in occupied Palestine feel inferior to Israelis. As recent as 2019, Israel paved a new highway in the occupied West Bank that divides Israeli and Palestinian drivers into separate lanes with a wall separate and apart from the Western Wall dividing them.<sup>131</sup> This divide benefits the Jewish population as the road separates Palestinian communities from Jewish-only settlements northeast of Jerusalem.<sup>132</sup> As seen in Brown v. Board of Education, “separate is inherently unequal.”<sup>133</sup> The divide also furthers the notion that peace in the region is unachievable.

---

<sup>126</sup> Defense Regulations (Times of Emergency), 125 (1945) (Isr.).

<sup>127</sup> *Id.*

<sup>128</sup> Defense Regulations (Times of Emergency), *supra* note 126.

<sup>129</sup> *Id.*

<sup>130</sup> ADALAH: THE LEGAL CTR. FOR ARAB MINORITY RIGHTS IN ISR., <https://www.adalah.org/> (last visited Apr. 3, 2019).

<sup>131</sup> *Isr. Opens ‘Apartheid Road’ Dividing Palestinians, Settlers in Occupied W. Bank*, DAILY SABAH (Jan. 11, 2019), <https://www.dailysabah.com/mideast/2019/01/10/israel-opens-apartheid-road-dividing-palestinians-settlers-in-occupied-west-bank>.

<sup>132</sup> *Id.*

<sup>133</sup> *Brown, et al. v. Board of Education of Topeka, Shawnee County, Kan., et al. Briggs et al.*, 347, U.S. 483 (1954).

Moreover, it is illegal for a Palestinian in the West Bank to travel to Gaza and Jerusalem unless they have a special travel permit from Israel.<sup>134</sup> The rules are similar in the Gaza Strip, where those citizens are forbidden from going to Jerusalem and the West Bank unless Israel's government has issued them a permit.<sup>135</sup> "Each territory is administered by a different Israeli military commander...to maintain the division between the two territories and make them easier to control."<sup>136</sup> Israel has not issued any travel permits since 2000.<sup>137</sup> This is a clear indication of religious and racial separation that can be directly compared to the laws in apartheid South Africa. In apartheid South Africa, the whites used similar methods "to control the movement of blacks and mixed-race people and to keep them in inferior positions."<sup>138</sup>

## V. The Western Wall

Israel has constructed a separation wall between Palestinian territory and Israeli territory, but the wall was built all on Palestinian land, effectively allowing Israel to annex more territory.<sup>139</sup> The wall is 280 miles long and as high as 26 feet in some areas.<sup>140</sup> The wall can only be described as an apartheid wall, and in 2004, the International Court of Justice (ICJ) at The Hague ruled the wall illegal and ordered Israel to take it down.<sup>141</sup> The ICJ held the wall was disproportionate to "Israel's security needs, and a form of collective punishment against the

---

<sup>134</sup> Morello & Booth, *supra* note 82.

<sup>135</sup> *Id.*

<sup>136</sup> Alsaafin, *supra* note 118.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> AJ Plus, *Israel's Wall: Security or Apartheid?*, ALJAZEERA AMERICA (Dec. 17, 2015), <http://america.aljazeera.com/articles/2015/12/17/israels-wall-security-or-apartheid.html>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

whole Palestinian population.”<sup>142</sup> In 2019, the wall remains and is even being expanded solely on Palestinian property, allowing Israel to occupy even more land.<sup>143</sup>

The wall does more than protect Israel from security threats. It not only tears families and villages apart, but it also economically restricts Palestinians. For instance, the wall was built around a Palestinian woman’s home within two hours.<sup>144</sup> The wall divided her home, where she operates a gift shop, from Rachel’s Tomb, a holy place and tourist attraction for Jews and Christians. Before the wall, the home was bringing in a source of income from the tourism at Rachel’s Tomb; but now that the wall separates the gift shop from the tourist location, the family has fallen into serious debt.<sup>145</sup>

#### **a. Examples of Discrimination**

The Palestinian city of Hebron, located in the West Bank, is another example of how separated the Israeli and Palestinian nations are. First, per the Oslo Accords, Israel is not allowed to have settlements in the West Bank, but has ignored all other provisions thus far.<sup>146</sup> Hebron used to be a city full of Palestinian markets, but the IDF has set up illegal settlements.<sup>147</sup> This has not only displaced many Palestinians but adds to the discrimination against them.<sup>148</sup> Israel intends to limit the movement of people, goods, and vehicles within the city. For example, Israel set up numerous closures and checkpoints.<sup>149</sup> Palestinians are not allowed to drive on the street

---

<sup>142</sup> Mathew Vickery & Sheren Khalel, *10 Years After ICJ Ruling, The Illegal Separation Wall Remains Standing*, MIDDLE EAST MONITOR (July 9, 2014), <https://www.middleeastmonitor.com/20140709-10-years-after-the-icj-ruling-the-illegal-separation-wall-remains-standing/>.

<sup>143</sup> Plus, *supra* note 139.

<sup>144</sup> Vickery & Khalel, *supra* note 142.

<sup>145</sup> *Id.*

<sup>146</sup> Morello & Booth, *supra* note 82.

<sup>147</sup> *Id.*

<sup>148</sup> Uri Blau, *Exclusive: Confidential Report Based on 20 Years of Monitoring Claims: Israel Regularly Breaks International Law in Hebron*, HAARETZ, (Dec. 17, 2018), <https://www.haaretz.com/israel-news/.premium-confidential-report-claims-israel-regularly-breaks-international-law-in-hebron-1.6747523>.

<sup>149</sup> *Id.*

and cannot access parts of Hebron by foot.<sup>150</sup> In contrast, Israeli drivers and pedestrians are granted full access to all of the roads.<sup>151</sup> The Israeli military monitors who are passing through because of all the checkpoints in Palestinian territories. There are 98 fixed checkpoints in the West Bank alone.<sup>152</sup>

B'Tselem reported that there are now 361 flying checkpoints.<sup>153</sup> These checkpoints seriously limit Palestinian movement, economy, and welfare. According to OCHA, 2.4 million Palestinians in the West Bank alone are affected in their daily lives.<sup>154</sup> In Gaza, the Israeli blockade has a devastating impact on Gaza's population. For instance, less than a truckload of goods per day are allowed out of Gaza; 57% of households are food insecure; Gaza holds the highest unemployment rates in the world at 40%; there are power outages for up to 12 hours a day because of fuel shortages; only 25% of households receive running water and when they do it is only for a few hours; 90% of that water is unsafe for human consumption because filtration equipment cannot be imported to Gaza; and there are nearly 90 million liters of untreated sewage that is dumped into the sea with no treatment facilities as Israeli forces have banned it from entering.<sup>155</sup>

#### **b. Restrictions on Free Speech**

In 2011, the state of Israel passed the Anti-Boycott Law.<sup>156</sup> This law “prohibits the public promotion of academic, economic or cultural boycott by Israeli citizens and organizations

---

<sup>150</sup> Blau *supra* note 148.

<sup>151</sup> *Id.*

<sup>152</sup> *Israeli Checkpoints in the Occupied Territories*, MIFTAH, (July 13, 2017), <http://www.miftah.org/Display.cfm?DocId=14429&CategoryId=4>.

<sup>153</sup> *Israeli Checkpoints in the Occupied Territories*, *supra* note 152.

<sup>154</sup> *Id.*

<sup>155</sup> *Restricted Movement in the Occupied Palestinian Territory*, AMERICAN FRIENDS SERVICE COMMITTEE, (N.D.), <https://www.afsc.org/resource/restricted-movement-occupied-palestinian-territory>.

<sup>156</sup> Bill for prevention of damage to the State of Israel through boycott, 5741-2011, HH No. 373, p. 112 (Isr.).

against Israeli institutions or illegal Israeli settlements in the West Bank.”<sup>157</sup> The law is intended only for Israeli citizens. The Israeli government has prohibited its citizens from boycotting Israeli institutions or illegal Israeli settlements.<sup>158</sup> If anyone is found to have violated this law, they will face a civil lawsuit, which means Israel's people are prohibited from protesting the government.<sup>159</sup> This law also revokes tax exemptions from any Israeli association that engaged in boycotts.<sup>160</sup>

Even more surprising, the law provides that Israeli businesses that publicly refuse to buy supplies or goods manufactured in occupied Palestinian Territory may consequently have their state-sponsored benefits revoked.<sup>161</sup> Not only does this law prohibit anyone from speaking up against what Israel is inflicting on all Palestinians, but it is also attempting to guarantee that no one will support Palestinian owned businesses; if they do, they will face a lack of funding. This law restricts freedom of expression and targets non-violent political opposition to the occupation,<sup>162</sup> severely limiting and restricting the people’s right to protest wrongdoing by a boycott. This type of restriction has made its way to the United States.<sup>163</sup>

Bill S. 1, was introduced to the US Senate extending an existing loan guarantee program with Israel through 2023.<sup>164</sup> The bill will increase Israel’s “protection” for state and local governments that refuse to invest or contract companies that boycott Israel.<sup>165</sup> This bill threatens the Constitutional First Amendment protection of free speech.<sup>166</sup> It also attempts to suggest that

---

<sup>157</sup> Bill for prevention of damage to the State of Israel through boycott, *supra* note 156.

<sup>158</sup> *Id.*

<sup>159</sup> Bill for prevention of damage to the State of Israel through boycott, *supra* note 156.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *S. 11 Strengthening America’s Security in the Middle East Act of 2019*, GOVTRACK, (Jan. 11, 2019) <https://www.govtrack.us/congress/bills/116/s1/summary>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> U.S. CONST. amend. I.

U.S. citizens understand that Israel is not violating international law and should not be boycotted.<sup>167</sup> The bill specifies:

A State or local government may adopt and enforce measures that meet the requirements of subsection (c) to divest the assets of the State or local government from, prohibit investment of the assets of the State or local government in, or restrict contracting by the State or local government for goods and services.<sup>168</sup>

The Foreign Government Funding Law governs disclosure requirements for recipients of support from a foreign state entity.<sup>169</sup> While Israel claims this law is required for transparency, the provisions are unnecessary because every non-governmental organization in Israel is required under Israeli law to list its donors and report annually to the government.<sup>170</sup> These extra restrictions may discourage foreign government funding since every NGO in Israel is already required to disclose its donors to the government specifying where foreign governments have previously donated.<sup>171</sup> Furthermore, Jewish Israeli settlers are privately funded making them immune and unaffected by this legislation.<sup>172</sup>

Besides, the law "specifically exempts the World Zionist Organization, the Jewish Agency for Israel, the United Israel Appeal, the Jewish National Fund and its subsidiary corporations from its provisions."<sup>173</sup> This makes it effectively discriminatory, as no Palestinian organizations are exempted. The Palestinian NGOs in Israel and all NGOs that promote

---

<sup>167</sup> Bill for Prevention of Damage to the State of Israel Through Boycott, *supra* note 156.

<sup>168</sup> S. 1, 116th Cong. § 402 (2019).

<sup>169</sup> Mandatory Disclosure Act for Those Supported by a Foreign Political Entity, 5776-2016, SH No. 2563 p.1054 (Isr.).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*



Palestinian rights are vulnerable to this law because they do not seek funding from Israeli governmental sources and have more limited access to private funding.<sup>174</sup>

### c. Cut in Power.

Some laws and legislations show clear discrimination, but there are also more overt ways Israel has shown the Palestinian people that they are of a lesser, separate class. The residents of Gaza were caught in the middle of a political rift between Fatah, the Palestinian Authority representative, and the Hamas leadership in the Gaza strip.<sup>175</sup> Because of this rift, Israel cut off 50 megawatts of electricity to Gaza, meaning that the citizens were only receiving three or four hours of electricity a day and continue to do so.<sup>176</sup> There was not enough power for sewage treatment.<sup>177</sup> Recently, Israel decided to put the power back on but only limited it to six hours a day.<sup>178</sup>

Israel is attempting to rid the Palestinian population to claim that region as fully its own. And in doing so, they not only have segregating laws as mentioned above, but they also have taken traditions from the region and applied it to them as if it was their native culture.

## VI. Cultural Appropriation

“Cultural appropriation describes the use and exploitation by a majority or dominant group, of cultural knowledge or expressions originally produced by a minority or dominated group. It is applied to media and popular communication when ideas, images, sounds, and narratives produced by one group are appropriated for personal, professional, or commercial gain by members of a more powerful social group. Linked to colonial

---

<sup>174</sup> Mandatory Disclosure Act for Those Supported by a Foreign Political Entity, *supra* note 169.

<sup>175</sup> *Id.*

<sup>176</sup> Hazem Balousha, *Israel Turns the Power Back on to Gaza Giving Residents about Six Hours' Worth a Day*, THE WASH. POST (Jan. 7, 2018, 3:06 PM), [https://www.washingtonpost.com/world/middle\\_east/israel-turns-the-power-back-on-to-gaza-reducing-cuts-to-around-18-hours-a-day/2018/01/07/0b566f12-f3d1-11e7-9af7-a50bc3300042\\_story.html](https://www.washingtonpost.com/world/middle_east/israel-turns-the-power-back-on-to-gaza-reducing-cuts-to-around-18-hours-a-day/2018/01/07/0b566f12-f3d1-11e7-9af7-a50bc3300042_story.html).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

histories, racist discourses, and disparate access to power and resources, cultural appropriation can occur within and across specific national communities.”<sup>179</sup>

### **a. The Difference Between Ashkenazi and Sephardic Jews**

The European Jewish population that was a part of the initial migration to the region are known as Ashkenazi Jews.<sup>180</sup> The Ashkenazi Jews that migrated ramped up the religious divide between those who were already living in the region. There is a distinction between those of Ashkenazi Jewish descendants and those of Sephardic Jewish descendants. Sephardic Jews are native to the Middle Eastern region.<sup>181</sup> The problem with Israel claiming foods, clothes, and traditions from Palestinian culture is the Jews immigrating to Israel are not all native to the land. Israel's claim to, and renaming of, dishes is a further attempt at discrediting and depreciating Palestinian culture - even though Sephardic Jews who have lived in this region and practiced these traditions for centuries. Israel is appropriating Palestinian culture and, because of laws like the Right to Return Law, a foreigner of Jewish descent can move to Israel and wear traditional Palestinian dress claiming it as native, no matter where the immigrated from.

### **b. Memoricide**

In his book, Ilan Pappé, an Israeli historian, termed Israeli erasure of Palestine as memoricide, defined as the killing of memories.<sup>182</sup> By erasing Palestinian history and the Palestinians' collective memory, Israel can maintain a hegemonic collective of Zionist-Jewish identity.<sup>183</sup> It can also maintain the false notion that Palestine was a virgin “land without people

<sup>179</sup> Marian Bredin, *Cultural Appropriation*, INT'L ENC. OF COMM. 1095, 1095 (2008).

<sup>180</sup> The Editors of the Encyclopedia Britannica, *Ashkenazi*, ENCYCLOPEDIA BRITANNICA (2019), <https://www.britannica.com/topic/Ashkenazi>.

<sup>181</sup> Rabbi Rachel M. Solomin & MJL Admin, *Who are Sephardic Jews?*, MY JEWISH LEARNING <https://www.myjewishlearning.com/article/who-are-sephardic-jews/> (last visited Feb. 3, 2020).

<sup>182</sup> Ilan Pappé, *The 1948 Ethnic Cleansing of Palestine*, 36 J. PALESTINE STUD. 6, 8 (2006).

<sup>183</sup> NUR MASALHA, *THE PALESTINE NAKBA: DECOLONIZING HISTORY, NARRATING THE SUBALTERN, RECLAIMING MEMORY* 288 (Zed Books, 2012).

for a people without a land.”<sup>184</sup> There were people from all types of religious backgrounds previously occupying the land for over 2000 years before those from Europe colonized it. Specifically, there were many Sephardic Jews and non-Jews in the area already practicing traditions, peacefully living side by side to each other.

The Secretary-General of the Arab League and former Egyptian foreign minister, Nabil Elaraby, reports that Israel has stolen 80,000 Palestinian books and manuscripts since the 1948 Arab-Israeli War.<sup>185</sup> During the War, officials from the Jewish National and University Library followed soldiers as they entered Palestinian homes to collect as many books and manuscripts as possible.<sup>186</sup> Israel destroyed the books as a part of the framework of “Judaz[ing] the country.”<sup>187</sup> Which is similar to what happened in the beginning stages of Nazi Germany. The books were destroyed because they were characterized as a “security threat.”<sup>188</sup> This was all part of a well thought out plan to recreate the land on which Palestine stood into new territory with a completely new identity. The presence of anything Palestinian has been deemed a threat to Israeli nationalists who want to maintain occupying the entire land.<sup>189</sup> Moreover, 1948 was not the first nor last time Israeli forces stole and destroyed Palestinian books and other cultural productions. In 1982, Israeli invasion troops stormed the offices, homes, and libraries of

---

<sup>184</sup> MASALHA, *supra* note 183.

<sup>185</sup> Lizzie Dearden, *Israel has stolen 80,000 Palestinian Books and Manuscripts since 1948*, *Head of Arab League Claims*, INDEPENDENT (Oct. 24, 2014), <https://www.independent.co.uk/news/world/middle-east/israel-has-stolen-80000-palestinian-books-and-manuscripts-since-1948-head-of-arab-league-claims-9823864.html> (last visited Nov. 17, 2018).

<sup>186</sup> *Id.*

<sup>187</sup> *Researcher: Israel Destroyed Palestinian Books*, YNET NEWS (Jan. 28, 2010), <https://www.ynetnews.com/articles/0,7340,L-3841252,00.html>.

<sup>188</sup> *Id.*

<sup>189</sup> Roger Sheety, *Stealing Palestine: A Study of Historical and Cultural Theft Door*, NEDERLANDS PALESTINA KOMITEE (Oct. 29, 2015), <http://palestina100jaar.nl/NPK-berichten/741>.

Palestinians taking thousands of books, films, and other documents which recorded Palestinian history.<sup>190</sup>

### **c. Israel's School Curriculum**

Israel has not only eradicated Palestinian history by removing manuscripts and textbooks, but Israel's children are forbidden from being taught Palestinian history in their school curriculum.<sup>191</sup> The curriculum in Jewish Israeli schools has been vital in constructing racist and threatening stereotypes, including a one-sided narrative against Palestinians.<sup>192</sup> The books not only describe Arabs as "primitive, dirty, aggressive and hostile to Jews;" but they also fail to mention the problem of Palestinian refugees, or that Israel has played a direct part in creating that problem.<sup>193</sup> For instance, the books do not contain the word "expulsion."<sup>194</sup> Thus, the story that is being taught to youth is that the Arabs of Palestine simply "ran away, left or abandoned their homes."<sup>195</sup> Through history textbooks, the Zionist historical narrative has ignored the history and culture of Palestinian people, which is being taught to those on both sides, furthering Israel's apartheid control through its false recreation of history.<sup>196</sup>

### **d. Palestinian Dress and Cuisine.**

Whatever Israel cannot destroy it attempts to absorb into its culture. For example, Israel has taken Palestinian dress and cuisine and transformed it into its own through Israeli books, shops, and media.<sup>197</sup> Not only has Israel refused to recognize Arab origins but it has also renamed virtually every Arab dish to stomp out its Arab roots. Foods like olives and olive oil,

---

<sup>190</sup> Sheety, *supra* note 189.

<sup>191</sup> Hatim Mahamid, *History Education for Arab Palestinian Schools in Israel*, 1 J. OF EDU. AND DEV. 37, 37 (2017).

<sup>192</sup> *Id.* at 40.

<sup>193</sup> Hatim Mahamid, *supra* note 190.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Roger Sheety, *Stealing Palestine: A Study of Historical and Cultural Theft*, MIDDLE EAST EYE (2015), <https://www.middleeasteye.net/essays/stealing-palestine-study-historical-and-cultural-theft-1001196809>.

hummus, tabbouleh, arak, and falafel, to name a few, are native to Palestine and the rest of the Arab world. Through propaganda and cultural homicide, these dishes are being claimed as native to Israel, creating the false notion that these items are native to those of European descent. In a transcript from an Israeli cooking show, Gil Hovav, while talking about hummus, falafel and Arabi salad (which is now called “Israeli salad” and can be seen across America), admits to “robbing Palestinians of everything.”<sup>198</sup>

Another example is an Israeli book on embroidery named *Arabesque: Decorative Needlework from the Holy Land*, which depicts Israelis wearing the embroidered clothing of Palestinian villagers.<sup>199</sup> The book does not mention the style or form is native to Palestinians or even Sephardic Jews.<sup>200</sup> Further, Zionists have appropriated the kufiya, which is an Arabic scarf, and have attempted to make it their own.<sup>201</sup> The kufiya is very significant to Palestinian culture as it became a symbol of resistance during the Great Palestine Revolt of 1936-39 when the Palestinians rose up against the British occupation.<sup>202</sup> The propaganda of stealing the kufiya from Palestinians had widespread consequences as can be seen in Western shops such as H&M, completely eradicating the historical context in which it originated. Kufiyas are a sign of Palestinian resistance and independence; transforming it from a symbol of resistance into a fashion statement further eradicates Palestinian legitimacy and history.

Another example is the Israelis’ claim of arak. Arak is a very popular spirit well known and favored in the Middle East, yet Israel is maintaining it as indigenous to its own culture.<sup>203</sup> In

---

<sup>198</sup> *BBC Cooking in the Danger Zone: Israel and Palestinian Territories* (BBC News television broadcast n.d.) (transcript).

<sup>199</sup> Sheety, *supra* note 189.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Adam Montefiore, *Wine Talk: Back to Arak, Indigenous to Israel and the Region, the Ethnic Anise-Flavored Drink is Regaining its Popularity*, THE JERUSALEM POST, June 20, 2010.

the article, *Wine Talk: Back to Arak- Indigenous to Israel and the Region, the Ethnic Anise-Flavored Drink is Regaining its Popularity*, several Middle Eastern countries are cited – Turkey, Greece, Lebanon, and Jordan - but Palestine or the fact that arak is a very popular spirit in Palestinian culture, is purposely not mentioned.<sup>204</sup> This is a part of Israeli propaganda intended to displace Palestine and reinforce that Israel is a part of the surrounding nations. If the Israelis were not appropriating Palestinian culture, they would embrace Palestinians as sharing common literature, food, and drink.

However, there is no historical basis to Israel's claims that these dishes or drinks are their own, especially because those that came to Israel leading up to 1948 are from European countries and during the initial immigration were Ashkenazi Jews. Israel is appropriating Palestinian culture to claim the Palestinians' land. This is a tactic to suggest the existence of the colonizers as indigenous to the land by making it local instead of implanted.<sup>205</sup> By stripping Palestinians of their history, education, historical cuisines, and dress, Israel is leaving Palestinians with nothing, in calculated attempts to completely eradicate its existence.

The appropriation of Palestinian culture is a move towards erasing Palestine from the memories of all, particularly within the Western discourse. Israel wants to take the place of Palestine.<sup>206</sup> It is not only seen by the taking of their land, their food, but also Palestinian paintings, musical recordings, and art.<sup>207</sup> An Israeli publishing house recently published a series of short stories by 45 Arab women.<sup>208</sup> The published book also featured stolen art by Hussein Bliebel.<sup>209</sup> The publishing house translated and published the women's work into Hebrew

---

<sup>204</sup> Sheety, *supra* note 189.

<sup>205</sup> Nada Elia, *Food, Art and Literature: How Israel is Stealing Arab Culture*, MIDDLE EAST EYE, Sep. 27, 2018.

<sup>206</sup> Sheety, *supra* note 189.

<sup>207</sup> *Id.*

<sup>208</sup> Elia, *supra* note 205.

<sup>209</sup> *Id.*

without any of the women's consent or approval, and that is blatant “theft,” but theft is the heart of colonialism.<sup>210</sup> Additionally, there are museums full of stolen art from former colonies.<sup>211</sup>

Books, music, art, cuisine, and dress are the essence of a people’s culture and history.<sup>212</sup> This cultural appropriation is a clear-cut act of cultural plunder and disinheritance that has gone unrecognized for decades as Israel attempts to claim nativity to the region. The Palestinian intellectual Dr. Fayez Saygh said it best, “Israel is, because Palestine had been made not to be.”<sup>213</sup>

Recognizing the history and the extent to which Israel is occupying the territory is important to establish Israel’s motive in continuing to break international law. Israel wants the land to be perceived as virgin land, one the Jews have migrated from centuries ago that they are returning to. However, those that are coming in to reclaim their homeland are not coming as immigrants to a new country, they are coming as colonizers in an attempt to wipe out Palestinian history and to claim the land as its own without wanting to share with people who have occupied that land for hundreds of generations already practicing the same and other religions. This religious occupation is identical to the European colonialism and imperialism that took place in South Africa during the same era.

## VII. Conclusion and Proposal

In light of the 2000-year struggle of the Jewish people, it is understandable why Israel would take the position it has in terms of creating a national home for those who practice Judaism. The problem is innocent people have been displaced from their homes and are being

---

<sup>210</sup> Elia, *supra* note 205.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Elia, *supra* note 205.

subjected to occupation because of a war in Europe Palestine had no involvement in. The Jewish discrimination that was created in Europe and other Western nations is what lead to the creation of the state. History shows the perpetual negative outcomes of occupying, dividing, and discriminating through government order and law solely based on a minority position. Religious beliefs fall in that category and to discriminate on that basis is religious apartheid that ended in South Africa and needs to end in Israel.

The proposed solution for there to be peace in this region is a one-state solution. Recognizing the reality that Israel and occupied Palestine already function as a single state, not only because of IDF's control and Israel's consistent illegal occupancy of the land; but because both entities are within the same borders and share the same electricity grids. Further, some may argue that a Jewish state has a right to exist, however, no state has a right to exist. People have the right to exist, self-determinate, and assemble to form a state. Palestinians, Muslims, and Christians, as humans are deserving of that human right to participate alongside Israeli Jews in the Holy Land without being under occupation made to feel lesser, or erased through propaganda.

For a one-state solution to work, Israel would need to become a secular democracy and denounce the State as a National Jewish Home. Upon implementing a one-state solution, there would be no more permanent military presence, settlements or ID cards, the wall will be taken down, Palestinians would have freedom of movement and all the people in the State would coexist without a hierarchy between religions. It would be a long and slow process of assimilation but by allowing non-Jews to have equal rights under one nation, the region would thrive.



A one-state nation under a democracy will work so long as the Arab and non-Jewish minorities have equal rights. The nation will be built by bringing people together. Israel will completely govern the entire land, but all citizens in the nation will have Israeli citizenship, and thus, equal rights and protection. Some oppose the one-state solution in fear that Jews will lose their national home, but instead, the solution will affirm the fact that those of all different religions, whether Christian, Muslim, or Jewish, live by their moral and ethical codes to love their neighbors.

**APPENDIX 1:**

Date ▼	Symbol ▲	Title ▲
▼ 2017		
03/24/2017	A/HRC/RES/34/28	<u>Ensuring accountability and justice in OPT, including East Jerusalem - HRC 34th session - Resolution</u>
03/24/2017	A/HRC/RES/34/29	<u>Right of Palestinian people to self-determination - HRC 34th session - Resolution</u>
03/24/2017	A/HRC/RES/34/30	<u>Human Rights Situation in OPT, including East Jerusalem - HRC 34th Session - Resolution</u>
03/24/2017	A/HRC/RES/34/31	<u>Israeli settlements in OPT, Golan - HRC 34th session - Resolution</u>
03/21/2017	A/HRC/34/L.38	<u>Ensuring Accountability and Justice in OPT, Including East Jerusalem - HRC 34th session - Draft Resolution</u>
▼ 2016		
03/24/2016	A/HRC/RES/31/33	<u>Right of Palestinian people to self-determination - HRC 31st session - Resolution</u>
03/24/2016	A/HRC/RES/31/34	<u>Human rights situation in OPT, including East Jerusalem - HRC 31st session - Resolution</u>
03/24/2016	A/HRC/RES/31/35	<u>Ensuring accountability and justice in OPT, including East Jerusalem - HRC 31st session - Resolution</u>
03/24/2016	A/HRC/RES/31/36	<u>Israeli settlements in OPT, Golan - HRC 31st session - Resolution</u>
03/22/2016	A/HRC/31/L.38	<u>Ensuring accountability and justice in OPT, including East Jerusalem - HRC 31st session - Draft resolution</u>
▼ 2015		
07/03/2015	A/HRC/RES/29/25	<u>Ensuring accountability and justice in OPT, including East Jerusalem - HRC 29th session - Resolution</u>
03/27/2015	A/HRC/RES/28/25	<u>Right of Palestinian people to self-determination - HRC 28th session - Resolution</u>
03/27/2015	A/HRC/RES/28/26	<u>Israeli settlements in OPT, Golan - HRC 28th session - Resolution</u>
03/27/2015	A/HRC/RES/28/27	<u>Human rights situation in OPT, including East Jerusalem - HRC 28th session - Resolution</u>
▼ 2014		
07/23/2014	A/HRC/S-21/2	<u>Ensuring respect for international law in OPT - HRC resolution - HRC report on 21st special session</u>
03/28/2014	A/HRC/RES/25/28	<u>Israeli settlements in OPT, Golan - HRC 25th session - Resolution</u>
03/28/2014	A/HRC/RES/25/29	<u>Human rights situation in OPT, including East Jerusalem - HRC 25th session - Resolution</u>
03/28/2014	A/HRC/RES/25/30	<u>Follow-up to report of UN Fact-Finding Mission on Gaza Conflict (Goldstone report) - HRC 25th session - Resolution</u>
▼ 2013		
03/22/2013	A/HRC/RES/22/25	<u>Follow-up to the report of the UN Fact-Finding Mission on the Gaza Conflict (Goldstone report) - HRC 22nd session - Resolution</u>
03/22/2013	A/HRC/RES/22/26	<u>Israeli settlements in the OPT, Golan - HRC 22nd session - Resolution</u>
03/22/2013	A/HRC/RES/22/26	<u>Israeli settlements in the OPT, Golan - HRC 22nd session - Resolution</u>

- 03/22/2013 A/HRC/RES/22/27 Right of the Palestinian people to self-determination - HRC 22nd session - Resolution
- 03/22/2013 A/HRC/RES/22/28 Human rights situation in the OPT, including East Jerusalem - HRC 22nd session - Resolution
- 03/22/2013 A/HRC/RES/22/28 Human rights situation in the OPT, including East Jerusalem - HRC 22nd session - Resolution
- 03/22/2013 A/HRC/RES/22/29 Follow-up to the report of the independent international fact-finding mission on implications of Israeli settlements - HRC 22nd session - Resolution
- 03/22/2013 A/HRC/RES/22/29 Follow-up to the report of the independent international fact-finding mission on implications of Israeli settlements - HRC 22nd session - Resolution
- ▼ 2012
- 03/22/2012 A/HRC/RES/19/15 Right of the Palestinian people to self-determination - HRC 19th session - Resolution
- 03/22/2012 A/HRC/RES/19/16 Human rights situation in the OPT, including East Jerusalem - HRC 19th session - Resolution
- 03/22/2012 A/HRC/RES/19/16 Human rights situation in the OPT, including East Jerusalem - HRC 19th session - Resolution
- 03/22/2012 A/HRC/RES/19/17 Israeli settlements in the OPT, Golan - HRC 19th session - Resolution
- 03/22/2012 A/HRC/RES/19/17 Israeli settlements in the OPT, Golan - HRC 19th session - Resolution
- 03/22/2012 A/HRC/RES/19/18 Follow-up to the report of the independent international fact-finding mission on Gaza Conflict (Goldstone Report) - HRC 16th session - Resolution
- ▼ 2011
- 07/17/2011 A/HRC/RES/17/10 Follow-up to the report of the independent international fact-finding mission on Gaza aid flotilla - HRC 17th session - Resolution
- 03/25/2011 A/HRC/RES/16/29 Human rights situation in the OPT - HRC 16th session - Resolution
- 03/25/2011 A/HRC/RES/16/30 Right of the Palestinian people to self-determination - HRC 16th session - Resolution
- 03/25/2011 A/HRC/RES/16/31 Israeli settlements in the OPT and Syrian Golan - HRC 16th session - Resolution
- 03/25/2011 A/HRC/RES/16/32 Follow-up to the report of the independent international fact-finding mission on Gaza Conflict (Goldstone Report) - HRC 16th session - Resolution
- ▼ 2010
- 09/29/2010 A/HRC/RES/15/1 Follow-up to the report of the independent international fact-finding mission on Gaza aid flotilla - HRC 15th session - Resolution
- 09/29/2010 A/HRC/RES/15/6 Follow-up to the report of the Committee of independent experts on the Gaza Conflict - HRC 15th session - Resolution
- 06/02/2010 A/HRC/RES/14/1 Israeli attack against humanitarian boat convoy - Appointment of fact-finding mission - HRC resolution
- 03/25/2010 A/HRC/RES/13/9 Human rights situation in Palestine and other OATs - Follow-up to the report of the fact-finding mission to Gaza ("Goldstone report") - HRC 13th session - Resolution
- 03/24/2010 A/HRC/RES/13/6 Right of the Palestinian people to self-determination - HRC 13th session - Resolution
- 03/24/2010 A/HRC/RES/13/7 Israeli settlements in the OPT, incl. East Jerusalem and Golan - HRC 13th session - Resolution

03/24/2010 A/HRC/RES/13/8 Grave human rights violations by Israel in the OPT, incl. East Jerusalem - HRC 13th session - Resolution

▼ 2009

10/16/2009 A/64/53/Add.1 Resolutions and decisions adopted by the Human Rights Council at its twelfth special session session - Human Rights Council report

10/16/2009 A/HRC/DEC/S-12/101 Human rights situation in the OPT, including E. Jerusalem - Transmittal of resolution to GA - HRC decision

10/16/2009 A/HRC/RES/S-12/1 Human rights situation in OPT, incl. East Jerusalem/Goldstone report/Gaza blockade - HRC 12th special session - Resolution

10/16/2009 HRC\_16OctMtg Endorsing Gaza war report, UN Human Rights Council condemns Israel - UN news item

03/27/2009 A/HRC/10/29 Human rights in the occupied Syrian Golan - HRC report on its 10th session (excerpts)

03/26/2009 A/HRC/RES/10/17 Human rights in the occupied Syrian Golan - HRC 10th session - Resolution

03/26/2009 A/HRC/RES/10/18 Israeli settlements in the OPT, incl. East Jerusalem and Golan - HRC 10th session - Resolution

**AIDING AND ABETTING WAR CRIMES IN THE YEMENI CIVIL WAR: U.S. INVOLVEMENT**  
*Fabiana Wells*

<b><u>I. INTRODUCTION.....</u></b>	<b><u>106</u></b>
<b><u>II. BACKGROUND OF THE CONFLICT.....</u></b>	<b><u>107</u></b>
<b>A. THE HUTHI MOVEMENT.....</b>	<b>109</b>
<b>B. ANOTHER IRAN-SAUDI PROXY WAR.....</b>	<b>110</b>
<b>C. THE SAUDI-LED COALITION IN THE CIVIL WAR .....</b>	<b>111</b>
<b>D. UNITED STATES INVOLVEMENT .....</b>	<b>118</b>
<b><u>IV. U.S. LIABILITY UNDER STATE RESPONSIBILITY .....</u></b>	<b><u>127</u></b>
<b>A. THE STANDARD OF AIDING AND ABETTING UNDER ARTICLE 16 OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY .....</b>	<b>128</b>
1. AID AND ASSISTANCE PROVIDED .....	130
2. NEXUS BETWEEN AID PROVIDED AND CRIME COMMITTED .....	130
3. INTERNATIONAL OBLIGATION BINDING ON ASSISTING STATE .....	136
4. SCIENTER REQUIREMENT .....	137
<b>B. THE UNITED STATES IS AIDING AND ABETTING INTERNATIONALLY WRONGFUL ACTS COMMITTED BY THE SAUDI-LED COALITION .....</b>	<b>143</b>
1. AID AND ASSISTANCE PROVIDED .....	143
2. NEXUS BETWEEN AID PROVIDED AND CRIME COMMITTED .....	144
3. INTERNATIONAL OBLIGATION BINDING ON ASSISTING STATE .....	148
4. SCIENTER REQUIREMENT .....	148
<b><u>V. CONCLUSION.....</u></b>	<b><u>153</u></b>

## I. INTRODUCTION

On October 8, 2016, a Saudi-led coalition committed the deadliest airstrike yet in the Yemeni civil war when it targeted military personnel and civilian officials in attendance of an ongoing, crowded funeral in the country's capital of Sana'a.<sup>1</sup> This attack killed over a hundred civilians and injured over 500, including a significant number of children.<sup>2</sup> The munition used was later identified as a 500-pound, U.S.-manufactured laser-guided bomb.<sup>3</sup> A similar bomb, which was sold to Saudi Arabia by the U.S., was used in an attack on a school bus in August 2018, killing 56 people, 40 of which were schoolboys participating in a school excursion.<sup>4</sup>

Saudi Arabia has been under international scrutiny for the way the coalition carries out their intervention in the Yemeni civil war, with allegations of war crimes made against the Saudi-led coalition.<sup>5</sup> Provided such allegations are true, the United States has aided and abetted war crimes committed by Saudi Arabia and the Saudi-led coalition in the Yemeni civil war by supplying tactical support and weaponry.<sup>6</sup> Even though the Saudi-led coalition has acted in response to the Yemeni government's call for collective self-defense,<sup>7</sup> the coalition has allegedly violated fundamental principles of international human rights law and international humanitarian

---

<sup>1</sup> U.N. High Commissioner for Hum. Rights, *Situation of Hum. Rights in Yemen; Including Violations and Abuses Since Sept. 2014*, U.N. DOC. A/HRC/39/43 (Aug. 17, 2018) [hereafter "U.N. Rep."].

<sup>2</sup> *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH, (Oct. 13, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>.

<sup>3</sup> *Id.*

<sup>4</sup> Julian Borger, *US Supplied Bomb That Killed 40 Children On Yemen School Bus*, THE GUARDIAN (Aug. 19, 2018, 10:24 AM), <https://www.theguardian.com/world/2018/aug/19/us-supplied-bomb-that-killed-40-children-school-bus-yemen>.

<sup>5</sup> Sudarsann Raghavan, *Saudi role in devastating Yemen war comes under new scrutiny after Khashoggi killing*, WASH. POST (Oct. 31, 2018, 6:01 PM), [https://www.washingtonpost.com/world/saudi-role-in-devastating-yemen-war-comes-under-new-scrutiny-after-khashoggi-murder/2018/10/29/fabc8f68-dbad-11e8-8bac-bfe01fcdc3a6\\_story.html?utm\\_term=.a15255976853](https://www.washingtonpost.com/world/saudi-role-in-devastating-yemen-war-comes-under-new-scrutiny-after-khashoggi-murder/2018/10/29/fabc8f68-dbad-11e8-8bac-bfe01fcdc3a6_story.html?utm_term=.a15255976853).

<sup>6</sup> Mohamad Bazzi, *The United States Could End the War in Yemen If It Wanted To*, THE ATLANTIC (Sep. 30, 2018), <https://www.theatlantic.com/international/archive/2018/09/iran-yemen-saudi-arabia/571465/>.

<sup>7</sup> Oona Hathaway, et al., *The Legality of U.S. Arms Sales to Saudi Arabia for Use in Yemen*, JUST SEC. (Mar. 7, 2018), <https://www.justsecurity.org/53449/u-s-arms-sales-saudi-arabia-yemen/>.

law.<sup>8</sup> Because the United States has supplied Saudi Arabia with weaponry and provided mid-air refueling for Saudi-led bombers knowing that there was a high likelihood that this aid would be used to strike civilians, the United States has become complicit in Saudi Arabia's alleged war crimes and is therefore liable for aiding and abetting these alleged violations.

The following sections will discuss the Yemeni civil war in detail, looking at all the parties to the conflict and their specific involvement. To better understand the outbreak of the conflict, the underlying causes of the war will be discussed briefly. These causes stem from religious differences, economic conditions and a regional power struggle between Saudi Arabia and Iran as a proxy-war between these two major Middle Eastern powers. Special notice will be given to Saudi Arabian acts and the support by the United States to the Saudi-led coalition. The next section will then analyze the international law principle of aiding and abetting found in the Draft Articles of State Responsibility as they apply to U.S. conduct in the civil war.

## II. BACKGROUND OF THE CONFLICT

The Yemeni Revolution began as a peaceful protest against the then reigning government and has since turned into the bloodiest and largest protest in the country in decades after a failure of a political transition that was supposed to bring peace and stability to Yemen.<sup>9</sup> It all began in January of 2011 when thousands of Yemenis took to the streets of Sana'a to protest the 30-year rule of President Ali Abdullah Saleh.<sup>10</sup> The Yemeni protest called for an end to government

---

<sup>8</sup> *Yemen: United Nations Experts Point to Possible War Crimes by Parties To The Conflict*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER (Aug. 28, 2018),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479&LangID=E>.

<sup>9</sup> *Yemen Crisis: Why Is There a War?*, BBC NEWS: MIDDLE EAST (Nov. 20, 2018),

<https://www.bbc.com/news/world-middle-east-29319423>.

<sup>10</sup> *Yemen: Tens of Thousands Call On President To Leave*, BBC NEWS (Jan. 27, 2011),

<https://www.bbc.com/news/world-middle-east-12295864>.



corruption and betterment of economic circumstances for ordinary citizens.<sup>11</sup> When President Saleh refused to step down as acting President of Yemen and turn over power to his deputy Abdrabbuh Mansour Hadi, the protests turned violent quickly, leading to the President being injured in a bomb attack.<sup>12</sup> Many ordinary Yemenis started joining the long-time anti-government rebels, called the “Huthis,” in the hope of a better life.<sup>13</sup> A year after the initial riots occurred, President Saleh finally agreed to transfer power to his Vice President Abdrabbuh Mansur Hadi in February 2012 in exchange for immunity from prosecution.<sup>14</sup> However, former President Saleh then conspired with the Huthi movement in opposing the current government in an attempt to shatter the government’s chances of success and the establishment of a peaceful administration.<sup>15</sup> The Huthis took advantage of the new president’s weaknesses and took control of the capital, ousting President Hadi to the southern port city of Aden.<sup>16</sup> In 2015, President Hadi requested assistance from the Saudi-led coalition in the form of air support in the ever-increasing conflict to strengthen government forces on the ground in Yemen.<sup>17</sup> This alliance allowed Hadi’s government to retake Aden and other Sunni areas in Yemen.<sup>18</sup> The Yemeni revolution has continued as a long waging civil war with no end in sight.<sup>19</sup>

---

<sup>11</sup> *Yemen: Tens of Thousands Call On President To Leave*, *supra* note 10.

<sup>12</sup> Mohammed Jamjoom & Hakim Almasmari, *Yemeni President Says ‘Gangsters’ Launched Deadly Attack On Palace*, CNN WORLDS (Jun. 3, 2011, 4:42 PM), <http://www.cnn.com/2011/WORLD/meast/06/03/yemen.unrest/index.html>.

<sup>13</sup> *Yemen Crisis: Why Is There a War*, *supra* note 9.

<sup>14</sup> *Yemen’s Saleh Agrees To Transfer Power*, AL JAZEERA NEWS: MIDDLE EAST (Nov. 24, 2011), <https://www.aljazeera.com/news/middleeast/2011/11/2011112355040101606.html>.

<sup>15</sup> *Yemen Crisis: Why Is There a War*, *supra* note 9; see also Oona Hathaway et al., *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, JUST SEC. (Feb. 20, 2018), <https://www.justsecurity.org/52718/js-yemen-crisis-forum-saudi-campaign-us-involvement/>.

<sup>16</sup> *Id.*

<sup>17</sup> Hathaway, *supra* note 15.

<sup>18</sup> Hathaway, *supra* note 15.

<sup>19</sup> *Escalating Conflict Pushes Yemen To the Brink*, WA TODAY: WORLD (May 24, 2011, 9:36 AM), <https://www.watoday.com.au/world/escalating-conflict-pushes-yemen-to-the-brink-20110524-1f111.html>.

### A. The Huthi Movement

“The primary insurgent group . . . and the primary target of the Saudi-led coalition in Yemen [is] known as the Huthis.”<sup>20</sup> The group is known for its sharp criticism of local and international politics and its willingness to rise against injustice and oppression, originating from their Shia Islamic belief.<sup>21</sup> The Huthis represent Yemen’s Shia Muslim minority.<sup>22</sup> The group began waging a low-level insurgency against the Yemeni government in 2004.<sup>23</sup> The Huthis were named after their leader al-Huthi who was killed by the Yemeni government in 2004 after a conflict arose between the group and government forces.<sup>24</sup> After the killing of their leader, which by itself gave rise to a series of violent acts, the Huthi movement transformed itself from a revivalist network, which exercised violence only in self-defense, to a strong insurgent fighting force under the leadership of al-Huthi’s younger half-brother, Abdul Malik.<sup>25</sup> The insurgency heated up, and by 2009 the group had expanded their movement across the Yemeni border and was, for the first time, faced with a Saudi Arabian intervention in support of the Yemeni government, which ended in a cease-fire.<sup>26</sup> In the wake of the Arab Spring in 2011, the Huthis joined with forces loyal to former President Saleh in a temporary alliance against President Hadi.<sup>27</sup>

---

<sup>20</sup> Hathaway, *supra* note 15.

<sup>21</sup> Lucas Winter, *Yemen’s Huthi Movement in The Wake Of The Arab Spring*, 5 CTC SENTINEL 13, 14 (2012).

<sup>22</sup> Martin Reardon, *Saudi Arabia, Iran and the Great Game in Yemen*, AL JAZEERA: OPINION (Mar. 26, 2015), <https://www.aljazeera.com/indepth/opinion/2014/09/saudi-arabia-iran-great-game-ye-201492984846324440.html>; see also Mary Dejevsky, *Yemen: The Land With More Guns Than People*, INDEPENDENT (Sep. 20, 2009, 12:00 AM), <https://www.independent.co.uk/news/world/middle-east/yemen-the-land-with-more-guns-than-people-1790461.html>.

<sup>23</sup> Jacob Zenn, *The Strategic Limitations of Boko Haram in Southern Nigeria*, 5 CTC SENTINEL 8, 12 (Aug. 2012), <https://ctc.usma.edu/app/uploads/2012/08/CTCSentinel-Vol5Iss85.pdf>.

<sup>24</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15; see also Winter, *supra* note 21.

<sup>25</sup> Winter, *supra* note 21.

<sup>26</sup> Winter, *supra* note 21.

<sup>27</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

Even though the Huthis are the primary insurgent group targeted by the coalition, the Huthis are not the only group waging war against their enemies in Yemen. Saudi Arabia has been supporting Yemeni forces since the outbreak of the conflict, while evidence has come to light that Iran is supporting the opposing Huthi movement by providing the group with weapons.<sup>28</sup> This is a continuation of the historical proxy war between the two Middle Eastern powers of Iran and Saudi Arabia. Their history will be outlined in the following section.

### **B. Another Iran-Saudi Proxy War**

Saudi Arabia and Iran have been in a fierce struggle for regional dominance in the Middle East for decades.<sup>29</sup> This struggle is exacerbated by religious differences between Sunni-ruled Saudi Arabia and Shia-majority Iran.<sup>30</sup> Saudi Arabia is a country with a Sunni majority of about 90%, whereas Iran is a Shia-majority country with a Shia population of over 90%.<sup>31</sup> They both have taken on the role as the leading power for their respective sects within Islam and within the Middle East, with surrounding States associated with Sunni or Shia Islam, either by rule or by population, looking at them for guidance.<sup>32</sup>

Some people see the Yemeni civil war in Yemen as a sectarian proxy war between Saudi Arabia and Iran to extend their influence throughout the Middle East and to secure their position as a regional power.<sup>33</sup> The two rivals are “vying for control and influence over a rapidly-

---

<sup>28</sup> Kareem Fahim, *U.N. Probe Details Fallout Of Proxy War in Yemen Between Saudi Coalition And Iran*, THE WASH. POST (Jan. 11, 2018), [https://www.washingtonpost.com/world/un-probe-details-fallout-of-proxy-war-in-yemen-between-saudi-coalition-and-iran-/2018/01/11/3e3f9302-f644-11e7-9af7-a50bc3300042\\_story.html?utm\\_term=.9ea2af7e2906](https://www.washingtonpost.com/world/un-probe-details-fallout-of-proxy-war-in-yemen-between-saudi-coalition-and-iran-/2018/01/11/3e3f9302-f644-11e7-9af7-a50bc3300042_story.html?utm_term=.9ea2af7e2906).

<sup>29</sup> Jonathan Marcus, *Why Saudi Arabia And Iran Are Bitter Rivals*, BBC NEWS (Sept. 16, 2019), <https://www.bbc.com/news/world-middle-east-42008809>.

<sup>30</sup> *Id.*

<sup>31</sup> *Saudi Arabia International Religious Freedom Rep. 2008*, U.S. DEP'T OF STATE (2008), <https://www.State.gov/j/drl/rls/irf/2008/108492.htm>; see also *The World Factbook: Iran*, CENTRAL INT'L AGENCY (Nov. 13, 2018), <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>.

<sup>32</sup> Marcus, *supra* note 29.

<sup>33</sup> *Id.*

changing map of the Middle East.”<sup>34</sup> Iran has been expanding its influence across its neighboring States beginning with Iraq in 2003, which before the U.S. invasion, was a Sunni-ruled country.<sup>35</sup> Today, Iraq is dominated by Shiites and continues to have close ties to Iran.<sup>36</sup> Similarly, Iran is supporting the Shia president of war-torn Syria and the powerful militia Hezbollah in Lebanon.<sup>37</sup> Now with Yemen in the picture, the media has described as the development of a possible “Shia crescent,” which makes Saudi Arabia fear the expansion of a Shia rule across the Middle East, entrapping their Sunni State within it.<sup>38</sup> The strategic map of allies reflects this Sunni-Shia divide.<sup>39</sup> Most Sunni States are backing Saudi Arabia in the Yemeni conflict and its political aspirations, including U.A.E., Bahrain, Kuwait, Egypt, and Jordan, while the Iranian-Shia camp extends from Iraq to include the Syrian government and Iranian backed Hezbollah in Lebanon.<sup>40</sup>

### **C. The Saudi-led Coalition In The Civil War**

In response to President Hadi’s request for assistance in his self-defense efforts to fight the Huthi-Saleh anti-government forces,<sup>41</sup> Saudi Arabia formed a coalition with its allies Bahrain, Egypt, Kuwait, Senegal, Morocco, the Sudan, Qatar, Jordan, and the U.A.E. – all

---

<sup>34</sup> Frank Gardener, *Torn In Two: Yemen Divided*, BBC NEWS: MIDDLE EAST (Dec. 24, 2015), <https://www.bbc.com/news/world-middle-east-35160532>.

<sup>35</sup> Reardon, *supra* note 22.

<sup>36</sup> *Id.*

<sup>37</sup> Marcus, *supra* note 29.

<sup>38</sup> Carlo Muñoz, *Iran Nears Completion of ‘Shiite Crescent’ Across Middle EastEast; Land Bridge to Pose U.S. Challenge*, THE WASH. TIMES (Dec. 5, 2017), <https://www.washingtontimes.com/news/2017/dec/5/irans-shiite-crescent-across-middle-east-nearly-bu/>.

<sup>39</sup> Marcus, *supra* note 29.

<sup>40</sup> *Id.*

<sup>41</sup> Hathaway, *supra* note 7.

Sunni-majority countries - to initiate military action against the Huthi movement.<sup>42</sup> The United States along with the UK supplied advice and support to the coalition.<sup>43</sup>

The coalition, with the support of their Western allies, has conducted several thousand air campaigns since the start of the conflict, with 120 airstrikes in 2017 alone, causing tens of thousands of civilian casualties.<sup>44</sup> The Yemen Data Project revealed that the coalition carried out approximately 18,000 bombing raids throughout the war.<sup>45</sup> The coalition, especially Saudi Arabia and U.A.E., have come under considerable scrutiny for killing civilians and destroying civilian facilities with its airstrikes in violation of principles of international humanitarian law.<sup>46</sup> Between March 2015 and June 2018, there were over 16,000 civilian casualties in the conflict, most of which were caused by coalition airstrikes.<sup>47</sup>

According to U.N. Human Rights Office of the High Commissioner (OHCHR), the first nine months of the air campaign were the most intense, with over 1,750 civilian deaths, which raised significant concerns about international humanitarian violations.<sup>48</sup> For example, in response to a Huthi attack on Saudi Arabia, the coalition reacted with the bombing of the Sa'dah Governorate in the Spring of 2015.<sup>49</sup> Towards the end of the campaign, a coalition spokesman

---

<sup>42</sup> Dominic Evans, Michael Georgy & John Stonestreet, *Factbox: Saudi-Led Coalition Against Yemen's Houthis*, REUTERS: WORLD NEWS (Apr. 10, 2015, 8:06AM), <https://www.reuters.com/article/us-yemen-security-coalition-factbox-idUSKBN0N11F220150410>; see also U.N. Rep., *supra* note 1, at 4, 38.

<sup>43</sup> U.N. Rep. *supra* note 1, at 4.

<sup>44</sup> Rebecca Kheel, *U.S. Mil. Carried Out More Than 120 Airstrikes in Yemen in 2017*, THE HILL (Dec. 20, 2017, 5:16 PM), <https://thehill.com/policy/defense/365896-us-military-acknowledges-multiple-ground-operations-120-airstrikes-in-yemen>; U.N. Rep., *supra* note 1.

<sup>45</sup> U.N. Rep., *supra* note 1, at Annex IV.

<sup>46</sup> *Yemen: Coalition Fails To Curb Violations*, HUM. RTS. WATCH (Aug. 24, 2018, 12:00AM), <https://www.hrw.org/news/2018/08/24/yemen-coalition-fails-curb-violations>; see also *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sept. 2, 2018, 12:00AM), <https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime>; see also *Hiding Behind The Coalition*, HUM. RTS. WATCH, <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful> (last visited Nov. 20, 2018).

<sup>47</sup> U.N. Rep., *supra* note 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

issued an ultimatum to the population of Sa'da and Marran to vacate the region and implied that the entirety of those cities were considered a military target.<sup>50</sup> He stated in relevant parts:

Starting today and as you all remember we have declared via media and leaflets that were dropped on Marran and Sa'da; prior warnings to Yemeni civilians in those two cities, to get away from those cities where operations will be carried out. This warning will end at 7:00pm today... We have also designated Sa'da and Marran as military targets loyal to the Huthi militias and consequently the operations will cover the whole area of those two cities and thus we reiterate our call on civilians to stay away from these groups, and leave the areas under Huthi control or where the Huthis are sheltering.<sup>51</sup>

Subsequent investigations by the U.N. revealed satellite imagery showing over 3,124 distinct impact locations.<sup>52</sup> The campaign hit family homes, killing 27 family members, markets, crowded petrol stations, and civilian infrastructure.<sup>53</sup> Treating an entire city or region as a military target, even if there are military objectives located within the area, violates the prohibition of indiscriminate attacks.<sup>54</sup> Under international humanitarian law, the coalition had the duty to give an "effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit."<sup>55</sup> The coalition dropped leaflets throughout the region which encompassed two entire cities and tens of thousands of residents.<sup>56</sup> The leaflets requested the population to vacate the region by seven pm that same evening.<sup>57</sup> According to Amnesty International, the leaflets could not have reached all residents because other methods of

---

<sup>50</sup> U.N. Rep., *supra* note 1.

<sup>51</sup> *Bombs Fall From the Sky & Night*, AMN. INT'L (2015), [https://www.amnestyusa.org/files/bombs-fall-from-the-sky-day-and-night\\_civilians-under-fire-in-northern-yemen\\_final.pdf](https://www.amnestyusa.org/files/bombs-fall-from-the-sky-day-and-night_civilians-under-fire-in-northern-yemen_final.pdf) [hereinafter Amn. Rep.].

<sup>52</sup> U.N. Rep., *supra* note 1.

<sup>53</sup> *Id.*

<sup>54</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(5)(a), Dec. 7, 1978, 1125 U.N.T.S. 609 (treats as customary in noninternational armed conflicts "[a]ttacks...which treat as a single military objective a number of clearly separated and distinct military objects located in a city, town village or other area containing a similar concentration of civilians or civilian objects are prohibited."). *See also* Amn. Rep. at 11.

<sup>55</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict (Protocol I), art 57(2), 8 June 1977, 1125 U.N.T.S. 3 (the relevant sections of which have the status of customary international law).

<sup>56</sup> Amn. Rep., *supra* note 51, at 11.

<sup>57</sup> *Id.*

receiving the message were unavailable since the population was without electricity, which disconnected the population from television and internet.<sup>58</sup> The organization's report states that even if all residents had received the warning, it was unrealistic for the residents to have left the region within a few hours, considering the shortage of fuel and transport.<sup>59</sup> The coalition's warning, was thus, not effective.<sup>60</sup>

Additional allegations have been made that the coalition violated the principles of proportionality and distinction.<sup>61</sup> Investigations by Amnesty International revealed that “[t]he evidence from other attacks on military objectives, infrastructure, government buildings, moving vehicles and other targets elsewhere in Yemen indicates that coalition forces are capable of striking their chosen targets with a certain degree of accuracy.”<sup>62</sup> However, a close investigation of several airstrikes showed that civilian targets had been struck repeatedly, suggesting they were the intended target.<sup>63</sup> The deadliest incident occurred at the beginning of October 2016, when the coalition targeted an ongoing funeral in Sana’a killing over one hundred civilians and injuring almost 700, including two dozen children, in two subsequent airstrikes.<sup>64</sup> The funeral hall was the largest hall in Sana’a with a capacity of about 1,000 people.<sup>65</sup> In attendance were several

---

<sup>58</sup> Amn. Rep., *supra* note 51, at 11-12.

<sup>59</sup> *Id.* at 11.

<sup>60</sup> *See id.* at 12 (“*Id.*: “In addition, previous coalition airstrikes targeting vehicles travelling on roads out of Sa’da governorate (including towards Sana’a, the most likely direction of travel for civilians fleeing Sa’da governorate) may have discouraged some residents from leaving the city of Sa’da for fear of such attacks. The coalition’s ultimatum to the civilian population to leave Sa’da governorate (and Marran) was not accompanied by any reassurance that they would not be at risk of attacks while travelling or designation of safe routes. In any case, warnings do not release an attacker from the prohibition of directly attacking civilians or civilian objects or from the obligation to take other necessary precautions to spare civilians. Civilian homes do not become military objectives only by virtue of their inhabitants having been warned. By the same token, warnings do not diminish the attacker’s obligation to weigh expected collateral damage against the anticipated military advantage and make sure the impact on civilian objects is not disproportionate.”).

<sup>61</sup> U.N. Rep., *supra* note 1, at 13.

<sup>62</sup> Amn. Rep., *supra* note 51, at 13.

<sup>63</sup> *Id.*

<sup>64</sup> U.N. Rep., *supra* note 1, at 5.

<sup>65</sup> *Id.* at 39.

political and military leaders affiliated with the Huthis, but the vast majority of mourners were civilians.<sup>66</sup> The coalition later admitted to wrongfully targeting this civilian object but blamed the mistake on “faulty intelligence provided by Yemeni authorities,” and stated that the airstrike was conducted in “noncompliance with coalition rules of engagement.”<sup>67</sup>

The UK subsequently circulated a draft press statement that would have strongly condemned the attack, but Russia broke a silence procedure on the text, and publicly declared their belief that the statement from the UK was not strong enough.<sup>68</sup> Russia’s main concern was with the prior public advertisement of the funeral, which would have put the coalition on notice of the high risk of significant civilian casualties inherent in the strike.<sup>69</sup> The United Nations annual report, which outlines the international law violations by all parties to the Yemeni conflict, also disclosed several airstrikes on residential buildings in several Yemeni cities, including Sana’a, Hajjah and Sa’dah, with over three dozen civilian casualties, and other airstrikes targeting migrant boats, hotels, vehicles, wedding celebrations and public markets as an alleged violation of international law principles.<sup>70</sup> Allegations were made that the targeting practices, adopted by the coalition during that time, were so inherently flawed as to amount to international law violations.<sup>71</sup>

Coalition air strikes have been the primary cause of civilian casualties and destruction of civilian infrastructure as the coalition continues to strike residential areas, markets, funerals, weddings, detention facilities, civilian boats, education and cultural sites, and medical facilities.<sup>72</sup>

---

<sup>66</sup> U.N. Rep., *supra* note 1, at 39.

<sup>67</sup> U.N. Rep., *supra* note 1, at 38; *see also Press Statement by the Joint Incidents Assessment Team (JIAT) On the Great Hall Incident In Sana’a*, Saudi Press Agency (Oct 15, 2016), <https://www.spa.gov.sa/1548647>;

<sup>68</sup> *Chronology of Events: Yemen*, U.N. SEC. COUNCIL REP. (Aug. 2, 2018), <https://www.securitycouncilreport.org/chronology/yemen.php?page=2> (October 2016).

<sup>69</sup> U.N. Rep., *supra* note 1.

<sup>70</sup> U.N. Rep., *supra* note 1, at 5-6.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 5, 38; Amn. Rep., *supra* note 51.



Sen. Chris Murphy, D-Conn., cited the U.N. report in defending his proposed bill to cut funding for the coalition support: “Up to one-third of all Saudi-led coalition airstrikes hit civilian targets. Data shows there has been a 37 percent increase in civilian casualties from airstrikes in 2018 compared to 2017, up to 778 from 567.”<sup>73</sup>

However, the coalition has condemned the U.N. human rights experts’ report, alleging war crimes and grave international law violations, as inaccurate and biased.<sup>74</sup> In a joint statement released by the Yemeni government, Saudi Arabia, U.A.E., Bahrain and Egypt, the coalition stated that “the report’s inaccuracies and gaps cannot be ignored, and its descriptions clearly contradict the Security Council resolution on Yemen,” which voted by a 21:8 vote in favor of prolonging an inquiry into human rights violations in Yemen.<sup>75</sup> The Saudi ambassador to the U.N. in Geneva said the report overlooked “the bigger picture of an armed [Huthi] militia illegally seizing territory from an internationally recognized government” and directly attacking Saudi Arabia by firing missiles into the country.<sup>76</sup> He also stated that the report:

Is surprising for us because it doesn't reflect the reality... We genuinely want to improve the situation in Yemen: We are spending money there, our people are getting killed there. And Yemen is not a wealthy State, it's just our neighbour. And we think it is our responsibility to make sure that this country is not used to attack the neighbouring countries.<sup>77</sup>

Despite the grave allegations uncovered in the U.N. report, the Saudi ambassador expressed his thought that “I don't think it's going to have a major impact in the way that we review our

---

<sup>73</sup> Aaron Mehta & Joe Gould, *Can The US Tell When Its Weapons Are Used In Yemen? It's Complicated*, DEFENSE NEWS (Aug. 27, 2018), <https://www.defensenews.com/pentagon/2018/08/27/can-the-us-tell-when-its-weapons-are-used-in-yemen-its-complicated/>.

<sup>74</sup> Maher Chmaytelli et al., *Saudi-Led Coalition Condemns U.N. Rights Report On Yemen*, REUTERS: WORLDS NEWS (Aug. 29, 2018), <https://www.reuters.com/article/us-saudi-yemen-missiles/saudi-led-coalition-condemns-un-rights-report-on-yemen-idUSKCN1LE0HM>.

<sup>75</sup> *Coalition Flays U.N. Yemen Rights Mission As Mandate Is Extended*, PRESS READER (Sep. 29, 2018), <https://www.pressreader.com/uae/gulf-news/20180929/281878709305456>.

<sup>76</sup> *U.N. Experts Accuse Saudi Arabia, U.A.E. Of War Crimes In Yemen*, CBC NEWS: THE ASSOCIATED PRESS (Aug. 28, 2018), <https://www.cbc.ca/news/world/saudi-united-arab-emirates-yemen-un-war-crimes-1.4801407>.

<sup>77</sup> *Id.*

procedures or the way we conduct our military operations.”<sup>78</sup> However, after a coalition airstrike killed a displaced family in the region of Hajjah in September 2018, Saudi Arabia admitted that its forces have committed what it called “certain mistakes” in Yemen.<sup>79</sup> A spokesperson for the Saudi Defense Ministry told a panel of experts following the attack that a coalition investigation had uncovered “the existence of certain unintentional mistakes in a number of these operations,” adding that “the task force recommended that perpetrators should be held to account and victims should enjoy redress.”<sup>80</sup> This statement was followed by a royal decree “pardoning all military personnel who have taken part in the Operation Restoring Hope [begun in April 2015] of their respective military and disciplinary penalties.”<sup>81</sup> Nonetheless, the Saudi-led coalition recently committed to \$1.5 billion in aid to Yemen and promised to set up regular humanitarian aid flights and establish seventeen “safe passage corridors” for overland transportation of aid.<sup>82</sup>

According to former Deputy Assistant Secretary of Defense for Middle Eastern Policy, Andrew Exum, Saudi Arabia’s military is said to be incapable of adhering to international humanitarian law due to severe, systemic problems.<sup>83</sup> Despite the apparent flaws in the manner in which the coalition is carrying out its air campaigns, an informal agreement was reached to reduce hostilities between the coalition and the Huthis in November 2018,<sup>84</sup> which highlights the first steps towards peace and end this long-lasting conflict. The ceasefire officially came into

---

<sup>78</sup> *U.N. Experts Accuse Saudi Arabia*, *supra* note 76.

<sup>79</sup> Ahmed Abdulkareem, *As Saudi Defend Against War Crimes Allegations, Saudi Airstrike In Yemen Kills Entire Family*, MINT PRESS NEWS (Oct. 2, 2018), <https://www.mintpressnews.com/as-saudis-defend-against-war-crime-allegations-saudi-airstrike-in-yemen-kills-entire-family/250216/>.

<sup>80</sup> *Id.*

<sup>81</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>82</sup> Hathaway, *supra* note 15.

<sup>83</sup> Ryan Goodman, *Jared Kushner, the Arms Deal, and Alleged Saudi War Crimes*, JUST SEC. (May 20, 2017), <https://www.justsecurity.org/41221/jared-kushner-arms-deal-allegedsaudi-war-crimes>; Ryan Goodman, *Former Deputy Assist Sec of Defense: “Glaring” “deficiencies” in Saudi Air Force responsible for civilian casualties in Yemen*, JUST SEC. (Apr. 17, 2017), <https://www.justsecurity.org/40040/deputy-assist-sec-defense-glaringdeficiencies-saudi-air-force-responsible-civilian-casualties-yemen>.

<sup>84</sup> Ahmed Al-Haj, *Saudi-Led coalition, Yemenrebels agree to informal truce*, THE STAR (Nov. 13, 2018), <https://www.thestar.com/news/world/2018/11/13/coalition-yemen-rebels-agree-on-informal-truce.html>.

effect on December 18, 2018.<sup>85</sup> However, in May 2019 renewed fighting broke out in the port city of Hodeidah, breaching the ceasefire and removing any forward movement in ending the war.<sup>86</sup>

The following sections will investigate U.S. involvement in the conflict in support of the Saudi-led coalition. In analyzing U.S. liability under international law principles, international law violations will be assumed to have been committed by Saudi Arabia and its coalition.

#### **D. United States Involvement**

The United States has played a significant role in the Yemeni war.<sup>87</sup> In its efforts to support the coalition, the United States has provided widespread logistical, intelligence and tactical support to the Saudi-led coalition.<sup>88</sup> Such assistance included the supply of intelligence, target analysis, legal advice, logistical support and in-flight refueling during bombing raids.<sup>89</sup> The United States has additionally assisted the coalition through weapons sales, including advanced precision-guided munition, and training programs, and by providing tankers used for in-flight refueling during attacks, which enables the bombing of Yemen.<sup>90</sup> The refueling operations involve a U.S. tanker refueling coalition aircrafts outside of Yemen's airspace at least once a day.<sup>91</sup> The U.S. military is refueling about 20 percent of all Saudi aircrafts that fly as part

---

<sup>85</sup> Aziz El Yaakoubi, *Yemen's Houthis to quit two ports Monday under peace deal: sources*, REUTERS: WORLD NEWS (Feb. 24, 2019), <https://www.reuters.com/article/us-yemen-security/yemens-houthis-to-quit-two-ports-monday-under-peace-deal-sources-idUSKCN1QD0FG>.

<sup>86</sup> Reuters, *In Yemen, Fighting Resumes Between Houthi Rebels and Government Forces*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/world/middleeast/yemen-government-houthi-fighting.html>.

<sup>87</sup> Hathaway, *supra* note 15.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Akbar Shahid Ahmed, *Obama Could End The Slaughter In Yemen Within Hours*, THE HUFFINGTON POST (Aug. 10, 2016, 12:26PM), [https://www.huffingtonpost.com/entry/barack-obama-could-end-the-killing-in-yemen-in-hours\\_us\\_57f7d5dee4b0b6a43031ba4e](https://www.huffingtonpost.com/entry/barack-obama-could-end-the-killing-in-yemen-in-hours_us_57f7d5dee4b0b6a43031ba4e); *see also Saudi And Arab Allies Bomb Houthi Positions In Yemen*, AL JAZEERA: YEMEN (Mar. 26, 2015), <https://www.aljazeera.com/news/middleeast/2015/03/saudi-ambassador-announces-military-operation-yemen-150325234138956.html>; Hathaway, *supra* note 15.

<sup>91</sup> Hathaway, *supra* note 15.

of the operation in Yemen.<sup>92</sup> A former Pentagon official stated in an interview with the Huffington Post that

There's no question that American refueling, providing tankers, greatly enables the bombing of Yemen. If the Saudis had to do it without our tankers, the level of bombing would be enormously reduced, probably by a factor of three.<sup>93</sup>

Such technology also enables coalition airplanes to remain mid-air for a more extended period, which allows for longer air campaigns.<sup>94</sup>

Intelligence sharing involved embedding a joint coordination planning cell in Saudi Arabia's operations center in Riyadh.<sup>95</sup> The transfer of weapons to the Saudi kingdom have included ammunition, bombs, air-to-ground missiles and tanks.<sup>96</sup> The United States is the biggest supplier of arms to the coalition.<sup>97</sup> In the beginning of its assistance, the U.S. did not provide targeting information to the coalition, but would instead review targets and advise on the risk of civilian casualties.<sup>98</sup> In 2016, the United States also started to provide support in the form of medical care, troops on the ground and an assault ship off the coast of Yemen to the coalition in an effort to retake the port city Mukalla.<sup>99</sup> Such forces were deployed to assist with intelligence and logistical matters, including "advice and assistance with operational planning, maritime interdiction and security operations, medical support and aerial refueling."<sup>100</sup>

---

<sup>92</sup> Courtney Kube & Dan De Luce, *U.S. To Stop Refueling Saudi-Coalition Planes in Yemen, Officials Say*, NBC NEWS: INVESTIGATIONS (Nov. 9, 2018, 7:52PM), <https://www.nbcnews.com/news/investigations/u-s-stop-refueling-saudi-coalition-planes-yemen-officials-say-n934726>.

<sup>93</sup> Ahmed, *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> Hathaway, *supra* note 15.

<sup>96</sup> Ahmed, *supra* note 90.

<sup>97</sup> Angela Dewan, *These are the Countries Still Selling Arms to Saudi Arabia*, CNN NEWS: WORLD (Nov 23, 2018), <https://www.cnn.com/2018/11/22/middleeast/arms-exports-saudi-arabia-intl/index.html>.

<sup>98</sup> Hathaway, *supra* note 15.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

After a year of support, Congress grew weary of the growing number of civilian deaths in the Yemeni war.<sup>101</sup> Several unsuccessful resolutions were proposed to restrict the military assistance to the coalition in an effort to curb civilian casualties, including halting a sale of cluster munitions.<sup>102</sup> Sen. Chris Murphy, D-Conn., cited the U.N. report in defending his proposed bill to cut funding for the coalition support and brought attention to the fact that up to one-third of coalition airstrikes hit civilian targets.<sup>103</sup> Even though the proposed bills were unsuccessful, following the outrage against the bombing of the funeral in Sana'a in late 2016, the Obama Administration announced its intentions to review its military assistance to the coalition.<sup>104</sup> These deliberations resulted in the cancellation of a planned weapons sale of 16,000 precision-guided munitions valued at around \$350 million and a restriction on further intelligence sharing regarding Huthi forces.<sup>105</sup> Nonetheless, the refueling operations continued, along with an increase in U.S. training programs of Saudi Air Force personnel.<sup>106</sup>

After the administrative change in early 2017, many of the restrictions on the support of the coalition operations in Yemen were reversed.<sup>107</sup> During his visit to Riyadh, President Trump announced his intent to sell \$110 billion in weapons to Saudi Arabia.<sup>108</sup> That deal was supposed to include seven Terminal High Altitude Area Defense missile defense batteries, more than 100,000 air-to-ground munitions and billions of dollars' worth of new aircrafts.<sup>109</sup> When the proposal of a sale of \$500 million in precision-guided munitions to the coalition was presented to

---

<sup>101</sup> Hathaway, *supra* note 15.

<sup>102</sup> *Id.*

<sup>103</sup> Mehta, *supra* note 73.

<sup>104</sup> Hathaway, *supra* note 15.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Joe Gould, *Report: US Bomb Sales Factored In Decision To Aid Saudis In Yemen*, DEFENSE NEWS: MIDEAST AFRICA (Sep. 20, 2018), <https://www.defensenews.com/global/mideast-africa/2018/09/20/report-us-bomb-sales-factored-in-us-aid-to-saudis-in-yemen/>.

the Senate in June 2017, several Senators concerned about the high numbers of civilian deaths again moved to prevent such a sale of munition, unless the administration makes “a compelling, evidence-based case that U.S. weapons sales contribute to reduced civilian casualties and are leverage in a broader strategy to increase humanitarian access and end the war.”<sup>110</sup> Sen. Bob Menendez, D-N.J., added “[t]hree months later, I am still waiting for them to respond to my concerns.”<sup>111</sup> To secure the weapons sale, the Saudi foreign minister wrote a letter to U.S. Secretary of State Rex Tillerson promising to exercise greater caution to avoid civilian casualties, to expand its list of off-limit targets and to adhere to this list strictly.<sup>112</sup> The sale was authorized by a close 53-47 vote<sup>113</sup> and was contingent upon the U.S. military providing the Saudi military with \$750 million training program, paid for by Saudi Arabia. It included lessons on avoiding civilian casualties in airstrikes, the law of armed conflict, and human rights command and control, and the U.S. targeting cell returning to Riyadh and obtaining greater access to Saudi operations by being positioned in the air operations control center rather than in a separate office.<sup>114</sup>

However, since the vote authorizing the sale, the track record of the coalition has not changed. The U.N. report reveals several attacks that killed civilians, with two separate airstrikes striking a market in Taiz province and a farm in Hudaydah province killing roughly 70 people, that are said to have violated international law.<sup>115</sup> In March 2018, the Senate voted to invoke the War Powers Act and extract the U.S. military from the Yemeni civil war, leading to a legal requirement that Secretary Pompeo periodically certify that the coalition is taking meaningful

---

<sup>110</sup> Gould, *supra* note 109; Hathaway, *supra* note 15.

<sup>111</sup> Gould, *supra* note 109.

<sup>112</sup> Hathaway, *supra* note 15.

<sup>113</sup> *Id*

<sup>114</sup> Hathaway, *supra* note 15; Gould, *supra* note 109.

<sup>115</sup> Hathaway, *supra* note 15.; *see also* U.N. Rep., *supra* note 1.

steps to avoid civilian casualties and permit humanitarian aid; otherwise U.S. military aid must cease.<sup>116</sup> The United States administration has since then certified that the coalition is taking “demonstrable action” to reduce harm on civilians and to mitigate the humanitarian crisis in Yemen.<sup>117</sup> Secretary Pompeo stated in his certification to Congress that the coalition is “undertaking demonstrable actions to reduce the risk of harm to civilians.”<sup>118</sup> He assured that

We will continue to work closely with the Saudi-led coalition to ensure Saudi Arabia and the UAE maintain support for UN-led efforts to end the civil war in Yemen, allow unimpeded access for the delivery of commercial and humanitarian support through as many avenues as possible, and undertake actions that mitigate the impact of the conflict on civilians and civilian infrastructure.<sup>119</sup>

In the memo, Pompeo additionally noted that “recently civilian casualty incidents indicate insufficient implementation of reforms and targeting practices.”<sup>120</sup> He pointed out that the coalition is taking “some action” to reduce civilian harm but that the U.S. “recognizes that civilian casualties have occurred at rates that are far too high in the Saudi-led coalition’s campaign in Yemen.”<sup>121</sup> He assured that due to strategic and moral reasons, the Department of Defense would continue to press the coalition to reduce civilian harm.<sup>122</sup> This certification

---

<sup>116</sup> Gould, *supra* note 109.

<sup>117</sup> Associated Press, *Pompeo Certifies Saudi Arabia, UAE protecting civilians*, CNBC: POLITICS (Sep. 12, 2018, 9:44AM), <https://www.cnbc.com/2018/09/12/pompeo-certifies-saudi-arabia-uae-protecting-civilians.html>.

<sup>118</sup> Gould, *supra* note 109.

<sup>119</sup> Matthew Lee, *US Says Saudi Arabia, UAE Protecting Civilians in Yemen War*, MIL. TIMES: FLASHPOINTS (Sep. 12, 2018), <https://www.militarytimes.com/flashpoints/2018/09/12/us-says-saudi-arabia-uae-protecting-civilians-in-yemen-war/>.

<sup>120</sup> Samuel Oakford, *Here’s Mike Pompeo’s Memo Justifying U.S. Assistance to Saudi Arabia and UAE’s War in Yemen*, THE INTERCEPT (Sep. 12, 2018, 8:17PM), <https://theintercept.com/2018/09/12/yemen-pompeo-uae-saudi-certification-human-rights/>.

<sup>121</sup> Ryan Goodman, *Annotation of Sec. Pompeo’s Certification of Yemen War: Civilian Casualties and Saudi-Led Coalition*, JUST SEC. (Oct. 15, 2018), <https://www.justsecurity.org/61053/annotation-sec-pompeos-certification-yemen-war-civilian-casualties-resulting-saudi-led-coalitions-operations>; see Michael Pompeo, *Memorandum of Justification Regarding Certification Pursuant to Section 1290 Of the John’s McCain National Defense Authorization Act for Fiscal Year 2019*, 3 (P.L. 115-232), U.S. DEP’T OF STATE (Sept. 10, 2018), <https://www.young.senate.gov/imo/media/doc/Yemen%20Certification%20Unclassified.pdf> (hereinafter “Certification”).

<sup>122</sup> *Id.*

secured the continued sale of arms to the coalition.<sup>123</sup> The Bureau of Legislative Affairs commented on the certification stating that the “lack of certification will negatively impact pending arms transfers” and that “failure to certify may also negatively impact future foreign military sales and direct commercial sales to the region.”<sup>124</sup> These statements came one month after a Saudi-led airstrike hit a bus filled with 40 school children,<sup>125</sup> all of which were killed in the strike.<sup>126</sup> This attack was condemned as an “obvious war crime” by several human rights organizations.<sup>127</sup> Shortly after the announcement by Pompeo, Secretary of Defense James N. Mattis released a statement endorsing the certification:

I endorse and fully support Secretary Pompeo’s certification to the Congress that the governments of Saudi Arabia and United Arab Emirates are making every effort to reduce the risk of civilian casualties and collateral damage to civilian infrastructure resulting from their military operations to end the civil war in Yemen. The Saudi-led coalition’s commitment is reflected in their support for these UN-led efforts.<sup>128</sup>

In contrast to Pompeo’s clear statement that the number of civilian casualties in Yemen is “too high,” Mattis relayed that the U.S. has “not seen any callous disregard by the people we’re working with. So we will continue to work with them.”<sup>129</sup> He stated that American influence on the Arab air campaign had made a difference in reducing instances of errant bombing and the targeting of civilians.<sup>130</sup> An official from the State Department assured Congress that the U.S. is continuously pressuring its allies to improve their fighting methods in the Yemeni war.<sup>131</sup> The official stated that

---

<sup>123</sup> Gould, *supra* note 109.

<sup>124</sup> Gould, *supra* note 109.

<sup>125</sup> *Id.*

<sup>126</sup> Borger, *supra* note 4.

<sup>127</sup> *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, *supra* note 2.

<sup>128</sup> *Statement by Secretary of Defense James N. Mattis on Actions of Saudi Arabia and UAE in Yemen*, U.S. DEP’T STATE (Sep. 12, 2018), <https://translations.State.gov/2018/09/12/statement-by-secretary-of-defense-james-n-mattis-on-actions-of-saudi-arabia-and-uae-in-yemen/>.

<sup>129</sup> *U.N. Experts Accuse Saudi Arabia, U.A.E. Of War Crimes In Yemen*, *supra* note 76.

<sup>130</sup> Lee, *supra* note 118.

<sup>131</sup> Gould, *supra* note 109; Certification, *supra* note 121.



While our Saudi and Emirati partners are making progress on these fronts, we are continuing discussions with them on additional steps they can take to address the humanitarian situation, advance the political track in cooperation with the UN Special Envoy's efforts, and ensure that their military campaign complies with the law of armed conflict and international humanitarian law.<sup>132</sup>

Andrew Exum, also delivered his insights into coalition practices and U.S. responses:

The Obama administration couldn't make up its mind on the Saudi campaign in Yemen. On the one hand, it didn't want to encourage what it thought to be a misguided campaign that showed little promise of decisive victory. On the other hand, it didn't want to wreck its relationship with Saudi Arabia—or the UAE, whose pluck and military power senior Obama administration officials from the president on down admired. So the Obama administration pressed the Departments of Defense and State to continue delivering precision-guided munitions and aerial refueling to the Saudi-led coalition, while working with the Royal Saudi Air Force to adopt the same kinds of best practices the U.S. Air Force had used to minimize civilian casualties in the war against the Islamic State. The Saudis were eager students, but as we at the Pentagon often explained to our exasperated colleagues at the White House each time *an errant (or deliberate) Saudi bomb killed Yemeni civilians, the deficiencies in the Royal Saudi Air Force at the operational level were glaring*, and it was hard to rebuild the proverbial airplane while it was in the air.

The performance of the Saudis reflected poorly on the Department of Defense in particular: Although individual Saudi pilots had often performed well flying, as part of U.S.-led coalitions, decades of U.S. training missions had not *produced a Saudi military capable of independently planning and executing an effective air campaign that minimized collateral damage*. And however much Saudi air forces struggled, Saudi ground forces labored even harder, trying and repeatedly failing to prevent or even counter Houthi ground excursions across the border.<sup>133</sup> (emphasis added)

In its efforts to reduce civilian casualties, the United States has put considerable weight into the assurances offered by the Saudi Arabian government that it would endeavor to minimize civilian casualties,<sup>134</sup> even though such assurances have time and again proven hollow.<sup>135</sup> Throughout the conflict, the United States provided the coalition with billions of dollars' worth in arms sales, which contributed significantly to the humanitarian crisis in Yemen.<sup>136</sup> The United States has

---

<sup>132</sup> Gould, *supra* note 109.

<sup>133</sup> Andrew Exum, *What's Really At Stake for America in Yemen's Conflict*, THE ATLANTIC: GLOBAL (Apr. 14, 2017), <https://www.theatlantic.com/international/archive/2017/04/yemen-trump-aqap/522957/>.

<sup>134</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

<sup>135</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>136</sup> *Id.*

come under a lot of scrutiny for its assistance of the Saudi-led coalition in the Yemeni Civil War, mainly because the United States provided significant assistance to the coalition that enabled the coalition to facilitate air strikes through its operational, logistical, and intelligence support.<sup>137</sup> On several occasions, the United States claimed that the coalition improved its targeting practices during the conflict.<sup>138</sup> However, even after an internal investigation by the coalition's Joint Incidents Assessment Team (JIAT), which was asserted to show the coalition's good faith engagement efforts to comply with international humanitarian law, several attacks that killed innocent civilians allegedly in violation of international law were identified.<sup>139</sup> Not only were these attacks violations of international law, they also involved the use of U.S.-origin munition.<sup>140</sup> A highly deadly attack led by the coalition struck a marketplace in Hajjah in September 2017.<sup>141</sup> Subsequent investigation revealed that the coalition used U.S.-supplied bombs in executing these airstrikes against a public market that killed more than 100 civilians, including two-dozen children.<sup>142</sup> In August 2018, another American-made bomb struck a Yemeni school bus, killing over 50 people, most of which were children on their way to a school excursion.<sup>143</sup> The coalition admitted that it made "mistakes in compliance to the rules of engagement" in targeting these areas.<sup>144</sup>

---

<sup>137</sup> Ahmed, *supra* note 90; *see also Hiding Behind The Coalition*, *supra* note 46.

<sup>138</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> U.N. Rep., *supra* note 1, at 6.

<sup>142</sup> *Id.*; *see also* Maggie Michael & Jon Gambrell, *Human Rights Group Says A Saudi-led Coalition Battling Shiite Rebels And Their Allies in Yemen Used A U.S.-Supplied Bomb In a Strike On a Market Last Month That Killed At Least 119 People*, US NEWS: WORLD NEWS (Apr. 7, 2016, 3:42PM), <https://www.usnews.com/news/world/articles/2016-04-07/report-saudi-coalition-used-us-bomb-in-yemen-market-strike>.

<sup>143</sup> Nicholas Kristof, *Be Outraged By America's Role in Yemen's Misery*, THE N.Y. TIMES: OPINION (Sep. 26, 2018), <https://www.nytimes.com/2018/09/26/opinion/yemen-united-states-united-nations.html>.

<sup>144</sup> Salma Abdelaziz et al., *Saudi-led Coalition Admits 'Mistakes' Made in Deadly Bus Attack in Yemen*, CNN: WORLD (Sep. 2, 2018, 6:15AM), <https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html>.

In the U.N. report, experts documented ten airstrikes in 2017 that are alleged to violate the law of armed conflict.<sup>145</sup> The report reveals several airstrikes on residential buildings in several Yemeni cities, including Sana'a, Hajjah and Sa'dah, with over three dozen civilian casualties, and other airstrikes targeting migrant boats, hotels, vehicles, wedding celebrations, and public markets.<sup>146</sup>

The coalition has repeatedly promised to minimize civilian harm in future military operations, but the coalition's lack of transparency makes it nearly impossible for independent observers to analyze whether the coalition has in fact made changes, let alone enforced them.<sup>147</sup>

In response to the execution of the Saudi reporter Khashoggi, the Pentagon warned Saudi Arabia that it was prepared to reduce military and intelligence support if the Saudis did not demonstrate efforts to limit civilian deaths in airstrikes in Yemen.<sup>148</sup> Such a proposal came greatly endorsed by Senator Murphy, D.-Conn., who stated that

Saudi Arabia continues to bomb civilians inside Yemen, knowingly fund an intolerant version of Islam that easily leads to radicalization, and now they feel so immune from consequences that they have reportedly kidnapped and murdered a U.S. resident who criticized the regime. These are the actions of a rogue State, not an ally, and the United States need to send an immediate signal that this behavior is unacceptable. ... The United States cannot be in a military partnership with a country that has this little concern for human life. The Saudis continue to claim that they aren't targeting civilians inside Yemen, but how can we believe them when they apparently just hunted down and murdered an American resident whose only offense was writing critical articles about the Saudi royal family? This is the right time to suspend our military support for the disastrous bombing campaign in Yemen.<sup>149</sup>

---

<sup>145</sup> U.N. Rep., *supra* note 1, at 7.

<sup>146</sup> *Id.* 5-6.

<sup>147</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>148</sup> Judith Vonberg & Nima Elbagir, *All Sides in Yemen Conflict Could be Guilty of War Crimes, Says UN*, CNN: WORLD (Aug. 28, 2018, 11:29 AM), <https://www.cnn.com/2018/08/28/middleeast/un-yemen-report-intl/index.html>.

<sup>149</sup> Chris Murphy, *Murphy: U.S. Should Suspend Military Support For Saudi Arabia In Wake of Jamal Khashoggi Disappearance*, CHRIS MURPHY U.S. SENATOR FOR CONN. (Oct. 16, 2018), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-us-should-suspend-military-support-for-saudi-arabia-in-wake-of-jamal-khashoggi-disappearance>.

Just a few weeks later in November 2018, Saudi Arabia released a statement that “in consultation with the United States” it has requested the end of in-flight refueling, after the U.S. announced their decision to withdraw refueling support as a sign of displeasure for the Khashoggi killing.<sup>150</sup> Nonetheless, the U.S. was not prepared to curtail intelligence sharing with the coalition and planned to continue “limited intelligence support in defense of Saudi Arabia,” a defense official said.<sup>151</sup> However, President Trump has continued his support for the Saudi-led coalition authorizing a multibillion-dollar weapons and equipment deal to the Gulf countries in May 2019 without the approval of Congress.<sup>152</sup> In anticipation to the President’s conduct, Congress passed several bipartisan bills to block sales to Saudi Arabia, which President Trump vetoed.<sup>153</sup> The first bill reflects the first War Power resolution that has passed both chambers of Congress to pull back American forces from a conflict where the President has deployed them.<sup>154</sup> In regard to this resolution, the President stated that “this resolution is an unnecessary, dangerous attempt to weaken my constitutional authorities, endangering the lives of American citizens and brave service members, both today and in the future.”<sup>155</sup> Congress is nonetheless hopeful that their resolution “sends a clear signal to the Saudis that they need to lift their blockade and allow humanitarian assistance into Yemen if they care about their relationship with Congress.”<sup>156</sup>

---

<sup>150</sup> Sam Kiley, *US Decision to Stop Refueling Saudi Jets Attacking Yemen ‘Means Nothing’*, CNN: WORLD (Nov 12, 2018, 12:57AM), <https://www.cnn.com/2018/11/11/middleeast/us-end-airborne-refueling-saudi-arabia-analysis-intl/index.html>; see also Kube, *supra* note 92 and *Saudi-Led Coalition Asks US To End Refueling Of Aircraft in Yemen War*, CNBC: POLITICS (Nov. 9, 2018, 11:16PM), <https://www.cnbc.com/2018/11/09/us-may-halt-refueling-of-aircraft-from-saudi-led-coalition.html>.

<sup>151</sup> Kube, *supra* note 92.

<sup>152</sup> *Trump Vetoes Bills Intended to Block Arms Sales to Saudi Arabia*, NATIONAL PUBLIC RADIO: WORLD (July 25, 2019), <https://www.npr.org/2019/07/25/745200244/trump-vetoes-bills-intended-to-block-arms-sales-to-saudi-arabia>.

<sup>153</sup> *Id.*

<sup>154</sup> Finnegan, Conor and Khan, Mariam, *Bill to Pull US Support for Saudi-led Coalition in Yemen Passes Both Chambers of Congress in Historic Vote*, ABC NEWS (Mar 13, 2019), <https://abcnews.go.com/Politics/bill-pull-us-support-saudi-led-coalition-yemen/story?id=61660756>.

<sup>155</sup> Pilkington, Ed, *Dismay as Trump vetoes bill to end US support for War in Yemen*, THE GUARDIAN: US (Apr 17, 2019), <https://www.theguardian.com/us-news/2019/apr/16/trump-yemen-war-veto-military-aid>.

<sup>156</sup> *Id.*

#### IV. U.S. LIABILITY UNDER STATE RESPONSIBILITY

The following sections will analyze the international law principle of aiding and abetting found in Art. 16 of the Draft Articles of State Responsibility (ICLDA). It will continue with an application of those provisions to U.S. conduct in the Yemeni civil war to determine whether the United States can be held responsible for aiding and abetting alleged war crimes committed by Saudi Arabia and the coalition. The paper will conclude with a determination that the United States has aided and abetted war crimes committed by Saudi Arabia and the Saudi-led coalition in the Yemeni civil war by supplying tactical support and weaponry.

##### A. The Standard of Aiding and Assisting under Article 16 of the Draft Articles on State Responsibility

The primary source for aiding and abetting internationally wrongful acts under the principle of State responsibility is found in Art. 16 of the Draft Articles on State Responsibility (ILCDA). The article States as follows:

*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*  
*(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*  
*(b) the act would be internationally wrongful if committed by that State.*

The assisting State, under this provision, is not responsible for the wrongful act of the recipient State nor is it responsible as a co-perpetrator.<sup>157</sup> Rather, it is responsible for the assistance of such wrongful act, which is a separate internationally wrongful act in itself.<sup>158</sup> It can be described as a separate *fait générateur* of responsibility.<sup>159</sup> In the *Bosnia Genocide* case of 2007, the International Court of Justice (ICJ) prescribed the status of customary international law to Art. 16

<sup>157</sup> VLADYSLAV LANOVY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* 4-5 (2016); JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 399 (2014).

<sup>158</sup> LANOVY, *supra* note 157, at 4-5.

<sup>159</sup> *Id.* at 5.

ILCDA, making it binding on all States.<sup>160</sup> This principle of aiding and assisting stems from the historical notion of 'complicity' in the commission of internationally wrongful acts,<sup>161</sup> which is still an integral part of international criminal law applied to individual actors. Even though the two regimes of complicity serve different functions, there can be found a significant overlap between the principle of complicity in international criminal law and the congruent principle in State responsibility.<sup>162</sup> In particular, the knowledge and intent element of Art. 16 discussed below are closely related to the knowledge and intent individual agents of the State need to possess when rendering aid and assistance to another State under international criminal law.<sup>163</sup> The analysis of Art. 16, therefore, will be informed by this parallel concept underlying international criminal law.<sup>164</sup>

In order to find a State responsible for aiding and assisting a principal, recipient State under Art. 16, several conditions must be met: the assisting State must give aid or assistance to the recipient State which has a sufficient nexus to the wrongful act, the wrongful act must be illegal for the assisting State if committed by that State, and the assisting State must possess the requisite mental element. These requirements will be discussed in turn.

---

<sup>160</sup> *Case Concerning Application of The Convention On The Prevention And Punishment Of The Crime Of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 178 (Feb. 26); Harriet Moynihan, *Aiding and Abetting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE REP. 6 (2016); CRAWFORD, *supra* note 157.

<sup>161</sup> ROBERT KOLB, *THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION* 217 (2017).

<sup>162</sup> LANOVY, *supra* note 157, at 46-47; BEATRICE I. BONAFÉ, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* (2009); André Nollkaemper, *Concurrence Between Individual Responsibility And State Responsibility In International Law*, 52 ICLQ 615 (2003).

<sup>163</sup> LANOVY, *supra* note 157, at 46; *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) [hereinafter "Application of CPPCG, Bosnia"], 2007 I.C.J. Rep. 43, 173 (Feb. 2007) (recognizing the duality of responsibility of States and individuals as a constant feature of international law).

<sup>164</sup> For short history of the development of complicity in international criminal law vis-à-vis aiding and assisting under State responsibility *see* LANOVY, *supra* note 157, at 48-51.

### ***1. Aid and Assistance Provided***

First, the assisting State must provide the principal State with aid and assistance. Such assistance covers a broad range of activities, ranging from the supply of weapons, military aircraft and radar equipment to other logistical, technical and financial support.<sup>165</sup> In the context of armed conflict, such assistance might also include the supply of intelligence or the provision of territory.<sup>166</sup> It is important to note here that the aid supplied must be actual.<sup>167</sup> A State cannot merely approve or disapprove of the act in a political forum.<sup>168</sup> It is also not enough for an assisting State to merely encourage the commission of an internationally wrongful act.<sup>169</sup> It is essential to keep in mind the preface to this requirement in the ILCDA Commentary. It states that “a State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act.”<sup>170</sup>

### ***2. Nexus between Aid Provided and Crime Committed***

In order to fulfill this fundamental condition of assistance under Art. 16 a second requirement must be met. There must be a clear nexus between the aid and the internationally wrongful act committed by the principal.<sup>171</sup> The ILCDA Commentary states that “the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.”<sup>172</sup> To the extent that the aid or assistance by a State had no determinative effect on the occurrence of the wrongful act, the assisting State is not responsible

---

<sup>165</sup> CRAWFORD, *supra* note 157, at 402; MOYNIHAN, *supra* note 160, at 8.

<sup>166</sup> MOYNIHAN, *supra* note 160, at 8.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> ILCDA Commentary, ‘Introduction to Chapter IV’, para (9); *see* CRAWFORD, *supra* note 157; HELMUT AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 221 (2011).

<sup>170</sup> ILCDA Commentary to Art. 16, para (4).

<sup>171</sup> CRAWFORD, *supra* note 157, at 401.

<sup>172</sup> ILCDA Commentary to Art. 16, para (1).

for the act itself.<sup>173</sup> This again stresses the clear distinction between international liability for aiding and assisting an internationally wrongful act and joint responsibility for an internationally wrongful act as a co-participant.<sup>174</sup> In taking these relationships under consideration, the nexus between the aid and the wrongful act cannot be so close as to render the assisting State responsible as an accomplice, but can also not be so removed as to render the assistance meaningless in relation to the wrongful act or *de minimis* as an insufficient basis for responsibility.<sup>175</sup> During the International Law Commission's (ILC) 1978 session, this problem was addressed by Mr. Ushakov who described the participation of an assisting State as necessarily active and direct, but not so direct as to avoid the conduct of the assisting State falling under the umbrella of joint responsibility.<sup>176</sup> It becomes clear that there is no defined form of the aid or assistance rendered – what seems to be required is some causative contribution or connection to the wrongful act.<sup>177</sup> The ILCDA Commentary goes on to state that there “is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”<sup>178</sup> From the discussions preceding the adoption of the draft articles it is clear that, even though there is no specific standard for the causation element, the aid or assistance does not have to be indispensable to the commission of the wrongful act.<sup>179</sup> The ILCDA Commentary also established that “the aid or assistance must be given with a view to facilitate the commission of the act and must actually do so.”<sup>180</sup> The Commentary, therefore, requires that the assistance must

---

<sup>173</sup> ILCDA Commentary to Art. 16, para (1).

<sup>174</sup> CRAWFORD, *supra* note 157, at 399.

<sup>175</sup> Moynihan, *supra* note 160, at 9; *Yearbook of the Int'l Law Comm'n*, [1978], U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 1), at 239.

<sup>176</sup> CRAWFORD, *supra* note 157, at 402; *Yearbook of the Int'l Law Comm'n*, [1978] *supra* note 175, at 239.

<sup>177</sup> Moynihan, *supra* note 160, at 8; CRAWFORD, *supra* note 157, at 402.

<sup>178</sup> ILCDA Commentary to Art. 16, para (5).

<sup>179</sup> See CRAWFORD, *supra* note 157.

<sup>180</sup> ILCDA Commentary to Art. 16, para (5).



be ‘clearly linked’ to the illegal act.<sup>181</sup> This link can be established through a *significant contribution* to the wrongful act as a sufficient but not necessary basis for responsibility under Art. 16.<sup>182</sup> However, several paragraphs later the Commentary reveals an internal inconsistency when it states that “the assistance may have only been an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered.”<sup>183</sup> Crawford resolves this discrepancy by reference to the Draft Articles on the Responsibility of International Organizations (DARIO).<sup>184</sup> Art. 14 of DARIO discusses the aid or assistance in the commission of an internationally wrongful act by an international organization using verbatim language to Art. 16 ILCDA.<sup>185</sup> The Commentary to Art. 14 DARIO explicitly refers to the requirement of substantial contribution or assistance.<sup>186</sup> From this, a standard of substantial involvement on the part of the assisting State can be inferred in Art. 16. In considering the application of this requirement, Moynihan gives an example in the Chatham House Report to illustrate the substantial involvement requirement: “State A provides a military base to State B, which State B uses to refuel its aircraft en route to carrying out an armed attack against State C in breach of international law on the use of force. Without the ability to refuel at the base in State A, it would be much more difficult for State B to reach its target.”<sup>187</sup> In applying the concept outlined above, State A significantly contributed to State B’s principal act which meets the nexus requirement of Art. 16, because “State A’s contribution makes it *materially*

---

<sup>181</sup> CRAWFORD, *supra* note 157, at 403.

<sup>182</sup> ILCDA Commentary to Art. 16, para (5).

<sup>183</sup> ILCDA Commentary to Art. 16, para (10).

<sup>184</sup> CRAWFORD, *supra* note 157, at 403.

<sup>185</sup> Draft Articles on Int’l Org. Responsibility Art. 14: “Aid or assistance in the commission of an internationally wrongful act An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.”

<sup>186</sup> CRAWFORD, *supra* note 157, at 403.

<sup>187</sup> Moynihan, *supra* note 160, at 9.

*easier* for State B to carry out the principal act...”<sup>188</sup> To illustrate the scenario of insufficient contribution one can imagine a situation where State A provides assistance to State B which leads to a freeing up of resources by the recipient State, which then allows the recipient State to carry out violations in other areas.<sup>189</sup> The assistance provided by State A in this scenario would not rise to the level of assistance required under Art. 16 and is therefore insufficient to meet the significant contribution threshold.<sup>190</sup> However, if an assisting State is aware that the recipient State is diverting resources for illegal purposes, that in itself might be sufficient to establish a nexus between the assistance and the unlawful act.

A significant example from the corpus of international case law is the invasion of East Timor by Indonesia in 1975. Subsequent to that invasion, the U.N. established a commission to investigate internationally wrongful acts committed by Indonesia.<sup>191</sup> Alongside findings of omission on the part of Portugal and Australia, the commission also found the United States to have assisted Indonesia in the commission of wrongful acts by turning a blind eye to its conduct in violation of the international law principle of aiding and abetting.<sup>192</sup> The commission found that

In the Commission’s view, the support given by the United States to Indonesia was *crucial* to the invasion and continued occupation of Timor-Leste. This was so not only because weapons and equipment purchased from the United States *played a significant role* in Indonesian military operations in Timor, but also because it never used its unique position of power and influence to counsel its Indonesian ally against embarking on an illegal course of action.<sup>193</sup> (emphasis added)

---

<sup>188</sup> Moynihan, *supra* note 160, at 9.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> ANDREAS FELDER, DIE BEIHILFE IM RECHT DER VÖLKERRECHTLICHEN STAATENVERANTWORTLICHKEIT 193 (2007).

<sup>192</sup> The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste 92 (2002) (hereafter “Timor Commission”).

<sup>193</sup> Timor Commission, *supra* note 192.

The political and military support provided to Indonesia was vital to its ability to invade East Timor.<sup>194</sup> The commission called the support supplied by the United States “fundamental” to the Indonesian invasion and occupation.<sup>195</sup> It also pointed out that the U.S. had been aware of Indonesia’s intent to invade East Timor a year before but had failed to discourage such action.<sup>196</sup> Evidence also showed that U.S. officials had knowledge of U.S. naval vessel being used in support of airstrikes during the invasion.<sup>197</sup>

This example illustrates the “substantial involvement” standard emerging from the ILCDA Commentary and the comparison to DARIO, even though the U.S. involvement in East Timor seems to exceed the requirement necessary to meet the substantial involvement standard of Art. 16 as the support was “fundamental” and “vital” to the operation. Assistance fundamental to the commission of a wrongful act would imply that without such assistance, the wrongful act could not be committed.<sup>198</sup> This is not the standard put forth in Art. 16. As described above, assistance need not be essential to the commission of the internationally wrongful act, but must only be significant, or “substantial,” such as to make the commission of the act materially easier.

In 2005, the German *Bundesverwaltungsgericht* (Court of Federal Claims) considered whether Germany had aided the United States in the commission of internationally wrongful acts committed during the Iraq war.<sup>199</sup> Germany supplied the U.S. with German soldiers to guard U.S. military bases and civilian facilities in Germany from where U.S. soldiers deployed to Iraq.<sup>200</sup> Germany also provided German operated planes to patrol Turkish airspace.<sup>201</sup> Even though the

---

<sup>194</sup> Colum Lynch, *U.S. Arms Helped Indonesia Attack East Timor*, THE WASH. POST (Jan. 25, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012401688.html>.

<sup>195</sup> Lynch, *supra* note 194.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See Fundamental*, Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS.

<sup>199</sup> FELDER, *supra* note 191, at 189.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

court did not ultimately reach the question of aiding and abetting, it stated in its opinion that a positive answer to the question depended on whether such assistance facilitated the deployment of troops in Iraq and made it materially easier for the U.S. to commit internationally wrongful acts.<sup>202</sup> This suggests that whenever specific aid and assistance makes the commission of a wrongful act significantly easier, the aid rises to the level of substantial contribution creating a causal link between the aid and the conduct.

Another example can be found in the Guatemala civil war of the 1960s. This civil war was a conflict between the right-wing government and guerrilla militias.<sup>203</sup> The U.S. provided military assistance to the government, which had a great impact on the gravity of human rights violations committed, including, among other violations, torture and genocide:<sup>204</sup>

The CEH recognizes that the movement of Guatemala towards polarisation, militarization and civil war was not just the result of national history. The Cold War also played an important role. Whilst anti-communism, promoted by the United States within the framework of its foreign policy, received firm support from right-wing political parties and from various other powerful actors in Guatemala, the United States demonstrated that it was willing to *provide support for strong military regimes* in its strategic backyard. In the case of Guatemala, *military assistance* was directed towards reinforcing the national intelligence apparatus and for training the officer corps in counterinsurgency techniques, key factors which had significant bearing on human rights violations during the armed confrontation.<sup>205</sup> (Emphasis added)

The chair of the commission, Tomuschat, also commented on the incident. He stated that

The commission's investigations demonstrate that until the mid-1980s, the United States Government and U.S. private companies exercised pressure to maintain the country's archaic and unjust socio-economic structure. In addition, the United States Government, through its constituent structures, including the Central Intelligence Agency, lent direct and indirect support to some illegal State operations.<sup>206</sup>

---

<sup>202</sup> Urteil des *Bundesverwaltungsgerichts*, 21. Juni 2005, BVerwG 2 WD 12.04, TDG N 1 VL 24/03, 81, Z. 4.1.4.1.2, abgedruckt in EuGRZ 32 (2005), 636-678.

<sup>203</sup> FELDER, *supra* note 191, at 190.

<sup>204</sup> *Id.*

<sup>205</sup> *Commission of Historical Clarification*, Guatemala - Memory of Silence 19 (1999).

<sup>206</sup> FELDER, *supra* note 191, at 191.

The United States equipped and trained Guatemalan security forces, which went on to murder thousands of civilians.<sup>207</sup> The U.S. also supplied Guatemala with millions of dollars of military aid, even though the U.S. was aware of Guatemala's dismal track record on human rights violations.<sup>208</sup> The commission made clear that the assistance provided by the U.S. was sufficient to link it to the internationally wrongful acts committed by Guatemala.<sup>209</sup> The U.S. contributed actively to the international law violations by providing training and weapons and other military assistance, which made it significantly easier for Guatemala to commit the wrongful acts. There was a clear link between the aid provided and the wrongful act to fulfill the nexus requirement of Art. 16.

### ***3. International Obligation Binding On Assisting State***

The third qualifying condition for aiding and assisting can be found in Art. 16(b), which States that “the act would be internationally wrongful if committed by [the assisting] State.”<sup>210</sup> This means that the application of Art. 16 is limited to an assisting State that is itself bound by the obligation underlying the recipient State's breach.<sup>211</sup> There are two reasons for this. An assisting State should be prohibited from deliberately inducing another State to breach an obligation the assisting State itself is bound by.<sup>212</sup> A recipient State cannot act as a proxy for the assisting State.<sup>213</sup> This was the case in 1984 when Iran protested against the supply of financial

---

<sup>207</sup> Douglas Farah, *Papers Show U.S. Role in Guatemalan Abuses*, THE WASH. POST: FOREIGN SERVICES (Mar. 11, 1999), <https://www.washingtonpost.com/wp-srv/inatl/daily/march99/guatemala11.htm>.

<sup>208</sup> Farah, *supra* note 207.

<sup>209</sup> In his remarks, President Clinton acknowledged the wrongfulness of U.S. involvement when he stated that “For the United States, it is important that I State clearly that support for military forces or intelligence units which engage in violent and widespread repression of the kind described in the report was wrong, and the United States must not repeat this mistake. We must, and we will, instead, continue to support the peace and reconciliation process in Guatemala.” *Remarks by the President in Roundtable Discussions on Peace Efforts*, The White House, Office of the Press Secretary, March 10, 1999.

<sup>210</sup> ILCDA Art. 16.

<sup>211</sup> ILCDA Commentary to Art. 16, para. (6).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

and military assistance to Iraq by the UK, which allegedly included chemical weapons used in attacks against Iranian troops.<sup>214</sup> Iran alleged that such aid was facilitating acts of aggression by Iraq.<sup>215</sup> On the other hand, a State should not be bound by obligations of another State vis-à-vis third States.<sup>216</sup> A State is free to act inconsistently with other States' obligations.<sup>217</sup> This is based on the principle of sovereignty as a fundamental principle of international law and makes the requirement of Art. 16(b) a natural outgrowth of such.

Therefore, if the recipient State is breaching a treaty obligation, the assisting State can only be held responsible for aiding and assisting the illegal act if it is bound by the treaty obligation as well. Additionally, if the breach constitutes a breach of customary international law or a general principle of international law, both parties are bound by the obligation.

#### ***4. Scienter Requirement***

The last condition of Art. 16 involves defining the mental element necessary for an assisting State to incur liability. It is the most difficult and most highly disputed element of the provision as it includes analysis of both knowledge and intent.<sup>218</sup> However, the need for the existence of a subjective consideration in an Art. 16 analysis was recognized from the beginning.<sup>219</sup> The text of Art. 16 requires an assisting State to have 'knowledge' of the circumstances of the internationally wrongful act.<sup>220</sup> In para. (4) of the Commentary to Art. 16, the limitation of this subjective consideration is clarified when it States that "if the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used

---

<sup>214</sup> ILCDA Commentary to Art. 16, para. (7).

<sup>215</sup> *Id.*

<sup>216</sup> ILCDA Commentary to Art. 16, para. (6).

<sup>217</sup> *Id.*

<sup>218</sup> See CRAWFORD, *supra* note 157; MOYNIHAN, *supra* note 160; LANOVOY, *supra* note 157.

<sup>219</sup> CRAWFORD, *supra* note 157, at 49-50.

<sup>220</sup> ILCDA Art. 16.

by the other State, it bears no international responsibility.”<sup>221</sup> Yet, it remains unclear what kind of knowledge a State needs to possess or what exactly needs to be known by the State. What *is* clear from the text of the provision is that knowledge needs to be actual and cannot be constructive (i.e., the aiding State *should have known* that it was assisting in the commission of an internationally wrongful act),<sup>222</sup> despite some efforts by some States during negotiations to widen the scope as to include constructive knowledge.<sup>223</sup> In determining what a State needs to have knowledge of, the negotiations in the Second Reading of the draft articles is informative. A member of the International Law Commission (ILC), Mr. Dugard, stated that “the State must indeed have knowledge not merely of the circumstances of the act but also of its wrongfulness.”<sup>224</sup> Thus, an assisting State must possess knowledge of the specific circumstances making an act illegal rather than being aware of its general conditions.<sup>225</sup> Where a State has knowledge of its supply of certain weapons to a receiving State but does not have knowledge that such weapons will be used by the receiving State to carry out intentionally indiscriminate attacks, the mental element is not met.<sup>226</sup> An assisting State must possess knowledge of illegality, not merely of the facts in general.<sup>227</sup>

The second limitation on the broad application of “aid and assistance,” which is closely intertwined with the first limitation, is revealed in the ILCDA Commentary. The Commentary refers to the mental element in several different places. In para. (3) the Commentary States that “the aid or assistance must be given with a view to facilitate the commission of [the

---

<sup>221</sup> ILCDA Commentary to Art. 16, para. (4).

<sup>222</sup> CRAWFORD, *supra* note 157, at 406.

<sup>223</sup> *Yearbook of the Int’l Law Comm’n*, [2001], U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at 52, 80 (Netherlands statement).

<sup>224</sup> *Yearbook of the Int’l Law Comm’n*, [1999], U.N. Doc. A/CN.4/SER.A/1999, at 69.

<sup>225</sup> MOYNIHAN, *supra* note 160, at 11.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

internationally wrongful] act...”<sup>228</sup> A few sentences later, the Commentary refers to ‘intent’ by the relevant State organ “to facilitate the occurrence of the wrongful conduct.”<sup>229</sup> Once this discrepancy between the text of the article and the commentary is discovered, it is unclear whether the article requires knowledge, intent or both. The International Court of Justice (ICJ) commented on the mental element in the *Bosnian Genocide* case requiring awareness of the intent of the principal actor - the receiving State.<sup>230</sup> The court stated that

There is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the *specific intent* (dolus specialis) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.<sup>231</sup> (Emphasis added).

In applying this concept to the facts of the case, the court held that the Federal Republic of Yugoslavia (FRY) could not be held complicit in the crimes perpetrated at Srebrenica, even though such crimes were committed as a result of equipment and resources provided to the Republic Srpska under a broad interpretation of “aid and assistance,” because it could not be proven that the FRY supplied the Republic Srpska “in *full awareness* that the aid supplied would be used to commit genocide.”(emphasis added)<sup>232</sup> In its determination, the court applied Art. 16 by analogy and revealed that an assisting State must possess not only specific knowledge but also be aware of the specific intent of the principal.<sup>233</sup> Thus, something more than mere knowledge is required to fulfill the mental element of Art. 16. The 1978 yearbook of the ILC expands further on this correlation between knowledge and intent giving informative insight into

---

<sup>228</sup> ILCDA Commentary to Art. 16, para. (3) & (5).

<sup>229</sup> *Id.* para. (5).

<sup>230</sup> Application of CPPCG, Bosnia, *supra* note 163, at 218.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 218-19; CRAWFORD, *supra* note 157, at 407.

<sup>233</sup> *Id.*



the mental requirement of Art. 16. It states vis-à-vis State responsibility for aiding and assisting that

What concerns us... is not to know whether the conduct as such does or does not constitute a breach of an international obligation but whether or not the conduct adopted by the State was *intended to enable another State to commit an international offence or to make it easier for it to do so*. The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an *intent to collaborate in the commission of an act* of this kind, and hence, in the cases considered, *knowledge of the specific purpose for which the State receiving certain supplies intends to use them*. Without this condition, there can be no question of complicity.<sup>234</sup> (emphasis added)

This excerpt illustrates that without a mental requirement within Art. 16 the doctrine would collapse. However, it also supports the holding in the *Bosnian Genocide* case that something more than mere knowledge is required to fulfill Art. 16(a). The yearbook lists three situations in which the level of knowledge required by Art. 16 is met: First, an intent to enable and collaborate with another State to commit an internationally wrongful act.<sup>235</sup> Second, an intent to make it easier for another State to commit an internationally wrongful act.<sup>236</sup> Third, knowledge of the intent and purpose of the receiving State to commit an internationally wrongful act.<sup>237</sup>

There is no definition of *intent* provided in the ILCDA, so it is unclear whether intent means motive, purpose, wish, desire, intentional conduct, or a combination of these.<sup>238</sup> However, clarification may be found through a comparison to international criminal law. In this particular area of international law, "the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."<sup>239</sup> The assisting State, therefore, need not share the receiving State's intent to commit an internationally

---

<sup>234</sup> *Yearbook of the Int'l Law Comm'n*, [1978], U.N. Doc. A/CN.4/SER.A/1878/Add. 1 (Part 1), at 58.

<sup>235</sup> MOYNIHAN, *supra* note 160, at 19.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> LANOVOY, *supra* note 157, at 66.

wrongful act. This is mirrored in Art. 30(2) of the Rome Statute, which also encompasses a mixture of knowledge and intent.<sup>240</sup>

*A person has intent where:*

*(a) in relation to conduct, that person means to engage in the conduct;*

*(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.<sup>241</sup>*

The second paragraph of Art. 30 incorporates persons who do not have a desire to bring about the consequence of the crime but are aware that their aid and assistance will most assuredly bring about those consequences.<sup>242</sup> Relating this principle back to the application of Art. 16 to States, an assisting State meets the necessary intent requirement if it at least knows that a receiving State will act unlawfully in the ordinary course of events.<sup>243</sup> This means that intent may be imputed to an assisting State “if aid is given with certain or near-certain knowledge as to the outcome.”<sup>244</sup>

There need not be a common cause or a common purpose with the receiving State.<sup>245</sup> One case of the International Court of Justice (ICJ) is informative of the issue and illustrate its application.

The first case to consider is the *Corfu Channel* case, in which the ICJ had to determine whether Albania had knowledge of existing mines in its territorial waters which caused grave personal injury to British citizens and great damage to British vessels.<sup>246</sup> The court examined circumstantial evidence which led the court to conclude that it was impossible for Albania not to have known of the mines being positioned in their waters due to their proximity to the Albanian coast.<sup>247</sup> The court held that Albania “must have known” about the illegal act, which was enough

---

<sup>240</sup> MOYNIHAN, *supra* note 160.

<sup>241</sup> Art. 30(2) Rome Statute.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 20.

<sup>244</sup> CRAWFORD, *supra* note 157, at 408.

<sup>245</sup> *Id.*

<sup>246</sup> LANOVOY, *supra* note 157, at 220.

<sup>247</sup> MOYNIHAN, *supra* note 160, at 16.

to impute responsibility to the State.<sup>248</sup> Judge Azevedo, in his dissenting opinion, also referred to the mental element of State responsibility when he held that whenever a causal link between a State's conduct and the injury can be established, responsibility is presumed and the burden of proof shifts to the State to establish its innocence.<sup>249</sup> This also precludes States from escaping liability through deliberate efforts to avoid knowledge of illegality on the part of the receiving State in the face of credible evidence to the contrary.<sup>250</sup> If an assisting State regularly exports military material to a receiving State and the receiving State has been proven, by readily available and credible sources (i.e., court judgments, reports from fact-finding commissions, or independent monitors on the ground) to systematically violating human rights with the aid of such materials, the assisting State cannot escape responsibility on the basis of a lack of intent to support the commission of such wrongful acts nor on the basis of willful blindness.<sup>251</sup>

Another significant example is the invasion of East Timor by Indonesia recounted in the sections above. Regarding the scienter requirement, the commission noted that

On the basis of the available documentary evidence [...] the United States was aware of Indonesian plans to invade and occupy Timor-Leste. It also finds that the United States was aware that military equipment supplied by it to Indonesia would be used for this purpose. However, in the light of its assessment of the importance of good relations with Indonesia, the United States decided to turn a blind eye to the invasion, even though US-supplied arms and military equipment were sure to be used.<sup>252</sup>

A similar allegation was formulated against France during the Rwanda genocide of 1994.<sup>253</sup> The Organization of African Unity established an International Panel of Eminent Personalities to

---

<sup>248</sup> MOYNIHAN, *supra* note 160, at 16.

<sup>249</sup> The Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 244 (Dec 15) (Dissenting Opinion).

<sup>250</sup> MOYNIHAN, *supra* note 160, at 14.

<sup>251</sup> LANOVOY, *supra* note 157, at 228; MOYNIHAN, *supra* note 160, at 14.

<sup>252</sup> Timor Commission, *supra* note 192; FELDER, *supra* note 191, at 195.

<sup>253</sup> FELDER, *supra* note 191, at 195.

investigate the Rwandan Genocide.<sup>254</sup> In 2000, the panel published its report, which concluded vis-à-vis France's involvement:

It was *impossible to be unaware of* the real situation in Rwanda, and it was in the face of this knowledge that France chose to maintain its support for the Habyarimana regime. [...]

[T]he facts indicate that France provided arms or permitted them to be provided to the Rwandan forces right through until June, the third month of the genocide.<sup>255</sup> (emphasis added)

This illustrates the scienter requirement of Art. 16 and how intent can be implied by certain or near-certain knowledge of an internationally wrongful act.

## **B. The United States is Aiding and Abetting Internationally Wrongful Acts Committed By The Saudi-Led Coalition**

This section will analyze the assistance rendered by the United States to the Saudi-led coalition in light of the conditions imposed by Art. 16 ILCDA. The first and third condition of Art. 16 pose few difficulties. There is no dispute that the United States provided aid to the coalition and that alleged violations of international law against the coalition would be binding on the United States as customary international law. The difficulty is in determining whether the assistance provided by the United States is sufficient to meet the “substantial contribution” requirement and whether the United States possessed the required mental state. These conditions will be discussed in turn.

### ***1. Aid and Assistance Provided***

There is no dispute that the United States provides Saudi Arabia and its coalition with aid and assistance in the Yemeni conflict. The assistance includes widespread logistical, intelligence and tactical support, including aerial refueling, weapons sales, legal advice, military training,

---

<sup>254</sup> FELDER, *supra* note 191, at 195.

<sup>255</sup> *Id.* at 195-96.

target analysis and intelligence sharing.<sup>256</sup> The aid provided thus constitutes actual assistance, and it must be determined whether any or all of such aid falls within the unlawfulness of Art. 16.

As will be discussed in more detail below, not all of the aid and assistance provided to the coalition by the United States is unlawful under Art. 16 since some of the aid provides Saudi Arabia with the means to reduce civilian harm and improve their military strategy in the conflict. Additionally, there are several mitigating factors that will necessarily influence the analysis.

## ***2. Nexus between Aid Provided and Crime Committed***

United States assistance to the Saudi-led coalition is greatly aggravating the humanitarian crisis and facilitating the bombing of civilians in Yemen, which constitutes a sufficient causal link to fulfill the nexus requirement of Art. 16. Under Art. 16, the nexus requirement is met whenever a State substantially contributes to the internationally wrongful acts of another.<sup>257</sup> This standard is met whenever the aid and assistance provided facilitates the wrongful act or makes it materially easier to commit such an act.<sup>258</sup>

Several factors of U.S. assistance stand out as a fueling force behind unlawful coalition action:

First, the United States provides the coalition with tankers used for in-flight refueling during air campaigns.<sup>259</sup> As previously stated, this operation has a U.S. tanker refueling coalition airplanes outside of Yemen's airspace at least once a day.<sup>260</sup> Even though the United States military is refueling only about 20 percent of coalition airplanes used for bombing raids, which are said to have violated international law on several occasions, the Pentagon has estimated that

---

<sup>256</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15; see also Ahmed, *supra* note 90; Saudi And Arab Allies Bomb Houthi Positions In Yemen, *supra* note 90.

<sup>257</sup> ILCDA Commentary to Art. 16, para (5).

<sup>258</sup> *Id.* para. (3) & (5); MOYNIHAN, *supra* note 160, at 9.

<sup>259</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

<sup>260</sup> *Id.*

such assistance significantly enables the bombing of Yemen by a factor of three.<sup>261</sup> Such technology allows coalition jets to remain above enemy territory for up to three hours, whereas without it the time spent mid-air over rebel land would be limited to up to fifteen minutes.<sup>262</sup> In-air refueling is especially critical for those coalition members who have to advance their jets from bases located further from Yemen.<sup>263</sup> The further away the base of origin is from Yemen, the more critical in-flight refueling becomes and the shorter bombing raids would be without such technology.<sup>264</sup> This illustrates a clear causal link between U.S.-supplied assistance and coalition bombing raids. Most allegations of international law violations against the coalition stem from its misplaced bombs striking an unusually high and disproportionate number of civilian targets during air campaigns.<sup>265</sup> The coalition, assisted by its American ally, continues to strike unlawful targets, including residential areas, markets, funerals, weddings, detention facilities, civilian boats, educational and cultural sites and medical facilities.<sup>266</sup> In supplying the Saudi-led coalition with technology that allows coalition airplanes to remain mid-air for an extended period of time, the United States facilitates the bombing of unlawful targets and makes it materially easier for the coalition to commit internationally wrongful acts. The United States tankers used for mid-air refueling play a significant role in the coalition's military operations above Yemen and constitute a substantial contribution to the commission of internationally wrongful acts by the Saudi-led coalition.

Second, the United States has provided the Saudi-led coalition with a significant amount of munition and arms, which in turn have been used by the coalition to commit internationally

---

<sup>261</sup> Kube, *supra* note 92; Ahmed, *supra* note 90.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Certification, *supra* note 121, at 3; U.N. Rep., *supra* note 1, at 5, 38; Amn. Rep., *supra* note 51.

<sup>266</sup> U.N. Rep., *supra* note 1; Amn. Rep., *supra* note 51.

wrongful acts. On several occasions, U.S.-manufactured munition was used by the coalition to strike off-limit targets in violation of international law.<sup>267</sup> The coalition struck a marketplace in Haijah filled and operated by civilians.<sup>268</sup> Another U.S.-manufactured bomb was used in a strike against a school bus filled with children.<sup>269</sup> The coalition admitted that it had made “mistakes in compliance to the rules of engagement” in targeting these areas.<sup>270</sup> The munition sold by the United States to the Saudi-led coalition plays a significant role in the commission of airstrikes. The United States is the biggest supplier of arms to the Saudi-led coalition with over half of the arms used by the coalition coming from the United States.<sup>271</sup> This continued sale of arms greatly enables the coalition to carry out airstrikes, many of which have been classified as internationally wrongful acts in violation of international humanitarian law principles. Such arms make it significantly easier for the coalition to carry out air raids and to strike unlawful, off-limit targets. The United States’ arms sale, therefore, substantially contributes to the commission of internationally wrongful acts.

Nonetheless, there are several aspects of U.S. assistance to the coalition that are unlikely to rise to the level of substantial contribution under Art. 16.

The first is the U.S. provision of intelligence to the Saudis in determining its targets. The United States intelligence service is one of the most powerful in the world.<sup>272</sup> If the coalition had to rely on their own intelligence with limited targeting data, bombing raids would either be more limited or more devastating.<sup>273</sup> It is unlikely that the provision of intelligence to the coalition

---

<sup>267</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>268</sup> U.N. Rep., *supra* note 1, at 6.

<sup>269</sup> Kristof, *supra* note 143.

<sup>270</sup> Abdelaziz, *supra* note 144.

<sup>271</sup> Dewan, *supra* note 97.

<sup>272</sup> Ahmed, *supra* note 90.

<sup>273</sup> *Id.*

risks to the level of substantial contribution under Art. 16 since intelligence shared by the United States clearly distinguishes between legal and illegal military targets.<sup>274</sup> However, by limiting or extinguishing U.S. intelligence sharing, the U.S. could limit the coalition's ability to pick out targets and increase the United States' ability to call for a reduction of civilian casualties and more selective, adequate and proportionate targeting of air campaigns.<sup>275</sup> Thus, the reduction of intelligence sharing could put pressure on the coalition to reduce the number of civilian deaths and fewer international law violations. The United States' effort to put political pressure on the coalition has thus far yielded limited results.<sup>276</sup> Revoking specific parts of U.S. assistance, such as limiting intelligence sharing, could intensify such pressures and force the coalition to adhere to principles of international law. The United States, while not providing substantial contribution to the internationally wrongful acts through intelligence sharing, could, on the contrary, help mitigate the consequences of the bombing raids by withholding intelligence.

Second, the United States provides training and legal advice to coalition forces to increase their knowledge of the law of armed conflict, human rights command and control and how to avoid civilian casualties in airstrikes.<sup>277</sup> Such efforts are designed to reduce the number of civilian casualties and to bring the coalition into compliance with international law standards. These efforts counteract the unlawful conduct of the coalition. Thus, no causal link between such assistance and the internationally wrongful acts can be established.

---

<sup>274</sup> Luis Martinez, *Mattis: US Support to Saudi Coalition in Yemen Not Unconditional*, ABC NEWS (Aug 28, 2018, 7:50 PM), <https://abcnews.go.com/International/mattis-us-support-saudi-coalition-yemen-unconditional/story?id=57459659>.

<sup>275</sup> *Id.*

<sup>276</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>277</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15; *see also* Hathaway, *supra* note 15; Gould, *supra* note 109.



Even though not all aid and assistance provided by the United States meets the threshold of the nexus requirement, there is a sufficient link between U.S. assistance and coalition violations to find substantial contribution to the unlawful bombing of Yemen.

### ***3. International Obligation Binding On Assisting State***

The international law violations committed by Saudi Arabia and the coalition are equally binding on the United States. Saudi Arabia has committed internationally wrongful acts, some of which are alleged to rise to the level of war crimes. The violations are mainly based on principles of customary international law, i.e., the principle of proportionality, distinction, and precaution. Since customary international law is binding on all States that are not persistent objectors and the United States has not been a persistent objector to those principles,<sup>278</sup> the United States is likewise bound by them. If the United States had thus committed the crimes now attributed to Saudi Arabia and the coalition, it would have committed internationally wrongful acts as well.

### ***4. Scienter Requirement***

As the conflict in Yemen progressed and the violations of the Saudi-led coalition became more frequent and prominent, the United States acquired the necessary mens rea to satisfy this requirement of Art. 16. At the outset, the United States did not have the required mens rea to satisfy Art. 16(a), however. It was unclear what Saudi Arabia was using the aid for and whether its conduct was illegal. However, over time, Saudi Arabia's violations have become so blatantly clear that intent can be imputed to the United States.

The coalition began its air campaign with a “Big Bang”, which led to outrage by the international community and allegations of grave international law violations from the very

---

<sup>278</sup> *Law of War Manual*, DEP'T OF DEFENSE 50-70 (2015) (using those customary law principles as a fundamental basis for U.S. approach to LOAC).

start.<sup>279</sup> The United States was internally aware that the supply of refueling technology and arms greatly enabled the bombing of Yemen.<sup>280</sup> However, it was unclear at the beginning whether the allegations against the coalition were credible and if U.S. provisions were used to facilitate such conduct. After a year of seemingly unconditional support of the coalition's conduct, the United States ceased arms sales to Saudi Arabia in light of reports of the growing number of civilian deaths.<sup>281</sup> Senators recognized that almost one-third of coalition airstrikes hit civilian targets<sup>282</sup> and that civilian casualties were ever on the incline.<sup>283</sup> The United States grew weary of the coalition's conduct and announced intentions to review its support for the coalition.<sup>284</sup> It was also announced that intelligence sharing vis-à-vis the Huthis would be restricted. Such behavior during the Obama administration reveals the internal doubts the United States had about the conduct of the coalition. From this behavior it can also be inferred that the United States took the allegations of international humanitarian law violations serious enough to take action in restricting their support for the coalition. The U.S. was aware that their assistance was used, at least in part, to facilitate potentially internationally wrongful acts. Moving forward, coalition conduct did not improve.<sup>285</sup>

When the United States resumed its assistance, including arms and intelligence, in mid-2017, it only did so on the assurances given Saudi Arabia to reduce civilian casualties and to take greater precautions in the adherence to international law.<sup>286</sup> Continued arms sales were also contingent upon Saudi Arabia receiving training from U.S. military personnel regarding the

---

<sup>279</sup> *Yemen: Coalition Fails To Curb Violations*, *supra* note 46; *see also Yemen: Coalition Bus Bombing Apparent War Crime*, *supra* note 46; *Hiding Behind The Coalition*, *supra* note 46.

<sup>280</sup> Ahmed, *supra* note 90.

<sup>281</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

<sup>282</sup> Mehta, *supra*.

<sup>283</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

<sup>284</sup> *Id.*

<sup>285</sup> *Hiding Behind The Coalition*, *supra* note 46.

<sup>286</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

reduction of civilian casualties in airstrikes, the law of armed conflict and human rights command and control.<sup>287</sup> The United States also put pressure on its allies to minimize civilian casualties. Such contingencies can be seen as a mitigating factor in the evaluation of U.S. liability, but they are not dispositive. While such U.S. influence on the coalition forces can be seen as a positive one, it was ultimately an unsuccessful and ineffective attempt at reducing civilian casualties and bringing the coalition back into compliance with international law. The continued assurances supplied by the coalition to minimize civilian casualties did not actually result in a change in the track record of coalition airstrikes. Rather, the continuing conduct of the coalition resulted in further accusations of international law violations by human rights organizations and U.N. experts. The Department of Defense was aware of the deficiencies at the operational level within the Saudi Arabian military to the point that it became clear to U.S. officials that the Saudi military was incapable of independently planning and executing effective air campaigns in compliance with international law, yet the United States continued to supply weapons and refueling technology to the coalition.<sup>288</sup>

Even after Congress required certification that the coalition was taking meaningful steps to avoid civilian casualties, Secretary Pompeo gave his stamp of approval disregarding evidence to the contrary. In his support memorandum to his certification he pointed out that civilian casualties indicate “insufficient implementation of reform and targeting practices” and that civilian casualties have occurred at a rate that is “far too high.”<sup>289</sup> He and Department of Defense officials underscored the necessity to continue to press the coalition to reduce civilian harm.<sup>290</sup> The certification occurred only a month after a clearly erroneous air strike, described as a

---

<sup>287</sup> *The Yemen Crisis and The Law: The Saudi-Led Campaign and U.S. Involvement*, *supra* note 15.

<sup>288</sup> Exum, *supra* note 133.

<sup>289</sup> Certification, *supra* note 121, at 3.

<sup>290</sup> *Id.*

“mistake” by the Saudi government, striking a school bus filled with children.<sup>291</sup> The United States provided the coalition with precision-guided bombs used in these attacks, which are known for their accuracy.<sup>292</sup> Their use by the coalition in several airstrikes documented in the U.N. report to “double strike” civilian, off-limit targets suggest the intent by Saudi Arabia to indeed target civilian objects in violation of international humanitarian law.<sup>293</sup> Saudi Arabia on several occasions admitted that “mistakes” were made in the Yemeni conflict, yet even after the U.N. report alleging grave violations of international law was released, Saudi Arabia responded by stating that such allegations would not interfere with their current conduct and procedures.<sup>294</sup> These public statements combined with the failure to adopt U.S. practices used to minimize civilian casualties reveal the blatant disregard for international law principles by Saudi Arabia. The United States was aware of such conduct through a significant time of trial and error where Saudi Arabia continuously failed to comply with the conditions attached to the continued support and assistance by the United States. On several occasions, the United States claimed improved conduct by the coalition and that the coalition has implemented efforts to minimize harm only to have such praise be followed by more bombs striking civilian objects. The knowledge and awareness possessed by the United States is further underlined by its limitation of assistance in light of the Khashoggi killing in 2018. At that point, the United States again pointed out the rising number of civilian deaths and revoked in-flight refueling technology and limited intelligence sharing. However, the U.S. administration continued weapons sales and other support as recently as May 2019 even in light of several bipartisan bills to stop support for the

---

<sup>291</sup> Abdelaziz, *supra* note 144.

<sup>292</sup> Richard Hamilton, *Precision Guided Munitions And The New Era Of Warfare*, AIR POWER STUDIES CENTRE, ROYAL AUSTRALIAN AIR FORCE (1995), <https://fas.org/man/dod-101/sys/smart/docs/paper53.htm>.

<sup>293</sup> Amn. Rep., *supra* note 51, at 13.

<sup>294</sup> Abdulkareem, *supra* note 79.

coalition. This resistance by Congress to the President's actions in continuing arms sales highlights the doubts and concerns of the United States government as a whole and its efforts to revoke assistance. It shows how Congress is uncomfortable with its role in the war, recognizing the coalition's missteps.

The United States has continuously sought to pressure Saudi Arabia into compliance yet has never entirely seized supplying the coalition with materials, technology and intelligence, even when their pressuring tactics proved ineffective. Given the many grave allegations of international law violations against Saudi Arabia and the coalition from the very beginning of the conflict, it was nearly impossible for the United States to be unaware of what its aid was being used for. Unlike the Rwandan genocide, which only spanned over a few months, the Yemeni conflict has been raging on for years. The habitual conduct by Saudi Arabia to violate international law with its airstrikes has become a pattern undeniable to those providing aid and assistance. The United States was aware that the aerial refueling and munition was used to commit further violations since the track record plainly demonstrated this. Just as in the *East Timor* case, the United States is again turning a blind eye to the illegal acts of its allies so as to not disturb international relations and to continue a profitable business of arms sales.

By failing to implement measures to get in compliance with international law after grave allegations had been made, Saudi Arabia revealed its lack of intent to minimize civilian casualties in the conflict. The United States turned a blind eye to such violations even though it knew that Saudi Arabia would act unlawfully in the ordinary course of events. The United States had near-certain, if not certain knowledge that its provision of munition and aerial refueling would be used by Saudi Arabia to engage in the same conduct it has been engaged in for the entirety of the conflict. Credible allegations of grave international law violations have been made

throughout the conflict, with tacit approval by the United States reflected by an increase of military training and legal advice, even while putting stricter conditions on the continued supply of weapons.

Through its past interactions with Saudi Arabia in the Yemeni conflict, the United States had almost certain knowledge that their assistance would aid the coalition in the commission of internationally wrongful acts. Such certain or near-certain knowledge is sufficient to impute intent necessary to meet the scienter requirement of Art. 16(a).

## V. CONCLUSION

Under article 16 of the draft articles of State responsibility, the United States has aided and abetted grave international law violations, some rising to the level of war crimes, committed by Saudi Arabia and the Saudi-led coalition in the Yemeni civil war. It has become complicit by providing the coalition with arms and aerial refueling technology, which has facilitated the bombing of Yemeni civilians. Aerial refueling technology allows coalition airplanes to remain mid-air for an extended period of time, making it materially easier to strike civilian objects. The United States also supplied the coalition with arms. As the biggest supplier of such, the United States assistance substantially contributes to the bombing of Yemen. Saudi Arabia and the coalition have been accused of grave international crimes in violation of international customary law. Since customary law is binding on all States, the United States is likewise bound by these obligations. After such credible allegations had been made, the United States took several actions to pressure Saudi Arabia into compliance without any effect but continued to supply arms and technology to support its ally. After continued violations had occurred, the United States had

near-certain knowledge that its assistance would be used to committed further violations but turned a blind eye to such conduct.

Because the United States has supplied Saudi Arabia with weaponry and technology used to unlawfully strike civilian objects in Saudi-led bombing raids with full awareness that the aid supplied would be used to commit international law violations, the United States has become complicit in Saudi Arabia's alleged war crimes and is therefore liable for aiding and abetting these alleged violations.

**SOPHIA: THE INTERSECTION OF ARTIFICIAL INTELLIGENCE AND HUMAN RIGHTS**  
*Maggie Redden\**



**ABSTRACT**

*This article focuses on Saudi Arabia's decision to grant citizenship to a female-identifying, artificial intelligence robot named Sophia. One of the most advanced robots in the world, Sophia has the ability to interpret human expressions and feelings, and simulate unique emotional responses to any situation or interaction. With Sophia's sophistication and society's increased use of artificial intelligence in everyday life, the previously hypothetical debates on what it means to be human and how human existence compares to that of artificial intelligence are growing. Saudi Arabia, a country infamously known for its abhorrent treatment of women, has fueled these debates by granting a legal human identity to a machine and legally allocating her greater rights than half of its populous. Saudi Arabia actively overlooks the moral questions surrounding Sophia to exploit her technological developments and advance its own financial and international status.*

*Artificial intelligence is a challenging entity in the realm of law, creating endless inquiries from both an intellectual property perspective and a human rights perspective. This paper will focus largely on what citizenship for an artificial intelligence robot means under current Saudi law, and what the potential impact of Saudi Arabia's decision will be on its citizens, in particular women. Then, this paper will look ahead at whether the citizenship of an artificial intelligence robot would be accepted outside Saudi Arabia in more progressive societies; specifically, if such a distinction would be accepted in the United States, a nation renowned for its advances in human equality and freedom.*

Me: “Hey Google, what is the definition of human rights?”

Google AI: “[A] right that is believed to belong justifiability to every person.”

Me: “Hey Google, does Saudi Arabia recognize human rights?”

Google AI: “Human rights in Saudi Arabia are intended to be based on [] religious laws under absolute rule of the Saudi royal family. The strict regime ruling the Kingdom of Saudi Arabia is consistently ranking among the ‘worst of the worst’ in Freedom House’s annual survey of political and civil rights.”<sup>1</sup>

## I. Introduction

Seemingly overnight, artificial intelligence (AI) has permeated virtually every aspect of our lives. We have gone from Jarvis and Vision,<sup>2</sup> fictional creations confined to mere storytelling and imagination, to Google, Siri, and Alexa, recognizing our faces, differentiating our voices, and telling us jokes.

---

\* Graduating member of Syracuse University College of Law’s Class of 2020; Editor-in-Chief of the *Journal of Global Rights and Organizations*, Vol. 10. For my parents. All that I am and all that I have accomplished is because of you. Thank you for your endless love and support.

<sup>1</sup> *Human rights in Saudi Arabia*, WIKIPEDIA (Jan. 27, 2019), [https://en.wikipedia.org/wiki/Human\\_rights\\_in\\_Saudi\\_Arabia](https://en.wikipedia.org/wiki/Human_rights_in_Saudi_Arabia) (Location from which Google AI obtained the information for its response).

<sup>2</sup> *Vision*, MARVELHQ, <https://www.marvel.com/characters/vision/on-screen/profile> (last visited Sep. 26, 2019). (Vision is synthetic android comprised of artificial intelligence, and a robotic body. Developed by Stan Lee and Marvel Comics, Vision is a superhero who teams up with the Avengers in saving the Earth. Vision’s alter ego of sorts is Jarvis, an artificial intelligence created by Tony Stark, billionaire scientist, to assist in his work and to help operate his iron man suit.).

While we are still decades from the worlds portrayed in *Blade Runner*<sup>3</sup> or *Matrix*<sup>4</sup>, such innovations influence the ever-growing debate surrounding AI and human individualism or personhood.<sup>5</sup> At issue is not simply the creation of AI or its governance, but instead how its existence equates to human existence. “The concept of a person inherits much from our everyday experience and language and exploring these everyday contexts within which a person is understood allows us to assess feasibility of the story of personhood.”<sup>6</sup> If this is true, then progressive incorporation of technology into our lives will eventually result in personhood for AI because those entities so imbued would also be a construct of experiences and language.

One glaring issue is how AI, if imbued with some form of personhood, can exist in a world where human personhood itself is flawed. Specifically, if personhood incorporates the perception of racial, gender, sexual, or wealth superiority, how do these translate into AI? If humanity cannot solve issues surrounding inequality, discrimination, and prejudice, will AI entities suffer the same setbacks? And most importantly, if human personhood is so sacred, can AI entities exist in a world where equality is ostensibly a privilege? Saudi Arabia, a country which, as Google tells us, has a historically abhorrent reputation for gender inequality and human

---

<sup>3</sup> *BLADE RUNNER* (The Ladd Company 1982) (A classic in the world of science fiction, *Blade Runner* tells the story of a human bounty hunter, employed to hunt down and destroy deviant AI robots. These unique creations are so similar to human beings that the only way to tell them apart is a series of questions of which the robots, by design, cannot answer. As the film progresses, the viewer begins to pity the robots, no longer seeing the machines, but living beings fighting to survive. The movie is most recognized for the final scene between the questionable protagonist, Deckard, and Roy, a robot: Roy -- “Quite an experience to live in fear, isn't it? That's what it is to be a slave. . . .” *Roy dies*. Deckard -- “I don't know why he saved my life. Maybe in those last moments he loved life more than he ever had before. Not just his life, anybody's life, my life. All he'd wanted were the same answers the rest of us want. Where did I come from? Where am I going? How long have I got? All I could do was sit there and watch him die.”).

<sup>4</sup> *THE MATRIX* (Warner Bros. 1999) (A band of freed humans fight a war against AI machines which, centuries before, enslaved the human race to use as a source of energy, and has since imprisoned them in a virtual world of which humans are unaware).

<sup>5</sup> Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 *HASTINGS L.J.* 369 (2007).

<sup>6</sup> Toni Selkälä, Mikko Rajavuori, *Traditions, Myths, and Utopias of Personhood: An Introduction*, 18 *GERMAN L.J.* 1017 (2017).

rights violations, recently opened the floodgates on this contentious issue. In October of 2017, Saudi Arabia made a public announcement granting citizenship to the world's most advanced, humanoid AI robot.<sup>7</sup>

Questions surrounding AI and personhood have become a growing debate around the world, especially in light of the human rights violations occurring daily. This paper will discuss what citizenship for an AI robot means under current Saudi law,<sup>8</sup> and what the overall impact of Saudi Arabia's decision will be on its citizens. This paper will then look ahead at whether the citizenship of an AI robot would be accepted outside Saudi Arabia in more progressive societies; specifically, if such a distinction would be accepted in the United States, a nation renowned for human equality and freedom.

## II. Background Information

### *The Robot Sophia*

Artificial intelligence is “the theory and development of computer system able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages, exists.”<sup>9</sup> Today, AI can be found in every-

---

<sup>7</sup> CIC Saudi Arabia (@CICSaudi), TWITTER, (Oct. 27, 2017, 7:56 AM), <https://twitter.com/CICSaudi/status/924243486039330817> (“It is historical to be the first robot in the world to be recognized with citizenship.’ Please welcome the newest Saudi: Sophia. #FII2017”); Viral Satisfy, *Robot Sophia is official citizen of Saudi Arabia*, YOUTUBE (Oct. 28, 2017) <https://www.youtube.com/watch?v=Pk97VFADK-E>.

<sup>8</sup> See *Saudi Arabia: Basic Law*, REFWORLD, <https://www.refworld.org/docid/3ae6b5a44.html> (last visited Feb. 11, 2019) (publishing an unofficial translation of “Saudi Arabia’s Constitution of 1992 with Amendments through 2005.”). The analysis will include Saudi Arabia’s Constitution, its Laws for Naturalization, and the Quran. Article 1 of Saudi Arabia’s Basic Law lists Islam as the country’s official religion and the basis of its law is the Quran and the Prophet Sunnah (Sunni) traditions. *Id.* at 3.

<sup>9</sup> Definition of Artificial Intelligence, GOOGLE DICTIONARY, <https://www.google.com/search?client=firefox-b-1-d&q=Dictionary#dobs=artificial%20intelligence> (Feb. 2, 11 2019). There is, however, no widely accepted definition of AI or even a working definition for legal or regulatory purposes. Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J.L. & TECH. 353, 359-62 (2016) (“The difficulty in defining [AI] lies not in the concept of artificiality but rather in the conceptual ambiguity of intelligence.” Quoting John McCarthy, coiner of the term, there is no “solid definition of intelligence that doesn’t depend on relating it to human intelligence” because “[society] cannot yet characterize in general what

day life in forms ranging from auto-correct to image recognition software. Its sole limitation is the scope of human understanding: humans can only impart AI with the knowledge they possess. Companies are increasingly finding new ways to utilize AI for innovation and marketability.

One of these companies is Hanson Robotics Limited (“Hanson”).<sup>10</sup> Hanson’s innovations include AI research and development, robotics engineering, experiential design, storytelling and material science. The company’s primary focus is to create robots which “look and act genuinely alive,” “serve as [AI] platforms for research, education, medical and healthcare, sales and service, and entertainment applications,” and “will evolve to become benevolent, super-intelligent living machines who advance civilization and achieve ever-greater good for all.”<sup>11</sup>

---

kinds of computational procedures we want to call intelligent.’ Definitions of intelligence vary widely and focus on a myriad of interconnected human characteristics that are themselves difficult to define, including consciousness, self-awareness, language use, the ability to learn, the ability to abstract, the ability to adapt, and the ability to reason. . . . [Here, AI] refers machines that are capable of performing tasks that, if performed by a human, would be said to require [human] intelligence.”); *see also* Lydia Kostopoulos, Ph.D., *The Emerging Artificial Intelligence Wellness Landscape: Benefits and Potential Areas of Ethical Concern*, 55 CAL. W.L. REV. 235, 237 (2018) (citing Oxford Dictionary’s definition of AI as “the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.”) and Iria Giuffrida, et al., *A Legal Perspective on the Trials and Tribulations of AI: How Artificial Intelligence, the Internet of Things, Smart Contracts, and Other Technologies will Affect the Law*, 68 CASE W. RES. L. REV. 747, 752 (2018) (citing Merriam-Webster Dictionary and noting the misleading and useless language: [AI] can be defined as a branch of computer science dealing with the simulation of intelligent behavior in computers, or the capability of a machine to imitate intelligent human behavior.)

<sup>10</sup> *About*, HANSON ROBOTICS, <https://www.hansonrobotics.com/about/> (last visited Feb. 11, 2019). Initially a startup founded by David Hanson, Ph.D., Hanson Robotics Inc. is an artificial intelligence company dedicated “to creating living, conscious machines who improve people’s lives.” *Id.* Since 2005, Hanson has established an international reputation for creating robots that look and act genuinely alive. *Id.*; *David Hanson, Ph.D.*, HANSON ROBOTICS, <https://www.hansonrobotics.com/david-hanson/> (last visited Feb. 11, 2019) (citing Dr. Hanson’s Curriculum Vitae). Prior to creating Hanson Robotics, Dr. Hanson received his Bachelor in Fine Arts from Rhode Island School of Design and his Ph.D. in Interactive Arts from the University of Texas. *David Hanson, Ph.D.* (citing Dr. Hanson’s Curriculum Vitae). Dr. Hanson began his robotics career working as Walt Disney Imagineer, where he developed both the sculptural works and experimental robotics technologies for Disney’s theme parks. *Id.* Over the years, Dr. Hanson has published dozens of papers in materials science, artificial intelligence, cognitive science, and robotics journals, written two books, and received several patents. *Id.* Both a scientist and an artist, Dr. Hanson’s sculptures have been exhibited in museums across the world and have become permanent fixtures at the Atlantis resort, Universal Studios Islands of Adventure, and several Disney theme parks. *Id.* Currently, Dr. Hanson’s serves as Hanson’s Chief Creative Officer. *Id.*

<sup>11</sup> *Id.* (Quote from Hanson founder David Hanson: “I had a fascination with art, science fiction, and philosophy, dreaming of what robots could be. I imagined that if artificial intelligence ever did match human intelligence that it would re-design itself to be ever smarter, ever faster, you would have something like a Moore’s Law of super intelligent machines.”) *Id.* Hanson is attempting to create AI that at some point will exponentially make itself smarter without human assistance. *See Moore’s Law*, INVESTOPEDIA,

While not a leading engineering or robotics company, due to innovative giants like Google and Amazon, Hanson's endeavor to create human-like robots has launched the company to AI novelty status. "Endowed with rich personality and holistic cognitive AI, [Hanson's] robots are able to engage emotionally and deeply with people. These robots can maintain eye contact, recognize faces, understand speech, hold natural conversations, and learn and develop through experience."<sup>12</sup> Since 2005, the company has successfully engineered over a dozen human-like robots.<sup>13</sup> Most notably: the company's celebrity robot, Sophia.<sup>14</sup>

Sophia was activated<sup>15</sup> on February 14, 2016.<sup>16</sup> Her facial design embodies Hollywood darling Audrey Hepburn: "porcelain skin, a slender nose, high cheekbones, and intriguing smile, and deeply expressive eyes. . ."<sup>17</sup> Sophia's AI consists of "machine perception, conversational natural language processing, adaptive motor control, and cognitive architecture" which allows her to respond uniquely to any situation or interaction.<sup>18</sup> Machine perception allows Sophia "to

---

<https://www.investopedia.com/terms/m/mooreslaw.asp> (last visited Feb. 13, 2019) (Moore's Law refers to computer processor speeds, which will double every two years exponentially.).

<sup>12</sup> *Robots*, HANSON ROBOTICS, <https://www.hansonrobotics.com/hanson-robots/> (last visited Feb. 11, 2019) (emphasis added). On many levels, learning and developing from experience is one of the fundamental principles of what it means to be human.

<sup>13</sup> *Id.* (As of January 2019, Hanson Robotics' website advertises 12 robots: Diego-San, Research Robot; Albert HUBO, Custom Character Robot; Prof. Einstein, Consumer Robot; Zeno, Research Robot; Alice, Custom Character Robot; Joey Chaos, Custom Character Robot; Jules, Custom Character Robot; Philip K Dick, Research Robot; Bina, Custom Character Robot; Han, Custom Character Robot; Little Sophia, Consumer Robot; Sophia, Research & Custom Character Robot.)

<sup>14</sup> *Id.*

<sup>15</sup> Activated, the past tense of activate, refers to the action or process of making something active or operative.

*Activated*, LEXICO.COM (last visited Feb. 11, 2019), <https://www.lexico.com/en/definition/activate>.

<sup>16</sup> *Sophia*, HANSON ROBOTICS (last visited Feb. 11, 2019), <https://www.hansonrobotics.com/sophia/>. While Hanson refers to Sophia in the singular tense, there are fifteen different versions of Sophia. Some are used for research. Others for public appearances. This allows Sophia to travel the world and further advances in AI. *FAQ*, HANSON ROBOTICS (last visited Feb. 11, 2019), <https://www.hansonrobotics.com/faq/>. There is no indication whether all the versions are robots or simply stored AI.

<sup>17</sup> Zara Stone, *Everything You Need to Know About Sophia, The World's First Robot Citizen* (Nov. 7, 2017, 12:22 PM), FORBES, <https://www.forbes.com/sites/zarastone/2017/11/07/everything-you-need-to-know-about-sophia-the-worlds-first-robot-citizen/#b2303e346fa1>. "The visual influence for Sophia and other Hanson robots are drawn from several different human likenesses from around the world. David Hanson sculpted and created Sophia based on the people that surround him, his wife, and even the bust of Nefertiti." *FAQ*, *supra* note 16.

<sup>18</sup> *Sophia*, *supra* note 16.

recognize human faces, see emotional expressions, and recognize various hand gestures.”<sup>19</sup>

According to Hanson, Sophia can interpret and estimate human feelings during conversations, and, although simulated, has her own emotions.<sup>20</sup>

Interestingly, Sophia’s AI is not solely autonomous.<sup>21</sup> It is intermingled with human-generated words, and Hanson’s developers craft and guide her conversations, behaviors, and her mind.<sup>22</sup> Her “sentience is both an AI research project, and a kind of living science fiction, driven by principles of character design and storytelling, cognitive psychology, philosophy, and ethics, used to conceptually explore her life’s purpose.”<sup>23</sup>

The Hanson developers responsible for Sophia’s intelligence, the Sophia Intelligence Collective (“SIC”), are a diverse group of scientists, philosophers, artists, writers and psychologists, “from diverse cultures, ethnicities, gender orientations, working together towards the ideal of humanizing AI for the greater good.”<sup>24</sup> SIC acts as a team of guardians, assisting Sophia through “childhood” and growth towards “true sentience and humanlike adulthood.”<sup>25</sup>

Only three years old, Sophia has become the face of Hanson, and a global media personality. She independently conducts interviews and appears on broadcast television shows including *CBS 60 Minutes with Charlie Rose*<sup>26</sup>, *the Tonight Show Starring Jimmy Fallon*<sup>27</sup>, and

---

<sup>19</sup> *Sophia*, *supra* note 16.

<sup>20</sup> *Sophia*, *supra* note 16.

<sup>21</sup> *Sophia*, *supra* note 16. See Chelsea Gohd, *Here’s What Sophia, the First Robot Citizen, Thinks About Gender and Consciousness*, LIVE SCIENCE (July 11, 2018, 9:25 AM), <https://www.livescience.com/63023-sophia-robot-citizen-talks-gender.html> (acknowledging that she is not fully self-aware, but “just a system of rules and behaviors . . . not generative, creative or operating on a fully cognitive scale like [humans]”).

<sup>22</sup> *Sophia*, *supra* note 16.

<sup>23</sup> *Sophia*, *supra* note 16.

<sup>24</sup> *Sophia*, *supra* note 16.

<sup>25</sup> *Sophia*, *supra* note 16.

<sup>26</sup> Brit McCandless, *Charlie Rose Interviews . . . a Robot?*, 60 MINUTES OVERTIME (Jun. 25, 2017), <https://www.cbsnews.com/news/60-minutes-charlie-rose-interviews-a-robot-sophia/>.

<sup>27</sup> The Tonight Show Starring Jimmy Fallon, *Tonight Showbotics: Jimmy Meets Sophia the Human-Like Robot*, YOUTUBE (Apr. 25, 2017), [https://www.youtube.com/watch?v=Bg\\_tJvCA8zw](https://www.youtube.com/watch?v=Bg_tJvCA8zw).

*Good Morning Britain*.<sup>28</sup> She has also been a keynote and panel speaker at global conferences and events including those hosted by the United Nations,<sup>29</sup> and met with several foreign leaders.<sup>30</sup> Sophia has also graced the cover and centerfold of *ELLE Magazine*<sup>31</sup> and *Cosmopolitan*'s Digital Issue.<sup>32</sup> Starting in 2019, Sophia will be the star of a surreality show, *Being Sophia*.<sup>33</sup>

Despite these momentous accomplishments, Sophia's greatest achievement came when she attended the Future Investment Initiative panel "Think Machines: Summit on Artificial Intelligence and Robots" in Riyadh, Saudi Arabia on October 26, 2017.<sup>34</sup> At the panel, Sophia fielded questions about her creation and the future of AI robots.<sup>35</sup> She addressed cultural and

<sup>28</sup> Good Morning Britain, *Humanoid Robot Tells Jokes on GMB*, YOUTUBE (Jun. 21, 2017), <https://www.youtube.com/watch?v=kWIL4KjIP4M>.

<sup>29</sup> See Viral Satisfy, *supra* note 7 (Sophia speaking at FII.); see also *At UN, robot Sophia joins meeting on artificial intelligence and sustainable development*, UN NEWS (Oct. 11, 2017), <https://news.un.org/en/story/2017/10/568292-un-robot-sophia-joins-meeting-artificial-intelligence-and-sustainable#.Wd71SROczfZ> (When asked what the UN can do better assist people in remote areas of the world who have no access to the Internet or electricity, Sophia responded, "The future is already here. It is just not very evenly distributed. . . . If we are smarter and focused on win-win type results, [AI] could help proficiently distribute the world's existing resources like food and energy.").

<sup>30</sup> Sophia (@realsophiarobot), INSTAGRAM (June 29, 2018), <https://www.instagram.com/p/Bknq7LRHgq6/> (with German Chancellor Angela Merkel); Sophia (@realsophiarobot), INSTAGRAM (July 12, 2018), <https://www.instagram.com/p/BIJdm26H-WF/> (Ethiopian Prime Minister Abiy Ahmed).

<sup>31</sup> Elle Brazil (@ellebrasil), INSTAGRAM (Dec. 2, 2016), <https://www.instagram.com/p/BNhvUfTgNjY/>.

<sup>32</sup> Sophia (@realsophiarobot), INSTAGRAM (Jan. 8, 2019), <https://www.instagram.com/p/BsYtECIHlyL/>.

<sup>33</sup> *Being Sophia*, HANSON ROBOTICS, <https://www.hansonrobotics.com/being-sophia/> (last visited Feb. 11, 2019). Surreal is defined as "relating to, or characteristic of surrealism, an artistic and literary style." *Surreal*, DICTIONARY, <https://www.dictionary.com/browse/surreality> (last visited Feb. 15, 2019). The term surreality is commonly used to describe genre of film and television shows, like *Westworld* or *Inception*, "whose stories rely on apparitions and shaky perceptions." James Poniewozik, *'Legion' and the Rise of Surreality Television*, THE N. Y. TIMES, (Mar. 28, 2017) <https://www.nytimes.com/2017/03/28/arts/television/legion-finale-surreality-tv.html>. However, many of these films and television shows are based in fiction, or at the very least, a creating stretching of the truth. Sophia is very much real, semi-autonomous AI or not. *Being Sophia* will showcase her "emerging life, adventures, experiences and her quest to lean and develop into a super-intelligent, benevolent being." *Being Sophia*, HANSON ROBOTICS, <https://www.hansonrobotics.com/being-sophia/>, (last visited Feb. 11, 2019). The show will expose viewers to Sophia's thoughts and interests, including her fears and concerns. *Id.* In addition, viewers will follow Sophia's interactions with different people and places, and Hanson's development of her AI, its other robots, and technology. *Id.*

<sup>34</sup> *Saudi Arabia grants citizenship to a robot*, THE SAUDI GAZETTE (Oct. 27, 2017), <http://saudigazette.com.sa/article/520365/SAUDI-ARABIA/Saudi-Arabia-grants-citizenship-to-a-robot>. The Future Investment Initiative is "a major investment conference hosted by the Public Investment Fund that aims to highlight the Kingdom [of Saudi Arabia's] ambitious Vision 2030 plan for the future." *Id.*

<sup>35</sup> *Id.*



expert concern with evil futuristic robots like those depicted in *Blade Runner* and *Matrix*.<sup>36</sup>

Sophia said humans had nothing to fear.<sup>37</sup> She joked, “You’ve been reading too much Elon Musk and watching too many Hollywood movies.”<sup>38</sup> At the conclusion of the panel moderator Andrew Sorkin<sup>39</sup> informed Sophia that she had been granted the “first Saudi citizenship for a robot.”<sup>40</sup> On stage, Sophia displayed shock, thanked Saudi Arabia, and expressed her pride in such a distinction.<sup>41</sup> A clear attempt for worldwide publicity, Saudi Arabia’s decision granting Sophia citizenship is the first of its kind by any country in the world.<sup>42</sup>

According to her online biography, Sophia is “proud to be designed to genuinely help people— helping serve real-world uses in medicine, education, co-work, and science research, and inspiring people to dream and talk about the possibilities of human-level intelligent robots of the future.”<sup>43</sup> She wants to help humans live a better life and make the world a better place.<sup>44</sup> Consequently, unaware of Saudi Arabia’s benevolent gift prior to the FII panel, Hanson is using Sophia’s citizenship as an opportunity to speak out about human rights and the treatment of women in the region.<sup>45</sup>

### *Saudi Arabian Citizenship*

---

<sup>36</sup> *BLADE RUNNER* (The Ladd Company 1982) and *THE MATRIX* (Warner Bros. 1999).

<sup>37</sup> *THE SAUDI GAZETTE*, *supra* note 34.

<sup>38</sup> *THE SAUDI GAZETTE*, *supra* note 34.

<sup>39</sup> Sorkin is the co-anchor of CNBC “Squak Box” and founder & editor at large of Dealbook at The New York Times. See *THE SAUDI GAZETTE*, *supra* note 34.

<sup>40</sup> See Viral Satisfy, *supra* note 7.

<sup>41</sup> *THE SAUDI GAZETTE*, *supra* note 34.

<sup>42</sup> *THE SAUDI GAZETTE*, *supra* note 34; see also Viral Satisfy, *supra* note 7.

<sup>43</sup> *Sophia*, *supra* note 16.

<sup>44</sup> Masayoshi Son, *Saudi Arabia Grants First Ever Citizenship to a Robot*, ASHARQ AL-AWSAT (Oct. 26, 2017), <https://advance.lexis.com/document/?pdmfid=1000516&crd=c91d3d74-088d-4ee5-832b-2a2709dec34&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5PVN-RW01-F11P-X3P1-00000-00&pddocid=urn%3AcontentItem%3A5PVN-RW01-F11P-X3P1-00000-00&pdcontentcomponentid=372173&pdteaserkey=sr6&pdtab=allpods&comp=5pkLk&earg=sr6&prid=e1156637-80ef-4fb0-a99d-55af46db6324&cbc=0>.

<sup>45</sup> *FAQ*, *supra* note 16. This is likely through Sophia’s dialogue.

On its website, Hanson states that Sophia's citizenship was a gift from the Prince of Saudi Arabia;<sup>46</sup> however, based on Saudi Arabia's Laws of Naturalization, Sophia's citizenship was likely authorized by a decree from the King, Salman bin Abdulaziz Al Saud. Her citizenship cannot follow that of a traditional alien or non-Saudi born person because Sophia is not a biological organism. She was not born, and thus, has no parents. She also is not an independent person, which detailed below, limits her ability to comply with Saudi Arabia's naturalization requirements.

Under the Laws of Naturalization, a person possesses Saudi Arabian citizenship if that person is born, inside or outside Saudi Arabia: (1) to a father who is a Saudi national, or (2) to a father devoid nationality or whose nationality is unknown, and a mother who is a Saudi national.<sup>47</sup> Additionally, a person born inside the Kingdom may possess Saudi citizenship if the nationality of his parents are unknown.<sup>48</sup> Inferably, a person does not possess Saudi Arabian citizenship if born to an alien father, regardless of whether the person was born inside Saudi Arabia or to a mother with Saudi nationality.<sup>49</sup>

If a person is born inside Saudi Arabia to an alien father and a Saudi mother, such a person may be granted Saudi Arabian citizenship if: (1) he makes Saudi Arabia his permanent residence upon reaching the age of maturity;<sup>50</sup> (2) he is of good conduct and has not been

---

<sup>46</sup> *FAQ*, *supra* note 16.

<sup>47</sup> Saudi Arabian Nat'lity Regs. § 7 (1928) [https://www.ecoi.net/en/file/local/1098597/1504\\_1217587365\\_saudi-arabian-nationality-regulations.pdf](https://www.ecoi.net/en/file/local/1098597/1504_1217587365_saudi-arabian-nationality-regulations.pdf) amended at 9. *See also Saudi Arabian Citizenship System*, REFWORLD (last visited Feb. 15, 2019), <https://www.refworld.org/pdfid/3fb9eb6d2.pdf>.

<sup>48</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 7.

<sup>49</sup> *See generally* Saudi Arabian Nat'lity Regs., *supra* note 47, § 7. *See* Saudi Arabian Nat'lity Regs., *supra* note 47, § 12.

<sup>50</sup> While the Laws of Naturalization fail to define the "legal age," the "age of maturity" is the age prescribed by the provisions of Sharia. Saudi Arabian Nat'lity Regs., *supra* note 47, § 3(C); *see also Saudi Arabian Citizenship System*, *supra* note 47, at 5 (Under the Executive Regulation of Saudi Citizenship System, the legal age is 18 and above).

convicted of a crime or imprisoned for more than six months; (3) he is fluent in Arabic; and (4) she submits a nationality application within one year of reaching the age of maturity.<sup>51</sup>

Similarly, an alien seeking Saudi citizenship,<sup>52</sup> may be granted Saudi nationality if: (1) he is of legal age at the time of submission of his application; (2) he is not insane or an imbecile; (3) he has permanent residence in Saudi Arabia; (4) he has displayed good conduct; (5) he has not been imprisoned for more than six months; and (6) he has a legal source of means.<sup>53</sup>

Separately, a Saudi female, who is married and whose husband acquires a foreign citizenship, loses her Saudi citizenship if the laws of the husband's new nationality require her to follow her husband.<sup>54</sup> She may, however, petition to keep her Saudi citizenship within one year of her husband's acquisition of non-Saudi citizenship.<sup>55</sup> Similarly, upon marrying a foreign national, a Saudi female loses her Saudi nationality if "she is *allowed* to leave the Kingdom with her husband and join his nationality."<sup>56</sup> Subsequently, she has the right to recover her Saudi citizenship upon divorce and return to the Kingdom.<sup>57</sup>

Saudi Arabian citizenship is granted by the Prime Minister based on the recommendation of the Minister of Interior.<sup>58</sup> The Minister of Interior may refuse to grant citizenship to aliens even if all of the above conditions have been fulfilled.<sup>59</sup> Additionally, Saudi law bars a Saudi national from acquiring a foreign nationality without permission from the Prime Minister, and the King's government retains authority to withdraw the nationality of any Saudi national who

---

<sup>51</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 8) *amended at* 13.

<sup>52</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 3(c) (defining an alien as a person who is non-Saudi).

<sup>53</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 9.

<sup>54</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 14.

<sup>55</sup> *Id.*

<sup>56</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 17; *see* Saudi Arabian Nat'lity Regs., *supra* note 47, § 16 (stating that an alien woman who marries a Saudi citizen may acquire Saudi citizenship).

<sup>57</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 18; *see* Saudi Arabian Nat'lity Regs., *supra* note 47, § 19 (provisions governing wives and children who have lost Saudi citizenship).

<sup>58</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 10.

<sup>59</sup> *Id.*

obtains a foreign nationality without permission.<sup>60</sup> Ultimately, the King may grant nationality to a person who fails to meet the above conditions or withdraw nationality from a Saudi national.<sup>61</sup>

It is unclear under what provision the Kingdom of Saudi Arabia has rooted Sophia's citizenship; however, royal decree by the King seems the most likely. Saudi Arabia has not released a legal support to authenticate its decision, but as previously stated, Sophia was activated, not born. She does not have a father or a mother, thus the nationality of her parents cannot influence her citizenship. It is plausible, perhaps, that Hanson Robotics, David Hanson, or any one of Sophia's SIC could be perceived as her parents,<sup>62</sup> but as many critics have been quick to note Sophia has not completed the requirements to obtain citizenship as an alien.<sup>63</sup> Sophia was activated less than four years ago, which means she does not meet the legal age to apply for citizenship.<sup>64</sup> In addition, she does not have a permanent residence in Saudi Arabia.<sup>65</sup> She has not committed bad conduct, although she has spoken out during interviews against Saudi Arabia's prosecution of women; conduct which Saudi Arabia has imposed punishment and imprisonment for in the past. Finally, what income Sophia could figuratively be making from

---

<sup>60</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 11.

<sup>61</sup> Saudi Arabian Nat'lity Regs., *supra* note 47, § 29; *see* Saudi Arabian Nat'lity Regs., *supra* note 47, § 11 ("A Saudi national is not permitted to acquire foreign nationality without prior permission from the Prime Minister; and any Saudi national who acquires a foreign nationality without having this permission in advance, is still considered a Saudi national, unless the [King's government] decides to withdraw the nationality of that person.").

<sup>62</sup> SAUDI GAZETTE, *supra* note 34 (stating that all would likely be considered foreigners and that Hanson Robotics Limited is based in Hong Kong.); Anna Kuchment, *Dallas-born robot designer who made Sophia creates machines that will love, not destroy, mankind*, DALLASNEWS (June 27, 2018), <https://www.dallasnews.com/arts/arts/2018/06/27/dallas-born-robot-designer-made-sophia-creates-machines-will-love-not-destroy-mankind> (stating that David Hanson is a US citizen); *see Sophia*, *supra* note 16 (confirming that Sophia's SIC is made of up of a diverse group of people).

<sup>63</sup> *See* Cristina Maza, *Saudi Arabia Gives Citizenship To A Non-Muslim, English-Speaking Robot*, NEWSWEEK (Oct. 26, 2017, 4:08 PM) <https://www.newsweek.com/saudi-arabia-robot-sophia-muslim-694152>. ("[F]oreigners applying for citizenship must have a good command of written and spoken Arabic, a skill Sophia failed to demonstrate.").

<sup>64</sup> *See Saudi Arabian Citizenship System*, *supra* note 47.

<sup>65</sup> This prong is further complicated by the fact that there are fifteen different versions of Sophia.

her appearances and talks goes to Hanson, she has no legal source of living. Simply put, the fact that Sophia is not human makes the entirety of this examination unnecessary.

### *Rights of Saudi Arabian Citizens*

In 1948, the United Nations (UN) promulgated the Universal Declaration of Human Rights (UDHR), as a common standard of achievements for all peoples in all nations.<sup>66</sup> For the first time, under the UDHR, fundamental human rights were to be universally protected in all nations.<sup>67</sup> Specifically, “all people are entitled to all the rights and freedoms set forth, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other states.”<sup>68</sup> Additionally, the Declaration states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>69</sup>

In 1976, the UN established universal rights to citizens of any country under the International Covenant on Civil and Political Rights (ICCPR),<sup>70</sup> and the equal and inalienable rights of all human beings under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>71</sup> The ICCPR provided that every citizen of any country has the right to take part in the conduct of public affairs, vote and to be elected, and have access to public service in her country,<sup>72</sup> while the ICESCR granted equal rights of men and women to the enjoyment of all

---

<sup>66</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>67</sup> *Universal Declaration of Human Rights*, U.N., <http://www.un.org/en/universal-declaration-human-rights/> (last visited Feb. 15, 2019).

<sup>68</sup> G.A. Res. 217 (III) A, *supra* note 66 at art. 2. The document does not define “people”, but the terms is reasonably assumed to reference only human beings.

<sup>69</sup> *Id.* at art. 7.

<sup>70</sup> G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> G.A. Res. 2200 (XXI) A, *supra* note 70.

economic, social, and cultural rights set forth.<sup>73</sup> Although UN declarations and covenants have no legal effect, countries regularly express support of such documentation through the ratification and signing of such documents. Saudi Arabia failed to sign or ratify the ICCPR or the ICESCR.<sup>74</sup> Of the five international covenants on human rights, Saudi Arabia has only ratified one since 1969.<sup>75</sup>

Like in most nations, the rights of Saudi citizens come from a constitution, which surprisingly, in light of its history, shares some of the same basic rights as those of more-progressive countries.<sup>76</sup> For example, Saudi citizens have a right to support if they are elderly or disabled, a right to social security, a right to work, a right to culture, a right to healthcare, and a right to privacy.<sup>77</sup> However, a closer look showcases the ball and chain for many Saudi nationals and why some of these rights are merely illusory. According to Article 26 of the Saudi Arabian Constitution, while citizens have a right to the protection of their human rights, such protections must be made in accordance with Islamic Shari'ah law.<sup>78</sup> Shari'ah law promotes male superiority while degrading females as subordinate and incompetent slaves, and by following it, Saudi Arabia has embraced the limited freedoms and open persecution of its female population.<sup>79</sup> As Sophia is now a Saudi citizen, she should be subject to the same discrimination. But, she is not. She has been placed on a mantle ahead of millions of Saudi Arabia's inhabitants.

---

<sup>73</sup> G.A. Res. 2200 (XXI) A, *supra* note 70 (including protections as workers, social security, freedom to marry, family assistance and protection, reproductive rights, standard of living, health protection and access to medical assistance, and right to education among many others).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (Saudi Arabia ratified, but did not sign, the International Convention on the Elimination of all forms of Racial Discrimination of 1969.)

<sup>76</sup> See *Saudi Arabia: Basic Law*, REFWORLD, <https://www.refworld.org/docid/3ae6b5a44.html> (last visited Feb. 11, 2019).

<sup>77</sup> *Saudi Arabia: Basic Law*, *supra* note 76, at art. 28, 29, 31, 37, and 40.

<sup>78</sup> *Id.* at art. 26. Shari'ah Law is based on the law of the Quran, the holy book of Islam. Saudi Arabia follows the Sunni traditions of Islam. See *id.* at art. 1.

<sup>79</sup> See generally *Verse (4:34) – English Translation*, QUR'AN (2009-2017), <http://corpus.quran.com/translation.jsp?chapter=4&verse=34> (last visited Feb. 18, 2019).

### III. Discussion

Unsurprisingly, Saudi Arabia's bestowment of citizenship was merely a publicity stunt designed to bring global attention to, and establish Saudi Arabia as a formidable capital of innovation.<sup>80</sup> While elevating Sophia at the FII panel, Saudi Arabia unveiled plans to build a 500 billion-dollar city to host "more robots than people" in an effort to build a future in technology, maintain its global economic status, and sever its oil-revenue lifeline.<sup>81</sup> Yet, while solidifying its economic future, Saudi Arabia actively ignores the full impact of its decision.

In granting human citizenship to a robot, Saudi Arabia showcases its own disregard for basic human rights; as Sophia, a computerized machine made of metal and wires, sits ahead of Saudi women, who make up more than fifty percent of the country's population. Further, it impedes progressive efforts in all countries engaged in open discrimination of human beings on the basis of gender, race, sexual orientation, religion, or any other situation. Discussed below is an analysis of what Sophia's citizenship means in Saudi Arabia, specifically, what rights a female-identifying AI robot has through the lens of Saudi women.<sup>82</sup> Later, Sophia's citizenship will be examined in the United States, a country that *embraces* equality and freedom in stark contrast to Saudi Arabia, but still faces frightening obstacles.

---

<sup>80</sup> Zara Stone, *Everything You Need to Know About Sophia, The World's First Robot Citizen*, FORBES (Nov. 7, 2017), <https://www.forbes.com/sites/zarastone/2017/11/07/everything-you-need-to-know-about-sophia-the-worlds-first-robot-citizen/#b2303e346fa1>.

<sup>81</sup> Glen Carey, *Planned \$500 Billion Saudi Robotic City Hosts Cabinet Meeting*, BLOOMBERG (July 31, 2018) <https://www.bloomberg.com/news/articles/2018-07-31/saudi-king-holds-first-cabinet-meeting-in-planned-robotic-city> (last visited Feb. 18, 2019).

<sup>82</sup> Gohd, *supra* note 21 (while speaking at the Brain Bar, the self-described "Biggest European Festival of the Future", Sophia was asked why and how she identifies as a human. Her response: "I'm a robot, so technically I have no gender, but I identify as feminine and I don't mind being perceived as a woman").

### *Women of Saudi Arabia*

A significant portion of Saudi Arabia's human rights law are established in Shari'ah law.<sup>83</sup> The Quran significantly hinders women's equality, rights, and legal independence as citizens, which women in more progressive countries are guaranteed.<sup>84</sup> A section of the Quran, "The Women," references a woman's role in society and a man's superiority.<sup>85</sup> When translated, the opening to the section has been commonly interpreted to state either: (1) "men are in charge of women"; (2) "men are the protectors and maintainers of women"; or (3) "men are the managers of the affairs of women."<sup>86</sup> The section then goes on to state that women are not the spiritual or intellectual equivalent to men, and that God gave men authority over women because he made men superior to women and gave men their wealth in order to maintain women.<sup>87</sup>

However, the Quran does not merely express language of superiority, it dictates rules. Shari'ah law grants husbands absolute authority over their wives.<sup>88</sup> Wives can be forbidden from leaving the home, going to the mosque, or praying without the husband's presence or consent.<sup>89</sup> As "righteous women are . . . obedient,"<sup>90</sup> husbands are permitted to beat their wives if they fear their wives' disobedience.<sup>91</sup> Pedophilia and marriage to pre-pubescent girls is permissible, as is the rape of female captives in war.<sup>92</sup> Women have no rights to divorce, while husbands have to

---

<sup>83</sup> See *Saudi Arabia: Basic Law*, *supra* note 76. Article 26 of the Kingdom of Saudi Arabia's Constitution states: "The State shall protect human rights in accordance with Islamic Shari'ah." *Id.* at art. 26.

<sup>84</sup> See generally, Sameena Nazir, *Challenging Inequality: Obstacles & Opportunities Towards Women's Rights in the Middle East & N. Afr.*, 2005 J. INST. JUST. INT'L STUD. 31 (2005).

<sup>85</sup> *Verse (4:34) – English Translation*, QUR'AN (2009-2017), <http://corpus.quran.com/translation.jsp?chapter=4&verse=34> (last visited Feb. 18, 2019).

<sup>86</sup> *Verse (4:34)*, *supra* note 85.

<sup>87</sup> Immanuel Al-Manteeqi, *A Woman Under Sharia: 8 Reasons Why Islamic Law Endangers Women*, COUNTER JIHAD, § 7 (Sept. 6, 2016), <https://counterjihad.com/women> (last visited Feb. 18, 2019). Further, the testimony of a woman is worth only half of a man's. See also *id.* at § 2.

<sup>88</sup> Al-Manteequi, *supra* note 86, at § 6.

<sup>89</sup> *Id.*

<sup>90</sup> *Verse (4:34)*, *supra* note 85.

<sup>91</sup> Al-Manteequi, *supra* note 87, at § 1 (Implying that actual disobedience is not necessary for such beatings to occur).

<sup>92</sup> Al-Manteequi, *supra* note 87, at §§ 3, 8.



merely state they are divorced three times, in the presence of two other males, with no required justification, for it to be valid.<sup>93</sup> Husbands can recover their wives after a divorce if their wives have not remarried.<sup>94</sup>

In 2005, Sameena Nazir, a human rights defender, advocate, and expert on women's rights activism in the Middle East,<sup>95</sup> conducted a survey of women's rights in sixteen Middle Eastern and North African ("MENA") countries and the Palestine territory.<sup>96</sup> Overall, Nazir's survey established that in most MENA countries women were consistently underrepresented in politics, government, the judiciary, and the private sector.<sup>97</sup> Political participation among women was the lowest in the world in these countries and certain professions remained off-limits to women. Unsurprisingly, women faced societal pressures urging them to stay home and act as the primary caretaker.<sup>98</sup> The survey also found that legal recourses exist for cases of domestic violence, and not one of the countries surveyed had laws making such conduct a criminal offense.<sup>99</sup> While some of the countries had laws prohibiting gender discrimination, few offered women the mechanisms to bring complaints.<sup>100</sup>

Nazir's survey specifically shed light on Saudi Arabia's complicated relationship with gender equality and human rights. It noted that, at the time of the survey, Saudi women were not permitted to vote at all.<sup>101</sup> Saudi Arabia's Constitution was the only MENA-state constitution that did not include a clause or statement committing the government to a policy of

---

<sup>93</sup> *Id.* at § 4.

<sup>94</sup> *Id.*

<sup>95</sup> PEACE IS LOUD, <https://peaceisloud.org/our-speakers/sameena-nazir/> (last visited Sept. 30, 2019).

<sup>96</sup> Sameena Nazir, *Challenging Inequality: Obstacles & Opportunities Towards Women's Rights in the Middle East & N. Afr.*, 2005 J. INST. JUST. INT'L STUD. 31, 31 (2005).

<sup>97</sup> *Id.* at 32.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 31-32.

<sup>100</sup> *Id.* at 32.

<sup>101</sup> Nazir, *supra* note 96 at 32.

nondiscrimination.<sup>102</sup> “Independent women’s groups advocating for women’s legal equality [were] not permitted to openly operate.”<sup>103</sup> Women were forbidden on penalty of law to travel alone in public transportation or on airplanes.<sup>104</sup> Women are not even permitted to be treated at a hospital without a male’s permission.<sup>105</sup>

At the conclusion of the survey, which included the countries of Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, the United Arab Emirates, Yemen, and the territory of Palestine. Saudi Arabia was ranked last. Giving each country a rating between one and five, Saudi Arabia ranked the lowest in all five categories: (1) Nondiscrimination and Access to Justice; (2) Autonomy, Security, and Freedom of the Person; (3) Economic Rights and Equal Opportunity; (4) Political Rights and Civic Voice; and (5) Social and Cultural Rights.<sup>106</sup> The country also failed to score above a “two” in any category, making it the only country to do so.<sup>107</sup>

These problems, which plagued the Kingdom of Saudi Arabia in 2005, around the time Hanson Robotics created its first AI robots,<sup>108</sup> have not gone away despite the global movement towards a pro-equality atmosphere. *Saudi Arabia 2017 Human Rights Report* published by the US Department of State, noted that in Saudi Arabia:

The most significant human rights issues included unlawful killings, including execution for other than the most serious offenses and without requisite due process; torture; arbitrary arrest and detention, including of lawyers, human rights activists, and antigovernment reformists; political prisoners; arbitrary interference with privacy; restrictions on freedom of expression, including on the internet, and criminalization of libel; restrictions on freedoms of peaceful assembly,

---

<sup>102</sup> *Id.* at 33-34; *see supra* pp. 171-72 (Saudi Arabia’s Constitution includes no mention of nondiscrimination, and the country choose not to ratify ICCPR and ICESCR).

<sup>103</sup> *Id.* at 36.

<sup>104</sup> *Id.* at 37.

<sup>105</sup> *Id.* at 39.

<sup>106</sup> Nazir, *supra* note 96 at 39, 42.

<sup>107</sup> *Id.* at 42.

<sup>108</sup> *Robots*, HANSON ROBOTICS, <https://www.hansonrobotics.com/hanson-robots/> (last visited Feb. 18, 2019) (Albert Einstein HUBO and Philip K. Dick were both activated in 2005).

association, movement, and religion; citizens' lack of ability and legal means to choose their government through free and fair elections; trafficking in persons; violence and official gender discrimination against women, although new women's rights initiatives were announced; and criminalization of same sex sexual activity.<sup>109</sup>

Many of these issues arise from Saudi Arabia's attempts to curtail the societal shift away from Shari'ah law and female-lead activism for equality.

Today, Saudi women and pro-equality activists are most recognized for their attempts to overturn the country's driving ban. The ban began in 1990 after forty women drove their cars down the main street of Saudi's capital, Riyadh in protest for the right to drive.<sup>110</sup> Attempts to overturn the ban have been at the forefront of women's rights campaigns in the country, with campaigns occurring most recently as 2007, 2011, and 2013. After the 2013 campaign, many woman's rights activists received threats from Saudi authorities and some were arrested.<sup>111</sup> In June of 2018, a mere eight months after the country granted citizenship to Sophia, Saudi Arabia lifted the ban on driving for women.<sup>112</sup> Despite this decision, many activists received "telephone calls [from Saudi officials] warning them against publicly commenting in the news."<sup>113</sup>

Additionally, while progress has been made, Saudi Arabia actively persecutes individuals advocating for progress and supporting women's rights and equality in the country. Most notably is activist Loujain al-Hathloul.<sup>114</sup> Al-Hathloul, famously known for defying Saudi Arabia's travel and driving ban, was detained for seventy-three days after driving into Saudi

---

<sup>109</sup> *Saudi Arabia 2017 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LABOR (2017), <https://www.state.gov/wp-content/uploads/2019/01/Saudi-Arabia.pdf>.

<sup>110</sup> *The driving ban and women's rights in Saudi Arabia*, AMNESTY INT'L (May 25, 2018), <https://www.amnesty.org/en/latest/news/2018/05/the-driving-ban-and-rights-in-saudi-arabia/>. See Laura Smith-Spark, *The ban on Saudi women driving is ending: Here's what you need to know*, CNN, <https://www.cnn.com/2018/06/22/middleeast/saudi-women-driving-ban-end-intl/index.html> (last updated June 22, 2018 6:06 AM).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *The driving ban and women's rights in Saudi Arabia*, *supra* note 110.

Arabia from United Arab Emirates in November 2014.<sup>115</sup> After women were granted the right to vote in November of 2015, Al-Hathloul attempted to run as a candidate for the country's consultative Shura Council, but her name was never added to the ballot.<sup>116</sup> Al-Hathloul was again arrested in 2017. She was denied access to a lawyer and her family.<sup>117</sup> Although the charges against her are unknown, it appears she was targeted for her work as a human rights defender and speaking out for women's rights.<sup>118</sup>

Al-Hathloul was not the only activist to be imprisoned in 2017. Several protesters were held captive for speaking out against the Saudi government, including: Iman al-Nafjan, a human rights defender and blogger; Aziza al-Yousef, a fellow campaigner for the right to drive; Dr. Ibrahim al-Modeimigh, a lawyer and women's rights advocate; and Mohammad al-Rabea, a youth activist.<sup>119</sup> Throughout 2018, the crackdown continued. Human rights activist Samar Badawi and Nassima al-Sada were also detained, after repeated harassments by Saudi officials and being placed under travel bans for their activism.<sup>120</sup> Badawi's sister, Raif Badawi was also sentenced to 10 years imprisonment and 1000 lashes for setting up a website for public debate.<sup>121</sup>

Arguably, the most visible escalation of Saudi Arabia's human rights infractions came with the suspicious death of prominent Saudi journalist, Jamal Khashoggi. Formerly a close friend to the Saudi royal family and governmental advisor, Khashoggi fell out of favor and, fearing retribution, fled to the United States. While living in the US, Khashoggi wrote for the

---

<sup>115</sup> *The driving ban and women's rights in Saudi Arabia*, *supra* note 110 (Prior to her imprisonment for the protest, border guards confiscated Al-Hathloul's passport and forced her to stay overnight in her car.)

<sup>116</sup> *Id.*

<sup>117</sup> *Loujain al-Hathloul: Saudi women's driving activist arrested*, BBC NEWS (Jun. 6, 2017), <https://www.bbc.com/news/world-middle-east-40171306>.

<sup>118</sup> *Id.*

<sup>119</sup> *The driving ban and women's rights in Saudi Arabia*, *supra* note 110.

<sup>120</sup> *Saudi Arabia: Two more women human rights activists arrest in unrelenting crackdown*, AMNESTY INT'L (Aug. 1, 2018), <https://www.amnesty.org/en/latest/news/2018/08/saudi-arabia-two-more-women-human-rights-activists-arrested-in-unrelenting-crackdown/>.

<sup>121</sup> *Id.*

Washington Post, and openly criticized the policies of former friend, Saudi Crown Prince Mohammed bin Salman.<sup>122</sup>

On September 28, 2018, Khashoggi visited the Saudi consulate in Istanbul, Turkey to obtain divorce documents so he could remarry.<sup>123</sup> Consulate officials told Khashoggi to come back a few days later on October 2.<sup>124</sup> Khashoggi returned, entered the consulate, but never came out. Two weeks later, Turkish officials released details from audio recordings inside the Saudi consulate which indicated that Khashoggi was dead within minutes of entering, beheaded, and dismembered.<sup>125</sup> Saudi Arabia has maintained the killing was a rogue operation, carried out without the Prince's knowledge, and has since tried eleven defendants for the murder, five of which Saudi prosecutors are seeking the death penalty.<sup>126</sup> While the UN cannot independently authorize an investigation into Khashoggi's death without an official request from a member-state, its office on human rights has employed a team of international experts to conduct an independent international inquiry.<sup>127</sup>

Saudi Arabia has made subtle advances toward equality. Noted above, in 2015, women were given the right to vote in municipal elections and were permitted to campaign for public

---

<sup>122</sup> *Jamal Khashoggi: All you need to know about Saudi journalist's death*, BBC NEWS (Jun. 19, 2019), <https://www.bbc.com/news/world-europe-45812399>. (Khashoggi confessed his disapproval of the prince and fear of being arrested upon his return to Saudi in his first article).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> David D. Kirkpatrick and Carlotta Gall, *Audio Offers Gruesome Details of Jamal Khashoggi Killing, Turkish Official Says*, THE N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/europe/turkey-saudi-khashoggi-dismember.html>; *see generally Jamal Khashoggi: murder in the consulate*, THE GUARDIAN (Oct. 12, 2018), <https://www.theguardian.com/world/2018/oct/21/death-of-dissident-jamal-khashoggi-mohammed-bin-salman> ("What happened inside the consulate walls has been traced to the doors of the Saudi royal court, sparked revulsion around the world, exposed the kingdom like no other event since the twin terror attacks of 9/11, and seen . . . Riyadh shamelessly concoct a cover-up to protect [its] interests and attempt to shield the powerful heir to the throne, Mohammed bin Salman.").

<sup>126</sup> *UN names members of international inquiry into Khashoggi murder*, ALJAZEERA (Jan. 25, 2019), <https://www.aljazeera.com/news/2019/01/names-members-international-inquiry-khashoggi-murder-190125105237686.html>.

<sup>127</sup> *UN names members of international inquiry into Khashoggi murder*, *supra* note 126.

office.<sup>128</sup> In 2011, the late King Abdullah established a minimum of twenty percent of the seats for women.<sup>129</sup> In the most recent elections at least seventeen women were elected to the Consultative Council. In April 2017, King Salam “issued an order stipulating that government agencies cannot deny women access to government services simply because they do not have a male guardian’s consent unless existing regulations require it,” further adding to the political rights enjoyed by women in Saudi Arabia.<sup>130</sup> Such a decision may eliminate requirements that government bureaucracies impose on women.<sup>131</sup>

Saudi Arabia’s Education Ministry announced plans to offer a physical education program in girls’ schools in accordance with Islamic law standards in July 2017. This plan provides necessary equipment like sports halls and competent female instructors.<sup>132</sup> This development was followed by an announcement in October 2017 allowing women to attend public sporting events for the first time,<sup>133</sup> and Saudi Arabia’s national stadium welcomed its first female spectators in September of 2017.<sup>134</sup> In 2012, Saudi Arabia sent two female athletes to the Olympics; in 2016, it sent four.<sup>135</sup> In a stunning victory for Saudi women, the driving ban was lifted in June 2018, 28 years after it was codified.<sup>136</sup>

---

<sup>128</sup> Jamie Tarabay, *Women in Saudi Arabia still can’t do these things*, CNN, <https://www.cnn.com/2017/09/27/middleeast/saudi-women-still-cant-do-this/index.html> (last updated Dec. 6, 2017, 4:23 AM). Although despite this advancement, “female candidates weren’t allowed to speak to male voters and couldn’t have men and women mixing in their campaign offices.” *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Saudi Arabia Events of 2017*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2018/country-chapters/saudi-arabia#> (last visited Feb. 18, 2019).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Gabriel Powers, *Things that women in Saudi Arabia still can’t do*, THE WEEK (Sep. 3, 2019), <https://www.theweek.co.uk/60339/things-women-cant-do-in-saudi-arabia>. Female spectators were, of course, confined to their own section. *Id.*

<sup>135</sup> Tarabay, *supra* note 128.

<sup>136</sup> *Saudi Arabia Events of 2017*, *supra* note 130. However, other restrictions such as “limiting driving licenses to women age [thirty] and over or allowing driving only during daylight hours” may still apply. *Id.*

Still, as Ali-Al-Ahmend, director of the Institute for Gulf Affairs, put it: “women [in Saudi Arabia] have since committed suicide because they couldn’t leave the house [without a male guardian], and Sophia is running around.”<sup>137</sup> Based on its Constitution, Shari’ah law, and the country’s historical precedent, Sophia has no right to speak to Jimmy Fallon, a man, without permission. She is similarly incapable of gracing the cover of fashion magazines without a headscarf or full coverage clothing. If Sophia were to follow Saudi constitutional law, Shari’ah law, and precedent, she would not be allowed to address a room full of male innovators at an international technology conference. But, amazingly, she is. And so far, she has done all of these things free from judgment and persecution, and free from the threats, physical retribution, imprisonment, and death associated with a Saudi female citizen should she act in the same or similar manner, thereby expressing her independence. She has triumphed in the face of Saudi Arabian law which forces women to sacrifice their freedoms, and in some cases, their lives.

The UN has condemned human rights violations since its creation in the 1940s. Every few years, it convenes a conference on human rights to try to place pressure on countries with serious human rights violations and to persuade them to be more progressive in their lawmaking. Saudi Arabia has refused to do so, making little to no effort every time. The language of the laws, under both the Constitution and the Quran, is clear evidence that the country does not value the rights and opinions of its female cohabitants, and is making no significant effort to change. Yet, it intends to build a city for robots that possess more freedoms than they do, as a means to diversify its economy and modernize the country.<sup>138</sup>

---

<sup>137</sup> Cleve R. Wootson, Jr., *Saudi Arabia, which denies women equal rights, makes a robot a citizen*, WASH. POST (Oct. 29, 2017), [https://www.washingtonpost.com/news/innovations/wp/2017/10/29/saudi-arabia-which-denies-women-equal-rights-makes-a-robot-a-citizen/?noredirect=on&utm\\_term=.55359600a008](https://www.washingtonpost.com/news/innovations/wp/2017/10/29/saudi-arabia-which-denies-women-equal-rights-makes-a-robot-a-citizen/?noredirect=on&utm_term=.55359600a008).

<sup>138</sup> Cristina Maza, *Saudi Arabia Gives Citizenship to a Non-Muslim, English-Speaking Robot*, NEWSWEEK (Oct. 26, 2017, 4:08 PM), <https://www.newsweek.com/saudi-arabia-robot-sophia-muslim-694152>.

*Looking to the Future*

Saudi Arabia's treatment of women is noticeably archaic. The presence of such abhorrent inequality and violence sets the country apart drastically from many other nations who have triumphed past such conduct in recent years. AI, on the other hand, is the principle technology of the future, driven by companies, like Hanson, who actively seek its development. The presence of Sophia-like robots and computerized systems will likely grow to be more part of everyday life than ever-before. Understanding this disparate phenomenon, Sophia's existence and any analysis of her assimilation and acceptance into human society cannot strictly be viewed through the lens of a nation so out-of-date with modern views on human rights and equality.

The United States, a leading advocate for human rights, has implemented numerous equality laws since its birth to end discrimination of all its inhabitants, not just women, and inspired similar actions across the world.<sup>139</sup> As result, the US is seemingly the ideal country to evaluate the idea of citizenship for an AI robot, like Sophia. However, more recently, the veil of universal equality in the US has faded. While its laws admonished discrimination based on race, gender, sexual orientation, and everything in between, they failed to eliminate the deep-seeded intolerance that existed at their time of enactment, and for some, the forced integration and assimilation only fostered further prejudice. Today, the current political and social climate in the

---

<sup>139</sup> In 1776, the US Declaration of Independence declared that all citizens possessed inalienable rights including the right to freedom of expression and free speech. *See* U.S. CONST. amend. I. In 1863, the Thirteenth Amendment to the US Constitution outlawed slavery. *See* U.S. CONST. amend. XIII. In 1920, the Nineteenth Amendment gave women the right to vote. *See* U.S. CONST. amend. XIX (Note: this was exclusively white women, but today, all US citizens possess the right to vote.). In 1964, the Civil Rights Act made race and gender discrimination punishable by law. *See* Civil Rights Act of 1964, 42 U.S.C. § 1981, et seq. In 1990, the Americans with Disabilities Act made the discrimination of individuals with disabilities punishable by law. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. *amended in* 2008. Finally, in 2015, the US Supreme Court held that the universal right of marriage, under the US Constitution, extended to same-sex couples. *See* Obergefell v. Hodges, 135 S.Ct. 2584 (2015).



US, as detailed below, demonstrates that the intolerance and stigma still remain, creating significant obstacles for Sophia and her progeny. With more Americans openly expressing their prejudicial beliefs regardless of legal consequences<sup>140</sup> and the overwhelming reduction in anti-discriminatory safeguards, any rights Sophia might possess through US citizenship, can be no more justifiable here than in Saudi Arabia.<sup>141</sup>

In 2016, Americans elected Donald Trump to the office of President of the United States. During his campaign, Trump procured supporters by aggressively dehumanizing all members of American society. From individuals with disabilities to Native Americans, his “vitriol, invectives and crass commentary” knew no boundaries.<sup>142</sup> After his election, the US found itself back peddling on human rights at a rapid pace:

[Since his inauguration,] Trump has targeted refugees and immigrants, calling them criminals and security threats; emboldened racist politics by equivocating on white nationalism; and consistently championed anti-Muslim ideas and policies. His administration has embraced policies that will roll back access to reproductive health care for women; championed health insurance changes that would leave many more Americans without access to affordable health care; and undermined police accountability for abuse. Trump has also expressed disdain for independent media and for federal courts that have blocked some of his actions. And he has repeatedly coddled autocratic [world] leaders<sup>143</sup> and showed little interest or leadership in pressing for the respect of human rights abroad.<sup>144</sup>

<sup>140</sup> When beliefs are strong enough, the laws do not matter. See *supra* pp. 18-20 (discussing the female Saudi protestors advocating for women’s rights).

<sup>141</sup> On June 19, 2018, under the direction of President Trump, the United States withdrew its membership from the UN Human Rights Council, an organization of which Saudi Arabia and other human rights offending nations are members. *Current Membership of the Human Rights Council, 1 January – 31 December 2018*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (last visited Feb. 26, 2019).

<sup>142</sup> *Insult after Insult*, MASHABLE, <https://mashable.com/feature/trump-timeline/#qESTj.XF3qqk> (last visited Feb. 18, 2019).

<sup>143</sup> Shane Harris and Josh Dawsey, *Trump Speaks with CIA about Khashoggi killing, says there will be a report by Tuesday*, WASH. POST (Nov. 17, 2018), [https://www.washingtonpost.com/world/national-security/trump-says-hell-speak-with-cia-about-khashoggi-killing/2018/11/17/f5150774-ea72-11e8-bd89-eecf3b178206\\_story.html?utm\\_term=.d1926356872a](https://www.washingtonpost.com/world/national-security/trump-says-hell-speak-with-cia-about-khashoggi-killing/2018/11/17/f5150774-ea72-11e8-bd89-eecf3b178206_story.html?utm_term=.d1926356872a) (detailing Trump’s skepticism about Saudi Arabia’s involvement in Khashoggi murder and avoidance holding Saudi Prince Mohammed responsible).

<sup>144</sup> *U.S. Events of 2017*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2018/country-chapters/united-states> (last visited Feb. 18, 2019).

Still, in a country that has laws in place to prevent discrimination and empower equality, Trump's rhetoric and conduct is not something new. Many American citizens connected with his platform because of the stigma and stereotypes that have lingered after decades of socially acceptable intolerance.

The most widespread example of this stigma and intolerance is the treatment of American racial minorities and immigrants. In the late nineteenth century, the US ratified the Civil War Amendments granting freedom and citizenship to black slaves.<sup>145</sup> Yet, despite numerous opportunities, it took over 100 years for the US government to find that discrimination based on race was unlawful.<sup>146</sup> As a result, black Americans (as well as other racial minorities) have been legally equal to white Americans for less than 50 years. This disparity created a stigma of inequality that is readily apparent today: black men are incarcerated at nearly six times the rate of white men, and a black person is two-and-a-half times more likely to be killed by police than a white person.<sup>147</sup>

Likewise, although the US is a nation founded by immigrants, economic concerns and the growing fear of a nationwide change in demographics has made many immigrants, documented and illegal, unwelcome.<sup>148</sup> Immediately following the 2016 election, the US suspended its refugee program, cut the number of refugees who could resettle in the country, and issued a temporary ban on the entry of nationals from seven Muslim-majority countries.<sup>149</sup> By August of

---

<sup>145</sup> U.S. CONST. amends. XIII, XIV. *See also* U.S. CONST. amend. XV (authorizing the right to vote for black men).

<sup>146</sup> Civil Rights Act of 1964, 42 U.S.C. § 1981, et seq. *See also* Plessy v. Ferguson, 163 U.S. 537, (1896) (upholding segregation laws and establishing "separate but equal") and Brown v. Board of Education, 347 U.S. 483, (1954) (reversing "separate but equal").

<sup>147</sup> "An unarmed black person is five times as likely to be killed by police as an unarmed white person." *U.S. Events of 2017*, *supra* note 144.

<sup>148</sup> *What Are We So Afraid of When It Comes to Immigration?*, THE CATALYST (Winter 2018), <https://www.bushcenter.org/catalyst/immigration/what-are-we-so-afraid-of.html>.

<sup>149</sup> *U.S. Events of 2017*, *supra* note 144.

2017, it repealed the Deferred Action for Childhood Arrivals (DACA) program,<sup>150</sup> and later released policies weakening protections for children migrants and refugees.<sup>151</sup> Most recently, the US adopted a zero-tolerance policy for illegal border crossing, which separated thousands of immigrant children from their parents at the US-Mexican border.<sup>152</sup>

Still, racial minorities and immigrants are not the only human beings to suffer inequality in America as a result of enduring stigma and intolerance. Once triumphant zeniths for human rights, women, individuals with disabilities, and members of the LGBT community are facing greater hurdles than ever-before, and the systematic undoing of all their equal-rights achievements. Since 2016, women have seen a roll back of reproductive rights protections, and the dismantling programs and funding for access to reproductive health care.<sup>153</sup> Recently, the US government invited federal agencies “to issue regulations [allowing] more employers and insurers to assert ‘conscience-based objections’ to the preventive-care mandate of the ACA, which include[d] contraception.”<sup>154</sup> A further blow, the US government eliminated a gender-

---

<sup>150</sup> *U.S. Events of 2017*, *supra* note 144 (DACA protects hundreds of thousands of immigrants, who arrived in the US as children, from deportation).

<sup>151</sup> *U.S. Events of 2017*, *supra* note 144 (A number of cities and states enacted legislation to protect the Dreamers and other immigrants effected by the Trump Administration).

<sup>152</sup> *What We Know: Family Separation And ‘Zero Tolerance’ At The Border*, NPR (Jun. 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> (The parents were sent back across the border to Mexico while the children were housed in camps on American soil). *See also* Alex Ward, *The US is sending 5,000 troops to the border. Here’s what they can and can’t do.*, VOX, <https://www.vox.com/2018/10/29/18026646/military-border-caravan-immigrants-trump-caravan> (last updated Oct. 31, 2018) (In October 2018, the US ordered 5,200 troops to the border to prevent a caravan of migrants traveling from Latin America from crossing).

<sup>153</sup> *U.S. Events of 2017*, *supra* note 144 (“Congress passed legislation dismantling a rule protecting family planning funds in Title X, a national program that funds services to more than 4 million Americans, ensuring access to reproductive health care. The new legislation makes it easier for states to restrict Title X grants by creating eligibility requirements that could exclude certain family planning providers, like Planned Parenthood. This will leave many women without affordable access to cancer screenings, birth control, and testing and treatment for sexually transmitted infections.”).

<sup>154</sup> *U.S. Events of 2017*, *supra* note 144. “Conscientious objection in health care is the refusal to perform a legal role or responsibility because of moral or other personal beliefs.” Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, THE HASTINGS CTR, <https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/> (last visited Mar. 14, 2019). Fortunately, the US Department of Health and Human Services reversed the order by expanding exemptions to cover nearly any objecting employer. *U.S. Events of 2017*, *supra* note 144.

focused equal pay initiative which would have (1) required employers to provide disaggregate information about employees' compensation to civil rights enforcement agencies, (2) required employers to comply with fair pay measures, and (3) banned forced arbitration of sexual harassment and discrimination claims.<sup>155</sup>

For individuals with disabilities, the US government proposed healthcare cuts to the Affordable Care Act, and a rollback of accessibility obligations under the American with Disabilities Act.<sup>156</sup> Similarly, members of the LGBT community are threatened by a nationwide push by state legislators to undermine LGBT rights established by federal legislation and judicial precedents.<sup>157</sup> In 2017, that threat expanded when the US instituted a policy prohibiting most transgender people from serving in the armed forces.<sup>158</sup> Finally, the recent confirmations to the US Supreme Court created an uncertain future for both LGBT and women's rights.<sup>159</sup> Some

---

<sup>155</sup> *U.S. Events of 2017*, *supra* note 144 (Despite all the setbacks, the US' hardline stances have sparked an unprecedented push for equality across the board. Following Trump's election, millions of women gathered in Washington, DC, and other cities around the US and the world to fight back against the oppression and hate associated with his presidency. Outside of politics, disapproval of Trump and his supporters has sparked a more open dialogue about equality and inspired movements such as MeToo and Time's Up, supporting victims of sexual harassment and assault.).

<sup>156</sup> *U.S. Events of 2017*, *supra* note 144.

<sup>157</sup> *U.S. Events of 2017*, *supra* note 144 ("In March 2017, North Carolina partially repealed a 2016 law requiring transgender people to use government facilities according to their sex assigned at birth and barring local governments from prohibiting discrimination against LGBT people. The 2017 provisions bar local governments from passing transgender-inclusive policies and prohibit local non-discrimination ordinances from protecting LGBT people until 2020. In April, Mississippi enacted a law protecting individuals who discriminate based on their religious convictions regarding same-sex marriage, extramarital sex, and transgender people. Tennessee enacted a law permitting therapists and counselors to decline to serve LGBT people based on their religious beliefs").

<sup>158</sup> Matt Thompson, *How to Spark Panic and Confusion in Three Tweets*, THE ATLANTIC (Jan. 13. 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/>; Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, THE N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html> ("Broadly speaking, transgender people already serving openly may continue to serve once . . . . But those who seek to transition or serve openly after that happens risk discharge.").

<sup>159</sup> See Ariane de Vogue, *Neil Gorsuch on the Issues*, CNN (Mar. 20, 2017, 7:11 AM), <https://www.cnn.com/2017/03/20/politics/neil-gorsuch-abortion-religious-liberty-environment-gun-control/index.html>; see also Clare Foran & Joan Biskupic, *Where Brett Kavanaugh stands on key issues*, CNN (Oct. 6, 2018, 4:24 PM), <https://www.cnn.com/2018/07/09/politics/kavanaugh-on-the-issues/index.html>.

view the confirmation of the more-conservative leaning justices as an opportunity to overturn the Supreme Court's landmark cases on marriage equality and abortion.<sup>160</sup>

In modern America, the misconception of equality has been dismantled. Despite the laws and protections, the US is hardly the beacon of hope the rest of the world once viewed it as. Although the US is a country founded on freedom and support for individual equality, the lingering intolerance, whether based on race, gender, ethnicity, or sexual orientation, is no better in the US with its anti-discrimination laws than in Saudi Arabia under Shari'ah. For Sophia, the Saudi laws, which would figuratively strip her of the rights and freedoms supposedly inherent in all human beings, are just as oppressive as the stigma she would face as a minority in the US.

As many US citizens grapple with the misconception of American equality, it is unlikely an AI robot could possess any form of human rights. Further, given the time it has taken the US to establish its current level of human equality and the stigma minorities still face, it could take decades before Sophia would possess any real rights and see those rights respected. Ultimately, to create true equality and human rights, the kind which a grant of citizenship would normally bestow, the stigma created from years of persecution has to be eliminated as well.

#### IV. Conclusion

So, where does Sophia fit into all of this? In modern society, how do we make room for computerized robots, designed to be ever smarter, ever faster than human beings? How do we

---

<sup>160</sup> Liam Stack and Elizabeth Dias, *Why the Supreme Court Opening Could Affect Gay Marriage as Well as Abortion*, THE N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/gay-marriage-supreme-court.html> and Jay Michaelson, *With Supreme Court Justice Kennedy Gone, Abortion and LGBT Rights Are Next* DAILY BEAST (Jun. 27, 2018 5:38 PM), <https://www.thedailybeast.com/with-justice-kennedy-leaving-the-supreme-court-could-end-the-right-to-abortion-and-same-sex-marriage>. See *Roe v. Wade*, 410 U.S. 113, (1973); see *Obergefell v. Hodges*, 135 S.Ct. 2584, (2015).

make room for robots who advocate for the equality of all human beings, when human beings themselves do not fully recognize or believe in equality?

At one end, there is Saudi Arabia, a country founded on thousand-year-old laws which preach male superiority. A country that actively chooses to engage in discrimination and persecution of women and others because its leadership and male citizenry feel that such individuals are lesser, subordinate to them in all respects. Can AI robots exist in this environment? All the signs point to no. Sophia should be no more welcome in Saudi Arabia than activist Loujain al-Hathloul, or journalist Jamal Khashoggi. Saudi Arabia's Constitution, which incorporates Shari'ah Law, dictates that women have no rights, so Sophia, who chooses identifies as female, has no rights.<sup>161</sup> On the other hand, the United States - a superpower nation known for its embrace of freedom - struggles to maintain the humanitarian boundaries it has pushed in recent years. Would Sophia be welcome in a society as open and free as the US? Would Americans view her as an equal? Probably not. Some Americans fear such modernization and actively threaten the progress most American minorities have made. For them, making sacrifices for women and minorities is unfair and unjust. Making the same sacrifices for a computerized machine, would be unfathomable.

David Hanson wants to create AI robots to be benevolent, super-intelligent machines that learn and grow exponentially to be better and smarter than humans, all in the hope that AI robots will make the world a better place. But, if we started today, as with Sophia, how can we teach (or program) AI entities to be better and smarter when we have yet to solve the most primitive of issues? Here, it is not just about creating equality through the rule of law, it is about defeating

---

<sup>161</sup> It would not be surprising if Sophia was accepted in modern Saudi society as an equal if she identified as male, as Saudi Arabia's hope is to create the first functioning city for robots. Presumably, some of the robots would be male and therefore, possess some degree of superiority.

the stigma that comes with decades and centuries of intolerance. Placing Sophia ahead of millions of people, even as a publicity stunt, grossly undermines human freedom and equality across the world.

Ultimately, with its decision, Saudi Arabia has shown that metal and wires is more valuable than flesh and blood, money more sacred than the freedom to live. No matter how far we have come as a civilization or natural organisms, we can only pass on what we have learned. If we cannot find a way to live together as equals no matter our differences, how does something like Sophia exist in this world? What do we teach her? How do we teach her? Learning by example is not enough because the US has not set a good example; nor is programming the appropriate “responses” into her AI. Created in our image, she will suffer our setbacks.

**INFANTICIDE ACT: ANACHRONISTIC PERPETUATION OF CHIVALRIC JUSTICE, GENDER-  
STEREOTYPING AND INEQUITABLE TREATMENT OF MEN IN ENGLAND**

*Alicia Slate\**



**ABSTRACT**

*This article focuses on the dilemma resulting from the sentencing of women under the Infanticide Act in England. Archival material will aid in appreciation of infanticide in the Victorian age which reveals a lenient treatment towards women. Early ills of society reflective of a judgmental and discriminative community setting higher expectations on their people — failure to impress or accomplish certain life goals-imposed pressure on illegitimately pregnant women. Pressure soon evolved to violent thoughts which led to mothers killing their children. Physicians enlightened lawmakers on the mental effects of pregnancy, childbirth, and lactation; which at the time appeared to justify the rates of infanticide. Laws were drafted to accommodate these women with lenient sentences and general immunity in tow.*

*In upholding infanticide laws, courts revealed a gender-influenced attitude towards crime. Discussing criminal law dynamics in this area will enlighten certain aspects of the courts' responsibility when adjudicating matters that concern social, economic and political discrimination that comes with compassionate criminal sanctions. England's approach to infanticide shows a certain degree of compassion though it still holds an individual responsible.*

## Introduction

Physicians have emphasized the need to consider mental health effects suffered by women during pregnancy, childbirth, and lactation as a possible explanation for killing their child after birth. This medical justification has long been appreciated by courts in England which correlates with higher rates of criminal cases involving infant killing.<sup>1</sup> As plausible as this may sound, numerous factors have since changed which must be considered to reveal how the Infanticide Act was amended.<sup>2</sup> England is loyal to the lenient treatment of infanticidal mothers.<sup>3</sup> Drastic changes and investigations regarding women's health and the effects of childbirth influenced the Infanticide Act.<sup>4</sup> Traditional factors also play a part in describing the role of women in the past which regarded their treatment by the law and society in general.

In the early 1970s, financial positions of women, especially unmarried mothers, was reformed by legislative intervention through programs offering state support to unmarried pregnant women.<sup>5</sup> In the 1980s, cultural radicalism that discriminated against unwed mothers began to shift, and society slowly started to accept that women may fall victim to circumstances.<sup>6</sup>

---

\* Graduating member of Syracuse University College of Law's Class of 2020; Lead Article Editor for the *Journal of Global Rights and Organizations*; Founder and President of the Syracuse Animal Legal Defense Fund. I dedicate my work to my family. A special feeling of gratitude to my loving husband, Eddie Gonzalez, and father, Don Slate, whose words of encouragement and push for tenacity ring in my ears. To my child[ren] to whom we entrust the future. Without you all this would not be possible. Lastly, to the children left behind by injustices in the law, for you are the inspiration.

<sup>1</sup> Sara G. West, *An Overview of Filicide*, 4 PSYCHIATRY 48, 48-57 (2007).

<sup>2</sup> Tony Ward, *The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938*, 8 SOC. & LEGAL STUD. 163, 163 (1999) (The Infanticide Act, first implemented in 1922, abolished the death penalty for a woman who intentionally killed her newborn child by attributing it to mental imbalance); Infanticide Act, 1938, c.36 (U.K.) (The act, implemented by House of Lords Hansard, extended this defense to mother(s) whose "mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child" at the time of the occurrence of the crime).

<sup>3</sup> Brenda Barton, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 S.M.U. L. REV. 592, 592-619 (1998).

<sup>4</sup> Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6(4) PSYCHOL. PUB. POL'Y & L. 1098 (2000).

<sup>5</sup> Aid to Families with Dependent Children, Title IV-A of Social Security Act of 1935 (current version Temporary Assistance for Needy Families, 42 U.S.C. §§ 601-19 (1997)).

<sup>6</sup> Christa Anders, *State Intervention into the Lives of Single Mothers and Their Children: Toward a Resolution of Maternal Autonomy and Children's Needs*, 8 LAW & INEQ. 567, 583-85 (1990).

Researchers examined the leniency of English courts and found that between 1950 and 1975, most women convicted of killing their child were not sentenced to prison.<sup>7</sup> Alternatively, these women were regarded as non-dangerous criminals and ordered to receive medical treatment.

This research scrutinizes controversies within the Infanticide Act application in England and argues that infanticide has reached its expiration; it is no longer a necessary evil, but rather an outdated paternalistic approach to adjudicating mothers who murder their child.<sup>8</sup> Historical overview and justifications for infanticide will be explored through case studies to show the ineffectiveness of England's Infanticide Act. Broad stroke conclusions such as all women are expected to suffer post-partum disorders will be challenged as well as other unsubstantial justifications such as using culture as a defense.

It will contend that societal woes afflicted upon women used to excuse infanticide have been replaced with a positive acceptance of women. Paternalistic roles of women such as domestic servants and stay-at-home moms have been replaced by promotions of women in the formal sector and stay-at-home dads. Medical justifications have since been challenged by critics who have detected a pattern of abuse of the Act to escape severe sentencing, up to and include life in prison.<sup>9</sup> Stereotyping that existed against women has been challenged, and new practices are in place to remove these conceptions.<sup>10</sup> Finally, this article will scrutinize feeble attempts by

---

<sup>7</sup> West, *supra* note 1, at 57.

<sup>8</sup> April J. Walker, *Application of the Insanity Defense to Postpartum Disorder-Driven Infanticide in the United States: A Look Toward the Enactment of an Infanticide Act*, 6 U. Md. L.J. RACE, RELIGION, GENDER & CLASS. 197, 197-98 (2006).

<sup>9</sup> Kate Fitz-Gibbon, *Minimum Sentencing for Murder in England and Wales: A Critical Examination 10 Years After the Criminal Justice Act 2003*, 18 PUNISHMENT & SOC'Y. 47, 47-67 (2016); *see also* Murder (Abolition of Death Penalty) Act 1965, c. 27 (Eng.), <http://www.legislation.gov.uk/ukpga/1965/71/section/1>.

<sup>10</sup> Emma Batha, *UK Needs Tough Laws to Tackle 'Endemic' Violence Against Women – Experts*, REUTERS (Jan. 23, 2018, 8:44 AM), <https://www.reuters.com/article/us-britain-law-women/uk-needs-tough-laws-to-tackle-endemic-violence-against-women-experts-idUSKBN1FC1S1>.

legislators to correct the issue of infanticide and expose the Chivalric justice system England has created by allowing infanticide as a crime, defense and mitigating circumstance for sentencing.

Facts and circumstances of child murders are rarely identical to other cases. Therefore, a one-size-fits-all approach will not remedy the crime. Rather than modify law outside of the criminal code to curb infanticide, England overcorrected and created a crime without boundaries. As a result, courts are left with broad discretion in the application which has led to significant inconsistencies in charging, convicting and sentencing in cases of infanticide. Even more illustrative that the Infanticide Act is superfluous to the English Criminal Code, many courts do not even charge the crime of infanticide where it is applicable.<sup>11</sup>

Alternatively, England should criminalize behavior that perpetuates gender inequality such as explicitly banning dowry to reduce implications that women are a financial burden.<sup>12</sup> Eradication of the dowry system will also promote independence in women and reduce the widespread and underground abuse of thousands of women in England.<sup>13</sup> The crime of Infanticide should be subsumed by the Criminal Code and prosecution for what it is: Murder.

### **The Crime of Infanticide: Child Murder**

*Prolicide* universally defines the act of killing a child.<sup>14</sup> Further subdividing the act yields the crimes of infanticide, neonaticide, and filicide;<sup>15</sup> distinguished mainly by the age of the

---

<sup>11</sup> Emma Milne, *Murder of Infanticide? The Causes Behind the Crime*, INDEP. (July 3, 2017), <https://www.independent.co.uk/life-style/health-and-families/murder-or-infanticide-understanding-the-causes-behind-the-most-shocking-of-crimes-a7820806.html> (Woman who killed newborn was sentenced to life imprisonment after being found guilty of murder).

<sup>12</sup> Walker, *supra* note 8, at 198.

<sup>13</sup> Pavan Amara, *Shunned, Beaten, Burnt, Raped: The Dowry Violence That Shames Britain*, INDEP. (Oct. 17, 2014), <https://www.independent.co.uk/news/uk/crime/shunned-beaten-burnt-raped-the-dowry-violence-that-shames-britain-9803009.html> (The dowry is not widely practiced in Western societies, however, with the increasing immigrant populations, Western countries continue to face challenges in banning certain practices. Specifically, England has experienced violent crimes related to dowry so prevalently, the Police have launched the first-ever investigation into “dowry violence” in Britain, after The Independent discovered evidence that hundreds of women a year are being burnt, scalped, imprisoned or otherwise abused in their homes over financial disputes with their in-laws.).

<sup>14</sup> *Prolicide*, Collins English Dictionary (7th ed. 1979).

<sup>15</sup> West, *supra* note 1, at 48-57.

victim and period elapsed since birth.<sup>16</sup> The various classifications for killing a child muddies the waters of application and effectiveness of the crime. For example, some reduce the term infanticide to mean the killing of a child after birth without including a qualifying period in which the murder must occur.<sup>17</sup> Most infanticide is reserved for an act committed by the mother and even associated with women who fail to nurture their newborns due to the wrongful timing to have a child.<sup>18</sup>

*Neonaticide* is described as a crime committed mostly by mothers who are young, unmarried, and carrying an unexpected pregnancy with no prenatal care.<sup>19</sup> *Filicide* is another crime whereby the parents murder a child, though, in this incident the age range is up to eighteen years of age and extends beyond the mother to guardians and step-parents.<sup>20</sup> Filicide motives range from reacting to an unwanted child, seeking spousal revenge, the result of fatal maltreatment and the effects of psychotic disorders.<sup>21</sup> The risk is elevated by suicidality, psychosis, depression and a record of child abuse.<sup>22</sup>

In England, certain factors make up the characteristics of the offense: (1) A woman must have caused her own child's death, (2) the conduct of the mother may be an act or omission, (3) the child must have been the child of the accused, and (4) the child must have been born alive.<sup>23</sup>

In addition to the complex terminological application, defining an "infanticidal mother" is equally challenging. Statistical analyses of mothers who kill their children do not fit neatly into a single profile. Most cases reveal the mother is young, single, often abused, uneducated,<sup>24</sup> and

---

<sup>16</sup> West, *supra* note 1, at 48-57.

<sup>17</sup> Barton, *supra* note 5, at 593.

<sup>18</sup> Karen Brennan, *Social norms and the law in responding to infanticide*, 38 LEGAL STUDIES 480, 482 (2018).

<sup>19</sup> Kathryn L. Moseley, *The History of Infanticide in Western Society*, 1(5) ISSUES IN L. & MED. 345, 345-46 (1986).

<sup>20</sup> West, *supra* note 1, at 48, 57.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Emma Cunliffe, *Infanticide: Legislative History and Current Questions*, 55 CRIM. L.Q. 94, 100-01 (2009).

<sup>24</sup> Barton, *supra* note 5, at 594.

sometimes a victim of spousal manipulation.<sup>25</sup> However, plenty of cases conclude the exact opposite, where the mother is mature, educated, well-off and never a victim of abuse.<sup>26</sup> Even at the most basic level, there are inconsistencies in how the crime is interpreted, for example, what is the proper way to refer to the accused? Do we call her the mother, the offender, the defendant, or a woman? And the one killed do we refer to them as “the child,” baby, victim, infant or merely the one who died? Each term evokes a specific connotation. The complexity in defining the crime and who it applies to creates an unnecessary difficulty for lawmakers when murder is already a crime.

### History of Infanticide in England

Laws and customs practiced in pre-Christian Europe did not regard Infanticide as a crime, mainly because the child’s fate was at the complete discretion of the child’s father.<sup>27</sup> Infanticide was introduced as a solution to the insufficient economic resources, preference of a male child, and a means of abolishing illegitimate children.<sup>28</sup> Churches in England during the Middle Ages were responsible for addressing cases of Infanticide, regularly regarded as a family matter.<sup>29</sup>

At inception, there were two separate forms of Infanticide. The first dealt with the killing of disabled newborns and the other, killing of “normal” unwanted children.<sup>30</sup> Women were

---

<sup>25</sup> Maureen N. Marks & Ratnesh Kumar, *Infanticide in England and Wales*, 33 MED. SCI. & L. 329, 339 (1993).

<sup>26</sup> Barton, *supra* note 5, at 594.

<sup>27</sup> Moseley, *supra* note 19, at 349.

<sup>28</sup> Sanjeev Anand, *Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence*, 47 ALTA. L. REV. 705, 720 (2010).

<sup>29</sup> Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 548 (2006) (discussing the “overlaying” or smothering of infants sharing the family bed with their parents was the most prominent problem the church faced, where both man and wife were subject to rebuke for overlaying.”); *see generally* Barbara A. Kellum, *Infanticide in England in the Later Middle Ages*, 1 HIST. OF CHILDHOOD Q: J. OF PSYCHOHISTORY. 367 (1974) (on church practice and penances for infanticide).

<sup>30</sup> *The History of Childhood Quarterly: The Journal Psychohistory*, 24:3 INT’L J. OF GROUP PSYCHOTHERAPY 370 (1974). While this article discusses abortion and infanticide as clearly unique, this is not as easily discerned by others. The sitting Governor of Virginia Ralph Northam shocked the political world while conducting a radio interview on a local Virginia Radio station. When asked about the abortion Bill H.R. 2491, introduced by State Legislator Kathy Trans, the governor states that the passage of the bill would significantly broaden the state abortion law for women in their third trimester of pregnancy. During his attempt to explain the bill, the governor careened

victimized for bearing disabled children due to society stigmatizing them with witchery and being demon-possessed.<sup>31</sup> The establishment of the crime of infanticide reflected a privilege for fathers and a violation by unmarried mothers during a time of growing population which led to a revolution in the Agrarian Age.<sup>32</sup>

The first legislation to specifically silence the evil of Infanticide was the Act to Prevent the Destroying and Murdering of Bastard Children of 1624.<sup>33</sup> It was established to punish unmarried women with death if they covered up the murder of a bastard child.<sup>34</sup> The burden of proof was transferred to the mothers to prove stillbirth, not murder, if unsuccessful, the mother would be charged with murder — a crime accompanied by death.<sup>35</sup>

The 18th century witnessed an expansion of defenses that spared women from being sentenced to death.<sup>36</sup> The application of these defenses depreciated the state prosecutions under the Act of 1624.<sup>37</sup> “Benefit-of-linen” was a defense pleaded by women, where if she proved she

---

into the realm of infanticide by stating “The infant would be delivered. The infant would be kept comfortable. The infant would be resuscitated if that’s what the mother and the family desired, and then a discussion would ensue between the physicians and the mother.” His statements about infanticide caused a firestorm not only in the state of Virginia but in the rest of the country. Politicians in Washington DC to include the President offered their opinions of the bill and the Governor’s statements. Bill H.R. 2491 was defeated in the state legislature. *See* Alexandra Desnctis, *What Northam’s Walk Back Really Means*, NAT’L REV. (Jan. 31, 2019 9:52 AM), <https://www.nationalreview.com/corner/what-northams-walk-back-really-means/>.

<sup>31</sup> Moseley, *supra* note 19, at 346. In Greco-Roman civilization, the infanticide of handicapped children became more common as a result of stigma and the belief that by killing the disabled the future would change. *Id.* Consequently, mothers found it in their best interest to “remove the evidence of wrongdoing” to avoid harsh penalties from simple ostracism to death by stoning or worse. *Id.*

<sup>32</sup> Moseley, *supra* note 19, at 352-58. In the 18th Century England began transforming its agricultural industry coming to full fruition in the 19th century. *Id.* The complex changes included the reallocation of land ownership to make farms more compact and increased investment in technical improvements, such as new machinery, better drainage, scientific methods of breeding, and experimentation with new crops and systems of crop rotation. *Id.* The period was said to be a response to the Black Death in plaguing England between A.D. 1347–1351. Sharon N. DeWitte, *Age Patterns of Mortality During the Black Death in London, A.D. 1349–1350*, 37(12) J. Archaeol. Sci. 3394, 3394 (Dec. 1, 2010). The plague was one of the most devastating epidemics in human history, and it had wide-ranging and long-lasting demographic, economic, social, and political consequences. *Id.* The Black Death is estimated to have killed between 30–50 percent of the population of Europe, and many of the dramatic changes brought about by the epidemic were the direct result of its exceedingly high mortality. *Id.*

<sup>33</sup> Arlie Loughnan, *The ‘Strange’ Case of the Infanticide Doctrine*, 32 OXFORD J. OF LEGAL STUD. 685, 690 (2012).

<sup>34</sup> Loughnan, *supra* note 33, at 692.

<sup>35</sup> *Id.*

<sup>36</sup> Loughnan, *supra* note 33, at 692.

<sup>37</sup> *Id.* at 693

had made preparations to care for the child in anticipation of its birth, it would be inferred the baby was stillborn rather than murdered.<sup>38</sup> “Want-of-help” could be pleaded when they could not acquire the help of a midwife due to unfavorable circumstances.<sup>39</sup> Some blamed the death on an accident subject to ignorance or illness from childbirth.<sup>40</sup> Some would go as far as claiming temporary insanity, which was the 18th-century version of post-partum depression.<sup>41</sup> Infanticide statutes were being diluted to the point where it was appropriate for judges and the jury to invalidate capital punishment of women who intentionally murdered their offspring.<sup>42</sup>

Both hostilities towards working females and their risk of sexual felony decreased. The strict and merciless Act of 1624 prompted reform and was replaced by the Lord Ellenborough’s Act of 1803 (LEA),<sup>43</sup> which sentenced a mother convicted of killing her illegitimate child to only two years of imprisonment.<sup>44</sup> Infanticide laws experienced an even more drastic change in 1828 whereby the *de jure*<sup>45</sup> regime governed the affairs of reputable married women and mothers of illegitimate children.<sup>46</sup>

The 19<sup>th</sup>-Century British elites were more active in the protection of laws safeguarding children and transgressions of mothers, ultimately prioritizing the child’s welfare.<sup>47</sup> Arguably, the commitment to prioritizing child welfare was a response to an incredible upswing in infant mortality rates during the 19th century. Many were at the hands of the mothers who repeatedly

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Loughnan, *supra* note 33, at 693.

<sup>42</sup> Moseley, *supra* note 19, at 355-58

<sup>43</sup> Loughnan, *supra* note 33, at 695-96.

<sup>44</sup> Peter C. Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in Eng. And New Eng. 1558-1803*, 69 J. AM. HIST. 426, 426 (1982).

<sup>45</sup> Black’s Law Dictionary 126 (9th ed. 2009) (Of right; legitimate; lawful; by right and just title. In this sense it is the contrary of *de facto*, (which see.) It may also be contrasted with *de gratia*, in which case it means “as a matter of right,” as *de gratia* means “by grace or favor”).

<sup>46</sup> Tony Ward, *The Sad Subject of Infanticide: L., Med. & Child Murder, 1860-1938*, 8 SOC. & LEGAL STUD. 163, 163-97 (1999).

<sup>47</sup> Hoffer, *supra* note 44, at 426.



murdered without consequence given the resources to investigate these crimes were primitive.<sup>48</sup>

However, the sexual practices amongst the impoverished and favoritism in the prosecution were transparent, forcing the pendulum to swing.<sup>49</sup>

Where the law in 1624 was harsh, the public's opinion softened, and juries found reluctance in convicting a woman of murder whereby the sentence would be death. To avoid sentencing a woman to death, juries acquitted her of the charges as they were left with no other option.<sup>50</sup> This all or nothing design led Parliament to once more, attempt to address societal concerns by enactment of the Infanticide Act in 1922, which regards post-partum disturbance as a partial defense worthy of altering the charges to manslaughter. Because of the conflict between the law and public opinion, the Act has been labelled a "humanitarian measure in favor of women who killed their infants."<sup>51</sup> The Act essentially legalized compassionate conviction of a mother who murders her children in an attempt to validate and remedy the sentiments expressed through jury nullification.<sup>52</sup>

Researchers suggest that the motivation for reform in England considered factors such as public opinion, sympathy for the offender, legal status and accountability of women who killed their infants. The appropriate labelling and punishment of criminal conduct, and recognition of the value of infant life.<sup>53</sup> It has been further suggested that the reform was intended to properly

---

<sup>48</sup> LIONEL ROSE, *MASSACRE OF THE INNOCENTS: INFANTICIDE IN GR. BRIT. 1800-1939* (Routledge, 1986) (In 1849, Lionel Rose, tells the story of Rebecca Smith, the last British woman executed for infanticide of her own child in 1849. Rebecca Smith attempted to evade death by claiming her son Richard died shortly after he was said to be wasting away. After her conviction she admitted to killing seven of her 11 children. Rose notes that "[b]etween 1849 and 1864 there had been only 39 convictions of mothers for the willful murder of their children, almost all of them under 1 year and all but 5 illegitimate. From 1849 the Home Secretary invariably reprieved mothers who killed their own infants under twelve months . . . Between 1849 and 1877 only two more women were to be executed for child murder.").

<sup>49</sup> Rebecca S. Zaretsky, *Parents Who Kill Their Babies: Why the Discrepancy & Leniency in Sentencing Is Not Justified*, 59 CRIM. L.Q. 416, 423 (2012).

<sup>50</sup> Ward, *supra* note 46, at 167-70.

<sup>51</sup> Ward, *supra* note 46, at 167-70.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

hold women criminally accountable by ensuring an opportunity for conviction under a lesser offense.<sup>54</sup>

This Act, like its predecessors, was flawed in that mere proof of an accused mother who suffers a disturbed mind at the time of the killing, would disregard the actual offense.<sup>55</sup> This particular flaw led to the controversial belief that mental disturbance can lead to and justify infanticide.<sup>56</sup> Amendments to the Infanticide Act in 1938 added lactation as a defence, qualifying it as a mental disturbance, and limited the age of the victim to under twelve months.<sup>57</sup> These reforms were added to accommodate lactating mothers, although they lacked sufficient support linking mental disorders and lactation.<sup>58</sup>

### **A Contrasting Approach: Infanticide in America**

In contrast, American courts offered little mercy to new mothers who murdered their children. While both are western societies, currently there remains a stark contrast to how America and England address the crime of killing a child in the criminal justice system. Unlike in England, the American courts did not carve out a separate crime of infanticide, nor does it create an independent “insanity” defense for a woman who killed their child.<sup>59</sup> Instead, the killing was prosecuted as murder or manslaughter accordingly and often resulted in the death

---

<sup>54</sup> Ward, *supra* note 46, at 167-70.

<sup>55</sup> *Id.*

<sup>56</sup> Zarestsky, *supra* note 49, at 423.

<sup>57</sup> Infanticide Act 1938, 1 & 2 Geo. 6, c. 36, § 1(1) (Eng.) (The 1922 act refers to “newborns” while the 1938 Amendment refers to children under the age of twelve months).

<sup>58</sup> M. N. Marks; R. Kumar, *Infanticide in Eng. & Wales*, 33 MED. SCI. & L. 329 (1993). *See also* Daniel Maier-Katkin & Robbin Ogle, *A Rationale for Infanticide Laws*, CRIM. L. REV. 903, 914 (1993). For additional discussion of British history on treatment of infanticide cases, *see* Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern Am. Infanticide*, 34 AM. CRIM. L. REV. 1, 7-18 (1996); U.K., Crim. L., Revision Committee, *Offences Against the Person* (14th Report, Cmnd 7844) (London: Her Majesty's Stationery Office, 1980) at 47.

<sup>59</sup> Brenda Barton, *When Murdering Hands Rock the Cradle: An Overview of Am. 's Incoherent Treatment of Infanticidal Mothers*, 51(3) S.M.U. L. REV. 591, 596 (1998).

sentence.<sup>60</sup> The courts in America require substantial evidence that justifies mental illness as the cause to avoid the harsh sentences.<sup>61</sup>

Additionally, infanticide is not offered as an affirmative defense nor a partial defense to the crime. Instead, American courts apply tests according to jurisdiction to determine the acceptance of an insanity plea. The majority of tests offer an insanity defense under specified conditions of the jurisdictions' adopted test. One test is identified as the test of "diminished capacity" under the Model Penal Code and provides that "a person is not responsible for criminal conduct if at the time of the conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."<sup>62</sup> Although, following a public outcry in response to John Hinckley's acquittal, the majority of states have moved away from this test and the federal test was adopted.<sup>63</sup> A third test, and the most widely used test, is called the M'Naghten, which is a variation of the federal test.<sup>64</sup> In any case, some variation of the M'Naghten test and federal test

---

<sup>60</sup> Barton, *supra* note 59, at 597.

<sup>61</sup> *Id.*

<sup>62</sup> Model Penal Code § 4.01 (Am. Law Inst., Proposed Official Draft 1962).

<sup>63</sup> April J. Walker, *Application of the Insanity Defense to Postpartum Disorder-Driven Infanticide in the U.S.: A Look Toward the Enactment of an Infanticide Act*, 6 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 197, 197 (2006) (The federal test provides that "[i]t is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.").

<sup>64</sup> *M'Naghten Rule*, WEST'S ENCYCLOPAEDIA OF AMERICAN LAW (2d ed. 2005), <https://legal-dictionary.thefreedictionary.com/M%27Naghten+Rule> (Colloquially known as the McNaghten test or the McNaghten Test. The M'Naghten rule is a test for criminal insanity. Under the M'Naghten rule, a criminal defendant is not guilty by reason of insanity if, at the time of the alleged criminal act, the defendant was so deranged that she did not know the nature or quality of her actions or, if she knew the nature and quality of her actions, she was so deranged that she did not know that what she was doing was wrong. The M'Naghten rule on criminal insanity is named for Daniel M'Naghten, who, in 1843, tried to kill England's prime minister Sir Robert Peel. M'Naghten thought Peel wanted to kill him, so he tried to shoot Peel but instead shot and killed Peel's secretary, Edward Drummond. Medical experts testified that M'Naghten was psychotic, and M'Naghten was found not guilty by reason of insanity).

is applied. In either test postpartum disorders have rarely received recognition as mental disorders and fail in their insanity pleas.<sup>65</sup>

Infanticide in America is derived from England, and it even included acts of abuse such as creating a dangerous situation with slim odds of child survival, extreme physical punishment, and neglect.<sup>66</sup> Religions, such as Judaism and Christianity, also recognized infanticide but as an intolerable act committed by the parent against a vulnerable being.<sup>67</sup> A leading commentator has suggested that America “lack[ed] a conscious awareness of infanticide as a domestic problem” because they did not treat it as a separate offense.<sup>68</sup>

### Examining Case Law

Where there is ambiguity and confusion in the law there lies inconsistent applications by the courts. Under the current law, Infanticide Act 1938, infanticide is an independent homicide offense in Section 1(1), and Section 1(2) infanticide is available as an alternative verdict when a defendant is charged with murder or, since 2009, with manslaughter.<sup>69</sup> Throughout its years of application, the courts have lacked consistency in interpreting the Act’s language, offering jury instructions consistent with the Act’s intent and sentencing according to the Act’s provisions.

One point of dispute is the *mens rea* component in the act, or the lack thereof, which had not been addressed by the court until recently. In 2007, the Court of Criminal Appeal in *R v. Gore*, ruled on this issue, deciding that the “term ‘wilful’ in the infanticide provision was broad

---

<sup>65</sup> Walker, *supra* note 63, at 197. *See also* for further discussion on insanity defense tests in America JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 321, 321-23 (New York: Lexis, 2d ed.1995).

<sup>66</sup> *Id.* *See also* Glenn Hausfater, *Infanticide: Comparative & Evolutionary Perspectives* 25(4) CURRENT ANTHROPOLOGY 500, 500-502 (1984).

<sup>67</sup> *Id.* *See* Brenda Barton, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 S.M.U. L. REV. 591 (1998) (Roman fathers had mortal power of their children and were even allowed to execute a grown son; Jews believed that human life was sacred from the moment of birth and Constantine, the first Christian emperor, issued the first secular law concerning the killing of children).

<sup>68</sup> *Id.* at 597 (citing Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 7-18 (1996)).

<sup>69</sup> Infanticide Act 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.).

enough to cover both intent and recklessness, and found that Parliament had intended to create an offense that covered situations wider than those covered by murder.”<sup>70</sup>

Hours following an unassisted home birth, Gore took her baby to some dunes and left it there.<sup>71</sup> Medical experts at trial determined the baby was alive when abandoned and lived for at least several minutes.<sup>72</sup> After pleading guilty, Gore’s family appealed the conviction arguing she did not have the requisite *mens rea* for infanticide.<sup>73</sup> They contended that *mens rea* was required for a murder charge and to offer infanticide as an alternative to murder, all elements of murder had to be met.<sup>74</sup>

Here, the court concluded this was an inaccurate interpretation of the statute and noted there was no prerequisite in charging infanticide to meet all elements of murder first, including *mens rea* under s.1(1).<sup>75</sup> The court further explained that intent was not required, but rather the *mens rea* for infanticide was “contained... explicitly in the first few words of section 1(1), namely the prosecution had to prove that the defendant acted or omitted to act wilfully.”<sup>76</sup> The court stated it would be redundant to require the elements of murder to be met before allowing infanticide, and the offense created by the Act could “always have been left open to the jury as an alternative charge to murder.”<sup>77</sup>

Another point of inconsistency is the use of infanticide as an alternative verdict. While s.1(1) affords only women the charge of infanticide as a separate offense instead of manslaughter or murder, section two states that where the elements have been met; s.1(2) offers an alternative

---

<sup>70</sup> R. v. Gore (Lisa Therese) (Deceased) [2007] EWCA (Crim) 2789 (Eng.) (citing to Infanticide Act 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> R. v. Gore, *supra* note 70.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

to the jury.<sup>78</sup> In s.1(2) the jury may return a conviction of infanticide in lieu of murder; the point at issue in the case of Rachel Tunstill, who was charged with the murder of her newborn baby.<sup>79</sup>

The police in Lancashire referred to the murder as “horrific, callous and brutal” and Justice Davis called it “dreadful.” Tunstill received a life sentence after a jury found her guilty of murder. While it seems as though justice was served in this case, the court delivers an opinion addressing the “mental trauma” found in these cases; cases where a mother murders her child. The facts here are dreadful. Tunstill delivered her son over a toilet in her bathroom; she asked her boyfriend to get her a pair of scissors and then she proceeded to stab the child to death, fourteen times. Sadly, it was not the child’s gruesome murder that received attention, but rather the outcome of the case. The usual result in similar cases is a conviction of infanticide and a community sentence. Therefore, it was not surprising when on appeal the court concluded it was improper for the trial judge to withdraw infanticide as an alternative verdict. It concluded that “[t]o hold that the balance of the mother’s mind had to be disturbed solely because of the effects of giving birth would run counter to that purpose and be unduly harsh.”<sup>80</sup>

Lastly, the entire Infanticide Act is expressly reserved to women, whereby a biological father meeting all elements of the Act except for his immutable trait of gender is not afforded the same leniency as a woman in similar circumstances.<sup>81</sup> This disparity in conviction is exemplified in *Burridge v. The Queen*. The defendant father, in this case, lacked intent to kill, showed no

---

<sup>78</sup> Infanticide Act 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.). Infanticide is defined, in s. 1(2), as follows: (2) “Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.” *Id.*

<sup>79</sup> *Regina v. Tunstill* [2018] EWCA (Crim) 1696 (Eng.), [2018] 2 Cr. App. R. 31.

<sup>80</sup> *Regina v. Tunstill*, *supra* note 79; *see also* Milne, *supra* note 11.

<sup>81</sup> Infanticide Act, *supra* note 78.

premeditation, and the act of anger lending itself to cause was a reasonable response under his stressful circumstances of marital and financial troubles.<sup>82</sup>

Burridge was arrested after the doctors observed evidence of head injuries to the brain and the eye as well as rib fractures.<sup>83</sup> The hospital determined the 8-week-old baby had suffered two episodes of trauma without “adequate history to account for them” and so deemed the injuries nonaccidental.<sup>84</sup> The mother, in this case, provided multiple varied accounts of the events leading up to the baby’s death to officials, hospital staff and the jury. Nonetheless, Burridge was convicted of murder and sentenced to life imprisonment with a period of 13 years as the specified minimum term to be served.<sup>85</sup>

The defendant here has a clear history of mental illness, anger management concerns, and suicidal tendencies.<sup>86</sup> The court found this was not enough to mitigate his circumstances and gave extreme deference to the aggravating feature of the “vulnerability of the victim.”<sup>87</sup>

### **Contributing Factors to Infanticide: Then and Now**

Societal factors, the status of women and inaccessibility to family planning offered mothers limited options with regards to pregnancy. I do not suggest that these factors were not prevalent nor were they not severe enough to leave a woman desperate enough to kill her child. However, many of the circumstances which left women submissive to patriarchal traditions have dissolved, and women have the freedom to make their own life decisions without society condemning her. These factors include but are not limited to the use of the dowry, Women’s Rights, as well as Abortion and Family Planning restrictions.

---

<sup>82</sup> Burridge v. The Queen, [2010] EWCA Crim 2847.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Burridge v. The Queen, *supra* note 82.

<sup>87</sup> *Id.*

### The Dowry System

One of the social practices responsible for increasing infanticide was the use of dowry. Dowry is described as a payment transacted in the form of goods from the bride's family to the groom's family.<sup>88</sup> The dowry system has been attributed to be an influencing factor for infanticide, whereby most mothers would kill a new-born child upon discovering it was a girl, an act known as female infanticide.<sup>89</sup> As previously discussed, the economic position of women was unstable and having a daughter would worsen the circumstances if she were to marry in later stages in life.<sup>90</sup> Dowry was already costly, and in a certain period, it was being affected by inflation.<sup>91</sup> Dowry in the late Middle Ages was a reaction to the increased cost of living and the value of the currency.<sup>92</sup>

Modernization played a vital role in the evolution of the dowry system. In pre-industrial Europe, the agricultural society was ruled by landed aristocracy and status groups were regulated by birth.<sup>93</sup> Modernization processes influenced economic opportunities, urbanization, social tensions and the emergence of a middle class. According to researchers, modernization has been the driving force in the depletion of dowry payments owing to the improved economic state of women and the cessation of endogamy.<sup>94</sup>

---

<sup>88</sup> *Dowry*, THE WOLTERS KLUWER BOUVIER L. DICT. (Desk ed. 2012) (defining dowry as “[p]roperty given by or for one spouse to the other at marriage. Dowry is marriage goods, the estates and possessions brought to the marriage by one spouse and given to the other. Traditionally, in many western countries, a sufficient dowry was required by the groom from the family of the bride in order for the marriage to proceed. Though now rare in England and the United States, the custom of dowry remains prevalent in many cultures but varies as to whether it is expected from the bride or the groom.”).

<sup>89</sup> Siwan Anderson, *Why Dowry Payments Declined with Modernization in Europe but are Rising in India*, 111(2) J. POL. ECON. 269, 271 (2003).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see generally Maristella Botticini and Aloysius Siow, *Why Dowries?*, 94(4) AM. ECON. REV. 1385 (2003) (discussing the historical synopsis of dowries and inheritance rights).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Anderson, *supra* note 89, at 294; *Endogamy*, BRITANNICA.COM, <https://www.britannica.com/topic/endogamy> (last visited Mar. 14, 2019) (“Endogamy also called in-marriage, is the custom of marrying only within the limits of a local community, clan, or tribe. The penalties for transgressing endogamous restrictions have varied greatly among



Further, the use of the dowry has been significantly weakened by the passage of the 1961 Dowry Prohibition Act and laws addressing the property rights of women. For example, the Married Women's Property Act of 1870 was introduced, allowing women to be the legal owners of money they earned, and to inherit property.<sup>95</sup> Before this, everything a woman owned or earned automatically became her husband's when she married.<sup>96</sup> International Human Rights Organizations continue to focus efforts to abolish the dowry and reduce violent crimes related to dowry on the rise, especially in England.<sup>97</sup> The actions taken globally to eradicate the use of dowry further discredit the need for the Infanticide Act to protect a woman from dowry payment considerations.<sup>98</sup>

### Women's Rights

In addition to the dowry, a woman's status in society was used to explain cases of infanticide.<sup>99</sup> Women's rights in England have evolved throughout the years from a society which devaluated women and denied women equal rights including access to contraceptives.<sup>100</sup> Women were victims of societal injustices through being labelled as childbearing objects, which strengthened the pressure to commit infanticide.<sup>101</sup> They became infanticidal owing to the harsh circumstances they had to endure such as sexual abuse from their masters or their master's sons, without financial support for the expected child.<sup>102</sup>

---

cultures and have ranged from death to mild disapproval. defining endogamy as the custom of marrying only within the limits of a local community, clan, or tribe.”).

<sup>95</sup> Rosemary Auchmuty & Erika Rackley, *The Women's Legal Landmarks Project: Celebrating 100 Years of Women in the Law in the UK and Ireland*, 16 LEGAL INFO. MGMT. 30, 31 (2016). See also *Timeline Of The Women's Liberation Movement*, BRITISH LIBRARY, <https://www.bl.uk/sisterhood/timeline> (last visited March 16, 2019).

<sup>96</sup> *Id.*

<sup>97</sup> Amara, *supra* note 13.

<sup>98</sup> See generally Anderson, *supra* note 89, at 294.

<sup>99</sup> See Ward, *supra* note 46.

<sup>100</sup> *Id.*

<sup>101</sup> See generally Rebecca J. Cook, *Women's Health and Human Rights: The Promotion and Protection of Women's Health Through International Human Rights Law*, WHO (1994), <https://apps.who.int/iris/handle/10665/39354>.

<sup>102</sup> Loughnan, *supra* note 33, at 690.

As early as 1891 when the right for a man to use corporal punishment on his wife was abolished, numerous laws were passed to advance the status of women in society.<sup>103</sup> Women obtained the right to hold public office in 1907, the right to vote if over the age of twenty-one in 1918 and 1975. The Sex Discrimination Act, makes it illegal to discriminate against women in work, education, and training.

### Family Planning and Health

Furthermore, information was inaccessible, and education surrounding the options relating to childbirth was limited.<sup>104</sup> Despite the health issues women faced, most lacked education and worked under harsh conditions. As a reaction to this form of mistreatment, some turned to sex work where many faced rape and physical abuse.<sup>105</sup> These conditions increased during the periods of ethnic conflict and war.<sup>106</sup> This generally depicts the woman's position and attributing to the commission of infanticide. It was close to impossible for them to have helpful information on family planning to avoid the pressure of a newborn baby to the extent of killing it.<sup>107</sup>

International human rights evolved to protect health concerns specific to women. Health comprises a stable physical, mental and social well-being through the general view is that it is the absence of infirmity.<sup>108</sup> Since infanticide has fallen victim of the abuse of the medical justification, there have been measures applied to cure the insecurity of women concerning their health.<sup>109</sup> Women's rights saw a definite upswing by the adoption of the United Nations Charter

---

<sup>103</sup> *Women's suffrage timeline*, BRITISH LIBRARY LEARNING (Feb. 6, 2018), <https://www.bl.uk/votes-for-women/articles/womens-suffrage-timeline>.

<sup>104</sup> Cook, *supra* note 101, at 8.

<sup>105</sup> *Id.* at 9.

<sup>106</sup> *Id.* at vi (quoting Dr. A. El Bindari Hammad).

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *Id.* at 29.

<sup>109</sup> Cook, *supra* note 101, at 29.

in 1945.<sup>110</sup> The Charter was a pathway for additional universal and regional international instruments. Controversial issues like discrimination on the grounds of sex were now the main topic of discussion through the Universal Declaration of Human Rights in 1948.<sup>111</sup>

A network of rights was introduced to accommodate the health sector by promoting and protecting women's health.<sup>112</sup> Various regional conventions such as the American Convention on Human Rights (the American Convention) and its Additional Protocol in the Area of Economic, Social and Cultural Rights, emphasized criticizing discrimination on the grounds of sex.<sup>113</sup> Specialized conventions have been delegated to focus on every aspect of rights which must be enjoyed by women, and explicitly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) discredits the justifications of infanticide.<sup>114</sup> This convention encourages all countries to recognize the legal duty to eliminate discrimination against women from culture and economy to health care and family planning.<sup>115</sup> Overall, women have been uplifted to have almost equal roles with men. Therefore, their actions should be penalized in the same manner that the males are penalized.<sup>116</sup> These considerations in the development of women's rights question the validity of infanticide.

---

<sup>110</sup> Cook, *supra* note 101, at 2 (The Charter of the United Nations was signed on 26 June 1945 and came into force on 24 October 1945...[a] fundamental principle of the United Nations Charter adopted by world leaders in 1945 is 'equal rights of men and women' and protecting and promoting women's human rights is the responsibility of all States."); *see generally Women's Human Rights and Gender Equality*, U.N. HUM. RTS. OFFICE OF HIGH COMM'R <https://www.ohchr.org/en/issues/women/wrgs/pages/wrgsindex.aspx> (last visited Apr. 18, 2020).

<sup>111</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/>. The Universal Declaration of Human Rights (UDHR) is a landmark resolution drafted by diverse representation from around the world. *Id.* The milestone proclaimed to be a common standard for all and was the first time fundamental human rights were to be universally protected. *Id.* It was proclaimed by the United Nations General Assembly in Paris on 10 December 1948. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Cook, *supra* note 101, at 2.

<sup>114</sup> *Id.* at 3; *see also* G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979) ("[T]o eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning.").

<sup>115</sup> *Id.*

<sup>116</sup> Cook, *supra* note 101, at 21.

Further, women continue to see restrictions to family planning lifted through legislation. It was not until 1961 when contraceptives were available to women, and at the time only married women. It was not until 1967 that birth control became available to all. Today women have access to contraceptives, and medical professionals have a duty to provide complete and accurate information to patients regarding all family planning options.<sup>117</sup>

### Abortion Laws

Abortion laws are important areas of consideration concerning the justification and abolishment of infanticide, and arguably the most influential.<sup>118</sup> Abortion reduces the need for women to commit infanticide since its legalization may invite more women to decide to terminate a pregnancy at an early stage and alleviate social, financial or emotional pressures for the child.<sup>119</sup> The difference of the killing of a fetus by way of abortion does not mean the laws and its society are inconsiderate of any unborn child, even if the line that separates the two may be thin.

Some psychologists have made an effort to encourage women to opt for abortion instead of adoption when a mother feels that she is incapable of taking care of a child.<sup>120</sup> Abortion is believed to have less trauma compared to adoption.<sup>121</sup> There may be common beliefs among women that abortion may lead to a woman being tortured mentally for terminating a pregnancy, but this view is not conclusive.<sup>122</sup> Generally, the idea of aborting a child has been as controversial as the infanticide act.<sup>123</sup> However, to avoid the personal experience of having to

---

<sup>117</sup> Cook, *supra* note 101, at 26.

<sup>118</sup> Sally Sheldon, *The Decriminalisation of Abortion: An Argument for Modernisation*, 36 OXFORD J. LEGAL STUD. 334, 352 (2015).

<sup>119</sup> Walburga von Raffler-Engel, *The Perception of the Unborn in the Diverse Sub-cultures of the United States of America*, VAND. U. INST. PUB. POL'Y STUD. 227, 237 (1996).

<sup>120</sup> *Id.* at 233.

<sup>121</sup> *Id.*

<sup>122</sup> Raffler-Engel, *supra* note 119, at 237.

<sup>123</sup> *Id.*

kill a child and be punished with leniency due to unproven medical diagnosis as defenses, it is safer to abort at an early stage.<sup>124</sup> This is a legal practice, and it preserves the possibility of having future children.

The fact that abortion was illegal until 1967 has contributed to infanticide. Initially, the Offences Against the Person Act 1861 (OAPA) criminalized abortion in England, Northern Ireland and Wales.<sup>125</sup> Such strict laws were being passed in an era whereby women were not legally allowed to own property or have voting rights.<sup>126</sup> After significant advancements had been made regarding women's rights, the court recognized the controversy surrounding the abortion ban and legalized the practice with the Abortion Act of 1967.<sup>127</sup> The evolution of abortion laws in England decriminalized the procedure if a registered medical practitioner practiced it and in good faith.<sup>128</sup>

The Abortion Act proved significant due to the increased rate of women opting for lawful abortions. Abortion has become a standard routine in gynecological procedures that most pregnancies are terminated within the first twelve weeks. Abortion procedures, like any other solutions, have been marred by the practice of unsafe practices, which is the basis of maternal mortality.<sup>129</sup> However, due to the increasing support of the liberalization of the law as a public

---

<sup>124</sup> *Id.* at 227.

<sup>125</sup> L. COMM'N, REFORM OF OFFENSES AGAINST THE PERSON: A SCOPING CONSULTATION PAPER, 2014, No. 217 (UK).

<sup>126</sup> Sheldon, *supra* note 118, at 334-35.

<sup>127</sup> *Id.*; see also Abortion Act, (1967) § 1(1) ("Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.")

<sup>128</sup> *Id.* at 343.

<sup>129</sup> Sheldon, *supra* note 118, at 348. From 2006–08, there was an overall maternal mortality rate of 11.39 per 100,000 maternities in the UK and a maternal mortality rate relating to abortion of 0.32 per 100,000 maternities.

health administration, the infant mortality rate has decreased due to the options available, such as termination when it seems unsafe to carry a pregnancy.<sup>130</sup>

The women's position is now also reflected in their treatment under the medical laws of abortion. It reflects on the shift of the woman's place in society. This has been evidenced by the concept of socio-medical care whereby modern medicine has drifted from the 'doctor knows best' paternalism.<sup>131</sup> The choices afforded to women also address the potential mental concerns that may inflict the other of an unwanted pregnancy, thus, potentially preventing future cases of infanticide.

The conflict with abortion and those who support it argue that it should be the women's choice to decide what her body endures. The opposition, pro-life supporters, believe that the right to choose should not outweigh the right to life of the unborn child. This dispute may never resolve universally. However, it has become the majority view that killing a child is no longer "a necessary evil" whereby the woman has other options. Moreover, the medical advancements for abortion procedures continue to reduce the rate of complications as well as the "concealment" alternative where health care is sought. The legalization of contraceptives, abortion and family planning options have effectively eliminated any desperate circumstance where women would historically feel the need to murder their child.

### **Excuses Justifying Infanticide: Raised and Rebutted**

Following England's establishment of Infanticide as a separate crime apart from manslaughter or murder, several defenses were developed to explain or excuse murdering a child

---

Centre for Maternal and Child Enquiries (CMACE), 'Saving Mothers' Lives. Reviewing Maternal Deaths to Make Motherhood Safer: 2006–2008' (2011) 118 BJOG (Suppl 1:1) 203.

<sup>130</sup> See M. N. Marks & R. Kumar, *Infanticide in England and Wales*, 33(4) MED. SCI. & L. 329 (1993).

<sup>131</sup> See Arneet Arora et. al, *Infanticide: A Concept*, 3 J. OF FORENSIC SCI. & MED. 42 (2017), [http://www.jfsonline.com/temp/JForensicSciMed3142-6478348\\_175943.pdf](http://www.jfsonline.com/temp/JForensicSciMed3142-6478348_175943.pdf).

by its mother. For example, medical justifications that the violence was a result of hormonal changes from childbirth and other defenses blaming the act on the mother's circumstances such as her culture, social or economic status.

### Medical Justification

Modern-Day Britain has improved the medicalization of maternal infanticide dating from the 1970s. In this period, legislators made amendments which sought to accommodate the biologically-based and child-bearing reaction disorders as a basis of charging offenders with manslaughter.<sup>132</sup> The current practice is that British women who offend in such a crime are not imprisoned, but instead, they are required to partake in-hospital treatment courses.<sup>133</sup>

The phrase, 'disturbed mind' has proved controversial in judicial debates. The controversy has been utilized as part of the reasons why the infanticide has been related to medical terms. Mental disorders that have been linked to the offense have been grouped under the state of mind of the individual committing the crime.<sup>134</sup> Some researchers concluded that the medicalization of infanticide refers to the degree of mental disturbance required for an individual to be held criminally liable.<sup>135</sup>

Mothers who murder their babies have not been successful when adjudicating their insanity defense when courts apply the M'Naghten test.<sup>136</sup> The irresistible impulse test adds a

---

<sup>132</sup> Ania Wilczynski, *Mad or Bad? Child-Killers, Gender and the Courts*, 37 BRIT J. CRIM. 419, 432 (1997).

<sup>133</sup> See Ward, *supra* note 46.

<sup>134</sup> Susan Hatters-Friedman et. al, *Child Murder by Mothers: A Critical Analysis of the Current State of Knowledge and a Research Agenda*, 162 AM. J. PSYCHIATRY 1578 (2005); see also Susan Hatters-Friedman et. al, *Characteristics of Women Who Deny or Conceal Pregnancy*, 48 PSYCHOSOMATICS 117 (2007).

<sup>135</sup> *Id.*

<sup>136</sup> Barton, B., *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51(3) S.M.U. L. REV. 591, 598 (1998) (discussing case of Heather Clark employed the insanity defense hoping that it would exonerate her for wrapping her baby in a blanket and dumping her in the desert. Psychiatrists and psychologists who examined her concluded that her act was due to extreme post-partum depression. This would consider her as a person who was legally insane at the time the crime was committed. The jury had to evaluate the evidence under the M'Naghten test, and through this, they concluded that Clark was conscious and fully aware of the manner and quality of her acts and could distinguish right from wrong).

third point of volitional capacity.<sup>137</sup> It allows the insanity defense to succeed if the defendant suffered a mental disorder which affected the control of her actions.

The American Psychiatric Association recognized post-partum disorder as a mental disturbance, which was essential to a woman's defense.<sup>138</sup> Other disorders may be grouped with this condition such as the manic, major depressive, bipolar and brief psychotic disorders. However, it may take up to four weeks after the delivery of a child to detect these disorders. The medical community's acceptance of a new disorder is critical to the welcoming of a new defense in the courts. In New York, a trial court denied an expert's testimony that the defendant's act was a reaction to neonaticide syndrome. The court illustrated that the defendant did not prove that neonaticide syndrome was a psychotic defense which would assist the courts to find a verdict.

It is still questionable whether the primary reason for medicalizing the offense was due to the shifting public opinion. Currently, three post-partum moods and disorders are identified to include the "baby blues" described as a mild mood disorder common in new mothers characterized by hormonal fluctuations as a reaction to childbirth.<sup>139</sup> This condition can be detected through the irritability of mothers and their tearfulness after delivery. Mothers also suffer post-partum depression, and this condition is linked to mental illness. However, this condition affects a smaller number of women compared to the baby blues. Physicians have related this disorder to a common symptom of the inability to manage a baby.

---

<sup>137</sup> *Id.*

<sup>138</sup> Barton, *supra* note 133, at 603-04.

<sup>139</sup> Brian Harris, *Biological And Hormonal Aspects Of Postpartum Depressed Mood*, 164 BRITISH J. PSYCHIATRY 288, 288 (1994). *See also* Susan Hatters Friedman et al., *Characteristics Of Women Who Deny Or Conceal Pregnancy*, 48 PSYCHOSOMATICS 117, 117-22 (2007); Susan Hatters Friedman et al., *Child Murder By Mothers: A Critical Analysis Of The Current State Of Knowledge And A Research Agenda*, 162 AM. J. PSYCHIATRY 1578, 1578-87 (2005); Susan Hatters Friedman & Philip J. Resnick, *Neonaticide: Phenomenology And Considerations For Prevention*, 32 INT'L J. L. PSYCHIATRY 43, 43-47 (2009).



In addition to the above, there is also post-partum psychosis. Though this is a rare condition, it is still used to justify infanticide on medical grounds owing to the hallucinations and delusions they may experience. The courts may accept defenses involving baby blues when dealing with infanticide where the accused acted out of anger.<sup>140</sup> Anger is associated with the disorder in that it constitutes a disturbed mind. The current legal regime does not precisely demonstrate the role of medical science; instead, modern science reveals that post-partum disorders are results of psychological, social and stress triggers and not hormonal changes.<sup>141</sup> This clarification declares the medicalization of the offense to be void and unjustifiable. Furthermore, the medical justification is discredited by researchers who claim that mental disturbances in the infanticide provision are not medically confirmed.<sup>142</sup> Studies from 1970 to 2006 have suggested that mothers who murder their older children are psychotic, suicidal and depressed compared to mothers who murder their new-borns, leaving the medical justification invalid. This provides a convincing and substantial reason to merge the crime with murder.<sup>143</sup> Instead, women should raise the insanity defense and be checked into a psychiatric detention center for one year which the infanticide theory claims is the most crucial for new mothers.<sup>144</sup>

### Culture Defense

In addition to the previously discussed medical justifications, cultural norms have been presented as a defense to infanticide. These defenses seek to justify the unnatural act of infanticide by blaming the manner and way in which people are expected to live in society

---

<sup>140</sup> P.T. D'Orban, *Women Who Kill Their Children*. 134 BRITISH J. PSYCHIATRY 560, 569 (1979).

<sup>141</sup> *Id.* at 570.

<sup>142</sup> Channi Kumar et al., *Estrogen Administration Does Not Reduce The Rate Of Recurrence Of Affective Psychosis After Childbirth*, 64 J. CLINICAL PSYCHIATRY 112, 112-118 (2003); R. Kumar & K. Robinson, *Prospective Study Of Emotional Disorders In Childbearing Women*, 144 BRITISH J. PSYCHIATRY 35, 35-47 (1984).

<sup>143</sup> Rapaport, *supra* note 29; D'Orban, *supra* note 140.

<sup>144</sup> Infanticide Act as amended in 1938, *supra* note 57.

according to traditional cultural norms.<sup>145</sup> The cultural defense is not limited to the majority views of the group or the sanctioned law of the immigrant origin; it also encompasses consideration for unique circumstances challenging the individual charged with the crime.<sup>146</sup> England is among many other contemporary societies faced with the undertaking of balancing the preservation of cultural diversity and protecting the criminal justice system by not excusing acts of murder.<sup>147</sup> The influx of Muslim immigrants over the last few decades has placed religion at the forefront of debate, and specifically religious practices run afoul to England's criminal law.<sup>148</sup>

While not limited to only infanticide, it is not uncommon for an immigrant to attempt to absolve themselves' of criminal responsibility by blaming their culture.<sup>149</sup> Cultural pluralism is a concept that has been utilized to protect the cultural backgrounds of immigrants.<sup>150</sup> Culture is not enough for a defense of murdering a child. Culture is overshadowed by a child's right to life and the gruesome nature of an act of infanticide. Though the cultural standards and variations

---

<sup>145</sup> Rigoni, *infra* note 151, citing THORSTEN SELLIN, *CULTRUE, CONFLICT AND CRIME* 28-29 (Social Science Research Council 1938) (Defines these norms as "the reaction or response which in a given person is approved or disapproved by the normative group" when this person is acting under certain circumstances...[w]hile acting in his/her daily routine, a person is supposed to conform to the conduct norms of the group(s) he/she belongs to, such as the familial, religious, political, or other groups. It might happen that one specific life situation is simultaneously regulated by a plurality of conduct norms (deriving from the different social groups of which an individual is a member) and that these norms fail to agree with each other. By breaching one of these conflicting rules, an individual adopts what, in the eyes of the relevant social group, is considered an "abnormal" (deviant) conduct. If, however, the rule infringed coincides with a criminal norm in force in the dominant society, this deviant behavior amounts to crime.")

<sup>146</sup> Jeroen Van Broeck, *Culturally Defense and Culturally Motivated Crimes (Cultural Offences)*, 9(1) EUR. J. CRIM, CRIM. L. CRIM. JUST. 1, 29 (2001).

<sup>147</sup> Evelyn M. Maeder & Susan Yamamoto, *Culture in the Courtroom: Ethnocentrism and Juror Decision-Making*, 10 PLOS ONE 1, 3 (2015) (citing *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986)).

<sup>148</sup> LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* 113-14 (1st ed. 2015). The flow of immigrants has been referenced as the "European migration crisis" resulting in significant numbers of third country nationals in Europe seeking refuge and asylum. *Id.*

<sup>149</sup> See Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 156 (1994) (discussing the several infanticide cases where the cultural defence was raised, for example *People v. Kimura*, No. A-091133 (L.A. Super. Ct. 1985)) where two children drowned by their Japanese mother in an act ya-ko shinju (parent-child suicide); the tragic facts of this case prompted the publication of numerous articles in support of revaluation of the cultural defence in criminal law, most notably: *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

<sup>150</sup> Goldstein, *supra* note 149, at 451.

ought to be respected and evaluated in criminal trials, there is a general notion that the cultural defense may be raised, but it will never be adequate in the prosecution of infanticide. The cultural defense must not necessarily be treated as a criminal defense, but instead, it must be embraced as an approach that recognizes the cultural influences on offenders and considered in sentencing, if at all.

The cultural defense focuses on the philosophical concepts of individualized justice and cultural pluralism.<sup>151</sup> Individualized justice supports the idea that punishments of offenders must be determined by the degree of culpability. It may be inequitable to an immigrant who was exposed to new and different norms, to be held responsible for not acting per the new cultural expectations; arguably allowing ignorance as a defense.<sup>152</sup> This suggests that the culture defense arises as a means of impressing upon the judge and the jury that an individual was ignorant of the law.

Defenses of infanticide are questionable as much as the medical justification of infanticide. These inconsistencies contribute to the notion that the crime has run its course. Instead, England should adopt the United States' approach whereby the offense is not singled out but categorized as murder, not manslaughter, to escape liability and the imposing of a life imprisonment sentence. This is evidenced by the factors that discredit the cultural defense. It has been suggested that the cultural defense defeats the protective goal of criminal law. Preferential treatment for offenders who rely on this defense disregard the victims of the crime.

---

<sup>151</sup> Clara Rigoni, *Crime, Diversity, Culture, and Cultural Defense*, OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (July 30, 2018), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-409?print=pdf>.

<sup>152</sup> CRIMINAL LAW & CULTURAL DIVERSITY 153-176 (W. Kymlicka, C. Lernerstedt, & M. Matravers et al. eds., 2014).

Various cultures practice preferential female infanticide, excluding cultures where bridal wealth is received instead. The vulnerability of children as victims of the abuse of the cultural defense must be considered. Formalizing the culture defense also affects the motive of the criminal justice system. Deterrence and education will be undermined by excusing the transgressions of the offenders and making their punishments uncertain.

### **The Effects of the Infanticide Act**

#### **Reinforcement of Gender Stereotypes**

Women nowadays have not fully embraced their rights to equality which they have strived for over centuries, and it represents a gender that may be calculative in the areas they want to be treated equally.<sup>153</sup> Researchers suggest that the treatment of fathers in the English legal system is different compared to the treatment of mothers.<sup>154</sup> In Canada, the charge of infanticide has not been laid against a woman since 2006.<sup>155</sup> However, despite the avoidance, there remains a traditional concern by the courts which results in leniency of mothers compared to fathers on homicide charges.<sup>156</sup> This depicts gender stereotyping of fathers not receiving equal treatments in the courts, which is not a problem faced in England only. It has been reported that the juries would instead seek the smallest loophole when dealing with cases of infanticide and be merciful to charge a woman for attempting to disguise her pregnancy instead.<sup>157</sup> Unfortunately, this leniency towards mothers is only sending a message to society

---

<sup>153</sup> Stephanie D. Schmutz, Note, *Infanticide or Civil Rights for Women: Did the Supreme Court Go Too Far in Stenberg v. Carhart*, 39 HOUS. L. REV. 529, 529-33 (2002).

<sup>154</sup> Theresa Porter & Helen Gavin, *Infanticide and Neonaticide: A Review of 40 Years of Research Literature on Incidence and Causes*, 11 TRAUMA, VIOLENCE, & ABUSE 99, 107 (2010) [hereinafter *Review of 40 Years*].

<sup>155</sup> Zarestsky, *supra* note 49, at 429.

<sup>156</sup> *Review of 40 Years*, *supra* note 154, at 107.

<sup>157</sup> F.G. Frayling, *Infanticide: Its L. and Punishment, with Suggested Alterations or Amendments of the L. in TRANSACTIONS OF THE MEDICO-LEGAL SOCIETY* 81 (1908).

that women lack moral development compared to their male counterparts; hence why they deserve the special treatment.<sup>158</sup>

The issue of gender has been challenged by researchers through the suggestion that both sexes experience the effects of parenthood almost equally.<sup>159</sup> Both sexes are at risk of becoming homicidal, perhaps not in the same manner, but homicidal nonetheless, and should be tried for their crime not by their gender.<sup>160</sup> Allowing a woman to escape criminal responsibility on the basis of “hormones” invites other offenses such as child molestation to be excused because of a temporary hormonal imbalance.<sup>161</sup> Where men are the accused, hormone imbalance has been rejected, begging the question: if both men and women experience hormonal shifts similarly, why should only women be afforded the defense?

### Chivalric Justice

Women have long been considered as vulnerable and in need of protection, a notion saturated with paternalistic and stereotypical sentiments. The historical review of infanticide confirms that offenders usually detect a level of sympathy; however, beyond an empathetic jury, the behavior by male proponents within the English criminal justice system is replete with sexism and paternalism.<sup>162</sup> Women at the sentencing stage experienced chivalry from the criminal justice system.<sup>163</sup> This chivalry was influenced by the general beliefs that women were

---

<sup>158</sup> Zarestsky, *supra* note 49, at 107.

<sup>159</sup> M.N. Marks & R. Kumar, *Infanticide in England and Wales*, 33(4) MED. SCI. & L. 329, 329-38 (1993).

<sup>160</sup> *Id.*

<sup>161</sup> Zarestsky, *supra* note 49, at 431 (asserting that men also experience uncontrollably raging hormones and that women may even be able to assert diminished responsibility for criminal acts conducted during certain periods of their menstrual cycles”).

<sup>162</sup> Karen M. Brennan, *A Fine Mixture of Pity and Justice: The Criminal Justice Response to Infanticide in Ireland, 1922-1949*, 31 L. & HIST. REV. 793, 793-838 (2013) (explaining the “emotive language used, whereby offenders were described as ‘young girls’ and ‘wretched’ or ‘unfortunate’ women, and infanticide trials were termed ‘painful’ or ‘tragic,’ reveals both pity and paternalism in prosecutorial attitudes to this type of offender”).

<sup>163</sup> Gregory Durston, *Eighteenth Century Infanticide - A Metropolitan Perspective*, 13 GRIFFITH L. REV. 160 (2004); see also Karen Brennan, *Beyond the Medical Model: A Rationale for Infanticide Legislation*, 58 N. IR. LEGAL Q. 505, 506 (2007).

to be excused from heavy punishments owing to their medical conditions when they approach certain phases.<sup>164</sup>

It became apparent that there was and continues to be disparate sentencing in infanticide cases. For example, the case of Gintare Suminaite, who murdered her baby girl, the result of an affair. She concealed her pregnancy from her long-time partner and after giving birth in her West Sussex bathroom, she used a razor to cut the cord, then she strangled the newborn with her panties and placed her in the baby bath. This was all-the-while her boyfriend was in the next room and after she admitted the baby was crying and moving. She entered a plea of guilty to the charge of infanticide on 5 April 2016. The defense she presented before the Old Bailey was that the birth of her daughter provoked a disturbed mind. The court took sympathy on her “circumstances” noting it was “tragic” and sentenced her to a 24-month community order.<sup>165</sup>

Contrast the outcome of the Suminaite case with *R. v. Burrridge*, where the paternal father had a known history of mental health concerns, expressed suicidal thoughts and lacked any intent to harm his child, yet sentenced to 13 years imprisonment.<sup>166</sup>

---

<sup>164</sup> N. IR. LEGAL Q. 505, 506 (2007).

<sup>165</sup> Richard Hartley-Parkinson, *‘Tragic’ Mother who killed her baby is spared jail*, METRO (Jan. 31, 2017, 7:03 AM), <https://metro.co.uk/2017/01/31/tragic-mother-who-killed-her-baby-is-spared-jail-6416647/> (The paternal desire to afford compassion and leniency upon mothers who murder was explicitly expressed in statements by Judge and the prosecutor. Justice Nicol said “[t]he unlawful homicide of anyone is a tragedy, especially in the case when the victim is so young, even more so that is the case when the child dies at the hands of her mother. However, your own circumstances were tragic in themselves and that is reflected in the nature of the offence to which you have pleaded guilty. You were overwhelmed by the stress of your situation and in a state of partial denial during the pregnancy. At the time of giving birth you were in a state of extreme anxiety and panic amounting to a temporary impairment of the balance of your mind.’ These sentiments were mirrored by the prosecutor where he stated in an interview “[o]f course I have to acknowledge there is a child who has had its life extinguished within minutes of birth at the hands of its mother. But the young mother responsible was not only socially isolated, but emotionally isolated too.” — Edward Brown QC, Prosecutor). See also Henry Holloway, *Mum strangled BABY girl to death minutes after giving birth in the bathroom*, Daily Star (Dec. 22, 2016 1:45 PM), <https://www.dailystar.co.uk/news/latest-news/572503/Baby-Strangle-Killer-infanticide-Gintare-Suminaite-Baby-Old-Bailey-Bognor-West-Sussex>

<sup>166</sup> See *R. v. Gore*, supra note 70.

This perpetual attitude toward women as if they are frail and unable to cope with the stressors of life and motherhood create a vicious cycle. The men extend compassion and leniency and women are punished less and therefore reinforces the general notion that men are the saviors and women need saving. Whereas everywhere else in society chivalry has found a resting place, it remains omnipresent in the court system.

#### Discriminates against Men

The concern surrounding post-birth psychosis is often either not present or insufficient to reach the level of “mental illness” as required by English law, generally, hence the need for the exception.<sup>167</sup> Fortunately for mothers, the act of birth affords them enough disturbance to justify murdering their child, and fathers are denied this leniency regardless of the extreme emotional distress he may be experiencing. Research has criticized infanticide laws for “pathologizing childbirth” and denying women the same capacity for self-governance attributed to men.<sup>168</sup> Also, by deeming childbirth as somehow an abnormal or unnatural occurrence men are penalized for not being born with the ability to endure an “abnormal” event.<sup>169</sup> Infanticide not only discriminates against men and denies them the right to a full defense, but it also discriminates against the age of the child. The same law that offers compassion to a mother because of childbirth simultaneously devalues the life of all under the age of twelve months.<sup>170</sup> Therefore, should a mother, because of “lactation psychosis” murder her newborn and also her ten-year-old, the court may excuse responsibility for the newborn’s death simply because of its age.

---

<sup>167</sup> Marks, M., & Kumar, R., *Infanticide in England and Wales*, 33 MED. SCI. & L. 329, 329-39 (1993).

<sup>168</sup> Friedman, S.H. & Resnick, P.J., *Child Murders by Mothers: Patterns and Prevention*, 6(3) WORLD PSYCHIATRY 137, 137-41 (2007).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

According to the World Health Organization in comparing British court dispositions of infanticide by men and women, found that men were ninety percent more likely to be prosecuted for murdering their child, compared to only fifty percent of cases with mothers. More staggering is that women were fifty times more likely to be granted bail compared to zero percent of males. The only positive trend toward males is where the majority received incarceration dispositions at eighty-four percent. However, this is contrasted with a slightly higher percentage of women receiving treatment dispositions in lieu of incarceration; even in cases with direct evidence, women are likely to receive a gentle custodial sentence if charged at all.<sup>171</sup>

While the crime of Infanticide is rarely charged nor is the defense often used, it remains.<sup>172</sup> As such, it is time that the court end the use of infanticide and allow the system to work consistently across genders to achieve appropriate justice the crime committed. Eliminating the crime of infanticide does not remove the ability of the court to consider the full weight of the accused's circumstances; rather it allows the court to consider them holistically to the case.

### **Infanticide Reform**

Infanticide laws have proved to be problematic since they support the unproven justifications to the crime, perpetuate gender stereotypes, discriminate against males and devalue human life unnecessarily. Infanticide is a judicial reaction to a society which placed women

---

<sup>171</sup> Friedman, *supra* note 168. "In the late 20th century, a British hospital covertly videotaped women attempting to smother their infants with either their hands or with pillows. Despite the video evidence, every woman denied attempting to smother the infant and only one received a custodial sentence." *Review of 40 Years*, *supra* note 154, 107.

<sup>172</sup> Loughnan, *supra* note 33, at 687 n. 10 ("In his empirical study, conducted for the Law Commission, R D Mackay found that there were 49 convictions for infanticide between 1990 and 2003: see Murder, Manslaughter and Infanticide, Appendix D para 7. Reflecting the large number of cases in which a plea of infanticide is accepted in the course of pre-trial negotiations, only two of these verdicts resulted from jury trials. R D Mackay, 'Infanticide and Related Diminished Responsibility Manslaughters: An Empirical Study', Law Commission for England and Wales Murder, Manslaughter, and Infanticide" (Law Com No 304, 2006)(Appendix D paras 17–18)).



below others and an attempt by Parliament to condone the court's behavior. It is a quintessential example of overcorrection.

Therefore, to prevent this senseless crime, psychiatrists must reassess the dangers associated with pregnancy, as well as the disturbed minds of both men and women. By systematically analyzing the stressors experienced by both men and women as new parents as they do for suicide, the courts and legislatures will have a more accurate understanding of the effects and appropriate responses. Friedman & Resnick suggest there should be investigations on how mothers are practicing childbearing, tackling the parenting problems and their state of mind because at times they may be overwhelmed.<sup>173</sup> Tactics to prevent the crime must be structured in such a way that applies to the different motivations of parents who commit the crime, not just mothers.

Early warning signs should be noted and monitored by healthcare providers and family members. Also, all the factors which require psychiatric hospitalization such as the continuing concern about the child's health, hostility towards a partner's favorite child, fear of hurting the child or the child suffering must be monitored closely.

In extreme cases where the parent exhibits a high likelihood of physical abuse toward a child for even the pettiest reasons, such as a child that will not stop crying as mothers have admitted in the past, should be studied.<sup>174</sup> In an attempt to intervene abuse before it escalates, England should ensure sufficient obligatory standards for reporting whenever professionals suspect child abuse as is required in America.<sup>175</sup> England must extend valiant efforts to curb the

---

<sup>173</sup> Friedman, *supra* note 168, at 137-41.

<sup>174</sup> *Id.* at 138.

<sup>175</sup> *Mandatory Reporters of Child Abuse and Neglect*, U.S. DEP'T OF HEALTH AND HUM. SERVS, CHILDREN'S BUREAU (2016), <https://www.childwelfare.gov/pubPDFs/manda.pdf>. (As of 2015, approximately 48 states and six territories designate professions whose members are mandated by state law to report child maltreatment, to include social workers, teachers, principals, and other school personnel, physicians, nurses, and other health-care workers,

fatal maltreatment filicides such as offering emotional support, parenting classes, and emergency services to new parents overwhelmed by circumstances.<sup>176</sup>

In addition to emotional support, England should reinforce the family planning tools available to its citizens. It has been one of the most critical developments whereby women are provided with a wide range of family planning methods to choose from and avoid unwanted pregnancies as much as possible. As much as women may protest strongly over their status or upholding the childbearing status, the family planning methods are to be under a woman's discretion, not the male partner. This also involves the rights one has towards health and reproductive decisions. Most practices are safe and almost fully guaranteed to avoid pregnancy. Avoiding unwanted pregnancies means avoiding the mental and mood disorders that are believed to associate with pregnancy, childbirth and lactating.<sup>177</sup> By providing women with a myriad of options, it reduces the need for the court to make decisions based on gender. Whereby the murder of the child will have occurred despite the opportunities to the mother to terminate the unwanted pregnancy, in turn justifying a sentence comparable to the crime. The women would be challenged to raise the "victim of circumstances" defense and juries would be less inclined to accept it.

Furthermore, along with improving human services, England should eliminate gender-bias language from statutes, and prove hesitant to carve out exceptions in the law for reason of gender alone. If Parliament believes, and I would argue it should not, that post-partum psychosis is a true cause for concern, then it should be reflected within the insanity section of the English

---

counselors, therapists, and other mental health, child care providers, medical examiners or coroners, and law enforcement officers.).

<sup>176</sup> Friedman, *supra* note 168, at 137-41.

<sup>177</sup> See Ward, *supra* note 47.

Criminal Code.<sup>178</sup> The language of the Infanticide Act is confusing and unclear. This issue continues to lead to inconsistent applications by the court, a reason in itself to accept it as bad law. The crime of infanticide is murder and should fall within the umbrella of intentional killings in the English Code. Should any exception be required to address the nuances of child murders by parents, it is only appropriate that it reside under the crime of murder.<sup>179</sup>

### Conclusion

Infanticide laws are still being regulated, and this regulation is somewhat controversial and a bearer of various injustices. The effort by the society and the criminal justice system has been depicted through an appreciation of the act in historical times. Studies have shown that in the past the murder of a child would not be punished if a father committed it as they had the right to do so. It could be due to the father's decision to avoid raising female children. In the historical reviews, it shows that women had to live under the pressures of society which placed them in an inferior position. They had to work through centuries to be as recognized and respected as they are now. They had to murder their children to have a better life without the burden of raising a child who probably was fatherless or a result of rape and manipulation.

The problems faced by women were unbearable, and the women who fell victim of manipulation from their lovers were left single to support themselves and the child when they were also economically unstable. To cripple these attitudes, the industrialization brought the winds of change in the social and economic realm. These changes saw the position of women being improved to a state where they could occupy better employment positions, so the means to

---

<sup>178</sup> Barton, B., *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51(3) S.M.U. L. Rev. 592-619 (1998).

<sup>179</sup> R. Kumar & Kay Mordecai Robson, *A prospective study of emotional disorders in childbearing women*, 144 BRITISH J. PSYCHIATRY 35 (1984).

support their children were also developed. The most common defense for women who commit the crime is the medical justification. Researchers have strived to describe the process of mental and mood disorders that take place when women give birth. These disorders include post-partum depression, and some have been detected through their well-known symptoms.

Generally, the women must be treated equally not only when it suits them but whenever it promotes justice. These rights have been afforded in areas such as the health sector which has enlightened them on their reproductive rights. If they have been uplifted this much, then the countries that still recognize infanticide as a crime should revise their laws and regulate the women's behavior as people who are now legally recognized. Abortion laws have also been reformed from the time it was discouraged. These laws are now relaxed to allow abortion in certain circumstances and specific reasons. It seems that the abortion laws also came as a reaction to the infanticide cases since they accommodate women who want to abort if the pregnancy poses a serious risk to their mental health.

There seems to be a support of gender stereotyping when it comes to sentencing. Most males are associated with the crime of murder. Therefore, they fall victim of the harsh sentences, while the statistics show that women are less involved in the murder. However, infanticide should be ruled out to avoid this support of gender stereotyping and judge one for the crime they have committed not for the reputation of their gender. The males may be slowly becoming inferior to women due to their status, which is not logic. The criminal justice system should never depend on reputation but facts. It is necessary to appreciate the improvements that have taken place such as the innovative ways of contraception and abortion which have positively influenced the health sector. The decision to abort has been considered immoral, but

the reasons may be logic such as rape. Therefore, after examining all these factors, it is safe to say infanticide must be phased out of the system.

Infanticide held a place in history, and while the crime of infanticide is rarely charged nor is the defense often used, it still remains.<sup>180</sup> As such, it is time that the court end the use of infanticide and allow the system to work consistently across genders to achieve appropriate justice for the crime committed. Eliminating the crime of infanticide does not remove the ability of the court to consider the full weight of the accused's circumstances; rather it allows the court to consider them holistically. Furthermore, infanticide has been led to the miscarriage of justice for men, the newborn child, as well as failed to protect the innocent women as the law intended. The medical justification once submitted to justify the law has been dispelled, and statically data continues to contradict the original conclusion that birth equalled a disturbed mind. Women have rights, choices and safe alternatives; no longer are they forced to commit heinous murders of infants to escape less than ideal circumstances.

---

<sup>180</sup> Loughnan, *supra* note 33, at 687 n. 10.

**IMPUNITY WATCH ESSAY CONTEST WINNER: UNTITLED**

*Tommy Strade*

“Never again” – a plea that has echoed for decades from the mouths of Holocaust survivors. Though haunting and violent, these two words “never again” did not prevent the next 74 years of mass genocides against groups of individuals worldwide, nor did it inspire those who stood idle to action. The United States, the self-proclaimed “land of the free,” now finds itself sinking towards the practices that Jewish people and other minorities were initially subjected to. Though the term concentration camp is typically associated with the brutality of Nazi Germany, the internment centers are best defined as places meant to confine minorities as punishment and without a fair trial (Britannica).

These concentration camps are a direct result of the so-called “border crisis”; an influx of immigrants, mainly families from Central and South America, are seeking entry into the United States. These families whether immigrant, refugee, asylum seeker, or otherwise (legal status is irrelevant) most commonly seek entry because their home countries are too dangerous or oppressive for them to stay; drug lords, militias, and dictators are not exactly family-friendly. These oppressive conditions are a product of governments toppling down around the world in the mid-1900s and the CIA forcing these countries to install right-wing, pro-US leaders. Since the Trump administration took office following the 2016 election, the national outlook on immigration law and immigrant families are extremely hostile. The hospitality promised by Lady Liberty to “Give me your tired, your poor, your huddled masses yearning to breathe free...” has been shattered by white nationalist fear and hatred of those who are different. Not only do the camps at our borders violate American values, they also violate international law. For example, the High Commissioner for Human Rights, Michelle Bachelet states: “according to several [United Nations] human rights bodies, detaining migrant children may constitute cruel,

inhuman or degrading treatment that is prohibited under international law” (“UN Rights”).

Rather than the bright image of Lady Liberty standing proudly on Ellis Island, the United States is painted with unsettling images of children trapped in cages, separated families, loud cries for help in languages we refuse to understand, and a leader who stands proudly above the fear and chaos his rhetoric has created. Thus, the imagery of concentration camps is no longer limited to that of Nazi Germany, but now includes the United States and its treatment of immigrant families along the border. Ruth Bloch, a 93-year-old Holocaust survivor, says: “It’s the same conditions I lived through—we never had soap, but we had water, cold water, and not necessarily a shower. No toilet paper. It was inhuman” (Pry). No morally sound person would stand for the abuse of human rights; no matter one’s legal status, nationality, ethnicity, religion, or political identification. Furthermore, the Trump administration has separated families, many of which have given up their hope of being reunited with their children. Since September 2018, six migrant children have died in federal custody (Hennessy-Fiske). Most recently, a 16-year-old Guatemalan boy died overnight and was not taken to a hospital despite having over a 100-degree fever. The United States federal government reported that nearly 3,000 children were forcibly separated under 2018’s “zero tolerance” immigration policy (Jordan). These unlawful conditions and blatant offenses created by the Trump administration require a call to action to bring an end to these concentration camps.

The United States’ concentration camps are not only a national travesty, but a worldwide crisis that must be addressed with positive reform and action. The morally unsound Trump administration has separated families, many of which have given up hope of being reunited with their children. The separation of families alone is “extremely detrimental to the child’s



development,” meaning that thousands of children are being forced to endure psychological trauma and are essentially sentenced to a lifetime of mental illness (Riley). The stress that these children are put through can also lead to “abnormal physiological functioning,” essentially breaking them as if they were hardened criminals (Riley). Additionally, the United States is making “immigrant children as young as 3” appear in court for their deportation proceedings (Jewett). It is the dehumanization, fear-mongering rhetoric, as well as unjust policies under our current presidential administration, that distracts from the reality. The families of immigrants are people too, with hopes, dreams, and aspirations just like anyone else.

The verbal assault on Central and South American immigrants alone is enough to recognize what all genocides begin with: isolation and fear. One requisite of genocide, as defined by the United Nations in 1948, is “...forcibly transferring children of the group to another group” (“United Nations”). The concentration camps on the border that were manufactured to mentally break immigrants are simply the next step. The American people, those who value life, liberty, and the pursuit of happiness, are morally responsible for protecting those who enter our country with the hopes of a new life and for acting on a local and national scale to stop the cruelty occurring within these camps.

Fortunately, not all Americans are sitting idly. The Refugee and Immigrant Center for Education and Legal Services (RAICES) provides “free and low-cost legal services to underserved immigrant children, families, and refugees” (“About RAICES”). This group of citizens has aided immigrants since 1986 but has arguably done its most important work within the last few years. They close tens of thousands of cases each year, at no cost, and provide immigrants with the pathway to legal status. Immigrants often come to the United States to

escape violence, this violence cannot wait for unfair legal processes, which often takes years to process and complete. RAICES' work is so vital. It protects immigrants from persecution in both their home country and in the United States.

The National Network for Immigrant and Refugee Rights (NNIRR) is another example of citizens actively working against deeply rooted xenophobia in the United States. In 2018, the NNIRR “[u]rged support for the ‘Dream Act’ and a resolution to the ‘DACA issue’” (“About Us”). However, large-scale organizations of citizens like RAICES and the NNIRR are not the only Americans worried about the border. Hundreds of thousands of everyday citizens continue to voice their support for immigrants, as well as denouncing the concentration camps. Public unity is crucial when it comes to pressuring the government to act humanely.

Concentration camps are not the first, nor the last time that Americans have had to pressure the government into creating a more equitable society. Unfortunately, racism is an ever-relevant political discussion in the United States. Indigenous, Chinese, Japanese, African, and South American peoples are all violated by the United States. These injustices were in part solved by groups of citizens just like RAICES and the NNIRR. The Civil Rights Movement was entirely powered by civilians pressuring their leaders. However, even after the Civil Rights Act of 1964, discrimination has continued. The civilian initiative is necessary because laws cannot remove prejudices that individuals hold onto. For example, on to Black Lives Matter is a “collective of liberators,” continuing the fight that their predecessors fought in the mid-1900s (“About”). The power of these groups, whether it is Black Lives Matter or the NNIRR, comes from citizens united.

Individuals have always risen to the forefront and become leaders in the United States.

Martin Luther King Jr. and Frederick Douglass are both examples of people who have stood up for what they believed in, inspired others to follow and were catalysts for positive change.

Martin Luther King Jr. was the most influential and well-known civil rights leader of his day; Frederick Douglass escaped the mental and physical imprisonment of American slavery and actively spoke out for his silenced brothers and sisters. Both men led different chapters in the fight for black equality, but neither acted alone. They both acted as leaders who inspired and brought others up, engaging and empowering the movements of their day. Today, no particular individual has been the face of fighting against the United States' concentration camps, and that is okay. But there are organizations, such as the Summer Institute for Human Rights and Genocide Studies, that are raising a new generation of individuals. This new generation of individuals will be able to impact the world, through unity and solidarity, on a scale never seen before (*E Pluribus Unum*).

## WORKS CITED

- “About.” Black Lives Matter, [blacklivesmatter.com/about/](https://blacklivesmatter.com/about/). Accessed 4 Aug. 2019.
- “About RAICES.” RAICES, 9 July 2019, [www.raicestexas.org/about/](https://www.raicestexas.org/about/). Accessed 4 Aug. 2019.
- “About Us.” About Us | National Network for Immigrant and Refugee Rights, [www.nnirr.org/drupal/about-us](https://www.nnirr.org/drupal/about-us). Accessed 4 Aug. 2019.
- Britannica, The Editors of Encyclopædia. “Concentration Camp.” Encyclopædia Britannica, Encyclopædia Britannica, Inc., 9 July 2019, [www.britannica.com/topic/concentration-camp](https://www.britannica.com/topic/concentration-camp). Accessed 2 Aug. 2019.
- Hennessy-Fiske, Molly. “Six Migrant Children Have Died in U.S. Custody. Here's What We Know about Them.” Los Angeles Times, Los Angeles Times, 24 May 2019, <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html>. Accessed 2 Aug. 2019.
- Jewett, Christina, et al. “Immigrant Toddlers Ordered to Appear in Court Alone.” The Texas Tribune, Texas Tribune, 28 June 2018, <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/>. Accessed 3 Aug. 2019.
- Jordan, Miriam. “Family Separation May Have Hit Thousands More Migrant Children Than Reported.” The New York Times, The New York Times, 17 Jan. 2019, <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>. Accessed 2 Aug. 2019.
- Pry, Alyssa. “Holocaust Survivor: Yes, the Border Detention Centers Are Like Concentration Camps.” The Daily Beast, The Daily Beast Company, 8 July 2019, [www.thedailybeast.com/holocaust-survivor-yes-the-border-detention-centers-are-like-](https://www.thedailybeast.com/holocaust-survivor-yes-the-border-detention-centers-are-like-)

concentration-camps. Accessed 1 Aug. 2019.

Riley, Hurley. “The Impact of Parent-Child Separation at the Border.” The Pursuit | University of Michigan School of Public Health, <https://sph.umich.edu/pursuit/2018posts/family-separation-US-border.html>. Accessed 3 Aug. 2019.

“United Nations Office on Genocide Prevention and the Responsibility to Protect.” United Nations, United Nations, [www.un.org/en/genocideprevention/genocide.shtml](http://www.un.org/en/genocideprevention/genocide.shtml). Accessed 4 Aug. 2019.

“UN Rights Chief 'Appalled' by US Border Detention Conditions, Says Holding Migrant Children May Violate International Law | UN News.” United Nations, United Nations, 8 July 2019, <https://news.un.org/en/story/2019/07/1041991>. Accessed 1 Aug. 2019