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THE GLOBAL MAGNITSKY ACT: U.S. LEADERSHIP OR LIP SERVICE IN THE FIGHT AGAINST CORRUPTION?

Taylor Booth*

ABSTRACT

The amount of money spent on bribery worldwide exceeds $1 trillion a year—and the impact of that corruption falls disproportionately on the developing world. In recent decades, there has been a growing awareness that public corruption is intimately related to human rights violations, or even a violation itself. Though the U.S. government's support for the international human rights regime has been mixed at best, it has undoubtedly been a leader in global anti-corruption enforcement, and recent steps like the passage of the Global Magnitsky Act were thought to signal a shift in U.S. policy toward a rights-based approach to anti-corruption enforcement. The Global Magnitsky Act was heralded as an historical step toward holding human rights violators and corrupt actors accountable; however, as the current geopolitical environment has tested the legislation's strength, it is clear the current iteration of the law is easily ignored. A notable example is the Trump Administration's failure to fulfill its reporting obligations following the murder of Jamal Khashoggi. Against that backdrop, this article assesses the efficacy of the Global Magnitsky Act's financial and immigration sanctions and explores whether the law suggests a renewed U.S. commitment to combat human rights abuses, or rather, simply pays lip service to the emerging rights-based anti-corruption movement. Part I will explore the background of the global anti-corruption movement, its growing connection to the fight for human rights, and the use of targeted sanctions to achieve both ends. Part II will critically analyze the legislation and explore a past attempt by the U.S. government to use similar immigration sanctions to target corruption. Part III will address the problems with the current legislation and offer amendments that would further existing U.S. interests while advancing the movement toward characterizing corruption as a human rights violation.

* New York–based Associate at Debevoise & Plimpton LLP; J.D., Columbia Law School (2020); LLM, International Criminal Law, University of Amsterdam Law School (2020). The author would like to thank Professor Sarah Cleveland for her insights and encouragement, Professor Jennifer Rodgers for her guidance and willingness to read and revise, and finally the staff of the *Syracuse Journal of Global Rights and Organizations* for their invaluable editorial assistance. Please note that the views expressed in this article are the author's personal views.

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"Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry 80 times over . . . A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of freedom from fear and want."

-Navi Pillay[1]

I. INTRODUCTION

In the developed world, public corruption[2] is a universally denounced, yet largely invisible, practice. Corruption scandals generate public outrage, but corruption itself does not permeate daily life; it is not a constant impediment to upward mobility. In many parts of the developing world, however, corruption is quite the opposite. It is an "insidious plague"[3] that affects almost every element of public and private life,[4] particularly for the poor.[5] The estimated annual amount of money spent on bribery worldwide exceeds $1 trillion USD.[6] The United States has traditionally been a key player in the global anti-corruption space - leading the way on legislation punishing foreign bribery, fostering the development of an international anti-corruption regime, and sparking a global trend of sanctioning individuals involved in corrupt acts or human rights violations.[7] What

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[1] *The Human Rights Case Against Corruption*, U.N. HUM. RTS., https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf#:~:text=The%20human%20rights%20case%20against%20corruption%20provides%20a,all%20human%20rights%20including%20the%20right%20to%20development (last visited Mar. 13, 2013).

[2] The definition of corruption varies depending on the context in which the word is used and often refers generally to the act of bribery. *See Corruption and Human Rights: Making the Connection*, INT'L COUNCIL ON HUM. RTS. POL'Y 1, 15 (2009), http://www.ichrp.org/files/reports/40/131_web.pdf. For purposes of this Article, "corruption" refers to any "abuse of public office for private gain." *See* Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U.L. REV. 1365, 1388 (2014), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6100&context=law_lawreview.

[3] Former U.N. Secretary-General Kofi Annan, Statement on the Adoption by the General Assembly of the U.N. Convention Against Corruption (Oct. 31, 2008), https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html ("Corruption is an insidious plague that has a wide range of corrosive effects on societies . . . [and] it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.").

[4] Pillay*, supra* note 1; for example, "from 2000 to 2009, developing countries lost $8.44 trillion to illicit financial flows, 10 times more than the foreign aid they received." Pillay, *supra* note 1, at 9.

[5] "[S]tudies show that the poor pay the highest percentage of their income in bribes. For example, in Paraguay, low income households pay 12.6% of their income to bribes while high-income households pay 6.4%. The comparable numbers in Sierra Leone are 13 percent and 3.8 percent, respectively." *Combating Corruption*, THE WORLD BANK http://www.worldbank.org/en/topic/governance/brief/anti-corruption (last visited Nov. 1, 2018).

[6] This figure does not account for embezzlement or tainted procurement. U.N. S.C., 72d Sess., 8346th mtg., U.N. Doc. SC/13493 (Sept. 10, 2018).

[7] *See generally* Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. (Oct. 9, 2013) (outlining history of anti-corruption movement); Collin Anderson et al., *U.S. Sanctions Regimes & Human Rights Accountability Strategies*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE 5, 15–17 (2018) (outlining history of U.S. sanction use in human rights field).

began in the United States as a reaction to the corruption uncovered by Watergate[8] has now grown from a solitary crusade to a heavily enforced, global network of anti-corruption movement supported by most Western powers.

In the decades since the United States committed to the anti-corruption fight, there has been an increasing awareness that public corruption is intimately related to human rights violations, or is a human rights violation itself.[9] Whether corruption contributes to a violation of "first generation" political and civil rights, or "second generation" economic and social rights, fighting corruption has become the new frontier in human rights law.[10] Proponents argue that only by engaging with anti-corruption efforts through a human rights frame can endemic corruption in the developing world be reckoned with.[11] While the U.S. government's historical support for the international human rights organization has been tepid at best, it has undoubtedly been a leader in global anti-corruption enforcement – a field that is increasingly intertwined with human rights protection – and recent steps like the passage of the Global Magnitsky Act may signal a shift in the U.S.'s international human rights priorities.[12]

Against this backdrop, this Article will explore the recently enacted Global Magnitsky Human Rights Accountability Act (hereinafter "GMA")[13] and its use of targeted financial and immigration sanctions to punish foreign actors accused of corruption or human rights abuses. Part I will explore the background of the global anti-corruption movement, its growing connection to the fight for human rights and the use of sanctions regimes to achieve both ends. Part II will analyze the GMA legislation and explore a past attempt by the U.S. government to use similar immigration sanctions to target corruption.[14] In the context of the movement to frame corruption as a human rights issue, Part III will assess whether the GMA suggests a renewed U.S. commitment to combat human rights abuses through corruption crackdowns and offer suggestions for a path forward that fills the unintended gaps in the legislation

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[8] Garen S. Marshall, *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, 46 N.Y.U. J. INT'L L. & POL. 1283, 1285 (2014).

[9] *See generally* Corruption and Human Rights: Making the Connection, *supra* note 2, at 15 (highlighting key human rights-based approaches to anti-corruption work).

[10] First generation human rights are traditionally civil and political rights that arose in the 17th and 18th century as a political theory and are embodied in documents such as the U.S. Bill of Rights. Second generation human rights are social, economic, and cultural rights that concern the basic necessities of human life and were conceptualized as societies industrialized. *The Evolution of Human Rights*, COUNCIL OF EUROPE, https://perma.cc/9CT2-SCW8 (last visited Feb. 9, 2019); *see also* Karel Vasak, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER 3, 29 (1977) (explaining the "generations" of human rights).

[11] Corruption and Human Rights: Making the Connection, *supra* note 2, at 23.

[12] *See* Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOBAL JUSTICE CTR. (June 22, 2017), https://perma.cc/T5EN-36QH.

[13] Global Magnitsky Human Rights Accountability Act, Pub. L. 114-328, § 1261–65, 130 Stat. 2533–38 (2017) [hereinafter GMA].

[14] Proclamation No. 7750, 3 C.F.R. 7750 (2004), reprinted at 3 U.S.C. § 301 (2005).

a. Origins and History of the Global Anti-Corruption Movement

Corruption was once seen by the international community as a necessary evil.[15] Now, due in large part to steps taken by the United States, anti-corruption has become a global norm. The Foreign Corrupt Practices Act (hereinafter "FCPA")[16] is robustly enforced and other Western powers have joined the fight with similar legislation.[17] In the decades following the FCPA's passage, globalism exposed both the financial and human costs of corruption and forced the international community to level the anti-corruption playing field.[18] In order to understand and assess the impact of legislation like the GMA on the effort to fight corruption as a human rights problem, it is imperative to understand the origins of the global anti-corruption movement, the shortcomings of the current enforcement regime, and the recent shift towards a human rights framework. Part I of this Article is divided into four discrete sections analyzing (i) the U.S. led effort toward anti-corruption enforcement; (ii) the globalization of the anti-corruption norm; (iii) the movement towards fighting corruption within a human rights frame; and finally, (iv) the current use of targeted sanctions to fight human rights abuses and corruption.

i. U.S. Anti-Corruption Enforcement: The Foundation for a Global Movement

The widescale corruption uncovered by the Watergate-era investigations into government activities had an international ripple effect that continues to impact the anti-corruption landscape today. Investigations following Watergate revealed the millions of illicit U.S. dollars flowing to foreign officials and regimes around the world.[19] U.S. Securities and Exchange Commission investigations during the 1970s revealed that U.S. companies made over $300 million of "questionable" payments to foreign government officials, politicians, and political parties in exchange for favorable action on their behalf.[20] In the face of the perceived threat of communism

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[15] John Brandemas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, 77 FOREIGN AFF., No. 5, Sept.–Oct. 1998, at 17 (characterizing view of bribery as necessary "grease for the wheels of progress"); *see* Matthew Murray & Andrew Spalding, *Freedom from Official Corruption as a Human Right*, BROOKINGS GOVERNANCE STUDIES 3 (2015), https://perma.cc/VM8D-VLAU (arguing against the prevailing idea that bribery is "human nature").

[16] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78m, 78dd-1 [hereinafter FCPA].

[17] The FCPA's U.K. counterpart, the Bribery Act was passed in 2010 and has been instrumental in developing the norm of robust anti-corruption enforcement as well. Bribery Act 2010, c.23 (Eng.); *see* Sean J. Griffith & Thomas H. Lee*, Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 7 (2019) (unpublished on file with Lee) (countries with 27% of world's exports record "active" enforcement (US, Germany, UK, Italy, Switzerland, Norway, Israel); "moderate" (Australia, Sweden, Brazil, Portugal); "limited" (11 countries including France, Netherlands, Canada)); *See also* Joon H. Kim et al., *Société Générale Enters Into First Coordinated Resolution of Foreign Bribery Case by U.S. and French Authorities*, CLEARY ENFORCEMENT WATCH, https://perma.cc/6VLT-9ZKW (June 7, 2018).

[18] Ilias Bantekas, *Corruption as an International Crime Against Humanity*, J. INT'L CRIM. JUST. 1, 2 (2006).

[19] Griffith & Lee, *supra* note 17, at 11.

[20] *See* SECURITIES AND EXCHANGE COMMISSION, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976); U.S. DEP'T STATE, 10731, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 2D ED. (2001).

in Latin America, these disclosures damaged the United States' position on the international stage and undermined foreign allies by uncovering capitalism's corrupt underbelly.[21]

The FCPA was passed in the wake of those disclosures and prohibited the payment of bribes to foreign officials.[22] Officially, the FCPA served to "establish ethical business practices and standards" for U.S. companies operating overseas.[23] Unofficially, the legislation was a "political weapon of the Cold War" motivated by national security concerns rather than an interest in cracking down on corruption – let alone human rights violations.[24]

In the years following the FCPA passage, the United States heralded the FCPA as promoting democratic values around the world,[25] but, in practice, failed to enforce the legislation in any meaningful way.[26] In turn, the international community largely ignored the call to fight corruption, and viewed U.S. efforts as "misguided American moralism" that gave other countries a competitive advantage in foreign markets.[27] Because of the international indifference to the anti-corruption crusade, the FCPA remained the sole transnational bribery statute in existence until the 1990s.[28] Alone on the moral high ground, the U.S. began to lobby heavily for multilateral anti-corruption agreements in order to level the playing field for U.S. corporations operating abroad.[29]

ii. International Cooperation: Anti-Corruption Conventions and Enforcement

In the wake of the Cold War, the U.S. abandoned the overt goal of promoting capitalist values through the FCPA and doubled down on enforcement, as well as efforts, to persuade foreign partners to join the anti-corruption fight.[30] Not only had the end of the Cold War removed any perceived need to support corrupt regimes, but globalization of the world economy had revealed

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[21] *See Protecting the Ability of the United States to Trade Abroad*: *Hearing Before the Subcomm. Int'l Trade of the S. Comm. on Finance*, 94th Cong. 9 (1975) (statement of Sen. Frank Church, Member, S. Comm. on Finance) (noting "there is little doubt that widespread corruption serves to undermine those moderate democratic and pro-free-enterprise governments which the United States has traditionally sought to foster and support"); *Activities of American Multinational Corporations Abroad*: *Hearings Before the Subcomm. Int'l Econ. Policy of H. Comm. Int'l Relations*, 94th Cong. 22–23 (1975) (statement of Mark Feldman, Dept'y Legal Advisor, U.S. Dep't of State) (explaining as a result of bribery revelations in the U.S., heads of friendly governments were removed from office and others under attack); *see also* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 932–43 (2012) (describing general background of how foreign policy concerns motivated the passage of the FCPA).

[22] *See* 15 U.S.C. § 78m, 78dd-1 (1998).

[23] DAVID LUBAN, JULIE O'SULLIVAN & DAVID STEWART, INTERNATIONAL AND TRANSNATIONAL LAW 622-623 (3d ed. 2010).

[24] Griffith & Lee, *supra* note 17, at 11.

[25] Spalding, *supra* note 2, at 1370.

[26] *See SEC Enforcement Actions: FCPA Cases,* U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; *Foreign Corrupt Practices Act Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/related-enforcement-actions (indicating that neither the SEC nor the Department of Justice pursued foreign bribery cases during early years of FCPA).

[27] *See, e.g.*, Brademas & Heimann, *supra* note 15, at 17 (describing indifference of European nations, noting Germany and France "allowed [bribes'] deductions as business expenses").

[28] Lucinda Low, Sarah R. Lamoree & Jack London, *The Demand Side of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563, 564 (2013).

[29] Bantekas, *supra* note 18, at 3-4.

[30] *See* Spalding, *supra* note 2, at 1370.

the extent and damage of foreign corruption.[31] The late 1990s to early 2000s saw a "corruption eruption" which saw European nations begrudgingly join the anti-corruption fight.[32] Suddenly, corrupt officials were "recognized for what they [were], irrational trade barriers blocking the access to interesting markets."[33] This change began with a series of regional and international agreements.[34]

On the international level, the Organization for Economic Cooperation and Development ("OECD") and the United Nations both produced comprehensive anti-corruption agreements, along with regional instruments from the Organization of American States ("OAS"), the Council of Europe[35] and the African Union.[36] Though the various regional instruments continue to play an important role in the anti-corruption fight, they are outside the scope of this Article.[37] This section, therefore, will focus on the international agreements, namely the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption.[38]

While a few predecessor agreements led the corruption charge,[39] the first comprehensive international instrument was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[40] The OECD Convention criminalized the

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[31] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 177 (1999) (noting that the end of the Cold War spurred an opening of governmental processes and media access that exposed long hidden corruption around the world).

[32] *See* Moises Naim, *Corruption Eruption*, 2 BROWN J. OF WORLD AFF., no. 2, 1995, at 245; *see also* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law,* 34 J. INT'L L. 149, 149 (2000) (noting Asian financial crisis of 1998 revealed widespread nature of corruption and need for new global financial system).

[33] Kofele-Kale, *supra* note 32, at 159 (*quoting* Mark Pieth, *International Efforts to Combat Corruption*, A GLOBAL FORUM ON FIGHTING CORRUPTION: SAFEGUARDING INTEGRITY AMONG JUSTICE AND SECURITY OFFICIALS 1, 1 (1999), https://1997-2001.state.gov/global/narcotics_law/global_forum/F331focr.pdf).

[34] LUBAN ET AL., *supra* note 23, at 650 (citing Michael F. Zeldin & Carlo V Di Floro, *Effective Corporate Governance Under Emerging Global Anti-Corruption Laws*, BUS. CRIMES BULL., June 1999, at 1).

[35] The Council of Europe is an international organization founded in 1949 to promote human rights, democracy, and the rule of law in Europe. There are currently 47 member states. *Who We Are*, COUNCIL OF EUROPE https://www.coe.int/en/web/about-us/who-we-are (last visited Feb. 9, 2019). It is worth noting that the primary Council of Europe instrument, the Criminal Law Convention on Corruption, does address demand-side bribery as well, but as a regional instrument it does not include member states suffering from the crippling corruption seen in some parts of the developing world. *See* Criminal Law Convention on Corruption *infra* note 36, art. 5.

[36] *See* Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. No. 105-39 (1998); Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173; African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5.

[37] The Inter-American Convention Against Corruption was the first anti-corruption treaty ever ratified and like the Council of Europe Convention, both the Inter-American Convention and African Union Conventions include prohibitions on passive bribery. African Union Convention art. 4(1)(a), (b); Inter-American Convention art. VI(1)(a), (b). Like many regional treaties it is unclear how robustly or uniformly enforced these conventions are. *See* Criminal Law Convention Against Corruption, *supra* note 36, art. 5; African Union Convention, *supra* note 36, art. 4(1)(a), (b); Inter-American Convention, *supra* note 36.

[38] The UNCAC has near universal ratification. *Signature and Ratification Status*, U.N. OFF. ON DRUGS & CRIME (last visited Feb. 9, 2019), https://www.unodc.org/unodc/en/corruption/ratification-status.html. For more information on regional anti-corruption instruments *see generally* Criminal Law Convention on Corruption, *supra* note 36; African Union Convention on Preventing and Combating Corruption, *supra* note 36.

[39] *See, e.g.*, Kofele-Kale, *supra* note 32, at 153 (discussing 1995 European Union Convention on the Protection of the European Communities' Financial Interests and subsequent protocols, dealing mainly with fraud); *see also* Inter-American Convention *supra* note 38, which entered into force in 1996.

[40] Kofele-Kale, *supra* note 32, at 155.

payment of bribes to foreign officials and placed an obligation on Member States to implement domestic, anti-corruption laws.[41] The agreement also extended both territorial and national jurisdiction over the act of bribery, making bribery an extraditable offense.[42] The OECD Convention was ratified by all thirty Member States[43] and led to a surge in domestic, anti-corruption legislation.[44] In fact, in order to conform with OECD guidelines, the U.S. amended and widened the jurisdiction of the FCPA.[45] Despite its widespread acceptance, the OECD was narrow in scope, prohibiting only supply-side bribery in the public sector [46] and the domestic legislation it sparked laid relatively dormant.[47]

Following the OECD Convention, the anti-corruption movement gained momentum as the U.S. stepped up FCPA enforcement [48] and entities like the World Bank and International Monetary Fund began to impose corruption protections on their projects.[49] Following this trend, the United Nations Convention Against Corruption ("UNCAC") entered into force in 2005, and with 186 parties to date, has become the most widely accepted anti-corruption instrument in existence.[50] Despite its success, UNCAC remains relatively permissive regarding liability for lesser corrupt offenses [51] and prohibitions on demand side bribery.[52]

The coalescence of international support around anti-corruption led to an era of enforcement that continues to this day.[53] International instruments like the UNCAC expanded the

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[41] Griffith & Lee, *supra* note 17, at 16; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1, 2, Dec. 17, 1997.

[42] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 9, 10, Dec. 17, 1997; LUBAN ET AL., *supra* note 23, at 653.

[43] THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/about/ (last visited Jan. 11, 2019) (The OECD is an economic organization founded in 1961 and has 36 members. The OECD Convention now has 44 signatories, including all OECD member-states and 8 non-OECD countries.).

[44] *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 42; LUBAN ET AL., *supra* note 23, at 652.

[45] *See* 15 U.S.C. § 78dd-1(a), 78dd-2(a), 78dd-3(a).

[46] LUBAN ET AL., *supra* note 23, at 650, 652; Kofele-Kale, *supra* note 32, at 155 (The OECD Convention, and many international anti-corruption agreements only punish "active" or "supply side" bribery, that is the actual giving of the bribe.).

[47] Griffith & Lee, *supra* note 17, at 17.

[48] *See SEC Enforcement Actions: FCPA Cases*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Nov. 21, 2020) (chronicling steady increase in FCPA enforcement actions since its passage).

[49] Brademas & Heimann, *supra* note 15, at 18, 20.

[50] Convention Against Corruption, Dec. 14, 2005, 2349 U.N.T.S. 41.

[51] *See id.* arts. 18, 21. Those acts which states are not required to proscribe under the UNCAC, i.e., Trading in Influence (art. 18), Abuse of Functions (art. 19), Illicit Enrichment (art. 20), and Concealment, are just the types of acts that are entrenched in societies with endemic corruption and have the most impact on potential human rights violations. This permissiveness indicates the limitations of the treaty regime as an effective tool to deter the type of public corruption that is intimately tied to human rights violations. *See, e.g.*, *State of Implementation of the United Nations Convention Against Corruption*, UNITED NATIONS OFFICE ON DRUGS AND CRIME 43 (2017) (noting Asian-Pacific and African member countries' reservations about criminalizing the specific act of "trading in influence" rather than general prohibitions on bribery).

[52] While UNCAC does address passive bribery, the prohibition is not mandatory. *See* Convention Against Corruption, art. 16(2) ("Each State Party *shall consider* adopting such legislative [measures] . . . necessary to establish as a criminal offence . . . the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage").

[53] *See SEC Enforcement Actions: FCPA Cases*, *supra* note 48. FCPA enforcement ballooned in the period from 2000 to the present. *See, e.g.*, *Petrobras Agrees to Pay More Than $850 Million for FCPA Violations*, U.S. DEP'T

jurisdiction of the FCPA, facilitated international cooperation in the fight against corruption, and prompted domestic enactment and enforcement of anti-corruption laws in other countries.[54] While this era of enforcement benefitted global business interests, the treaty regime's [55] focus on supply-side corporate actors only went so far in combatting the truly insidious corruption that fosters human rights violations in the developing world.[56]

While the FCPA and its counterparts were gaining widespread international acceptance, the rationales behind the anti-corruption push were slowly changing.[57] The international community was coming to the realization that corruption was intrinsically tied to human rights violations and that the treaty regime largely protected "Euro-American economic" interests,[58] while failing to solve the problem of the local corruption endemic to the developing world.[59] In fact, instead of encouraging non-corrupt practices, studies indicate that the modern era of anti-corruption enforcement has a "sanctioning effect" on developing countries, whose population and economy already suffer from the disease of corruption, by encouraging compliant countries to withdraw foreign direct investment all together.[60]

OF JUSTICE (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

[54] While the U.S. used to be the sole actor on the anti-corruption enforcement stage, European countries, particularly those with corporations being targeted under the FCPA, have joined the fight as well. That being said, enforcement patterns are mixed. Currently, the seven countries with 27% of the world's exports, classify as "active" enforcement states (United States, Germany, United Kingdom, Italy, Switzerland, Norway, and Israel), but almost half of the OECD signatories (twenty-two countries, with aggregate global exports of 39.6%) pursue "little or no" enforcement of foreign corruption laws. TRANSPARENCY INTERNATIONAL, EXPORTING CORRUPTION—PROGRESS REPORT 2018: ASSESSING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 4 (2018); *see also* Thomas Pogge, *Recognized and Violated by International Law*: *The Human Rights of the Global Poor*, 18 LEIDEN J. INT'L. L. 717, 736 (2005) (doubting effectiveness of OECD Convention in curbing corruption).

[55] The term "treaty regime" is used in this Article to refer to the type of global enforcement sparked by the passage of legislation of the FCPA. This encompasses the work done by the FCPA, the international instruments following the FCPA model (OECD Convention and UNCAC) and the FCPA's counterpart legislation in foreign countries. The FCPA only targets the supply side of corruption, i.e., the corporate official making the corrupt payment. 15 U.S.C. Foreign Corrupt Practices Act § 78dd-3(a). This model is only able to punish corrupt actors who are either U.S. "domestic concerns" (U.S. citizens, nationals, residents, or employees of a U.S. incorporated company, *see* § 78dd-2 (h)(1)(A), (B)) or on U.S. territory (§ 78dd-3(a)), and engaging in active bribery. Those foreign officials engaging in passive bribery (taking the bribe) are not reached by the statute specifically. The UK Bribery Act similarly does not provide an avenue to punish the specific foreign officials taking bribes, though it does prohibit both passive and active bribery from the entities regulated by the statute. Bribery Act 2010, c. 23 §§ 2, 6(7) (Eng.).

[56] *See* Kofele-Kale, *supra* note 32, at 150 ("[The] present international regime is not all that concerned about what happens once economic distortions and inefficiencies have been removed.").

[57] Spalding, *Corruption, Corporations, and the New Human Right*, *supra* note 2, at 1368 (citing The White House National Security Strategy, 38 (2010)). *See* Spahn, *Implementing Global Anti-Bribery Norms, supra* note 7, at 3 (noting global norms around corruption have slowly shifted from free market competition to democracy and development) (citing James Wolfensohn, President, World Bank, Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund (Oct. 1, 1996) (commenting on the "the cancer of corruption")); *see also* Bantekas, *supra* note 18, at 2 ("Public opinion and civil society in the developed world began to have a strong impact . . . ultimately corruption itself became a civic concern.").

[58] Kofele-Kale, *supra* note 32, at 158.

[59] Griffith & Lee, *supra* note 17, at 4 ("Foreign anti-corruption laws are a supply-side solution to a first-world problem").

[60] Spalding, *Corruption, Corporations, and the New Human Right*, *supra* note 2, at 1370, 1379; *see* Alvaro Cuervo-Cazurra, *Who Cares About Corruption*? 37 J. INT'L. BUS. STUD. 807, 808 (2006).

In the face of these shortcomings, lawmakers began to move away from the single frame of white-collar enforcement toward viewing corruption through a human rights lens.[61] It is within this frame that enforcement methods such as targeted sanctions, like those imposed under the GMA, are gaining traction today. In order to assess the impact of the recent uptick in targeted sanctions legislation around the world, it is important to understand the current state of human rights law as it relates to corruption. The following section will explore the ongoing movement to frame corruption itself as a human rights violation and assess where exactly the GMA falls within the debate.

iii. The Human Rights Perspective: Where Anti-Corruption and Human Rights Efforts Converge

Widespread corruption has a disparate impact on the marginalized – women, children, and the poor suffer corruption's harshest consequences.[62] It limits access to public services, allows discriminatory laws to stand, and "touch[es] upon" all human rights.[63] Despite this impact, the idea of corruption as a societal ill is a relatively new concept. Corruption was long viewed as a necessary byproduct of doing business in the developing world.[64] As such, human rights instruments failed to contemplate corruption fully, and corruption instruments failed to mention human rights.[65] As the global anti-corruption norm began to crystallize however, a human rights approach to combatting the issue eventually emerged and continues to this day.[66]

In human rights scholarship, there are two main views regarding the status of corruption and which legal instruments should be employed to combat it.[67] The consensus view is that corruption is a means of violating pre-existing human rights[68] and should be fought through existing legal instruments.[69] Under this approach, corruption impedes a state's obligation to

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[61] *See* Press Release, The White House, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york (describing corruption as "a profound violation of human rights").

[62] *The Human Rights Case Against Corruption, supra* note 1 (reporting data that 25% of household income in Mexico is lost to petty corruption).

[63] *Id.* at 4.

[64] *See* Brademas & Heimann, *supra* note 15, at 17; Bantekas, *supra* note 18, at 2 (noting the "common secret" that business in the developing world required corrupt practices).

[65] Carmona, *supra* note 2, at 3.

[66] *See, e.g.*, Human Rights Council Res. 23/9, U.N. Doc. A/HRC/23/L.19 (June 13, 2013) (recognizing link between anti-corruption efforts and human rights).

[67] *See* Carmona, *supra* note 2, at 3.

[68] *See id.* at 3, 23, 27 (acknowledging the split in scholarship and taking the "different approach" that connection exists where "corrupt act is deliberately used as means to violate a [human] right"); *Id*. at 29 (demonstrating how a bribe to a judge is a means of violating the ICCPR Art 14 rights to fair trial); *see also The Human Rights Case Against Corruption, supra* note 1 (focusing on use of existing international human rights obligations to fight corruption).

[69] The primary international human rights instruments are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E., 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). The primary regional instruments are the American Convention on Human Rights, the European Convention for Protection of Human

respect, protect, and fulfill existing treaty obligations.[70] The second approach argues that the right to be free from corruption is a human right in itself.[71] Under this umbrella, scholars have characterized corruption as a violation of Lockean natural rights,[72] a violation of customary international law,[73] or even a crime against humanity.[74]

The means-end approach[75] views corruption as a factor impeding a state's ability to comply with its existing human rights obligations and has been adopted in practice by the United Nations.[76] Under this framework, corruption has either a direct, indirect, or remote impact on a human rights violation.[77] For example, a bribe offered to a judge has a direct impact on the right to a fair trial. Whereas a bribe offered to government officials leading to the importation of toxic waste into a residential area has an indirect impact on the violation of the residents' right to life and health.[78] Even low-level corruption may have a remote impact on an eventual human rights violation. This is especially true in situations where suspicion of corruption in the political process leads to political unrest and the eventual violent suppression of peaceful protests.[79]

Given that the legal framework for a means-end approach already exists, its dominance in the current discourse is not surprising. However, scholars arguing that freedom from corruption is a human right *itself* note that human rights jurisprudence has been expanding since the adoption of the Universal Declaration of Human Rights and should continue that trajectory.[80] They argue that the adoption of freedom from corruption as a freestanding human right would combat the idea that corruption is a byproduct of "human nature" that will eventually self-correct.[81] Under this approach, the right to live in a corruption free society is grounded in natural rights[82] and reinforced by civil and political values across cultures.[83] The theory posits that civil society is formed by creating a government that is bound by "established standing laws" promulgated by the people.[84] Natural rights, such as life and liberty, are entrusted to the government's protection when society forms. Therefore, freedom can only exist when the government confers benefit in accordance with

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Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 5, U.N.T.S. 221 (entered into force Sept. 3, 1953); African Charter on Human and Peoples' Rights, adopted June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

[70] Carmona, *supra* note 2, at 25–28.

[71] Spalding, *supra* note 2, at 1368-69.

[72] Spalding, *supra* note 2, at 1396.

[73] Kofele-Kale, *supra* note 32, at 163–66, 170–74.

[74] *See* Bantekas, *supra* note 18, at 1.

[75] Spalding, *Corruption, Corporations, and the New Human Right*, *supra* note 2, at 1400-02.

[76] *See*, *e.g.*, U.N., Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rts. Comm., Rep. on the Thirtieth & Thirty-First Sessions, at 50, U.N. Doc. E/2004/22, E/C.12/2003/14 (2004) ("State party faces serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant.") (in reference to the Republic of Moldova).

[77] The Human Rights Case Against Corruption, *supra* note 2, at 25–29.

[78] The Human Rights Case Against Corruption, *supra* note 2, at 25–29.

[79] The Human Rights Case Against Corruption, *supra* note 2, at 28.

[80] Murray & Spalding, *supra* note 15, at 13-14 (citing Vasak, *supra* note 10).

[81] *See* Murray & Spalding, *supra* note 15, at 3 (cautioning that similar cultural relativism arguments were also used in the past to deny other basic rights such as freedom from slavery).

[82] Spalding, *supra* note 2, at 1366–68; Kofele-Kale, *supra* note 32, at 163.

[83] *See* Murray & Spalding, *supra* note 15, at 10–11 (examining corruption in Islamic and Confucian legal traditions); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (noting "anti-corruption principle" present in U.S. Constitution).

[84] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch IX, § 131 (1690).

standing law.[85] In contrast, corruption occurs when officials confer benefit in contravention of standing law.[86] Under this view, corruption breaches the social contract by violating the natural right to liberty.[87] Carving out a stand-alone right to be free from corruption would lend national governments the legitimacy to enforce anti-corruption legislation and give international anti-corruption laws greater normative weight.[88] Scholars have even used this theory to argue that corruption itself is an international crime or a "crime against humanity."[89]

Though the push to establish a "right to be free from corruption" is gaining traction, particularly in the developing world,[90] both schools of thought have influenced a key shift in the current anti-corruption regime toward individual sanctions targeting officials for engaging in corrupt acts or gross human rights violations.[91]

iv. Targeted Sanctions: The Next Frontier in Anti-Corruption and Human Rights Enforcement

Because the anti-corruption enforcement regime originated from the FCPA and has grown through the implementation and support of other major western countries,[92] enforcement has taken a primarily supply-side, corporate approach. This is due both to jurisdictional limitations of the statutes in force and the fact that the first wave of anti-corruption movement was driven by business interests.[93] In areas where few multinational corporations operate, the deterrence effect of the current enforcement network is minimal. Furthermore, corruption prohibited under the current regime necessarily involves business transactions with multinational corporations rather than the types of public corruption that severely hinder the realization of human rights in developing countries. Recent sanctions legislation in the U.S. and around the world punishes both corruption and human rights violations in a way that may be a step toward closing the impunity gap left by the current regime.[94] This section will briefly explore the history behind the use of targeted sanctions and assess where the recently enacted GMA fits within this trend.

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[85] Spalding, *supra* note 2, at 1368.
[86] Spalding, *supra* note 2, at 1398.
[87] *Id*; *See* LOCKE, *supra* note 84, at § 199 (defining tyranny as "making use of the power any one has in his hands, not for the good of those who are under it but for his own private, separate advantage").
[88] Murray & Spalding, *supra* note 15, at 4–5.
[89] While these theories are outside the scope of this note, both schools of thought are based in a Lockean conception of the natural right to be free from corruption. For more on the idea of corruption as an international crime, *see* Kofele-Kale, *supra* note 32, at 167. For arguments framing corruption as a "crime against humanity," *see* Bantekas, *supra* note 18 (classifying grand corruption as an attack on a civilian population sufficient to qualify as crime against humanity); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1282 (2007) (arguing for interpretation of corruption as "other crimes" under the Rome Statute).
[90] *See, e.g.*, Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?*, 2 INT'L J. TRANSITIONAL JUST. 310, 315 (2008) (noting human rights practitioners in Africa are shifting toward idea of corruption itself as "key" problem to be addressed).
[91] *See* Anton Moiseienko, "*No Safe Haven": Denying Entry to the Corrupt As A New Anti-Corruption Policy*, 18 J. MONEY LAUNDERING CONTROL 400, 405 (2015) (noting recent scholarship recognizes that "large scale corruption offen[ders] may be complicit in human rights violations").
[92] *See, e.g.*, Bribery Act 2010, c. 23 (Eng.).
[93] *See generally* Griffith & Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws, supra* note 17 (describing interest group involvement in FCPA enforcement).
[94] *See* Marshall, *supra* note 8, at 1285.

Currently the key international enforcement instruments only punish supply-side corruption – those corporate officials actually bribing government officials abroad.[95] While the current regime has made strides in stemming corporate corruption, in some respects "enforcement is [still] too feeble to drive high-ranked perpetrators of corruption away from developing countries."[96] Influenced in part by the realization of the link between corruption and human rights violations, the United States has been a leader in the gradual shift toward the use of individual sanctions against corrupt actors and more recently against human rights violators as well.[97]

Since the early 2000s targeted sanctions have become an increasingly common tool for the U.S. government to target individual bad actors, to mixed results.[98] Absent legislation like the GMA, targeted sanctions have often been established via executive order under authority vested to the President by the Immigration and Nationality Act ("INA") or the International Emergency Economic Powers Act ("IEEPA").[99] An early example of the use of visa restrictions to combat foreign corruption is Proclamation 7750, a 2004 order which denies U.S. visas to foreign officials "who have committed, participated in, or are beneficiaries of corruption" that has "serious adverse effects" on U.S. interests.[100] Since Proclamation 7750, individualized sanctions have become increasingly common via either Presidential action under the IEEPA,[101] or individual legislation like the GMA.[102] Notable in the realm of visa sanctions is President Obama's Presidential Proclamation No. 8693, which imposes sanctions on individuals designated by the U.N. Security Council, and No. 8697, which imposes sanctions on those who "participate in serious human rights

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[95] Low et al., *supra* note 28, at 579.
[96] Moiseienko, *supra* note 91, at 402.
[97] Moiseienko, *supra* note 91, at 402.
[98] *See* INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *supra* note 7, at 15–17.
[99] *Id.* at 11 (2018). Both laws grant the President the discretion to impose individual sanctions, including visa restrictions, in times of national emergency or when an individual poses an "extraordinary threat" to the United States. *See* International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1977); Immigration and Nationality Act of 1952, 8 U.S.C. § 1227(a)(4)(C)(i) (denying visas to those whose entry would have "serious adverse foreign policy consequences"); *see also id.* § 1182 (a)(3)(E)(iii) (denying visas to individuals who have participated in acts of genocide or committed acts of torture, extrajudicial killings, and other human rights violations); *id*. § 1182(f) (granting Presidential authority to "suspend the entry" of any individual "detrimental to the interests" of U.S.).
[100] Proclamation No. 7750, *supra* note 14. Owing to statutes governing the confidentiality of visa information, *see* 8 U.S.C. § 1202(f), the effectiveness of Proclamation 7750 is hard to measure. Low et al., *supra* note 28, at 595. Reports from the period following Proclamation 7750 do however evidence a direct impact on the public perception of corruption in certain countries. *See, e.g*, Confidential telegrams from U.S. Embassy in Nigeria (Feb. 28, 2006), https://wikileaks.org/plusd/cables/06ABUJA483_a.html (noting roles of Proc. 7750 denials in "entrenching the precepts of good governance and accountability"); *see also* Nick Wadhams, *Kenya: U.S. Ambassador's Crusade Against Corruption*, TIME (Jan. 28, 2011), http://content.time.com/time/world/article/0,8599,2044615,00.html (documenting use of visa bans to fight corruption in Kenya). For more on Proclamation 7750, *see* discussion *infra* Sec. II (a)(iii).
[101] *See, e.g.*, Exec. Order No. 13,712, 80 Fed. Reg. 73, 633 (Nov. 22, 2015); Exec. Order No. 13,667, 79 Fed. Reg. 28, 387 (May 12, 2014); Exec. Order No. 13,671, 79 Fed. Reg. 39,949 (July 8, 2014); Exec. Order No. 13,572, 76 Fed. Reg. 24,787 (Apr. 29, 2011); Exec. Order No. 13,469, 73 Fed. Reg. 43,841 (July 25, 2008). *See also* Exec. Order No. 13,664, 3 C.F.R. § 1 (2014) (executive orders targeting human rights violators in Burundi, Central African Republic, Democratic Republic of Congo, Syria, and corrupt actors in Zimbabwe respectively).
[102] *See* Countering America's Adversaries Through Sanctions Act ("CAATSA"), Pub. L. No: 115-44, 131 Stat. 886 (2017) (providing authority for sanctions against persons engaged in human rights violations and acts of corruption in Iran, Russia, North Korea, and Russia); United States Consolidated Appropriations Act of 2010, Pub. L. No: 111-117, 23 Stat. 3034 (2009) (granting State Dept. authority to impose visa restrictions on foreign officials where "credible evidence" suggested an involvement in corruption in the extraction of natural resources).

abuses."[103] Similar corruption and human rights related sanctions are also available under Sec. 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, a recently favored avenue of the Trump Administration.[104]

These actions, along with a stranger-than-fiction backstory, set the legal stage for the passage of first the Sergei Magnitsky Rule of Law Accountability Act in 2012,[105] and eventually the Global Magnitsky Human Rights Accountability Act in 2016 ("GMA").[106] The original Magnitsky Act was a targeted instrument designed to impose economic and visa sanctions on Russian individuals involved in the torture and killing of Sergei Magnitsky, a Russian accountant murdered for his efforts to expose corruption within the Kremlin.[107] Similar to its predecessor, the Global Magnitsky Act directs the executive branch to enact visa bans and targeted economic sanctions against individuals responsible for committing "gross violations" of internationally recognized human rights or acts of "significant corruption," but unlike the original Magnitsky Act it is global in scope.[108] Under Executive Order No. 13,818, President Trump authorized the Departments of Treasury and State to take actions implementing the legislation pursuant to his powers under the IEEPA.[109] Under the GMA, requests for potential sanctions are made by the State Department, Congressional Committees,[110] and outside sources such as nonprofit groups.[111] Sanction recommendations from Congress must be followed within 120 days by a report from the President detailing the results of an investigation and whether the administration intends to impose sanctions.[112] The Act also requires the President (or the implementing agencies) to submit an annual report to Congress describing each individual sanctioned (or released from sanctions) under the legislation and the type of sanctions imposed.[113] Unlike previous sanctions regimes, the identity of those sanctioned are required to be made publicly available, with certain exceptions for classified information.[114]

In addition to the breadth of the legislative language, the implementing executive order grants much broader sanctioning powers than contemplated even in the legislation itself.[115] First,

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[103] Proclamation No. 8693, 3 C.F.R. § 2011 (July 24, 2011); Proclamation 8697, 125 Stat. 2056–58 (Aug. 4, 2011); *see* Proclamation 8693, 3 C.F.R. § 2011, Annex A, B for a comprehensive list of individual sanctions regimes.

[104] Dep't of State, Foreign Operations, and Related Programs Appropriations Act of 2020 (Div. G, P.L. 116-94).

[105] Russia and Moldova Jackson Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act, Pub. L. 112-208, 126 Stat. 1497–1509 [hereinafter "Magnitsky Act"]; *see The US Global Magnitsky Act*, HUMAN RIGHTS WATCH (Sept. 13, 2017) https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act.

[106] Global Magnitsky Human Rights Accountability Act, Pub. L. 114-328, §§ 1261–65, 130 Stat. 2533–38 (2017) [hereinafter "GMA"].

[107] *See generally* BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN'S FIGHT FOR JUSTICE (2015) (detailing the events leading up to Magnitsky's death and efforts to pass the resulting legislation).

[108] GMA § 1263.

[109] Blocking Property of Persons Involved in Serious Human Rights Abuse or Corruption, Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017) [hereinafter "Exec. Order 13,818"].

[110] GMA § 1263 (j)(1), (2) (sanctions requests may originate from the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Foreign Relations Committee, the House Committee on Financial Services, or the House Committee on Foreign Affairs).

[111] GMA § 1263 (c)(1), (2); *see The US Global Magnitsky Act*, HUMAN RTS. WATCH (Sept. 13, 2017) https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act.

[112] GMA § 1262(d)(1).

[113] *Id.* § 1264(a), (b).

[114] *Id.* § 1264(c), (d).

[115] Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win. No, Really*, JUST SECURITY (Jan. 10, 2018), https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/.

the order's language lowers the threshold for sanctionable conduct by punishing acts of "corruption" rather than "significant corruption"[116] and sanctioning "serious human rights abuse" rather than "gross violations of internationally recognized human rights."[117] Second, the GMA includes a requirement that the human rights abuses in question be committed against those either seeking to expose illegal activity by the government or to promote human rights. President Trump's order eliminates this whistleblower element all together.[118]

Pre-GMA sanctions regimes based solely on human rights violations suffer from selective enforcement and are often criticized as ineffective.[119] Until relatively recently, corruption-specific sanctions were virtually nonexistent,[120] despite the correlation between the two issues. By placing corruption and human rights under the same enforcement mechanism, the passage of the GMA and similar legislation in Canada and the United Kingdom[121] may signal an end to this perception.[122] Sanctions of the type called for in the GMA have the capacity to name and shame repressive actors where in-country accountability is unlikely, create space for domestic opposition movements, and at the very least signal the anti-corruption expectations of the international community.[123] However, these types of individual sanctions are not the first of their kind and certain gaps in the legislation may lead to unintended consequences, particularly in regard to their deterrent effect on corrupt actors. The following sections will identify potential problems the legislation may pose to the ongoing effort to fight corruption through a human rights frame.

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[116] Neither the bill nor the implementing Executive Order specifically define "corruption" or "significant corruption," but both contain the same examples, begging the question of whether this shift in language was intentional. *Compare* Exec. Order No. 13,818 (a)(ii)(B)(1), 82 Fed. Reg. 60,839 (Dec. 26, 2017) ("corruption including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery; or (2) the transfer or facilitation of the transfer of the proceeds of corruption") *with* GMA § 1263(a)(3) ("significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions").

[117] *Compare* Exec. Order No. 13,818 § 1(a)(ii)(A), 82 Fed. Reg. at 60,839 *with* GMA § 1263(a)(1). The GMA itself only sanctions those involved in "gross violations of internationally recognized human rights," which are defined as "torture, or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges or trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty or the security of the person." *See* GMA § 1262(2) (citing Foreign Assistance Act of 1961, 22 U.S.C. § 2304(d)(1)). The term "serious human rights abuse" is undefined in both the text of the law and the implementing executive order, which may be beneficial for human rights advocates attempting to link systemic corruption with human rights violations.

[118] *Compare* Exec. Order No. 13,818 § 1(a), 82 Fed. Reg. at 60,839 *with* GMA § 1263(a)(1)(a), (a)(1)(b).

[119] *How to Get Human Rights Abusers and Kleptocrats Sanctioned Under the Global Magnitsky Act, Hearing Before the U.S. Helsinki Comm'n* (2018) [hereinafter Helsinki Hearing], https://www.csce.gov/sites/helsinkicommission.house.gov/files/GetAbusersandKleptocratsSanctionedUnderMagnitsky.pdf (Statement of Adam Smith, Partner, Gibson, Dunn & Crutcher) ("Human rights are a really hard thing to sanction people for…from a behavior-change perspective, because very often people who are committing human rights violations are doing it in the name of what they think of as broader ideal…That's a much harder thing to move people on.").

[120] *Id.* (Statement of Brad Brooks-Rubin, Managing Director, The Sentry) (noting corruption as a sanctionable offense is new, corruption is typically an issue used as "political football" but rarely enforced against); *see, e.g.*, Proclamation No. 7750, 3 C.F.R. 7750 (2004).

[121] *See* Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c 21 (Can.); Sanctions and Anti-Money Laundering Act of 2018, c. 13 (Eng.).

[122] Helsinki Hearing, *supra* note 120 (Statement of Brad Brooks-Rubin, Managing Director, The Sentry) (noting the "intersection" between corruption and human rights violations brought into focus by the Global Magnitsky Act).

[123] INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *supra* note 7, at 15.

II. FORESEEABLE ROADBLOCKS: SELECTIVE ENFORCEMENT AND LAX REPORTING REQUIREMENTS SPELL TROUBLE FOR THE GLOBAL MAGNITSKY ACT

Whether one adopts the consensus approach that corruption needs to be fought in tandem with human rights abuses, or the emerging view that corruption itself is a human rights violation – sanctions regimes like the GMA can have a net positive impact on the human rights movement if enforced effectively. That being said, individualized sanctions are susceptible to selective enforcement problems and several mechanisms contained in the GMA may have unintended consequences on the ground.

In both the human rights and anti-corruption spaces the breadth of sanctioning power granted under the GMA is what makes the legislation unique. The fact that it combines human rights and corruption enforcement makes its passage even more novel.[124] In fact, in relation to both its international and preexisting national counterparts, the GMA and its implementing order cast an exceptionally broad net of sanctionable conduct.[125] Though the language and aim of the GMA speak to the recognition of the need to fight corruption and human rights violations on the same plane,[126] the mechanisms contained in the law may create roadblocks to the use of legislation to fight the type of entwined corruption and human rights violations endemic to the developing world.

While a growing body of scholarship already addresses a number of problems with targeted sanctions generally,[127] this section will identify the problems that arise from the mechanisms in the GMA specifically, and will explore the unintended consequences that the public nature of sanctions like this can have on the domestic fight against corruption in developing countries. This section will explore the shortcomings of the law by engaging in both a critical analysis of the potential problems with the current legislation, as well as an informal case study of one of its predecessors, Proclamation 7750.

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[124] Helsinki Hearing, *supra* note 119 (Statement of Mark Dubowitz, CEO, Foundation for Defense of Democracies) (characterizing GMA and Executive Order as most powerful, if not "only game in town" for corruption related sanctions of this nature).

[125] Both the Canadian and UK legislation maintain the whistleblower requirement that was absent from Executive Order No. 13,818, *see supra* note 116, and accompanying text, and the UK legislation focuses solely on human rights violators rather than corrupt actors. *See* Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c 21 § 4(2)(a)(Can.); Criminal Finance Act of 2017, c. 22 (Eng.); Proceeds of Crime Act of 2002, c. 29, § 241 A(2)(i), (ii) (Eng.) (requiring human rights violations be carried out against a person who has "sought to expose illegal activity…or defend or promote human rights."); *see also* Sanctions and Anti-Money Laundering Act of 2018, c. 13 § 2(f) (Eng.) (granting sanction power to "provide accountability for or be a deterrent to gross violations of human rights"). Furthermore, the GMA and implementing order create a lower threshold for sanctionable conduct than Sec. 7031(c) which sanctions "gross violations of human rights" and "significant corruption." Dep't of State, Foreign Operations, and Related Programs Appropriations Act of 2020, 8 U.S.C. § 1182.

[126] *See* GMA § 1263 (a)(1), (a)(3)*; see also* Exec. Order No. 13,818 ("Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; [and] perpetuate violent conflicts . . . .").

[127] Targeted sanctions have raised due process concerns since their rise in use. *See, e.g.*, Devika Hovell, *Due Process in The United Nations*, 110 AM. J. INT'L L. 1 (2016) (assessing efficacy of oversight mechanisms in UN sanction system); Tom Ruys, *Immunity, Inviolability and Countermeasures - A Closer Look at Non-UN Targeted Sanctions*, *in* CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW 670 (T. Ruys and N. Angelet eds., 2019) (addressing conflicts between targeted sanctions and immunity law).

a. The GMA's Discretionary Language Leads to Selective and Lopsided Enforcement

The first problem posed by the GMA is the risk of selective enforcement by the executive branch—both in the individuals targeted and the type of sanctions levied. Selective enforcement is a problem that has plagued similar sanction regimes[128] and is one of the GMA's biggest vulnerabilities. Despite the opportunities for Congressional and NGO input regarding sanctionable individuals,[129] the power to sanction remains discretionary and depends on a President who is willing to respect Congressional recommendations. In fact, the broad sanctioning power that is the GMA's hallmark may actually provide cover for an administration to "exercise its discretion" to take no action at all, or may allow the President to shift blame for inaction to the agencies he or she has delegated sanctioning power to. This particular problem recently reared its head in the uproar surrounding the assassination of the Saudi journalist Jamal Khashoggi. Though the legislation's first official test eventually resulted in the sanctioning of 17 Saudi officials, the Trump Administration ignored Senators' requests for a report on the incident (as required by law) and the actor responsible for the killing, Crown Prince Muhammed Bin Salman was not sanctioned.[130] The Khashoggi affair is a troubling indication of the type of political concerns preventing the GMA from achieving its full potential.[131]

i. Political Considerations

In contrast to the original Magnitsky Act,[132] the GMA gives the President (and, pursuant to Executive Order No. 13,818, the Departments of State and Treasury) the discretion to decide whether or not to impose sanctions on recommended individuals. The language of the original Magnitsky Act is absolute. It mandates that the President or delegated executive entity *shall* impose sanctions on the individuals covered by the Act and submitted by Congress.[133] The GMA,

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[128] *See* INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *supra* note 7, at 22–26; Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L. L. 1, 74–7 (2001) (discussing problem of selective enforcement in U.S. sanction regimes and the negative impact it has on international credibility).

[129] GMA § 1263 (c), (d).

[130] Anne Gearan, Karen DeYoung & Karoun Demirjian, *White House declines to submit report to Congress on Khashoggi killing*, WASH. POST (Feb. 8, 2019), https://www.washingtonpost.com/politics/white-house-declines-to-submit-report-to-congress-on-khashoggi-killing/2019/02/08/fdab7f96-2bd4-11e9-984d-9b8fba003e81_story.html?utm_term=.89eed0bdf499; Editorial Board, *Since the Murder of Jamal Khashoggi, the cruelty of Saudi Arabia's ruler has only grown*, WASH. POST (Oct. 1, 2020).

[131] *See* Press Release, Secretary of State Mike Pompeo, Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi (Nov. 15, 2018), https://www.state.gov/secretary/remarks/2018/11/287376.htm. Despite the imposition of financial sanctions, it is unclear whether visa bans were similarly imposed on the 17 individuals. The failure to move forward with additional measures, e.g., blocking arms sales to Saudi Arabia, may indicate the administration's reluctance to do any more than the bare minimum on human rights. *See, e.g.*, Burgess Everett, *Senators demand Trump say whether Saudi prince ordered Khashoggi killing*, POLITICO (Nov. 20, 2018), https://www.politico.com/story/2018/11/20/senators-trump-khashoggi-killing-1009549.

[132] Magnitsky Act, *supra* note 105.

[133] *Compare* GMA § 1263(a) ("The President *may* impose the sanctions described in subsection (b) with respect to any foreign person the President determines…."), *with* Magnitsky Act § 404(a), 126 Stat. at 1506 ("Not later than 120 days after the date of the enactment of this Act, the President *shall* submit [sanctions] list"); *see also* Magnitsky Act § 405(a), 126 Stat. at 1506 ("An alien is ineligible to receive a visa to enter the United States . . . if the alien is on the list required by Sec. 404(a)"); Magnitsky Act § 404(b) ("the Secretary of State *shall* revoke [visa] in accordance with this title.")(emphasis added). It is important to note despite the mandatory language; President

though it does mandate an executive report regarding individuals recommended by the Senate, is purely discretionary when it comes to the imposition of the sanctions themselves.[134] This difference makes achieving designations under the GMA "doubly hard" and undermines the law's ability to combat the human rights violations and corruption it intends.[135] Furthermore, because the GMA *requires* public disclosure of sanctioned individuals, politically sensitive designations are increasingly levied through different avenues, like Sec 7031(c), which do not demand such transparency, but rather allow public disclosure at the administration's discretion.[136]

Given these shortcomings, the GMA falls prey to the same selective enforcement problem that has plagued previous sanctions regimes.[137] The current language, in conjunction with the public nature of those sanctioned, will likely lead to situations in which sanctions are only levied against perceived "adversarial" countries or used as political tools.[138] Both scenarios could render the legislation meaningless in the fight against the endemic corruption and human rights abuses that plague the developing world by deeming certain acts unimportant while amplifying and punishing others. Selective enforcement of this nature negates any deterrent effect the legislation may have on low-level actors because it fails to establish uniformity against prohibited activities.

In fact, an examination of the first crop of GMA sanctions in January 2018 indicates that selective enforcement has been a problem from the very beginning.[139] The first list of sanctions failed to include any individuals in the Middle East, Central Asia, or sanctions against other U.S. security partners like Turkey and the Philippines who have engaged in documented human rights

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Obama asserted his discretion to "act on requests when appropriate." Press Release, Office of the Press Secretary, Statement by the President on Signing the National Defense Authorization Act for Fiscal Year 2017 (Dec. 23, 2016); *see* Rob Berschinski, *Senate's Letter on Khashoggi and the Global Magnitsky Act*, JUST SECURITY (Oct. 12, 2018) https://www.justsecurity.org/61030/explainer-senates-letter-khashoggi-global-magnitsky-act/ (further discussion on the legality of the original Magnitsky Act language).

[134] GMA § 1263(a).

[135] Helsinki Hearing, *supra* note 119 (Statement of Rob Berschinski, Senior Vice President, Human Rights First) (noting that given its discretionary language, the GMA is not the "first tool" to employ against entrenched corruption).

[136] In fact, the Trump administration has increasingly used Sec. 7031(c), rather than the GMA to levy high-profile visa sanctions. *See generally* U.S. Dep't of State, Global Magnitsky Act, https://www.state.gov/global-magnitsky-act/ (last visited Dec. 4, 2020) (aggregating releases regarding visa sanctions from 2017-to the present; indicating a trend toward Sec. 7031(c) use). Furthermore, review of the Sec. 7031(a) reports indicates that most designated individuals are first sanctioned privately or confidentially and then moved to the public list – a mechanism not available under the GMA. *See* Bureau of International Narcotics and Law Enforcement Affairs, Reports to Congress on Anti-Kleptocracy and Human Rights Visa Restrictions, https://www.state.gov/report-to-congress-on-anti-kleptocracy-and-human-rights-visa-restrictions-2/ (last visited Dec. 3, 2020) (aggregating all public reports to Congress from 2017-2020).

[137] *See* INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *supra* note 7, at 22–26 (noting condemnation of non-adversarial countries is rare in history of U.S. sanction regimes and sanctions typically align with political convenience).

[138] *See id.*

[139] *See, e.g.*, *Implementation of the Global Magnitsky Act: What Comes Next?*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (Sept. 20, 2018), https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/magnitsky_wcn_final.pdf (discussing sanctioned and notably unsanctioned individuals; referencing in particular the decision to sanction Dan Gertler in relation to corrupt dealings in the DRC mining industry); *see* Press Release, U.S. Department of the Treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec. 21, 2017), https://home.treasury.gov/news/press-releases/sm0243, but not President Joseph Kabila; *see* GLOBAL WITNESS, REGIME CASH MACHINE (2017) (discussing Kabila's mining sector corruption).

abuses in the past.[140] While the sanctions list has grown more geographically and politically varied since 2018, the selectivity problems remain today. For example, Human Rights First documented that the Administration ignored credible evidence of sanctionable conduct in Azerbaijan, Bahrain, Egypt, the Philippines, Tajikistan, the United Arab Emirates, and Uzbekistan, among others; and in regards to Turkey specifically, used the GMA to secure the release of a detained American pastor (seemingly catering to President Trump's political base), but failed to levy any additional sanctions regarding other widespread and documented human rights abuses in the country.[141] As the last two years indicate, the legislation lends itself to selective, politically expedient enforcement; in the rare scenarios where that is not the case, sanctions may be the result of high-profile abuses, like the murder of Jamal Khashoggi, that would be impossible to ignore.[142]

This problem is particularly troublesome for the fight against corruption as a human rights issue. The political will to punish corrupt individuals, particularly low-level actors, is not as strong as the political will to punish human rights abusers whose names are splashed across the headlines.[143] The susceptibility of the GMA to politicization is further exacerbated by its public nature. Though public naming and shaming is an effective tool to hold bad actors accountable, a completely public process has the unintended consequence of tying sanction designations to U.S. geopolitical concerns in a way that previous sanctions regimes were not.[144] This problem demonstrates at least one area in which the classification of corruption as a human rights violation would help move the needle towards combating impunity and indicates that the passage of the GMA itself does little to connect the two in the public or legal consciousness. Given these considerations the current discretionary nature of the GMA may render the legislation meaningless as a tool to combat the corruption that contributes to human rights abuses in the developing world.

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[140] *See* Rob Berchinski, *Trump Administration Notches A Serious Human Rights Win. No, Really*, JUST SECURITY (Jan. 10, 2018), https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/ (noting the failure to sanction Egyptian officials after first-hand accounts of torture by victims of the el-Sisi regime). Since January 2018, sanctions have since been placed on 101 officials. *See* Tom Firestone & Kerry Contini, *The Global Magnitsky Act*, CRIMINAL LAW FORUM (Sept. 28, 2018), https://link.springer.com/content/pdf/10.1007%2Fs10609-018-9353-z.pdf.

[141] *See* Human Rights First, *Walking the Talk: 2021 Blueprints for a Human Rights- Centered U.S. Foreign Policy* (Oct. 2020), https://www.humanrightsfirst.org/sites/default/files/HRF_Standalone_Ch.1_v5.pdf (discussing Trump Administration's use of the GMA generally and failures in Turkey specifically, noting failure to sanction individuals responsible for detention of Turkish-American dual citizens).

[142] *See* Luis Fleischman, *The Khashoggi, Alban And Nisman Cases: Are We Consistent on Our Human Rights Policies?*, CTR FOR SECURITY POL'Y (Oct. 22, 2018), https://www.centerforsecuritypolicy.org/2018/10/22/the-khashoggi-alban-and-nisman-cases-are-we-consistent-on-our-human-rights-policies/ (documenting other political disappearances that occurred at the same time as the Khashoggi killing and received little attention and no sanctions under the GMA).

[143] *See* HELSINKI COMMISSION, HOW TO GUIDE: SANCTIONING HUMAN RIGHTS ABUSES AND KLEPTOCRATS UNDER THE GLOBAL MAGNITSKY ACT 3 (May 24, 2018) ("The Department of State must determine that the potential damage to bilateral relations is outweighed by the value of addressing…corruption through sanctions….[B]uilding political will for corruption sanctions may be more difficult than for serious human rights abuse."); Hilary Hurd, *Getting the Right People on the Global Magnitsky Sanctions List*, GLOBAL ANTICORRUPTION BLOG (Apr. 27, 2018), https://globalanticorruptionblog.com/2018/04/27/getting-the-right-people-on-the-global-magnitsky-sanctions-list-a-how-to-guide-for-civil-society/.

[144] *See, e.g.*, Proclamation 7750, *supra* note 14.

ii. The GMA's Financial Sanctions Are Disproportionately Enforced Over Visa Bans

Another byproduct of the discretionary language in the GMA is the failure to concretely link the two discrete sanctions available under the legislation. While the original Magnitsky Act language mandated that an individual sanctioned under the act would face both asset freezes and a visa ban (or revocation),[145] under the GMA those sanctions are discretionary.[146] Additionally, under Executive Order No. 13,818, the sanctions are left to the separate discretion of the Departments of State (visa restrictions) and Department of the Treasury (financial sanctions).[147] This distinction is important when evaluating the GMA's effect as a tool to fight systemic corruption because it is visa bans, rather than asset freezes, that often have a large deterrent effect on actors in developing countries where corruption is intimately linked with human rights abuses.[148] In the first two years of the GMA's implementation, exactly zero visa bans were imposed, in contrast to 198 financial designations.[149] At the time of writing, the most recent report has not been released, however of the 2020 designations the Trump Administration has publicly released, only one instance[150] included visa bans under the GMA.[151]

In cases where corrupt actors or human rights violators may have few U.S. assets, or do little business with U.S. companies, visa sanctions are a crucial tool.[152] As evidenced by the forthcoming study of Proclamation 7750, the threat of a visa revocation is a powerful method to influence official behavior.[153] Visa bans, rather than asset freezes, can draw attention to individual actors and expose authoritarian or corrupt leaders to public pressures by cutting off their ability to

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[145] *See* Spahn, *supra* note 7, at 10; *see* Helsinki Hearing, *supra* note 119.
[146] GMA § 1263(a).
[147] Exec. Order No. 13,818, 82 Fed. Reg. 60,839, 60,841 (Dec. 20, 2017).
[148] *See* Spahn, *Implementing Global Anti-Bribery Norms, supra* note 7, at 128 (listing visa denials as one of the most powerful tools to punish, deter corruption).
[149] Global Magnitsky Human Rights Accountability Act Annual Report, 83 Fed. Reg. 67,460 (2018); Global Magnitsky Human Rights Accountability Act Annual Report, 84 Fed. Reg. 72,424 (2019).
(Dec. 10, 2018); *Sanctions List Search* (Program List: GLOMAG), OFFICE OF FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ (last visited Jan. 3, 2019).
[150] *See* Press Release, U.S. Dep't of State, *Former First Lady of The Gambia Sanctioned for Supporting the Former President's Corruption* (Sept. 15, 2020), https://www.state.gov/former-first-lady-of-the-gambia-sanctioned-for-supporting-the-former-presidents-corruption/.
[151] It is worth noting that some commentators have attributed this lopsidedness in part to the documented hollowing out of State Department staff and corresponding budget cuts under the Trump Administration. *See* Human Rights First, *Walking the Talk: 2021 Blueprints for a Human Rights- Centered U.S. Foreign Policy* (Oct. 2020), https://www.humanrightsfirst.org/sites/default/files/HRF_Standalone_Ch.1_v5.pdf.
[152] *See, e.g.*, Helsinki Hearing, *supra* note 119, at 17 (Statement of Adam Smith, Partner Gibson, Dunn & Crutcher, Former National Security Council and Department of Treasury Official) ("[T]he quintessential example for this is Joseph Kony. He has been on the SDN list for a decade. Does he deserve to be on the list? Absolutely he deserves it…. However, there is a question about whether or not his ability to commit atrocities over the past decade has actually been implicated by the fact that he's on the SDN list. He doesn't have a bank account, as far as we know, doesn't go to an ATM machine."). *See also* Griffith & Lee, *supra* note 17 (noting instruments like the FCPA will do little to combat corruption in countries with little to no multinational corporations).
[153] *See infra* Section II(a)(iii).

escape justice at home.[154] The closure of a potential "escape route" can act as a major deterrent to corrupt officials who fear sanctions or public backlash.[155]

Furthermore, in certain circumstances visa bans can be considered a more stringent punishment because there is less recourse to judicial review than with financial sanctions. Financial sanctions are under the purview of the Office of Asset Control within the Department of the Treasury and are evaluated under a "credible evidence standard," which can be challenged in court.[156] Visa decisions, on the other hand, are determined by the State Department and are largely immune from judicial review.[157]

Despite the fact that visa bans and financial sanctions are punishments for the same conduct and cited in the same legal documents, there is little official policy linking the two processes.[158] Though the two are often conflated,[159] they are separate processes that are left to the discretion of different federal entities and largely cloaked in confidentiality.[160] Because of this, the

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[154] *Corruption, Global Magnitsky, and Modern Slavery – A Review of Human Rights Around the World*: *Hearing Before the S. Comm. on Foreign Relations*, 114th Cong. (2015) (Statement of Mark Lagon, President, Freedom House).

[155] *Id.* (noting "an escape route matters a great deal to officials in some countries, particularly in the Americas" who may shape up conduct in fear of losing that "escape").

[156] GMA § 1263(a); *see* CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, *supra* note 139. While there is little case law defining this standard in relation to sanctions punishing human rights violations and/or corruption, the legal framework governing other sanctions levied under the national security provisions of the IEEPA is extremely deferential to the executive branch. Most case law involves challenges to economic sanctions against those suspected of funding terrorist activities post 9/11. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). It is possible given that the GMA is less obviously in the realm of national security concerns that a different standard will emerge which allows for greater judicial discretion, but the current framework employs a balancing test, which is ultimately deferential to OFAC determinations, allowing the Department of Treasury to rely on classified information when making sanctions determinations as long as it follows certain minimum procedures. *See* Al-Haramain Islamic Found., Inc. v. U.S. Dep't. of Treasury, 686 F.3d 965, 979 (9th Cir. 2012); Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) ("[R]eview—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential"); *cf.* Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, 857 F.3d 913 (D.C. Cir. 2017).

[157] Fiallo v. Bell, 430 U.S. 787, 787 (1977) (noting Courts "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *see* CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, *supra* note 139 (discussing judicial review for financial versus immigration sanctions).

[158] Helsinki Hearing, *supra* note 119 (Statement of Josh White, Former Treasury Official, Director of Policy and Analysis, The Sentry) (noting while the State Department may look to OFAC designations when making visa determinations, they are completely different processes and there is no formal policy regarding how information from Congressional recommendations will be processed by separate agencies).

[159] *See id.* (noting that SDN designation generally equals a visa ban as well). Furthermore, most briefings and news coverage of sanction orders or legislation make no distinction between visa bans and financial sanctions despite separate enforcement policies. *See, e.g.,* Press Release, Michael Pompeo, Secretary of State, Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi (Nov. 15, 2018), https://www.state.gov/secretary/remarks/2018/11/287376.htm (State Department release announcing GMA sanctions, but only mentioning asset freezes); Press Release, Heather Neurart, State Department Spokesperson, Global Magnitsky Designations for Nicaragua (July 5, 2018), https://www.state.gov/r/pa/prs/ps/2018/07/283833.htm (again announcing "sanctions" but not distinguishing or including whether visa bans were imposed); Jordan Tama, *What is the Global Magnitsky Act, and why are U.S. senators invoking this on Saudi Arabia?*, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/12/what-is-the-global-magnitsky-act-and-why-are-u-s-senators-invoking-this-on-saudi-arabia/?noredirect=on&utm_term=.ebe154624623.

[160] *See generally, e.g.*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE OFAC LIST (2014), https://www.lccr.com/wp-content/uploads/The-OFAC-List-2014-FINAL.pdf (guidance and background on OFAC designations process).

discretionary language in the GMA has already led to extremely lopsided enforcement.[161] In fact, though Executive Order No. 13,818 mandates that *both* visa bans and financial sanctions be levied,[162] *and* requires the two agencies to consult with one another on sanctions, based on the State Department Reports neither is happening in practice.[163] Additionally it appears the preferred practice may be to sidestep the GMA altogether in favor of Sec. 7031(c).[164]

iii. Practical Effect: Proclamation 7750 in Africa

An exploration of a predecessor to the GMA, Proclamation 7750 demonstrates how a sanctions regime, focused on confidential visa restrictions, provided key leverage to diplomats and others attempting to curb the type of corruption prevalent in developing countries. As noted, Proclamation 7750 is a Bush era executive order that aimed to combat public corruption abroad by denying or revoking U.S. visas for those suspected of engaging in or benefitting from corruption.[165] While empirical evidence of Proclamation 7750's effectiveness is difficult to measure,[166] anecdotal evidence from several African countries, including Tanzania, Nigeria, Cameroon, and Kenya, indicate that the regime was effective in both punishing corrupt officials and deterring future behavior.[167] Counterintuitively, the confidentiality of the regime allowed the sanctions or threat of sanctions to be used as leverage to both spark anti-corruption campaigns on the ground and to punish low-level corrupt actors.[168] A brief look at the press coverage

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[161] *See* Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149 (indicating 0 out of 101 sanctioned individual received visa bans).

[162] Exec. Order No. 13,818 § 2 (aliens meeting Sec. 1 of the order were to be suspended entry, the December 2018 Congressional report indicates this did not occur).

[163] Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149 ("Although no visa restrictions were imposed under the Act during 2018, persons designated pursuant to E.O. 13818 shall be subject to the visa restrictions articulated in section 2, unless an exception applies."). It is worth noting that it is possible certain individuals have been sanctioned under other available, confidential programs, but this possibility and appearance of lopsided enforcement only further demonstrates the problems with the discretionary language of the legislation.

[164] In fact, of only three public visa sanctions in 2020, two were levied under Sec. 7031(c) rather than the GMA. In many cases financial sanctions were levied under the GMA and visa sanctions against the same individual levied under Sec. 7031(c) – a point which further underscores the need to link the GMA processes. *See, e.g.*, Press Release, U.S. Dep't of State, *The United States Imposes Sanctions and Visa Restrictions in Response to the ongoing Human Rights Violations and Abuses in Xinjiang* (July 19, 2020), https://www.state.gov/the-united-states-imposes-sanctions-and-visa-restrictions-in-response-to-the-ongoing-human-rights-violations-and-abuses-in-xinjiang/ (visa sanctions under 7031(c)); Press Release, U.S. Dep't of State, *The United States Designates Corrupt Lebanese Political Leader Gibran Bassil* (Nov. 6, 2020), https://www.state.gov/the-united-states-designates-corrupt-lebanese-political-leader-gibran-bassil/ (visa sanctions under 7031(c)).

[165] Proclamation No. 7750, *supra* note 14.

[166] *See* Low et al., *supra* note 28, at 595; *Human Rights Violators & War Crimes Unit: Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/human-rights-violators-war-crimes-unit (last visited Jan. 9, 2019) (noting 139 individuals were denied entry to U.S. since Proclamation 7750's announcement in 2004).

[167] This section will focus largely on Proclamation 7750's effectiveness in the aforementioned African countries, but evidence of Proclamation 7750's effectiveness is documented in others as well. *See, e.g.*, Low et al., *supra* note 28, at 595 (citing Confidential Telegram from U.S. Embassy in Jakarta (Aug. 27, 2004), https://wikileaks.org/plusd/cables/07JAKARTA2339_a.html ("Indonesian officials…welcome judicious implementation of PP7750")).

[168] *See, e.g.*, Confidential Telegram from U.S. Embassy in Tanzania (Sept. 10, 2008), https://wikileaks.org/plusd/cables/08DARESSALAAM582_a.html (summarizing editorial coverage of Proc. 7750,

surrounding the regime as well as communications from U.S. embassies in Tanzania, Nigeria, Cameroon, and Kenya, demonstrate the work the program was able to do.

In Nigeria, Cameroon, and Kenya, Proclamation 7750 was a key tool in the fight against corruption – and in many cases used to combat the type of corruption that is intimately tied with human rights violations. In Nigeria, for example, officials used Proclamation 7750 in the wake of what were widely considered sham elections in 2007.[169] Foreshadowing the problems with the GMA, an embassy cable noted Proclamation 7750 can and should be used against all levels of corrupt officials, not limited to the "politically safe" but also those "at the highest levels, who . . . participated in the rigging of elections."[170] Similarly, in Cameroon, officials reported the use of Proclamation 7750 and its coverage in the press as a diplomatic tool to encourage anti-corruption efforts by the sitting administration.[171] In fact, one embassy cable recounts that press stories speculating whether officials were sanctioned under Proclamation 7750 led a prominent businessman facing corruption allegations, "to approach the Embassy to 'tell all' and deliver a duffel bag filled with incriminating documents, which he . . . hoped would keep him off [sanctions] list."[172] Finally Proclamation 7750 played a large role in the fight against corruption in Kenya, both through public debate and press coverage of public corruption[173] and by active use of the sanctions by Ambassador Michael Ranneburger, who served from 2006-2010.[174] Press coverage

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calling on local government to follow the U.S. lead and "tackl[e] this vice, instead of waiting for the American President to sort things out").

[169] Confidential Telegram from U.S. Embassy in Nigeria (May 22, 2007), https://wikileaks.org/plusd/cables/09ABUJA895_a.html.

[170] *Id. See also* Confidential Telegram from U.S. Embassy in Nigeria (Feb. 28, 2006), https://wikileaks.org/plusd/cables/06ABUJA483_a.html (discussing use of Proc. 7750 to "entrench […] the precepts of good governance and accountability"); *id.* (May 10, 2007), https://wikileaks.org/plusd/cables/07ABUJA911_a.html ("What would have impact here is the public reference to our ability to use the 7750 process - not the number of people who actually lose their visas . . . pursuing these [] cases…could send a strong message to the public and Nigerian elites."); *id.* (May 22, 2009), https://wikileaks.org/plusd/cables/09ABUJA895_a.html (discussing use of visa bans to "send strong message" to the government).

[171] Confidential Telegram from U.S. Embassy in Cameroon (Apr. 22, 2009), https://wikileaks.org/plusd/cables/09YAOUNDE370_a.html (describing Ambassador's meeting with then President Biya regarding corruption in his Cabinet, mentioning that "Washington had recently found a member of [his] Cabinet ineligible for U.S. travel" cautioning him "that the decisions might make its way to the public domain."); *see also id.* Confidential Telegram from U.S. Embassy in Cameroon (Sept. 22, 2008), https://wikileaks.org/plusd/cables/08YAOUNDE913_a.html (describing local press outreach, high profile stories that "sent a jolt through Cameroon's corrupt cadres").

[172] Confidential Telegram from U.S. Embassy in Cameroon (Sept. 22, 2008), https://wikileaks.org/plusd/cables/08YAOUNDE913_a.html.

[173] *See, e.g.*, Mutinda Mwanzia, *US Ban: It Wasn't Me Says Ruto*, STANDARD MEDIA KENYA, (Mar. 20, 2009), https://www.standardmedia.co.ke/business/article/1144009361/us-ban-it-wasn-t-me-says-ruto; Ben Agina, *Why Kibaki is Angry with Obama*, STANDARD MEDIA KENYA (Sept. 27, 2009) https://www.standardmedia.co.ke/article/1144024999/why-kibaki-is-angry-with-obama; *Prominent Kenyans Banned From Entering US*, VOICE OF AMERICA (Oct. 31, 2009), https://www.voanews.com/a/a-13-2006-05-24-voa46/312743.html.

[174] *See* Nick Wadhams, *Ambassador's Crusade in Kenya*, TIME (Jan. 28, 2011), http://content.time.com/time/world/article/0,8599,2044615,00.html; Elijah Nyaga Munyi, *Obama Delivers for Kenya: On Business*, *in* THE WORLD VIEWS OF THE OBAMA ERA 51 (Matthias Maass ed., 2018) (describing period of "activist diplomacy"). The use of Proclamation 7750 continued after Ambassador Ranneburger stepped down. *See, e.g.*, Juma Kwayera, *US envoy: Our foreign policy bars me from naming and shaming corrupt Kenyans*, CDT AFRICA (Dec. 10, 2015), http://cdtafrica.org/2015/12/10/us-envoy-our-foreign-policy-bars-me-from-naming-and-shaming-corrupt-kenyans/ (noting bans announced by Ambassador Godec).

of speculated bans under Proclamation 7750 not only sparked public conversation regarding government corruption, but affected the behavior of corrupt officials, causing preemptive resignations[175] and providing local government the cover to clean up their own ranks.[176] In the majority of these cases, it was not just the confidentiality of the program that allowed Proclamation 7750 to avoid the selectivity problems that will likely come to pass in the GMA, but it was also the fear of visa bans or revocations in developing countries where the aforementioned "escape route" is a golden ticket that corrupt actors or human rights abusers do not want to see disappear.[177]

b. The GMA's Definitional Language and Reporting Requirements Provide Unclear Guidance and Limit the Deterrent Effect of the Legislation

The GMA's selective enforcement problem is compounded by a lack of uniformity or transparency in the legislation's definitional language and reporting requirements, both of which hinder outside groups' ability to effectively recommend individuals for sanctions and lessen the deterrent effect of the law as a whole.

i. Discrepancies Between the Language in the Legislation and the Implementing Executive Order

The discrepancy between the definitional language in the GMA and the implementing executive order, at best, vaguely broadens sanctionable conduct beyond the strictures of the legislation and, at worst, creates a situation where Congressmembers and advocates are flying blind regarding the sanctions standard and unable to successfully petition for action at all.[178] The executive order implementing the GMA expands sanctionable conduct by employing broader language than the legislation itself.[179] Though this broadening may appear beneficial to those seeking sanctions, it also offers spotty guidance regarding what exactly constitutes sanctionable conduct. More importantly, for those fighting to reframe corruption as a human rights violation, the problem is that these discrepancies are not likely to be left untested for long. When these definitions make their way through courts or get defined in regulation, it is likely that the

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[175] *See id.* (describing a Cabinet Secretary who had previously refused to resign amid a corruption scandal involving misallocation of sh800 million, stepping down for fear of a visa ban); Confidential Telegram from U.S. Embassy in Kenya (Mar. 17, 2009), https://wikileaks.org/plusd/cables/09NAIROBI546_a.html ("We expect this step to receive extensive media coverage . . . influencing some action by the coalition government. Visas to the U.S. are highly sought after and prized by Kenyans. In our experience, just the idea of possibly being denied a visa (or having one revoked) can be a powerful incentive for politicians and government officials to change their attitudes and behavior.").

[176] *See* Confidential Telegram from U.S. Embassy in Kenya (Oct. 24, 2005), https://wikileaks.org/plusd/cables/05NAIROBI4384_a.html (noting President Kibaki's eagerness to understand U.S. actions in order to plan his own actions on certain officials).

[177] *See* Lagon, *supra* note 154. While Proclamation 7750 and others like it are still in existence, the GMA is the first instrument to place corruption and human rights abuses on the same level and the lopsided enforcement of visa sanctions under this framework is a lost opportunity to spark the types of results seen under Proclamation 7750, particularly given the effectiveness of visa sanctions in influencing behavior.

[178] *See* Helsinki Hearing, *supra* note 119; Helsinki Hearing, *supra* note 120; Justice for Victims of Corrupt Officials Act; Sanctions and Anti-Money Laundering Act of 2018; *see* Helsinki Hearing, *supra* note 120 (detailing definitional discrepancies).

[179] *See* Helsinki Hearing, *supra* note 119; Helsinki Hearing, *supra* note 120; *see* Justice for Victims of Corrupt Officials Act; *see* Sanctions and Anti-Money Laundering Act of 2018; *see* Helsinki Hearing, *supra* note 120.

definitions that emerge will revert back to more traditional conceptions of human rights violations and corruption. This is an even greater risk now that the GMA's counterpart, Section 7031(c), is actively in use by the current administration, because Sec 7031(c) mirrors the language of the GMA rather than the implementing order.[180]

For example, the GMA currently relies on a definition of human rights violations from 1961 that leaves little room for an interpretation that includes systemic corruption as a violation.[181] Though the executive order's broader "serious human rights abuse" language does leave the door open, it is not difficult to imagine a court falling back on the language in the legislation itself. Furthermore, the international dominance of the FCPA, coupled with the human rights community's acceptance of the "U.N. definition" of corruption,[182] indicates that without more specific definitions, the ambiguities in the current language will be resolved in favor of a siloed definition of corruption that either: only punishes major instances of corruption (rather than systemic)[183] or fails to link corruption and human rights at all.[184]

ii. Current Reporting Requirements Are Uneven and Unenforceable

In addition to the confusion created by the ambiguities in the definitional language, the GMA's reporting requirements provide little meaningful guidance for those submitting sanction requests. Though the law invites outside groups to submit requests,[185] the administration is only required to give status reports on requests that originate from Congress.[186] Furthermore, though the President is required by law to report annually on *all* individuals sanctioned under the GMA, the first two reports indicate that the reporting guidelines are not being met – only 30 of the 101 individuals sanctioned under the GMA in 2018 were named and described according to the reporting guidelines.[187] While the Departments of Treasury and State have conducted briefings

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[180] *See* Congressional Research Service, *FY2020 Foreign Operations Appropriations: Targeting Foreign Corruption and Human Rights Violations* (last updated Apr. 17, 2020), https://fas.org/sgp/crs/row/IF10905.pdf (explaining differences between Sec. 7031(c) language and GMA).

[181] *See* GMA § 1262(2) (citing Foreign Assistance Act of 1961) ("gross violations of internationally recognized human rights" against those who seek to expose corruption or obtain, exercise, defend, or promote human rights).

[182] Spalding, *supra* note 2, at 1397.

[183] The FCPA regime has seemingly set a bar for high profile, largescale corruption. *See, e.g.*, *SEC Enforcement Actions: FCPA Cases*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Jan. 24, 2019). Based on the limited number of sanctions announced so far, it seems this pattern is already being followed by the GMA. Most individuals sanctioned for corruption (of those that have been properly reported on by OFAC) are major offenders. *See* Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149.

[184] The international order still views corruption within a corporate frame. *See* Spalding, *Corruption, Corporations, and the New Human Right*, *supra* note 2, at 1386–94, 1397 (discussing the definitions of corruption employed by various sectors). While there is a growing understanding that corruption implicates human rights concerns, the default position, even by human rights institutions, is to define and combat corruption as a means to the end of human rights violation, rather than a violation itself. *See* discussion, *supra* Section I(a)(iii).

[185] GMA § 1263(c)(2).

[186] *Id.* at § 1263(d)(1)(B).

[187] The President is required to report on all individuals sanctioned under the GMA in the previous calendar year, including a description of the individual, the type of sanctions imposed, and the reasons for imposing (or terminating) sanctions. GMA § 1264(a)(1)–(6). However, the 2018 report includes such a description of only 31 individuals, despite 101 designations. *See* Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149. The first report was published in 2017 before any designations under the legislation had

for NGOs and outside groups attempting to submit sanctions requests,[188] the lack of an 120 day reporting requirement for outside groups and the apparent failure of the government to adhere to the reporting guidelines at all raises questions regarding which types of actors are likely to be sanctioned under the legislation and wastes the time and resources of groups hoping to use the annual reports to develop advocacy tactics.

The holes in the legislation's reporting requirements are extremely important in the effort against the type of corruption that has human rights implications. In regard to this type of activity it is often NGOs and outside groups that actually have a pulse on the ground and understand the implications of a certain corrupt actor's conduct. Given the problems regarding the difficulties of obtaining sanctions under the GMA in general,[189] the reporting failures only exacerbate those problems by hobbling the very entities that have the potential to make the GMA function robustly. In order to actually fulfill its mission of clamping down on human rights abusers and corrupt actors across the globe, amendments to the legislation much be made that hold bad actors accountable for sanctionable offenses while continuing to inspire outside participation in the sanctions program. The following section will suggest amendments to the language and reporting mechanisms of the legislation that will help achieve a happy medium. One in which the GMA does not devolve into a political naming and shaming of only a few key players, but rather addresses both high-profile human rights and corruption offenses and systemic abuses hobbling the developing world.

III. PROPOSED LEGISLATIVE AMENDMENTS

The passage of the original Magnitsky Act and its global counterparts was an important moment for the fight against human rights violations generally – at the most by providing methods to hold violators accountable on the world stage, at the least as symbols of a renewed commitment to human rights. Though the GMA names and shames major corrupt actors or human rights abusers, it is not clear it helps at all in the fight against the low-level corruption that leads to systematic human rights abuses across the developing world. While there is value in holding those responsible for human rights atrocities and large-scale corruption accountable, the fight must be fought on both fronts if it is to change the quality of life for those living under low-level corrupt or violent actors.

For those fighting to link the struggle against corruption with the struggle to protect human rights, the selective and lopsided enforcement problems inherent in the GMA can be remedied by:

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officially been made. *See* Global Magnitsky Human Rights Accountability Act Annual Report, 82 Fed. Reg. 28,215 (filed Apr. 21, 2017) (published June 20, 2017). At the time of writing, the 2020 report has not been published, through Secretary Pompeo's State Department appears more willing to document GMA designations than his predecessor Former Secretary of State Rex Tillerson. See, e.g., United States Department of State, Global Magnitsky Act, https://www.state.gov/global-magnitsky-act/ (last visited Dec. 3, 2020) (aggregating press releases on designations).

[188] *See* Firestone & Contini, *supra* note 140 (reporting State and Treasury websites and email addresses for NGOs to report individuals); *see generally* Helsinki Hearing, *supra* note 119 (federal agency hearing on recommending sanctions). It is worth noting that many briefings and documents designed to aid NGOs place a heavy emphasis on the political blowback of sanctions, further highlighting the problem of selective enforcement based on political considerations. *See, e.g.*, *id.* (remarks of Rob Berschinski, Senior Vice President of Human Rights First) (noting applications must "address the potential political blowback and should explain how such blowback will be minimized").

[189] *See* HELSINKI COMMISSION, *supra* note 143 and accompanying discussion.

(1) amendments to the discretionary sanction language; (2) the addition of definitional terms; and (3) enhancement of the legislation's reporting requirements. The following section will address each of those solutions in turn and explore why enhanced reporting requirements would be the most effective first step.

a. Amendment of Existing Language

To some extent selective enforcement in sanctions regimes is always going to exist, as a natural function of the separation of powers within the U.S. government. While the Constitution assigns foreign policy powers to both the President and Congress[190] the Supreme Court has consistently recognized the unique authority of the executive branch in this sphere.[191] In the realm of visa sanctions particularly, the Court has declined to wade into challenges to either Congressional imposition of visa denials,[192] or discretionary decisions made by the Executive branch.[193] That being said, the particular language in the GMA grants much more discretionary power than other similar sanctions legislation and should be amended to include language that would place more of an obligation on the Department of State and Treasuries to impose (or at least investigate) sanctions and narrow the agencies' discretion not to act by clearly defining sanctionable conduct. The following amendments would address both the selective and lopsided enforcement issues identified in previous sections.

i. Discretionary Language

As noted, the current GMA sanctions language is entirely discretionary. There is no binding obligation to investigate or sanction the requested individuals. The language simply states the President *may* impose sanctions upon credible evidence of human rights violations or corruption.[194] This language is in direct opposition to the language in the original Magnitsky Act which mandated action by the President (and by extension the State Department and Department of the Treasury).[195] Though the original Magnitsky Act does provide for some executive discretion through national security waiver provisions, the language imposes a much stronger obligation on

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[190] U.S. CONST. art. I, § 8 (Congressional power to regulate foreign commerce, declare war, raise an army, and provide a navy); *id.* art. II, § 2 (Presidential power of Commander in Chief, to make treaties and appoint ambassadors with advice and consent of the Senate).

[191] *See* U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (finding that the President enjoys broad discretion in the realm of foreign affairs); *see also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085–88 (2015) (discussing interplay between Congressional foreign policy powers and Presidential power of recognition).

[192] *See* Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("The power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *see also* Nsiah v. Perryman, No. 97-1163, 1997 WL 661184 at *1 (7th Cir. Oct. 17, 1997) ("[T]he judiciary has refused to intrude on the process of granting or denying visas.").

[193] U.S. *ex. rel* Knauff v. Shaughnessey, 338 U.S. 537, 544 (1950) ("[W]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

[194] *See* GMA § 1263 ("The President may impose the sanctions . . . with respect to any foreign person the President determines, based on credible evidence [meets requirements]".).

[195] Magnitsky Act § 405(b) ("The Secretary of State shall revoke . . . the visa . . . of any alien who would be ineligible to receive such a visa or documentation under subsection (a) of this section"); *id.* § 406(a)(1) ("The President shall exercise all powers granted by the [IEEPA] to the extent necessary to freeze and prohibit all transactions in all property and interests in property of a person who is on the list….").

the executive branch from the outset.[196] The original legislation mandates action unless a national security exception is determined – implying that, barring exceptional circumstances, sanctions must be investigated against individuals meeting the requirements for sanctionable conduct. Even those exceptional circumstances must be reported to Congress in advance of any waivers.[197] As is, the GMA simply reminds the executive branch it may act if it pleases.

Though a review of the legislative history of the GMA does not reveal why such a marked change was made between the language of the two,[198] the four years between the passage of the original Magnitsky Act and the GMA indicate that the current language may be the result of political resistance to expanding the scope of the original act's stringent demands. However true that may be, amendments to the GMA that would revert the language back to the strong stance taken in the original Magnitsky Act are a critical first step in combating the bill's susceptibility to selective enforcement. A framework that mandates the President "shall" impose the enumerated sanctions for the enumerated conduct, while re-imposing waiver provisions for cases dealing with pre-existing international obligations or national security, would make selective enforcement more difficult and allow for Congressional oversight of those cases where the administration declined to impose sanctions despite qualifying conduct.[199] This type of language would additionally combat the lopsided enforcement of financial sanctions by compelling each agency to undertake a mandatory process, rather than merely offering sanctions options.

Though limiting the discretionary language of the law is a key step, the suggested changes cannot completely close the discretionary holes. While the suggested amendments would not encounter Constitutional issues themselves,[200] the nature of the separation of powers make it such that there is no way to avoid at least some of the selective and lopsided enforcement that is beginning to come out of the GMA. Though countless other sanctions laws employ mandatory language, including the recent Countering America's Adversaries Through Sanctions Act[201] (which is similar in mission and structure to the GMA),[202] executive discretion would not be completely removed because the respective agencies would retain the discretion to make "credible

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[196] *See id.* § 405(c)(1) ("The Secretary of State may waive the application of subsection (a) or (b) in the case of an alien if (A) the Secretary determines that such a waiver (i) is necessary to permit the United States to comply with an [international] agreement…(ii) is in the national security interests of the United States); *id.* at § 406(b) ("The Secretary of the Treasury may waive the application of subsection (a) if the Secretary determines that such a waiver is in the national security interests of the United States….").

[197] *Id.* at § 405(c)(1)(B); 406(b).

[198] H.R. REP. NO. 114-840, at 1204–05, (2016) (Conf. Rep.) (showing limited additions or amendments between House and Senate versions of the legislation); 115 CONG. REC. 2,991 (2016) (SA 4031 Cardin Amendment) (indicating Sen. Cardin's amendment was accepted without alterations); *see* Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Actions Overview, https://www.congress.gov/bill/112th-congress/house-bill/6156/actions?q=%7B%22search%22%3A%5B%22Magnitsky%22%5D%7D&r=4&s=3 (last visited Nov. 22, 2020) (indicating that original Magnitsky Act passed House and Senate without amendment, no conference report).

[199] *See* Magnitsky Act §§ 405 (c)(1)(B); 406(b).

[200] In regard to the visa sanction provisions, Congress is well within its power to supply the conditions of entry to the United States. *See* Kerry v. Din, 135 S. Ct. 2128, 2136 (2015) (noting "Congress's plenary power to 'suppl[y] the conditions of the privilege of entry into the United States") (quoting U.S. *ex rel.* Knauff, 338 U.S. 537, 543 (1950)).

[201] *See* Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

[202] *See id.* § 104(b) (also printed in 22 U.S.C. § 9403(b)); Reciprocal Access to Tibet Act of 2018, H.R. 1872, 115th Cong. § 5(b) (2018) (enacted Dec. 13, 2018, not recorded); Foreign Assistance Act of 1961, 22 U.S.C. § 2304; Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms–Burton Act"), Pub. L. 104–114 § 401(a), 110 Stat. 822 (1996).

evidence" determinations regarding the conduct of recommended individuals.[203] Courts' unwillingness to compel executive agencies to enact visa sanctions is another roadblock,[204] but it is ultimately the power retained by the executive branch in both immigration matters and in general execution of the law that hinders any true ability to mandate equitable enforcement of both the types of individuals sanctioned and the types of sanctions employed.[205]

Though selective enforcement is a problem that can never be completely solved, amending the language would not just be an exercise in semantics. Making the suggested amendments would: alter the order of operations employed when determining whether sanctions should be imposed; help close the gap between visa and financial sanctions by at the very least mandating an initial investigation by both sanctioning entities; and finally, have a deterrent effect on potential violators by widening the net of possible sanctionable individuals.

ii. Definitional Language

Amending the discretionary language in the law is imperative to its effectiveness, but the definitional language – defining key terms such as "gross violations of human rights" and "significant corruption" – is where those fighting to link corruption and human rights abuses have the most opportunity to wield the legislation for their cause.

The GMA itself lacks robust definitions for several key terms[206] and the scant legislative history does not provide much guidance.[207] Furthermore, there are significant discrepancies between the language of the law and the implementing Executive Order.[208] These conditions, in conjunction with the fact that the legislation is untested by the Courts, mean that although advocates and Congressmen are operating under spotty guidance, there is an opportunity for advocates to make a strong case for definitions that advance the fight against corruption rather than limit the number of sanctionable individuals. Amendments that implement strong definitions of "significant corruption" and "serious human rights abuse" would allow for more behavior to fall under the legislation's purview.

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[203] GMA § 1263(a).

[204] *See, e.g.*, *In re* Harbour E. Dev., Ltd., No. 10–20733–BKC–AJC, 2011 Bankr. LEXIS 59, at *4 (Bankr. S.D. Fla. Jan. 6, 2011). ("This Court also does not have the authority or jurisdiction to compel the Executive Branch, through the Secretary of State, the Attorney General or Office of Foreign Assets Control ("OFAC"), to deny a visa or exclude any foreign person from the United States.").

[205] *See* Immigration and Nationality Act, 8 U.S.C § 1182(f) (giving the President authority to "suspend the entry" of any foreign national whose entry is "detrimental to the interests of the United States."). *See* GMA § 1263(c)(1), (2), 130 Stat. at 2535 (some legal scholars have suggested that Congress may not grant its own Committee the power to compel executive action in the form of the sanctions requests in GMA § 1263(c)(1,2) of the GMA, but such claims have yet to be tested in the courts and are outside the scope of this note). *See* Rob Berschinski, *An Explainer: Senate's Letter on Khashoggi and the Global Magnitsky Act*, JUST SECURITY (Oct. 12, 2018), https://www.justsecurity.org/61030/explainer-senates-letter-khashoggi-global-magnitsky-act/ (citing Marty Lederman (@marty_lederman), TWITTER (Oct. 11, 2018, 10:06 AM), https://twitter.com/marty_lederman/status/1050387986746171392 (citing Barack Obama, Statement on the Signing of the National Defense Authorization Act for Fiscal Year 2017 (Dec. 23, 2016), https://www.govinfo.gov/content/pkg/DCPD-201600863/pdf/DCPD-201600863.pdf.)

[206] GMA § 1262, 130 Stat. at 2533 (failing to provide a definition for either "corruption" or "significant corruption").

[207] *See* H.R. REP. NO. 114-840, *supra* note 198.

[208] *See* Helsinki Hearing, *supra* note 119; *see* Helsinki Hearing, *supra* note 120; *see* Justice for Victims of Corrupt Officials Act; *see* Sanctions and Anti-Money Laundering Act of 2018; *see* Helsinki Hearing, *supra* note 120.

Right now, the GMA punishes those who engage in "gross violations of internationally recognized human rights," using the definition of "gross violations" provided by the Foreign Assistance Act of 1961.[209] However, the Executive Order only punishes "serious human rights abuse."[210] An amendment to the law that aligns the legislation's language with the lower threshold contained in the Executive Order, and defines "serious human rights abuse" as not only the gross violations provided for by the Foreign Assistance Act, but also as a "pattern of systematic violation of internationally recognized human rights," would allow for the law to punish both those who commit human rights atrocities and those who have systematically and severely deprived a population of human rights—which would not always include what are traditionally viewed as atrocities.[211]

In addition to the human rights language, there are important discrepancies between the definition of punishable corruption in the GMA and the implementing Executive Order.[212] The GMA punishes "significant corruption" and provides no definition of either "corruption" or "significant."[213] Executive Order No. 13,818 on the other hand simply punishes "corruption."[214] Though it is important to reconcile the discrepancy between the two terms for practical guidance and enforcement reasons, a definition of actionable corruption that takes into the account the aggregate seriousness of systematic conduct would allow for GMA sanctions to strike the same fear into corrupt government officials that was observed under Proclamation 7750, and this time with a higher profile and the added possibility of financial sanctions. As of yet, no Court has been called upon to interpret these terms, and the single round of regulations from the Office of Foreign Assets Control dealt solely with financial sanctions and did not include any guidance on the aforementioned terms.[215]

As with any specific legislative language, amendments that create particular definitions carry the risk of imposing legal parameters that are exclusive or difficult to prove. Though the current discrepancies have the negative consequence of providing unclear guidance to those seeking to sanction bad actors, they arguably allow for creativity (on the part of submitters) and

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[209] *Compare* Exec. Order No. 13,818 (a)(ii)(B)(1), 82 Fed. Reg. 60,839 (Dec. 26, 2017 *with* GMA § 1263(a)(3); *compare* Exec. Order No. 13,818 § 1(a)(ii)(A), 82 Fed. Reg. at 60,839 *with* GMA § 1263(a)(1); *see* GMA § 1262(2) (citing Foreign Assistance Act of 1961, 22 U.S.C. § 2304(d)(1)).

[210] Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2018).

[211] There are some human rights that have gained customary international law status which do not include violence per se, but when deprived systematically have serious consequences on human lives. For example, the right to a fair trial is protected in all major human rights instruments and its core tenants have achieved customary international law status. *See* ICCPR, *supra* note 69, arts. 14, 16; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 69, art. 6; *see also* DAVID ROBERTSON, A DICTIONARY OF HUMAN RIGHTS, Ch. F (2d ed. 2004) ("The idea of a fair trial is central to human rights doctrine . . . ."); *Customary International Humanitarian Law: Fair Trial Guarantees*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 (last visited Jan. 9, 2019). In this manner, a public official who systematically deprives a population of human rights would be committing "serious human rights abuse." Furthermore, this definition would allow for systematic corrupt acts to be classified as human rights abuse, which would significantly expand the reach of the GMA and allow corrupt officials to be held accountable for the insidious corruption eating away at the developing world, while deterring future bad actors.

[212] *See supra* notes 116-18 and accompanying text.

[213] *See* GMA § 1263(a)(3) (listing acts of significant corruption as a sanctionable offense); *see generally* GMA § 1262 (providing no definition for corruption or significant corruption).

[214] *See supra* note 116 (listing examples of punishable corruption).

[215] *See generally* Global Magnitsky Sanctions Regulations, 31 C.F.R § 583.300–315 (June 29, 2018) (defining key terms relating to financial sanctions, omitting clarification on "corruption" or "serious human rights abuse").

discretion (on the part of sanctioning bodies) regarding what constitutes a sanctionable offense, which could benefit human rights advocates. While that may be true in the short term, when these definitions are tested by Courts or redefined by regulators it is more likely those bodies will fall back on the old definitions and understandings of human rights violations and corruption that exist on the record, than those emerging in recent scholarship.[216] The likelihood of that outcome makes the proposed definitional amendments worth the risk.

b. Additional Reporting Requirements and Enforcement Mechanisms

Finally, in order for the legislation to most effectively realize its mission to punish and deter human rights abuses and corruption, the reporting requirements must be substantially strengthened. The reporting requirements and public nature of the GMA are the aspects of the legislation that make it groundbreaking in its attempt to coerce executive action against corrupt actors and human rights violators. Unfortunately, as written, the reporting mechanisms fail to serve much meaningful purpose. This is evidenced by their lax application thus far – to date 45 sanction requests have been either issued from the applicable Senate committees or publicly requested by the House [217] and based on the current designation list the Administration has ignored at least 14 of those requests[218] – and it is not clear the Administration has adequately reported on any of them.[219] The most notable example being the Trump Administration's decision to ignore a Congressional request to report on the Khashoggi murder.[220] Effective remedies to this problem include: (1) extension of the mandatory response requirement to requests submitted by NGOs in addition to Congressional committees; (2) a requirement that annual reports include the number of individuals considered for sanctions and for which type; and (3) the implementation of enforcement mechanisms for failure to conform to reporting procedures.

Under the GMA, the President is required to submit an annual report to Congress detailing those individuals sanctioned under the legislation in the prior year.[221] Though the annual report includes any individual sanctioned regardless of the entity that submitted the request, there are additional reporting requirements that apply solely to requests from Congress. Given Congress's access to sensitive information and status as a co-equal branch of government it may seem practical

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[216] *See* Helsinki Hearing, *supra* note 119; *see* Helsinki Hearing, *supra* note 120; *see* Justice for Victims of Corrupt Officials Act; *see* Sanctions and Anti-Money Laundering Act of 2018; *see* Helsinki Hearing, *supra* note 120.

[217] Human Rights First, List of Public Congressional Recommendations for Global Magnitsky Sanctions, https://www.humanrightsfirst.org/sites/default/files/Congressional-Magnitsky-Recommendations.pdf (last visited Oct. 27, 2020) [hereinafter List of Congressional Recommendations].

[218] *Compare* List of Congressional Recommendations *with* Human Rights First, Targeted Human Rights and Anti-Corruption Sanctions Resources: U.S. Government Global Magnitsky Act Sanction Designations to Date, https://www.humanrightsfirst.org/topics/global-magnitsky/resources (last visited Dec. 3, 2020).

[219] *See, e.g.*, Global Magnitsky Human Rights Accountability Act Annual Report (2019) (reporting on only 49 out of 198 designations); *compare* GMA Annual Report 2019 *with* List of Congressional Recommendations (indicating that of 2019 Senate requests alone, the 2019 annual report is not adequate – the report only describes 1 Sudanese designation when there were 6 in 2019; does not report on sanctions of Chinese officials involved in treatment of Uyghar population despite multiple Senate requests; no mention of either Russian or Brunei requests; finally no mention of Khashoggi related requests from 2019).

[220] Gearan et al., *supra* note 130; *see also* GMA § 1263(d)(1)(B) and accompanying discussion (noting that first full GMA annual report was not in conformance with the law).

[221] GMA § 1264 (requiring a report containing a list of sanctioned individuals, the type of sanctions imposed, sanctions that were lifted, the dates sanctions were imposed or lifted, and reasons for imposing or lifting said sanctions).

that the legislation holds the President more accountable to Congress than outside groups, but in reality, this feature hinders outside groups' ability to effectively engage with the law. When a sanctions request originates from a designated Congressional committee[222] per GMA § 1263(d)(1) the President is obligated within 120 days to (A) determine whether the individual has engaged in actionable conduct and (B) submit a report to the requesting committee detailing whether or not sanctions are to be imposed and if so, what type.[223] This obligation does not extend to requests submitted by outside groups. Amending the legislation to extend the same reporting requirements to requests submitted by NGOs would allow outside groups to effectively tailor their future requests and provide a paper trail that would at the very least give advocates a way to threaten low-level offenders who are not designated for sanctions upon first request but may be chastened by the knowledge they were submitted or seriously considered at all.

In addition to placing the requests of NGOs and Congressional committees on equal footing, the reporting requirements should function as both guidance for requesting entities and deterrence for future bad actors. An amendment to the annual reporting requirement that mandates not only a list of those sanctioned under the law, but those considered for sanctions and for which type would allow for the naming and shaming that had been missing from previous sanction regimes without any of the political ramifications that drive selective enforcement. Furthermore, the aggregated information from lists of this nature would help future policy makers understand the effectiveness of the GMA as well as help advocates on the ground understand how best to tailor their strategies against bad actors.

While there are legitimate national security concerns that likely will be raised regarding this type of transparency into the sanctioning process, the GMA already allows for classified and unclassified versions of existing reports and grants Presidential discretion to classify information that is "vital for the national security interests of the United States.[224] Even in a scenario when an individual's name is classified, merely allowing for the publication of the analytics behind the annual submissions would be a helpful deterrent. For example, although reports publishing the name of individuals submitted and considered under each sanction would be ideal, data indicating the number of individual sanction requests submitted and under which sanction, absent names, would provide guidance to groups submitting requests in the future and help spark public relations campaigns and/or enact change on the ground.[225]

Given the potential difficulties inherent in adding a completely new reporting procedure to the legislation, at the very least, the law should be amended to include an enforcement mechanism for the existing reporting requirements. While the GMA requires an annual report detailing those sanctioned and the types of sanctions levied, an examination of the first full report indicates this procedure is not being followed.[226] Though 101 individuals are listed in the annual report as having been designated under the GMA in 2018, only 31 individuals are detailed in the report, without an explanation as to the discrepancy.[227] Furthermore, it is not clear which individuals received visa sanctions (if any), financial sanctions, or both. As currently written, the GMA does not include enforcement mechanisms for either the annual reporting or the 120-day response to Congressional requests.

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[222] *Id.* § 1263(j).
[223] *Id.* § 1263(d)(1)(A), (B)(i), (B)(ii).
[224] *Id.* § 1264(c)(2)(A).
[225] *Compare* Mwanzia, *supra* note 173, *and* Wadhams, *supra* note 174, *with* press speculation over Proclamation 7750.
[226] *See* Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149.
[227] *See* Global Magnitsky Human Rights Accountability Act Annual Report (2018), *supra* note 149.

Advocates for a stronger GMA would be well suited to push for amendments to the reporting requirements that trigger additional measures once the President fails to report in either reporting scenario, as President Trump has done in the past.[228] An example of one such measure is publication by the appropriate Committees of sanction requests that were not responded to, either after an initial request, or by the end of the year, as well as the alleged actionable conduct of the recommended individuals. Again, a paper trail of this sort would help hold sanctioning entities accountable, provide Congress and the public with an idea of the effectiveness of the GMA, and give outside groups an additional tool to pressure the executive branch. These additional mechanisms would also work towards resolving, or at least bringing to light, the current lopsided enforcement of financial sanctions.

Though amendments to the legislation's discretionary and definitional language is necessary to close the enforcement gaps, to combat the type of corruption that implicates human rights concerns, amending the reporting requirement is likely the most effective and, as recent news indicates, the most necessary first step.[229] As noted, selective enforcement in targeted sanctions regimes can never be completely eradicated.[230] Also, the current discretionary language was likely the result of a political compromise that may be hard to undo.[231] Additionally, any definitional amendments would require the acceptance of definitions of human rights violations and corruption that have yet to be adopted by the human rights community itself.[232] In contrast, the reporting requirements of the GMA makes the legislation truly novel. Unlike the definitional amendments, the reporting requirements already exist and have been agreed to by Congress, and additional tweaks are not as burdensome as the addition of (in some cases) completely new definitions. Furthermore, amendments to the reporting requirements would not implicate the delicate executive power questions that amendments to the discretionary language may but would still serve to combat some of the political concerns that lead to selective enforcement.[233]

IV. CONCLUSION

The international order is premised on the building and enforcement of global norms – which are shaped in large part by the actions, or inaction, of the United States. If applied consistently and in good faith, individual sanctions regimes like the GMA can play a large role in the development of those norms.[234] The early enforcement of the GMA, and the efforts it has spurred around the world, suggest the movement towards a new norm is occurring.[235]

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[228] Gearan et al., *supra* note 130.
[229] Gearan et al., *supra* note 130.
[230] *See* discussion *supra* Section III(a)(i).
[231] *See supra* text accompanying note 198.
[232] *See* Spalding, *supra* note 2, at 1386–94 (discussing currently accepted legal definitions of corruption).
[233] *See* discussion *supra* Section III(b) (noting how added reporting requirements may serve name and shame function of GMA while avoiding political controversies).
[234] Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 2–5 (2001).
[235] As noted, the Global Magnitsky Act has inspired several foreign counterparts, most notably in Canada and the UK. *See supra* note 121; *see also Anna Sayre, 2017 Magnitsky Act and Other Global Initiatives Underscore Vital Importance of Corruption Perception Index in Risk Assessment*, SANCTIONS ALERT 1 (Mar. 12, 2018), https://sanctionsalert.com/2017-magnitsky-act-and-other-global-initiatives-underscore-vital-importance-of-corruption-perception-index-in-risk-assessment/ (Syria 13460, Zimbabwe 13469, Venezuela 13692 have imposed

Symbolically, the law is already doing important work to shine a light on the nexus between human rights and corruption, but symbolism is not enough.[236] If used correctly, the GMA can be a powerful tool in the fight to expose the "false distinction" between corruption and human rights abuses.[237] However, changes must be made to ensure the legislation lives up to its potential. With the legislation set to sunset in 2022, the incoming Biden Administration has the opportunity to use a strengthening of the GMA and related sanctions to reassert the U.S. commitment to human rights while reclaiming the place on the world stage left vacant by a largely inward-looking Trump Administration.[238] The amendments suggested will help ensure that the current global attention on anti-corruption efforts does not leave countries who have the most to gain from those efforts out in the cold or impede the movement to reframe corruption itself as a human rights violation.

Magnitsky like sanctions targeting corruption domestically). Furthermore, while the reporting mechanisms leave much to be desired, it is clear that enforcement efforts are being focused on both corruption and human rights violations. *Id.*

[236] *See* Remarks of Assistant Secretary for Near Eastern Affairs David Schenker (Dec. 6, 2019), https://www.state.gov/assistant-secretary-for-near-eastern-affairs-david-schenker-on-iraqi-global-magnitsky-designations/ (acknowledging that GMA designations remain "first and foremost symbolic").

[237] Helsinki Hearing, *supra* note 120 (Statement of Brad Brooks-Rubin, Managing Director, The Sentry) ("[In South Sudan, Congo, and the Central African Republic] which are traditionally looked at through a human rights lens…what we've seen…is that the thought of [sanctions] as human rights sanctions was simply because people weren't looking at the financial aspect of these…what we see with the Global Magnitsky target list is there is an increasing intersection of those worlds. In some ways the distinction between a human rights target and a corruption target may almost become a false distinction over time.").

[238] Michael A. Weber & Edward J. Collins-Chase, CONG. RESEARCH SERV., IF10576, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT (2020).

REPARATIONS FOR DRONE WARFARE: COMPENSATING VICTIMS OF EXTRAJUDICIAL KILLINGS

Pranav Lokin*

ABSTRACT

In 2017, an errant drone strike orchestrated by the U.S. military in Yemen killed dozens of children on their way to school. The families of those children have no way of formally getting justice, truth, or a guarantee that these lives were not lost in vain. Under President Barack Obama [and continued in the Trump presidency], drone strikes have become the primary means of armed combat. The issue of civilians being killed in significant numbers due to collateral damage from drone strikes is not new. However, victims of drone strikes abroad are unable to seek redress in U.S. courts. While the news articles gain notoriety, our current system remains silent on the injustice. The Political Question Doctrine (PQD) prevents U.S. courts from assessing fault in a drone strike. The inability of the Judiciary to become involved prevents a formal recognition of failed processes or errors in targeting. The military's lack of accountability harms the credibility of U.S. operations abroad. Human rights activists have been largely unsuccessful in petitioning the U.S. government to address its drone policy. However, victims of drone strikes abroad can access U.S. courts if the strike in question was carried out by private military contractors. When a private contractor's actions in a drone strike run afoul of the "color of law," they are subject to liability. This presents a dual liability regime, especially as drone technology moves towards increased privatization. Private actors being held liable could lead to a renewed interest in Congressional action. The exposure of private actors to liability could chill investment and innovation in a space where all parties want better targeting and less collateral damage. This Article argues that a new system is needed that improves transparency and addresses the gap in liability. A system created by Congress would bypass any PQD concerns of the Judiciary and allow for recognition of mistakes through compensating families. This Article highlights the existing inequalities in the system and proposes a new solution that would provide accountability.

* JD, Emory University School of Law (2020); MSc London School of Economics (2016); MSc, St. Antony's College, University of Oxford (2015). I want to thank Professor Frank Vandall for his valuable comments during the drafting process and my mother Manjusri Vennamaneni for supporting my endeavors at every step. It is important to examine the systems that underlie the injustices in the world if we ever want to see a better future.

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I. INTRODUCTION

[Yemen, 2012] Two weeks before being killed, Salem Ali Jaber delivered a sermon denouncing Al-Qaeda and jihadism.[1] Neither Salem nor his son, Waleed, a Yemeni police officer, were terrorists.[2] However, both died as innocent bystanders as a result of a United States ("U.S.") drone attack.[3] Drone strikes typically target terrorists and those suspected of threatening the United States.[4] However, the U.S. military never acknowledged that the attack on Salem Ali Jaber cost the lives of two innocent civilians.[5] Moreover, the U.S. never revealed the intended target of the attack.[6] These Yemeni citizens worked to rid their society of the terroristic elements that took root, but speculation shrouds their death because it is unclear why they were targeted by the U.S.[7]

Faisal Ahmed bin Ali Jaber, an engineer in Yemen, was two blocks away when his brother and nephew – Salem and Waleed – died.[8] Initially, he misconstrued the sounds of the attack for a local mountain eruption.[9] Amidst the rubble, he could only identify his family members by charred ID cards and clothing.[10] Later, a Yemeni official offered Faisal and his family $100,000 (USD), claiming that the sum was from the U.S. government.[11] However, Faisal wanted an acknowledgement from the U.S. government that it was responsible for the death of his brother and nephew.[12] Specifically, Faisal wished to clear the name of his relatives as alleged terrorists by suing in a U.S. court of law.[13] After losing at the U.S. District Court for the District of Columbia, Faisal appealed his case.[14]

In 2017, the U.S. Court of Appeals for the District of Columbia Circuit held there was no constitutional recourse for the families of those killed in drone strikes abroad.[15] The court reasoned that the judicial branch does not have the power to question executive decisions with regard to military affairs.[16] Judge Janice Rogers Brown, a George W. Bush appointed Conservative, took the extraordinary step of writing a majority opinion upholding the current regime and a concurrence questioning the prudence of the established case law in *Ahmed Salem Bin Ali Jaber v. United States*.[17] Citing justiciability concerns, her majority opinion affirmed the district court's dismissal of the case; her concurrence questioned the lack of oversight of extrajudicial killings and

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[1] Spencer Ackerman, *Yemeni Man Denied Apology from US for Drone Strike that Killed his Family*, THE GUARDIAN (Oct. 2, 2015), https://www.theguardian.com/us-news/2015/oct/02/yemen-faisal-bin-ali-jaber-no-apology-drone-strike; *Faisal bin Ali Jaber*, REPRIEVE U.S. (Nov. 22, 2020, 1:11 PM), https://reprieve.org/cases/faisal-bin-ali-jaber/.

[2] Ackerman, *supra* note 1; REPRIEVE U.S., *supra* note 1.

[3] Ackerman, *supra* note 1.

[4] Ackerman, *supra* note 1.

[5] Creede Newton, *US Court Dismisses Jaber Lawsuit for Yemen Drone Attack*, AL JAZEERA (Jun. 30, 2017), https://www.aljazeera.com/news/2017/07/court-dismisses-jaber-lawsuit-yemen-drone-strike-170630230444615.html.

[6] *Id.*

[7] *See id.*

[8] *Id.*

[9] *Id.*

[10] Newton, *supra* note 5.

[11] Ackerman, *supra* note 1.

[12] Ackerman, *supra* note 1.

[13] Ackerman, *supra* note 1.

[14] Ackerman, *supra* note 1.

[15] Jaber v. United States, 861 F.3d 241, 241 (D.C. Cir. 2017).

[16] *Id.* at 246.

[17] *Id.* at 243.

the inability of the Judiciary to provide compensation for victims.[18] Additionally, Judge Brown questioned the ability and incentive to improve targeting mechanisms if judicial review is precluded by precedent.[19]

Judge Brown argued that the Executive branch, which coordinates drone strikes abroad, lacks sufficient oversight**,** leading to a lack of transparency.[20] "Despite an impressive number of executive oversight bodies, . . . [the government] often seems . . . more interested in protecting and excusing the actions of agencies than holding them accountable."[21] Judge Brown suggested that the President and his military staff are more concerned with damage control and avoiding political pitfalls than strengthening the norms of warfare.[22] Judge Brown further questioned the ability of Congress to reach a solution addressing the issue, stating that "Congressional oversight is a joke."[23] She challenged policymakers to deviate from entrenched policy in the future noting "the spread of drones cannot be stopped, *but the U.S. can still influence how they are used in the global community* . . . . The Executive and Congress *must establish a clear policy for drone strikes and precise avenues for accountability*."[24] Accordingly, this Article seeks to clarify the current barriers to compensating victims of drone strikes abroad and offer a solution that allows an avenue of accountability within existing legal constraints.

The issue of civilians being killed in significant numbers due to collateral damage from drone strikes is not new.[25] Defective U.S. targeting in drone strike operations results in vast amounts of collateral damage.[26] Under President Barack Obama, drone strikes became a primary means of armed combat.[27] Recently in Yemen, a Saudi Arabian drone strike conducted with U.S. approval and coordination struck a school bus carrying at least 29 children.[28] Another shocking example occurred in Pakistan, where a U.S. drone campaign killed 874 people (including 142 children) while trying to target 24 suspected terrorists.[29] Attempts to compensate the families of those unintentionally killed in drone strikes have mostly failed to hold the responsible actors accountable.[30] A new approach to remedying victims of drone-related torts committed internationally can, and should, be pursued.

Section I provides background of drone warfare by the U.S. and the collateral damage it has caused throughout the years. Section II highlights how the Political Question Doctrine (hereinafter PQD) limits the ability of U.S. courts to review the legality of drone strikes. Section

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[18] *Id.* at 244.
[19] *Id.*
[20] *Id.* at 253.
[21] *Id.* at 253 (Brown, J., concurring).
[22] *See generally* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 912 (1990).
[23] *See id.* at 912 ("If Congress enacts a War Powers Act and the President goes his merry way in reliance on a more expansive view of executive power (and a stingy view of legislative power), Congress need not give up.").
[24] *Jaber*, 861 F.3d at 254 (emphasis added).
[25] Zaid Ali & Laura King, *U.S. Drone Strike on Yemen Wedding Party Kills 17*, L.A. TIMES (Dec. 13, 2013), http://articles.latimes.com/2013/dec/13/world/la-fg-wn-yemen-drone-strike-wedding-20131213.
[26] *Id.*
[27] Conor Friedersdorf, *The Obama Administration's Drone-Strike Dissembling*, THE ATLANTIC (Mar. 14, 2016), https://www.theatlantic.com/politics/archive/2016/03/the-obama-administrations-drone-strike-dissembling/473541/.
[28] Saeed Khamali Degan, *Dozens Dead in Yemen as Bus Carrying Children Hit by Airstrike*, THE GUARDIAN (Aug. 9, 2018), https://www.theguardian.com/world/2018/aug/09/dozens-dead-in-yemen-as-bus-carrying-children-hit-by-airstrike-icrc.
[29] Spencer Ackerman, *41 Men Targeted but 1,147 People Killed: US Drone Strikes – the Facts on the Ground*, GUARDIAN (Nov. 24, 2014), https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147.
[30] *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (2010); Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984).

III discusses recent court decisions allowing for the liability of private sector actors for their role in drone-related deaths abroad, while preserving immunity for government actors. These different approaches to liability may exacerbate incoherence and fester frustration with the law. Finally, in Section IV, this Article argues that supplementing existing congressional legislation with an appropriate statute is a viable way to pursue recovery for drone-related torts abroad.

II. BACKGROUND ON DRONE USE AND COLLATERAL DAMAGE UNDER THE LAW

Drone strikes became popular during the War on Terror after September 11, 2001. At that time, U.S. military focus was on secrecy and protecting information, rather than minimizing collateral damage.[31] As a result, records of civilian casualties and the circumstances in which they arose are contested.[32] Currently, there is no legal avenue that can force the Executive branch to be transparent about civilian deaths.[33] While other countries can examine the legality of U.S. drone practices, the U.S. Executive branch's control over its use of drones results in a lack of accountability to the public and affected parties.[34] Collateral damage caused by drone strikes underlies the need to address flaws in drone targeting and to provide a remedy for aggrieved parties.

The U.S. Department of Defense defines "unmanned aerial vehicles" (colloquially known as "drones") as powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.[35] Ballistic or semi-ballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.[36] While drones were initially used only for surveillance, by 2001, the U.S. started to arm drones with missiles to combat terrorists in Afghanistan.[37]

The U.S. uses drones throughout the Middle East, South Asia, and North Africa.[38] The first drone-facilitated targeted killing in Afghanistan occurred in November 2001.[39] Drone strikes like the ones first enacted to target members of Al-Qaeda in Yemen and Pakistan, have been confirmed as "a clear case of extrajudicial killing"[40] The strikes have been ordered by the CIA and specifically from CIA headquarters, while targeting decisions are made at the U.S. Central Command. This highlights the remote nature of these decisions and the U.S. based direction of the strikes.[41]

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[31] *See* Ackerman, *supra* note 30.
[32] *See* Ackerman, *supra* note 30.
[33] *See Jaber*, 861 F.3d at 254.
[34] *See* Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court & the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1873 (2007).
[35] U.S. Dep't of Def., The Dictionary of Military Terms 577 (2009).
[36] *Id.*
[37] Fred Kaplan, *A History of the Armed Drone*, SLATE (Sept. 14, 2016), https://slate.com/news-and-politics/2016/09/a-history-of-the-armed-drone.html.
[38] *Id.*
[39] *Id.*
[40] Waseem Ahmad Qureshi, *The Legality and Conduct of Drone Attacks*, 7 NOTRE DAME J. INTER. & COMP. LAW 2, 91–105 (2017).
[41] *Id.*

Since lawsuits seeking compensation are dismissed under the PQD, bad press is arguably the only consequence of improper drone strikes by the U.S. military.[42] For example, the U.N. Special Rapporteur referred to U.S. drone strikes as a violation of International Human Rights Law.[43] The U.N. also commented that the U.S. had repeatedly underestimated the number of civilians killed in its drone strikes abroad.[44] Additionally, various Non-Governmental Organizations (NGOs) often point to the U.S. drone campaign as the most evident example of ongoing U.S. human rights violations.[45] These public condemnations in the media have not led to a crackdown on practices by the U.S. courts since formal judicial review of military action is usually barred by the PQD.[46]

Courts in other countries rule on the appropriateness of targeting civilians in drone strikes by reviewing the actions in the context of international human rights scholarship.[47] For example, the Israeli Supreme Court authored the "world's first judicial decision on targeted killings," holding that "terrorists are civilians under the law of armed conflict and thus are lawfully subject to attack only when they directly participate in hostilities."[48] Internationally, there is much debate regarding how to legally conduct drone warfare and how the law should evaluate a government's ability to use their military capabilities given that new technology allows them to target civilians en masse and across country borders.[49] However, U.S. courts decline to address these issues pursuant to the PQD and do not favor compensation for collateral damage of drone strikes.[50] The reluctance of U.S. courts to judge the merits of drone strikes arguably contributes to the unchecked continuation of the U.S. drone strike campaign despite international objections.[51]

III. PQD LEADS TO NON-JUSTICIABILITY OF DRONE STRIKES CONDUCTED BY THE U.S. GOVERNMENT

Judiciary intervention in the arena of drone strikes is limited by the PQD.[52] The PQD is used by the Judiciary to avoid questioning specific actions authorized by the Executive branch.[53] Arguably, collateral damage resulting from drones can be addressed without disrupting the PQD.

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[42] Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 405 (2011).
[43] Owen Bowcott, *Drone Strikes by US Might Violate International Law, Says UN*, THE GUARDIAN (Oct. 18, 2013, 10:36 AM), https://www.theguardian.com/world/2013/oct/18/drone-strikes-us-violate-law-un.
[44] Rob Crilly, *UN Inquiry Finds More Civilians Killed by US Drone Strikes than Reported*, THE TELEGRAPH (Oct. 18, 2013, 10:29 AM), https://www.telegraph.co.uk/news/worldnews/asia/pakistan/10387810/UN-inquiry-finds-more-civilians-killed-by-US-drone-strikes-than-reported.html.
[45] Mark Schone, *White House Admits Killing Civilians with Drone Strikes, Denies Breaking Law*, NBC NEWS (Nov. 2, 2015), https://www.nbcnews.com/news/world/white-house-admits-killing-civilians-drone-strikes-denies-breaking-law-flna8C11435816.
[46] El-Shifa Pharm. Indus. Co., 607 F.3d at 844; Qureshi, *supra* note 40, at 95.
[47] *See* Eichensehr, *supra* note 34.
[48] *See* Eichensehr, *supra* note 34.
[49] Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. REV. 675, 677 (2012).
[50] Qureshi, *supra* note 40, at 95.
[51] *See Jaber*, 861 F.3d at 253.
[52] *Jaber*, 861 F.3d at 253.
[53] *Id.*

However, the approaches are ultimately unsatisfactory in response to the crux of Judge Brown's critique in *Ali Jaber*.[54] This revelation underscores the need for an alternative solution.

Justiciability doctrines govern which cases federal courts can hear and decide, and which cases must be dismissed.[55] These doctrines include ripeness, mootness, standing, and the PQD.[56] These limitations on the exercise of judicial power were judicially-created and are not specifically addressed in the United States Constitution.[57] The Constitution's separation of powers doctrine justifies these limitations, as the Judiciary should rule only on those matters over which it has authority and expertise.[58] The PQD prevents courts from ruling on subject matter that is better left to the politically-accountable branches of government.[59] When a political question arises, the court dismisses the case rather than analyzing a potential constitutional violation.[60]

The issue of justiciability under the PQD has a rich history.[61] In *Baker v. Carr*, the Supreme Court ruled that the form in which a legislature reapportioned seats is not a political question because the suit objected to the arbitrary and capricious nature of the selection under the Equal Protection Clause.[62] *Baker* establishes the rationale for political question: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution."[63] Ultimately, the PQD turns on whether the issues at bar are best resolved by another branch of government.[64] *Baker* further outlines six factors to aid in understanding whether a particular issue is a non-justiciable political question: (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding the case without an initial policy determination; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due for the other branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.[65]

Over time, courts have applied these factors differently, each making independent decisions regarding how many factors are necessary and which are more important. In *Japan Whaling Ass'n v. American Cetacean Society*, the Court ruled that private parties can question whether the U.S. is meeting its treaty obligations, noting that "not every matter touching on politics is a political question, and not every case or controversy which touches foreign relations lies beyond judicial cognizance."[66] The Court went on to reinforce *Baker's* definition of political question while articulating a clear rationale for why the doctrine exists: "[C]ontroversies which revolve around policy choices and value determinations constitutionally committed to Congress

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[54] *Id.* at 251.
[55] ERWIN CHEMERINSKY, ASPEN STUDENT TREATISE FOR CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (Aspen Student Treatise Series) 47 (5th ed. 2015).
[56] *Id.*
[57] *Id.*
[58] *Id*.
[59] *Id.*
[60] CHEMERINKSY, *supra* note 55.
[61] CHEMERINKSY, *supra* note 55.
[62] Baker v. Carr, 369 U.S. 186, 198 (1962).
[63] *Id.* at 211.
[64] *Id.*
[65] *Id* at 217; *see also Jaber*, 861 F.3d at 245.
[66] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229-30 (1986).

or the Executive Branch; the Judiciary is particularly ill-suited . . . to formulate national policies or develop standards for matters not legal in nature."[67]

Japan Whaling warns against the impetus to shirk away from controversial topics or areas of concern simply out of fear of political blowback: "[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."[68] Courts thus retain the ability to apply traditional rules of statutory interpretation to the facts presented in a particular case.[69]

At the outset, given the ability of the Court to rule on topics of national importance and those that might lead to issues of controversy based on *Japan Whaling*[70] and *Baker*,[71] it is not immediately evident why liability for drone strikes is deemed non-justiciable. *Bancoult v. McNamara* is instructive and provides clarity.[72] In *Bancoult*, descendants of indigenous people on the island of Diego Garcia in the Chagos Archipelago ("Chagossians"), sued the U.S. government for torts committed when the people's ancestors were forced out of their homes and off their land as part of military preparations during the Second World War.[73] The Chagossians also asserted that the families were relocated to Mauritius and were barred from returning.[74] None of the Chagossians were identified as enemy combatants.[75]

The *Bancoult* court clarified what subject matter automatically comprises political questions: "[t]he instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations."[76] In *Bancoult*, the D.C. Circuit Court of Appeals ruled that "the decision to establish a military base on Diego Garcia is not reviewable . . . [it] was an exercise of the foreign policy and national security powers entrusted by the Constitution to the political branches of our government."[77] Applying the factors enumerated in *Baker*, the court found that "the conduct of military operations and foreign policy complained of in this case was the exclusive province of the political branches."[78] This seems to indicate that military operations are of a nature outside the courts' domain, and that the courts should not make rulings that invade the political branches' authority.

Additionally, many among the Judiciary believe they are not well-versed enough to decide military matters.[79] The rationale in the drone context has been that "[j]udges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine [the context of military actions],"[80] or "create standards to determine whether the use of force was justified or well-founded."[81]

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[67] *Id*. at 230.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 227.
[71] *Baker,* 369 U.S. at 186.
[72] Bancoult v. McNamara, 445 F.3d 427 (2006).
[73] *Id.* at 430.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 433.
[77] *Bancoult*, 445 F.3d at 433.
[78] *Id.* at 431.
[79] DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973).
[80] *Id.*
[81] *Id.*; *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 844.

In contrast, there is a view that courts have previously interpreted the law of war, and that legal analysis of drone strikes should simply be a logical extension of those previous determinations.[82] Scholars have argued that there is room to re-examine the role of the courts because "[j]udicial review does not examine the wisdom of the decision to carry out military operations. The issue addressed by judicial review is the legality of the military operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful."[83] This view deviates from the belief that the Executive branch has unilateral authority over military actions.[84] In fact, this view asserts that the Judiciary could review the type and properness of the military measure chosen by the executive.[85]

Legally, military actions are examined from the viewpoint of the law of armed conflict and the relevant nation's expressed rationale for its military actions.[86] This view suggests that drone strikes conducted by the U.S. military can be examined *ex post facto* for legality and properness, which is to say that there ought to be an examination of whether the actions undertaken differ from the legal rationale used to justify said actions.[87] For example, a court could determine whether the underlying reasons for a specific attack did or did not correspond with the actual effect of the attack.[88] One law review note suggests that two criteria – (1) distinction of the strike and (2) proportionality of impact – could aid the international community's interpretation of how to evaluate the legality of strikes.[89]

The decision to undertake a drone strike is supposed to uphold values of distinction and proportionality. [90] The military has its own control mechanisms that should apply, "Air Force JAGs have an affirmative duty to apply distinction and proportionality to every contemplated strike. *Ex post* judicial review of drone strikes would thus entail reviewing strikes for their compliance with these well-established universal norms."[91] *Ex post* judicial reviews would review the most heinous of errors, such as a drone strike on a purported terrorist meeting that is actually a wedding, or an errant drone strike that hits a school bus full of children.[92] However, such an examination may yield only declaratory judgments and not compensation for victims.[93] A declaratory judgment would make a ruling on whether to attribute fault to a party but would do little to compensate the loss of human life.[94]

One potential solution would be to authorize a court or venue for these kinds of claims to be heard and adjudicated. Such a system would resemble a workers' compensation board and would consist of an administrative hearing detailing the rationale underlying the proposed drone strike and the reality of unintended damage caused. This would likely offer the victims' families an opportunity to clear the names of their loved ones who were deemed suspected terrorists in order to justify the strikes, as well as offer the responsible government officials an opportunity to evaluate their targeting measures to reduce the likelihood of future errors. Ultimately, this solution

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[82] *See* Joshua Andresen, *Due Process of War in the Age of Drones*, 41 YALE J. INT'L L. 155 (2016).
[83] *Id.* at 163.
[84] *See id.*
[85] *See id*.
[86] ÉRIC DAVID, PRINICIPES DE DROIT DES CONFLITS ARMÉS, BRUSSELS, BRUYLANT 921-22 (3rd ed., 2002).
[87] *See* Andresen, *supra* note 82.
[88] *See* Andresen, *supra* note 82.
[89] *See* Andresen, *supra* note 82, at 174.
[90] *See* Andresen, *supra* note 82, at 174.
[91] *See* Andresen, *supra* note 82, at 175-76.
[92] *See* Ali and King, *supra* note 25; Degan, *supra* note 28.
[93] Andresen, *supra* note 82, at 180.
[94] Andresen*, supra* note 82, at 180.

would restore some trust in the U.S. government and the use of technology currently viewed as "killing machines" that can reach out and murder many people at once without a judicial proceeding adjudicating the targets' guilt.[95]

The sentiment that the U.S. drone campaign is operating unchecked is not a minority viewpoint.[96] Critics, like Judge Brown in *Ali Jaber*, also question the ability of the U.S. government to correct poor targeting practices without sufficient oversight.[97] Others advocate for some sort of judicial review out of a practical acknowledgement that the Executive branch has little political incentive to openly acknowledge past mistakes in the drone program.[98] Without victims having an opportunity to be heard and a neutral arbitrator available to adjudicate, meaningful correction of past practices is unlikely.[99]

Existing methods to compensate innocent victims of U.S. drone strikes lack public acknowledgement and are often "shrouded in secrecy."[100] These methods include cash payments made to foreign governments or local brokers by the U.S. with instructions to pass the payment along to the victims' families.[101] Such payments have had little impact on improving U.S. targeting as evidenced by the ongoing stream of civilians killed in drone strikes abroad.[102] Some critics paint a rather ominous picture of the unchecked nature of the current situation: "executive control mechanisms . . . have ignored the issue; congressional oversight has given a 'free pass' to the CIA in this area; judicial review has been effectively precluded; and external oversight has been reduced to media coverage . . . dependent on information leaked by the CIA itself."[103] There has been a general lack of oversight over the drone strike program for far too long with little prospect of reform within the existing system.[104]

Asking the Judiciary to weigh-in on an errant drone strike is "to decide whether the United States' attack . . . was mistaken and not justified" and "to determine the factual validity of the government's stated reasons for the strike," and this presents a nonjusticiable political question.[105] The language in *El Shifa* reinforces the rationale in *Bancoult*: "if the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[106] Thus, under current precedent the Executive branch is beyond the Judiciary's review in the realm of drone strikes.

Ultimately, in *Ali Jaber*, the court relied on a functional approach to the PQD that differentiated between two actions: "decid[ing] whether taking military action was wise – a policy choice . . . constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'. . . [or] claims presenting purely legal issues such as whether the government had legal authority to act."[107] The latter would have been justiciable, but the former is what was

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[95] *See* Mark Bowden, *The Killing Machines: How to think about drones*, ATLANTIC (Sept. 2013), https://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/.
[96] *See Jaber*, 861 F.3d at 253.
[97] *See id.*
[98] Alston, *supra* note 42, at 85.
[99] Alston, *supra* note 42, at 84.
[100] Alston, *supra* note 42, at 71 n.333.
[101] Alston, *supra* note 42, at 64.
[102] Alston, *supra* note 42, at 66-67.
[103] Alston, *supra* note 42, at 117.
[104] *See* Alston, *supra* note 42, at 117.
[105] *Jaber*, 861 F.3d at 246.
[106] *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 844.
[107] *Jaber*, 861 F.3d at 246.

sought by the claimants.[108] Undoubtedly, the former policy choice is the more interesting and necessary question because it examines whether the drone strike, that used the threat of terrorism as a justification to kill fathers, mothers, daughters and sons, was properly vetted and without preventable error.[109] U.S. courts cannot presently answer this question.[110] The current scenario is one where the law is unable to aid those seeking relief.[111] Judge Brown's critique was essentially between these two positions; because the PQD prevented her from ruling on the merits of the case, the merits are left unquestioned and any resulting possibility of reform lost.[112] By allowing this result, our system precludes any sort of questioning about whether the strike was factually sound or whether proper steps to ensure minimal damage to civilians was taken.

However, an analysis of whether the government abided by its own standards of distinction and proportionality, and not necessarily the underlying merits of the claim, might be a way to avoid justiciability issues.[113] Such a method would avoid the PQD concerns because it would not require the Judiciary to be involved.[114] A revised approach could entail correspondence with the governmental bodies that ordered the drone strike, by presenting information about the targeted individuals in hopes of reshaping the existing targeting systems.[115] It could likely lead to some closed door conversations that are entirely off the record and at the discretion of the relevant Executive branch members.[116] Perhaps, this would lead to actual changes in the targeting process, but the evidence that is weighed would not necessarily be included in the public record, thereby not quelling existing complaints related to a lack of transparency with the current system.[117] Two assumptions underlie this hypothetical: (1) the agencies involved would be enthusiastic about discussing their role in a poorly targeted drone strike and (2) the leaders of the executive branch would permit such a conversation to even occur.[118] Further adding to the issues presented by this solution, no formal enforcement power would be present because any changes undertaken would be fully voluntary and subject to review only at the respective agencies' discretion.[119] It would likely be difficult to even monitor whether the proposed changes are adopted.

A method that avoids a neutral arbiter would not adequately address the brunt of Judge Brown's critique.[120] The Judiciary's inability to decide on the merits of the issues brought forth regarding drone strikes leads to a lack of oversight by the Executive and Legislative branches, to ensure proper practices take place.[121] Additionally, conversations with government agencies trying to backchannel change in the targeting process are by no means enforceable and would require a significant amount of connections and access that many victims' families are unlikely to

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[108] *See id.*
[109] *Id.* at 249.
[110] *See id*.
[111] *See id*.
[112] *See Jaber*, 861 F.3d at 250.
[113] *Id*.
[114] *Id*.
[115] *Id.*
[116] *See* Alston, *supra* note 42.
[117] *See* Alston, *supra* note 42; *Jaber*, 861 F.3d at 249.
[118] *See* Alston, *supra* note 42; *Jaber*, 861 F.3d at 259.
[119] *See* Alston, *supra* note 42; *Jaber*, 861 F.3d at 259.
[120] *Jaber*, 861 F.3d at 259.
[121] *See id.*

have.[122] Such a method might even require state or diplomatic intervention, which, given the state of current conflict zones, seems unlikely.[123]

IV. PRIVATE ACTORS CANNOT USE PQD TO EVADE JUDICIAL REVIEW

This section highlights a gap in the law that leads to varying analyses for private companies involved in drone-related activities. Under current legislation, U.S. contractors and private companies that develop their own technology used in drone strikes face potential liability for through existing legislation.[124] The Torture Victims Prevention Act ("TVPA") and the Alien Tort Statute ("ATS") could be used to hold private companies liable for their involvement with drone usage, unlike the U.S. government, which is barred from liability due to the PQD.[125] This discrepancy in treatment is particularly relevant considering the growing privatization of the military, especially in the field of drone technology.[126] Such a discrepancy in the application of the law regarding drone strike-related liability is untenable, producing incoherent precedent, and limiting the potential vehicles of investment for drone technology. These issues with the current system highlight the need for an alternative solution.

While there may be no route to recovery for those who allege similar suits against the U.S. government, there is an opening for those who allege that improper targeting or lack of safety measures were pursued by private military contractors.[127] This sort of justiciability may also apply to civilian drone operators that commit torts internationally, such as, Amazon or other large multinational U.S.-based companies.[128] The most relevant case in the area of private actor liability is *Al Shimari v. CACI Premier Tech.*[129]

In *Al Shimari,* the court ruled that because the contractors' conduct was unlawful, the contractors could not claim the protection that otherwise would have been provided to them had they been operating under the color of the law.[130] *Al Shimari* concerned tort claims made by Iraqi nationals against private contractors who worked at Abu Ghraib prison and conducted torturous

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[122] *See* Bowden, *supra* note 95.
[123] *See* Bowden, *supra* note 95.
[124] *See* Bowden, *supra* note 95.
[125] *Jaber*, 861 F.3d at 259.
[126] *See generally* Keric D. Clanahan, *Drone-Sourcing? United States Air Force Unmanned Aircraft Systems, Inherently Governmental Functions, and the Role of Contractors*, 22 G.W.U FED. CIR. B.J. 1-44; David Isenberg, *Predator Military Contractors: Privatizing the Drones*, THE HUFFINGTON POST (Dec. 18, 2012), https://www.huffpost.com/entry/contractors-privatizing-the-drones_b_1976650; *see also* Laura A. Dickinson, *Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, *in* NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE 93-124 (Molly K. Land and Jay D. Aronson eds., 2018); W.J. Hennigan, *Air Force Hires Civilian Drone Pilots for Combat Patrols; Critics Question Legality*, L.A. TIMES (Nov. 27, 2015, 3:00 AM), https://www.latimes.com/nation/la-fg-drone-contractor-20151127-story.html.
[127] *See Al Shimari*, 840 F.3d at 147.
[128] Ed Oswald, *Here's Everything you need to know About Amazon's Drone Delivery Project: Prime Air*, DIGITAL TRENDS (May 3, 2017), https://www.digitaltrends.com/cool-tech/amazon-prime-air-delivery-drones-history-progress/; Hamza Shaban, *Amazon is Issued Patent for Delivery Drones that can React to Screaming Voices, Flailing Arms*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/22/amazon-issued-patent-for-delivery-drones-that-can-react-to-screaming-flailing-arms/?utm_term=.c66f840e1513.
[129] *See* Al Shimari v. CACI Premier Technology, Inc., 840 F.3d 147, 147 (4th. Cir. 2016).
[130] *Id.* at 151.

interrogations.[131] The court ruled that "[t]he plaintiffs' claims are justiciable to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred."[132]

Al Shimari stands for the proposition that "conduct by [private contractor defendants] that was unlawful when committed is justiciable, irrespective whether that conduct occurred under the actual control of the military," while "acts committed by [private contractor defendants] are shielded from judicial review under the PQD if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments."[133] Put simply, unlawful conduct that is normally not justiciable when committed by the U.S. military or a government agency is justiciable when conducted by a private contractor.[134]

Extending this line of reasoning to private military contractors overseeing drone strikes follows similar logic.[135] Namely, conduct by private contractors involved in drone strikes that violates settled international law is therefore unlawful.[136] This means that the private military contractors' unlawful conduct cannot claim the protection afforded to the U.S. government under the PQD. [137]

The unlawful versus lawful distinction arises out of the language of the TVPA.[138] The TVPA is a statute which permits the finding of liability that could be used in drone strikes.[139] The Act facilitates the compensation of those victimized by individuals or private companies who, acting in an official capacity for any foreign nation, commit torture or extrajudicial killing.[140] The TVPA contains no limitation on the nationality of the plaintiff but requires an exhaustion of local remedies.[141] The following excerpt from the TVPA governs the requirements for liability; note how it prescribes international law norms upon an actor who is acting under the authority of a nation.[142] This would include private military contractors engaging in drone strikes.[143]

> Liability. An individual who, *under actual or apparent authority or color of law*, of any foreign nation --
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[144]

This statute effectively imputes liability to a private contractor who, in the course of fulfilling its duties, violates international law in such a way that its act(s) are considered an

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131 *Al Shimari*, 840 F.3d at 159–60.
132 *Id.* at 159–60.
133 *Id.* at 151.
134 *Id.*
135 *See id.*
136 *Al Shimari*, 840 F.3d at 158.
137 *Id.*
138 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) [hereinafter TVPA].
139 *Id.*
140 *Id.*
141 *Id*.
142 TVPA § 106.
143 *Id*.
144 *Id*.

extrajudicial killing.[145] While U.S. government leaders might disagree, "execut[ing] someone without a trial . . . is an 'extrajudicial killing' and a human rights crime."[146] The TVPA defines an "extrajudicial killing" as follows:

> (a) Extrajudicial Killing. For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.[147]

Because the TVPA was created by Congress, the TVPA applies to companies operating in the U.S., including military contractors and their employees.[148] Therefore, a private military contractor that engages in drone strikes on behalf of the federal government or a private company that engages in drone-based delivery services can be subject to liability under the TVPA.[149] In *Al Shimari*, the court decided that a failure to adhere to proper procedures by a military contractor constituted a failure to adhere to the color of the law.[150] As a result, a private drone operator who fails to adhere to proper procedures would subject his or her company to liability, whereas the government in charge of the operation would be immune due to the PQD.[151] Additionally, private companies could be subject to further liability if their actions constitute torture under the TVPA.

A private actor can be found liable if he or she failed to act under the color of law.[152] For example, if the act itself is akin to torture, then it would be a violation of the color of law. An investigation of the private actors' actions and whether steps taken by the actor are within the color of the law could bring to light the evidence that might be relevant to the adjudication of liability.[153] This investigative approach could create a back-end way to examine the claims of those affected by drone strikes while avoiding dismissal on political question grounds.[154] However, this analysis is limited to the evaluation of the conduct of private actors, who, for the time being, are not the primary conductors of U.S. drone strikes.[155]

Al Shimari requires that all "unlawful" claims must be deemed unlawful under settled international law or the law of the place of tort.[156] The court commented, "[a]lleged conduct that

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[145] *See* TVPA § 106.
[146] Rebecca Gordon, *How the US Military Came to Embrace Extrajudicial Killings*, THE NATION (July 18, 2016), https://www.thenation.com/article/how-the-us-military-came-to-embrace-extrajudicial-killings/; *See also Special Rapporteur on extrajudicial, summary or arbitrary executions*, OFF. HIGH COMMISSIONER HUM. RTS. (Nov. 22, 2020), https://www.ohchr.org/en/issues/executions/pages/srexecutionsindex.aspx.
[147] TVPA § 106.
[148] *See id*.
[149] *See id.*; *see also Al Shimari*, 840 F.3d at 147.
[150] *See Al Shimari*, 840 F.3d at 147.
[151] *Id.*
[152] *Id.*
[153] TVPA §106; *see Al Shimari*, 840 F.3d at 158.
[154] TVPA §106; *see Al Shimari*, 840 F.3d at 158.
[155] James Ball, *Revealed: Private Firms at Heart of US Drone Warfare*, THE GUARDIAN (July 30, 2015), https://www.theguardian.com/us-news/2015/jul/30/revealed-private-firms-at-heart-of-us-drone-warfare ("Approximately one in 10 people involved in the effort to process data captured by drones and spy planes are non-military.").
[156] *See Al Shimari*, 840 F.3d at 160.

on its face is aggravated and criminal in nature, such as sexual assault and beatings, clearly will present a subject for judicial review unaffected by the [PQD]."[157] Because *Al Shimari* concerns allegations of sodomy, sexual abuse, and violent torture by private military contractors – markedly different actions from drone strikes – this portion of the opinion is not directly transferrable to the current discussion regarding drone strikes.[158] This means that before assessing whether private drone operators or military contractors can avoid justiciability under the PQD, the legality of drone strikes must be analyzed.[159]

As discussed above, one way of judging the legality of drone strikes is utilizing the extrajudicial killings definition under the TVPA.[160] If drone strikes that harm civilians are construed as extrajudicial killings, then the strike would be unlawful under international law and would be justiciable if the actions were committed by private actors.[161] Under this interpretation, similar to *Al Shimari*, private contractors that engage in extrajudicial killings are conducting activities that are judged unlawful under international law and therefore cannot avoid judicial review.[162] Another potential way to ascertain legality of the private contractor's actions is to look at whether the host nation consents to drone strikes within its borders. One example of a current practice that is unlawful under international law is "[a]ttacking non-state actors in hot pursuit in the host states."[163] Under international law, "[d]rones…can be used against insurgent groups or terrorist organizations by a foreign state with the consent of host state . . . only to stabilize the region."[164] This means that conducting any drone strikes in another country without the consent of that nation violates international law.[165]

One example of a country that objects to U.S. drone activity within its borders is Pakistan.[166] Under international law, "[d]rone attacks against the will of a host state or drone attacks against a state to help rebel groups destabilize a region are entirely illegitimate."[167] As a result, drone strikes in Pakistan are illegal under international law because the U.S. lacks Pakistan's consent given that there is not a recognized armed conflict in Pakistani territory.[168] Despite this lack of consent, Pakistan is the location of one of the U.S.' deadliest drone campaigns.[169] In spite of protests by the Pakistani government pointing out that the U.S.' continuation of drone strikes is illegal under international law, the U.S. has continued to carry out strikes, with 13 taking place during 2017 and 2018.[170]

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[157] *Al Shimari*, 840 F.3d at 159.
[158] *Id.* at 160.
[159] *See id.*
[160] TVPA § 106.
[161] *See Al Shimari*, 840 F.3d at 159-60.
[162] *Id.*
[163] Qureshi, *supra* note 40, at 105.
[164] Qureshi, *supra* note 40, at 105.
[165] Qureshi, *supra* note 40, at 105.
[166] Qureshi, *supra* note 40, at 105.
[167] Qureshi, *supra* note 40, at 105.
[168] Qureshi, *supra* note 40, at 105.
[169] Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N. Y. TIMES (Apr. 6, 2013), https://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html.
[170] Peter Bergen et al., The *Drone War in Pakistan*, Chapter in *America's Counterterrorism Wars*, NEW AM., https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-drone-war-in-pakistan/ (last updated Mar. 30, 2020).

These strikes, and all resulting potential claims by civilians, could provide the basis for suits against private contractors because the actions are unlawful under the relevant law.[171] If the strikes are completely under the guise of government control, then liability is severed due to the PQD.[172] However, if private actors are involved in drone strikes in Pakistan, due to the illegality of drone warfare in the nation, the private actors are not under the color of law and their activity is considered unlawful.[173] As a result, private contractors that engage in drone activity in countries that do not consent to U.S. drone activity would be subject to justiciable actions in the U.S.[174]

One scholar posits that regardless of the justification, international humanitarian law does not allow for the U.S. to continue its current drone campaign, as it is engaging in preemptive self-defense.[175] The continuation of drone strikes under the theory of constant armed conflict against terror groups in the Middle East constitutes a challenge to the concept of self-defense.[176] Qureshi argues that "drone strikes, and thereby target killing, constitutes an act of war and the use of force can only be justified as self-defense in an actual armed conflict."[177]

Three requirements must be satisfied to qualify as self-defense "(1) drone strikes must be undertaken out of absolute military necessity[;] . . . (2) to commence a kill list in drone attacks, targets must be combatants[;] . . . and (3) drone attacks must be aligned with the principle of proportionality, by which civilians are protected against collateral damage."[178] Qureshi asserts that it is impossible to claim that the U.S. drone campaign falls within the requirements imposed by international law to judge it legal; and therefore, the drone campaign violates customary international law as well as several treaties the U.S. has signed.[179] Although such a determination is beyond the scope of this Article, if this theory is correct, then all drone strikes conducted by the U.S. have an element of unlawfulness.[180] Therefore, the analysis of whether private actors are operating under the color of the law can extend to all drone strikes conducted by the U.S.[181]

The purpose of showing that there is unlawfulness abound in the drone strike system currently utilized is to highlight a plethora of ways that private actors can be held liable for drone-related torts committed internationally.[182] Private military-focused companies are increasingly involved in helping to facilitate and carry out drone strikes,[183] and the impact of this trend is yet to be fully quantifiable.[184] The increased interplay between private contractors and the U.S. government comes in the wake of increased investment in privatized drone technology, now that companies are using drone technology to modernize their supply chain systems to create new ways

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171 Qureshi, *supra* note 40, at 105-06.
172 *See Jaber*, 861 F.3d at 247.
173 Qureshi, *supra* note 40, at 103, 105.
174 Qureshi, *supra* note 40, at 103, 105.
175 Qureshi, *supra* note 40, at 103, 105.
176 *See* Qureshi, *supra* note 40, at 93.
177 Qureshi, *supra* note 40, at 105.
178 Qureshi, *supra* note 40, at 105.
179 Qureshi, *supra* note 40, at 100.
180 Qureshi, *supra* note 40, at 105 ("distinguished from the noncombatant civilian population in accordance with the principle of distinction under humanitarian law—to avoid lawlessness and complete injustice.").
181 *See Al Shimari*, 840 F.3d at 147.
182 *Id.* (Holding that PQD cannot be applied to military contractors without an analysis of whether their actions were within the law).
183 *See* Ball, *supra* note 155.
184 *See Al Shimari*, 840 F.3d at 147.

to deliver items to remote customers.[185] If these drones have errors such as battery loss or computer malfunctions, they might injure civilians. Such private actors will be subject to liability in suits in the U.S. barring other jurisdictional issues.[186] Private military contractors who conduct research for drone strikes or lend targeting support can be implicated for their role in unintended killings, whereas the government will avoid liability based on political question grounds.[187]

Under the ATS a lawsuit can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process in U.S. Territory.[188] Recently the ATS has been constrained in its applicability to foreign corporations, but because the U.S.'s military contractors are often domestically-based, due to national security concerns, such constraints are inapplicable.[189]

In light of the fact that drone-related activity is likely to grow, the causes of action discussed above could lead to a world of unclear liability.[190] Private contractors play an increasingly important role in various parts of drone strike reconnaissance, planning, and execution.[191] These private companies conduct satellite research acquiring information on targets and specific contractors serve as intelligence operatives on drone strike missions.[192] Private contractors are even serving as drone operators on missions, and certain companies are being given intelligence from the U.S. military and serving as the primary operators of drone strikes as part of their service.[193] Privatization has led to a situation where, depending on how the mission is categorized, it might become necessary to trace the specific levels of private contractor involvement in each relevant drone strike mission.[194] This could potentially pose problems for the U.S. government because, although it is safe from potential liability, tracking down information of those involved in each drone strike requires an examination and potential release of confidential records that could pose national security concerns.[195]

Additionally, as companies like Amazon begin experimenting with privatized drone technology that seeks to make long-range deliveries or monitor shipments, accidents can, and are likely to, result.[196] Such accidents, while not classified as drone strike per se, could involve tortious conduct related to their drones falling out of the sky onto persons, property, or chattel. Such tortious conduct, if conducted overseas, could be traceable to Amazon in the U.S. as a result of the Alien Tort Statute ("ATS").[197] In the case of Amazon or other companies engaging in drone-based

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[185] Paul Armstrong, *Why You Should be Investing in Drone Technology now not Later*, FORBES (Sept. 3, 2018), https://www.forbes.com/sites/paularmstrongtech/2018/09/03/why-you-should-be-investing-in-drone-technology-now-not-later/#2385f73e3903; Vanessa Ogle, *Drone Strike! Our Photographer Injured by TGI Friday's Mistletoe Copter*, BROOKLYN DAILY (Dec. 8, 2014), https://www.brooklynpaper.com/stories/37/50/bn-drone-disaster-at-tgifridays-2014-12-12-bk_2014_50.html.

[186] Such as personal jurisdiction or venue.

[187] *See Al Shimari*, 840 F.3d at 147.

[188] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[189] *See id.*

[190] *Al Shimari*, 840 F.3d at 147.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See* Ball, *supra* note 155.

[196] *Al Shimari*, 840 F.3d at 147.

[197] *See Jesner*, 138 S. Ct. at 1393-1419.

delivery, the private drone actor incurs potential liability if its drones injure someone. The U.S. government's actions, on the other hand, are exempt due to the PQD.[198]

Under the ATS, an individual harmed by Amazon's drone activity could hold Amazon liable in U.S. courts.[199] While critics might argue that a private company being held for its negligence is unrelated to the U.S. military being held liable for its national defense-focused actions, the technology at issue is similar.[200] Civilian lawsuits arising from drone related activity depict the same errors in targeting that plague errant military strikes.[201] Because the body of law dealing with drones is fledgling in nature, any rulings regarding the type of targeting used and underlying procedures followed could become significantly influential precedent.[202] The establishment of such precedent could be problematic for U.S. military operations.[203]

Various policy concerns could arise from the dissonance in liability between civilian and government actors. American companies might be wary of increased investment or delay bringing suitable products to the market for fear of liability. Alternatively, American companies could bear the burden of investment risk by constantly modifying their tracking technology or incur delays in execution of commands because the U.S. government has avoided oversight of the kind advocated for by Judge Brown.[204]

The U.S. military, on the other hand, may face a shortage of contractors willing to engage in military activities as a result of unfavorable rulings. This could burden the ability of the military to conduct missions and provide for the national defense. Additionally, the unequal nature of attributing liability complicates the already confusing nature of our drone warfare program.[205] Currently, the Judiciary is forced to untangle murky questions that will grow in difficulty as the public and private elements of our national defense program continue to work in tandem.[206]

The above issues raise several important questions. If private actors are able to be held liable, what level of involvement by a private actor is necessary to avoid justiciability concerns? Does PQD apply if the private actors conduct research on who to target and government employees actually operate the drone? Does the PQD apply if the private actor is merely a drone operator? If the nation in which the drone strike occurs does not support U.S. intervention in its borders, then, by definition, color of law is violated, and any private actor involvement subjects the entire case to review.[207] When a private actor consults on a drone strike to one of these nations, the entire strike is subject to review.[208] Would this not violate the entire purpose of the PQD? Judicial review of executive matters related to national security has been avoided due to the lack of expertise the Judiciary possesses and because military action is understood to be managed by the politically accountable branches.[209] If a private actor is involved, are the courts forced to cast aside

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198 *See Al Shimari*, 840 F.3d at 151-62 (2016).
199 *See id.*
200 *See id.*
201 *See Jaber*, 861 F.3d at 249; *see also Al Shimari*, 840 F.3d at 151-62.
202 *See* Austin Choi-Fitzpatrick, *Drones for Good: Technological Innovations, Social Movements, and the State*, 68 J. OF INT'L AFFS. 19, 19-36 (2014).
203 *See id.*
204 *See Jaber*, 861 F.3d at 249.
205 *See id.*
206 *See id.*
207 *See Al Shimari*, 840 F.3d at 151-62 (holding that PQD cannot be applied to military contractors without an analysis of whether their actions were within the law).
208 *Id.*
209 CHEMERINSKY, *supra* note 55.

the precedent and policy upon which the PQD rests and actually answer the question of whether the military action was justified?

These questions point to the need for clarification from Congress to balance the need to protect national security with the need to provide a transparent accounting of our nation's drone warfare reconnaissance, planning, and execution procedures. As noted above, there is, at present, no way for the Judiciary to properly weigh in-on the legality of a drone strike without running afoul of the PQD.[210] Congress should create and pass a statute that allows for the legitimate claims of victims' families to meaningfully be heard to avoid the breakdown of public trust in the ability of our nation to maintain our national security using fair, ethical standards.

V. LOOKING TO WORKERS' COMPENSATION BOARDS AS THE KEY TO A PRESCRIPTIVE SOLUTION

A new way to adjudicate drone related deaths should provide a venue for the victims and their families to be heard and an opportunity to improve existing targeting systems. This venue would also avoid the two different liability regimes of private actors involved in drone related activity and the U.S. military highlighted in Section III. The proposal is a system enacted by Congress that would avoid the federal courts and with it any concerns of PQD preventing the courts from holding the respective parties accountable. This system seeks to draw from the exclusive remedy doctrine that underlies Workers' Compensation systems so that there is a single venue for drone related claims.[211] The key features of the system proposed by this Article are that claims are adjudicated, potential changes in targeting are considered, and victims are compensated.

Unlike Judge Brown, who questioned the ability of Congress to create a solution to the issue,[212] this Article argues that Congress is the only body that can credibly create a solution. Politically, the executive branch is too concerned with avoiding any bad press associated with the unintended consequences and is less likely to propose a solution that places their decisions under a microscope.[213] A Congressional statute would be the easiest way to institute a body that would adjudicate claims resulting from U.S. drone strikes. This solution, while ambitious, is warranted because the problem of inconsistent liability will grow as drone use expands.

This system would be created by statute and resemble a Worker's Compensation Board or a State Employee Claims Board where the adjudicatory body is separate from the existing judiciary of the country. The system can have set-aside values to compensate as well as subpoena power to properly examine records as needed. Of the existing systems in place, such a system would most likely resemble the current Iran Claims Tribunal (ICT).[214] The ICT was created by a treaty and oversees claims between the U.S. and Iran regarding frozen assets under the Carter administration.[215] Looking to the ICT is useful for this Article's purposes because it shows that a remedy system can be constructed for a narrow set of claims regarding a subject matter. Similarly, a system concerning drone strikes abroad could be created.

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[210] *See Jaber*, 861 F.3d at 247.
[211] H. Michael Bagley et al., *Workers' Compensation*, 47 MERCER L. REV. 493, 493 (1995).
[212] *Jaber*, 861 F.3d at 253.
[213] *See id.*
[214] *About the Tribunal*, IRAN-UNITED STATES CLAIMS TRIBUNAL, https://www.iusct.net/Pages/Public/A-About.aspx (last visited July 5, 2019).
[215] *Id.*

The solution at hand must balance the need to attribute liability, improve existing targeting systems, compensate victims, and increase public trust through transparency. Critics might suggest that war lacks transparency and covert decisions are to be expected.[216] However, the type of war currently fought by the U.S. lacks a finite end goal and the current method of warfare favors remote operated missions.[217] As technology reshapes how war is fought, it will remain to be seen how U.S. military actors will adapt accordingly.[218] Information technology (IT) developments require new measures to ensure effectiveness and transparency.[219] The harsh nature of remote killing has been written about elsewhere.[220] This deviation from existing warfare lacks the ability to evaluate targets and the change, while promoted as effective in preventing military casualties, requires further scrutiny as to its impact on unintended casualties on the battlefield.[221] Improving targeting of drones does not seek to reveal covert information, instead, this proposed solution seeks to improve the credibility of the U.S. to legitimately pursue its missions without establishing a precedent that indiscriminate killing is tolerated. Differentiating aggression between combatants and civilians is a basic tenet of armed conflict and there needs to be a strong rejection of imprecision.[222] Not improving the methods used could lead to drones being used in perpetuity without acknowledging the cost of human life that accompanies the benefit of troop safety. While increased drone usage makes combat safer for ground troops, it also creates a greater potential for imprecision – something often identified after the collateral damage has occurred. Ground troops are forced, via the existing rules of war, to act with more certainty when they engage a target. Furthermore, the governing principles of drone strikes affect its future use within the borders of the U.S. to police its own citizenry. Following the logic that drone usage in combat increases troop safety, U.S. police departments may employ drones with increasing regularity to police citizenry. Any imprecision in this scenario cannot be tolerated. Such justification could lead to further exploitation if unchecked.

Most importantly the new system would require precise avenues of accountability as suggested by Judge Brown.[223] This system will require a provision that allows victims' families to provide documentation to the governing body to support their theory of the case and assertions that their relatives were improperly targeted by the U.S. Moreover, the governing body should be able to adjudicate whether the claims have merit. To reach this conclusion, the U.S. government must be required to pass along relevant records and witness statements to the governing body as well as provide an accounting of the steps taken to ensure that the identities of the targets were properly verified prior to the drone strike. Any confidential records could be made public at the ruling body's discretion after a certain amount of time passed or after private review by the members of the tribunal. Moreover, the decisions must be made public for the families of the victims. Public disclosure will help maintain trust if the U.S. public knows that their government

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[216] *See* Blank, *supra* note 49.
[217] *See* Blank, *supra* note 49, at 703.
[218] *IT Is Changing the Nature of Warfare*, ASS'N OF THE U.S. ARMY (Dec. 4, 2017), https://www.ausa.org/news/it-changing-nature-warfare.
[219] *Id.*
[220] *See also* Jeff McMahan, *Rethinking the 'Just War' Theory (pt. 1),* N.Y. TIMES (Nov. 11, 2012, 6:22 PM), https://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/,
[221] *See* Jeff McMahan, *Rethinking the 'Just War' Theory (pt. 2),* N.Y. TIMES (Nov. 12, 2012, 8:15 PM), https://opinionator.blogs.nytimes.com/2012/11/12/rethinking-the-just-war-part-2/.
[222] *Id.*
[223] *See Jaber*, 861 F.3d at 250.

is committed to investigating its own conduct to prevent the same mistakes from happening in the future.

The membership of the tribunal should be composed of a rotating door of judges, international law experts, and military legal advisors. This would ensure that differing perspectives are taken into account and the pressures of national security are weighed against the rights of life guaranteed by the Geneva Conventions.[224]

Similar to the European Court of Human Rights,[225] there could be a number of judges from various countries assigned to the board – especially if the U.S. chose to pursue this as a joint effort with other nations similarly interested in protecting their national security interests through drone warfare. However, this would require a level of Executive branch cooperation that has thus far not manifested in the PQD defense of drone strikes. Here, the Iran Claims Tribunal example is instructive because the ICT equally divides its arbitrators amongst Iran and the U.S.[226] Equal representation of interests would allow the fairest outcome for all parties involved. However, similar concerns of the Executive branch control that has resulted in a lack of transparency and accountability for drone strikes might pose an issue.

The payments structures to the families of victims could be based on existing figures. For example, workman's compensation boards typically pay two-thirds of a worker's salary at the time of death. If a worker makes $60,000, at the time of death the payout would be roughly $40,000. There is likely a larger figure that could be offered by the company – more money can be offered if the company is liable in the death of the employee. With that in mind, a figure of $100,000 (USD) per unintended death caused by drone strikes is a similarly fair figure. This amount represents the income disparity between individuals killed abroad versus the U.S. as well as the need to have a uniform set of measurement for those killed by the U.S. government. Larger figures would likely be politically infeasible, whereas a smaller amount can lead to lessened confidence in the compensation.[227]

Further discussion could be devoted to whether the payments should be the equivalent of $100,000 (USD) or whether the amount should be in the currency of the decedent's nation to reflect the purchasing power of the country where the decedent lived. U.S. dollars may be the appropriate currency because the U.S. is responsible for the attack.

Additionally, a set figure would avoid burdensome comparisons or inconsistent results stemming from economic prosperity or downturn following an unintended death. For critics who may be wary of the proposal due to the $100,000 USD price point, it might be worth remembering that a U.S. life is adjudged by the courts to be worth from anywhere around 2.5 million USD to 8 million USD by various government agencies.[228] The $100,000 USD figure already reflects the fact that this amount would have a much greater value in countries where the U.S. is currently engaged in drone strikes without being so high that it is politically infeasible.

Another consideration is whether payments should go to a general fund or the families of victims. Payments ought to be made directly to the victim's families as long as they can establish

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[224] *See* IAN DAVID PARK, THE RIGHT TO LIFE IN ARMED CONFLICT (Oxford University Press 2018).

[225] *See generally* Eur. Ct. H.R., EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/Pages/home.aspx?p=home (last visited July 5, 2019).

[226] *See generally Jaber*, 861 F.3d at 247.

[227] Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PRO PUBLICA (Apr. 5, 2013, 10:15 AM), https://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age.

[228] Dave Merrill, *No One Values Your Life More Than the Federal Government*, BLOOMBERG (Oct. 19, 2017), https://www.bloomberg.com/graphics/2017-value-of-life/.

a close relation (i.e., brother, sister, nephew, aunt). The concern here is that general payments to communities might be less satisfying than those actually harmed by the unintended death. Additionally, there is a concern that a general payment might allow nefarious elements of society present to illicitly benefit.

In the case of a board created by Congress, liability and responsibility of the act would also be adjudicated, which might give some small amount of satisfaction to the grieving party that the U.S. government was held accountable.

Payments to victims of drone strikes abroad are not an entirely new concept. In his confirmation hearing in 2013, former CIA Director John Brennan mentioned "condolence payments" as a potential way to improve relations with locals following drone strikes.[229] These payments were largely informal and lacked the gravitas of a more formal governing board judgment that is being proposed in this Article.[230] Because of the lack of formality of these payments, exactly how the payments were given, or the precise amount of payments given, is unclear.[231] However, there are backchannel / colloquial / informal examples such as Mr. Ali Jaber reporting that a Yemeni official offered $100,000 (USD) as a condolence payment at the instruction of U.S. officials.[232]

Unfortunately, the current regime of informal payments has led to a system where unintended casualties are notoriously underreported.[233] An article from 2013 notes "the government has released almost no information on civilian casualties sustained in drone strikes conducted by the CIA and the military in Pakistan, Yemen and Somalia."[234] Perhaps more shocking, government numbers of unintended casualties via drone strikes number single digits, whereas reports compiled by news organizations and independent researchers estimate that number in the several hundreds and thousands.[235] The data is clear: "[a]ccording to the Bureau of Investigative Journalism, U.S. drone strikes have killed as many as 1,551 civilians in Afghanistan, Pakistan, Somalia, and Yemen since 2004."[236]

While such a number might seem small in the context of war, the U.S. government has proposed vast and costly overhauls for much less. Following less than fifteen deaths resulting from bottles of Tylenol being opened and filled with tainted capsules, the FDA and Johnson & Johnson introduced tamper proof packaging at the cost of nearly 100 million USD in the 1980s.[237] Based on less than 300 toddler deaths, the Department of Transportation at the urging of Congress required all automobile manufacturers in the U.S. to introduce backup cameras as a standard

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229 Currier, *supra* note 227.
230 Currier, *supra* note 227.
231 Currier, *supra* note 227.
232 *See* Ackerman, *supra* note 1; *See also Jaber*, 861 F.3d at 244 (noting that Yemeni government officials originally stated that the money was from the U.S. government but then walked the statements back when asked for written confirmation); *Humanitarian Impact of Drone strikes,* WOMEN'S INT'L LEAGUE FOR PEACE & FREEDOM 1, 23 (Oct. 2017), https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian-impact-of-drones.pdf (noting that payment by proxy is a common way for the U.S. government to handle fallout from drone strikes).
233 Ackerman, *supra* note 1.
234 Currier, *supra* note 227.
235 Currier, *supra* note 227; THE BUREAU OF INVESTIGATIVE JOURNALISM, *Drone Warfare*, https://www.thebureauinvestigates.com/projects/drone-war (last visited Nov. 22, 2020).
236 *Trump Threat Puts European Role In Lethal Us Drone Strikes Under New Scrutiny*, AMNESTY (Apr. 18, 2018), https://www.amnestyusa.org/reports/trump-threat-puts-european-role-in-lethal-us-drone-strikes-under-new-scrutiny/.
237 Howard Markel, *How the Tylenol Murders of 1982 Changed the way we Consume Medication*, PBS NEWSHOUR (Sept. 29, 2014), https://www.pbs.org/newshour/health/tylenol-murders-1982.

feature on new cars.[238] Critics will point out that the issue of war cannot be compared to either of the above examples and that the U.S. took quick steps in the above cases because U.S. citizens died – whereas the vast majority of drone strikes result in non-U.S. citizens dying. While putting issues in the context of war has previously been used to justify costly interventions, a society should not tolerate unintended death simply because of the citizenry of the victims.

The drone community has an interest in calling for increased transparency and accountability. As drone strikes continue and civilian casualties remain unaddressed, fear of governmental abuse and unchecked killings could drive the practice into a standstill or result in international bans.[239] This would prevent the benefits of drones from being realized, such as reduced military troop deaths and remote warfare capabilities.[240] This could even interrupt the ability for private application of drone technology in the security sector such as police usage or business innovations such as Amazon's new methods of shipment.[241] Transparency now would lead to credibility later on which can only improve the state of affairs. The argument that drone related deaths abroad are not substantial enough to warrant intervention is not compelling. The system proposed by this Article would arguably manage costs in comparison to litigation, which has historically led to defending multiple appeals. Also, the compensation being proposed by this Article would still result in less overall investment by the government than tamper proof packaging or backup cameras.

Once claims are brought forward, the U.S. government has a chance to evaluate the information presented and make the changes as needed to targeting practices. At present, the government is less concerned with denying assertions and mostly focused on dismissing cases for procedural reasons.[242] The government does not attempt to provide explanations or attempt to argue that the deaths resulting from drone attacks were justified based on the information present.[243] Further, the government does not address the merits of the claim because it is not required to under the current system.[244] This could change if the proposed statute is adopted. With the advent of a congressionally created oversight seeking, compensation board, the fears of large monetary liability are assuaged, and the government can offer substantive contributions to the discourse. The focus can be restricted to developing the best national defense strategy while also respecting the sanctity of human life abroad. Oversight measures can be adopted *sua sponte* by the responsible agencies or following advice of the compensation board. This advice will allow for the oversight that has been notoriously lacking and that Judge Brown commented was necessary to reduce the continuation of similar unintended killings resulting from drone strikes.[245] Unlike the current system, there is no concern of the inability to reach the merits of military action under PQD because the advice discussed above directly results from the application of a congressional statute.[246] As mentioned in *Al Shimari*, "[c]onducting a 'textual, structural, and historical' examination of a statute or treaty 'is what courts do' and typically is not barred by the

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[238] Nathan Bomey, *Backup Cameras now Required in new cars in the U.S.*, USA TODAY (May 2, 2018), https://www.usatoday.com/story/money/cars/2018/05/02/backup-cameras/572079002/.
[239] *See Al Shimari*, 840 F.3d at 147.
[240] *Id.*
[241] *Id.*
[242] *Jaber*, 861 F.3d at 250.
[243] *Id.* at 245.
[244] *See e.g. Jaber*, 861 F.3d at 244 (by implication because the government seeks to dismiss similar suits on procedural grounds rather than litigate them on the merits).
[245] *See id.*
[246] *Id.* at 245.

PQD."[247] Therefore, the solution proposed by this Article avoids current pitfalls in addressing liability of government actors.

As a result, the governing body proposed by this Article will bring more transparency to the U.S.'s role in drone warfare and establish important norms to ensure targeting is done fairly while maintaining efficiency and national security.

VI. CONCLUSION

This Article seeks to highlight the current inability of the U.S. judiciary to review drone strikes committed abroad. Due to the PQD, the judiciary is hesitant to invade the space of the Executive branch concerning matters of national security. Currently, the courts are unable to provide relief, even in circumstances where there should be additional oversight of the government's conduct and tort liability. However, based on recent cases finding that similar justiciability concerns do not affect the liability of private military contractors, there is a potential gap in accountability.[248] While the U.S. government avoids liability because of justiciability concerns, private companies do not have similar protections unless they are within the color of the law.[249] Drone strikes abroad, especially in nations that have not consented to U.S. drone activity within its borders, are not technically within the color of law.[250] As private military contractors take on a larger role in drone warfare and as private companies like Amazon begin entering the space of drone technology, this gap in accountability becomes untenable.[251] As a result, this Article proposes that Congress create an avenue by statute or treaty for claims to be adjudicated.

This new approach aims to relieve concerns about judicial overreach because the other political branches would specifically be allocating a role for the Judiciary. Under this system, the Executive branch opens itself up to needed oversight in the realm of drone warfare – increasing public trust and transparency, as well as compensating the families of victims of extrajudicial killings. This Article proposes a prescriptive solution that enables the U.S. to regain some of its international credibility in the wake of its questionable usage of drones to carry out extrajudicial killings by installing a policy that focuses on due process and human rights.

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[247] *Al Shimari*, 840 F.3d at 159.
[248] *See Al Shimari*, 840 F.3d at 147.
[249] *Id.*
[250] Qureshi, *supra* note 40, at 100.
[251] *See Al Shimari*, 840 F.3d at 147.

NON-DISCRIMINATION ON THE BASIS OF RELIGION: A COMPARATIVE LEGAL ANALYSIS OF THE JUDICIAL REVIEW OF TAX EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS BY THE SUPREME COURT OF THE UNITED STATES AND THE CONSTITUTIONAL COURT OF GEORGIA

Chiora Taktakishvili*

ABSTRACT

The article examines and contrasts constitutional legal frameworks in the United States and Georgia and the case-law of the United States Supreme Court and the Georgian Constitutional Court on the constitutionality of tax exemptions for religious organizations. The article argues that tax exemption regimes and constitutional review in the United States and Georgia are situated in two different constitutional paradigms. The two Constitutions similarly protect equality and prohibit discrimination based on religion; however, the constitutional basis for the review of tax exemption challenges differs. Contrary to the U.S. Constitution's first amendment, which prohibits establishment of religion, the Georgian Constitution does not provide such safeguard as part of the freedom of religion. Instead, the Constitution explicitly endorses one religious organization – the Christian Orthodox Church. In the United States, the Supreme Court uses the Establishment Clause of the U.S. Constitution, while in Georgia, complaints related to tax exemptions are examined under the right to equality that explicitly protects against the discrimination based on religion. The major difference between the U.S. and Georgian regimes deals with tax exemptions exclusively benefiting religious organizations. In the Supreme Court's practice, it is well-established that tax benefits for religious organizations are per se not permitted unless they incidentally benefit religious organizations. Contrarily, the Georgian Constitutional Court asserts that tax benefits exclusively benefiting religious organizations are allowed unless they discriminate between different religions. As for the levels of scrutiny, the U.S. Supreme Court uses strict scrutiny for facially discriminatory tax exemptions and the Lemon test for facially neutral exemptions, while the Georgian Constitutional Court always uses the strict scrutiny. The meaning of strict scrutiny itself is articulated in slightly different terms by the two courts. Nevertheless, both courts seek to achieve the same result – ensuring that the intrusion on a constitutionally protected right serves a compelling interest and is the most minimal infringement possible to achieve its legitimate purpose.

* Chiora Taktakishvili is a guest lecturer at Ilia State University (Republic of Georgia) and senior researcher at Policy Daily LLC. The publication of this article would not have been possible without the Fulbright Scholarship and support from my professors: Dr. Corri Zoli, Prof. Cora True-Frost and Prof. Gary Kelder to which I am deeply grateful.

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INTRODUCTION

This paper is a first attempt to describe and analyze the constitutionality of the tax exemption regimes in the United States of America and Georgia using a comparative constitutional legal framework on non-discrimination on the grounds of religion or belief.

Situated on the eastern coast of the Black Sea, in the South of Caucasus Mountains, Georgia is a partially free Constitutional Democracy,[1] with a civil law legal system,[2] and a parliamentary democracy aspiring to join the North Atlantic Treaty Organization and the European Union.[3] Georgia is a unitary state with no division of powers between federal and state levels. In 1998, Georgia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.[4] Thus, decisions of the Georgian Courts dealing with administrative, civil, and criminal cases may be ultimately challenged in the European Court of Human Rights in Strasbourg, France for an alleged infringement of the Convention.[5]

The current Georgian Constitution was adopted on August 24, 1995.[6] Within the Georgian Constitution, Articles 16, 11, and 8 provide particular significance to ensuring human rights. Article 16 guarantees the freedom of religion or belief.[7] Article 11 ensures the equal protection of laws and prohibits discrimination on the ground of religion or belief.[8] Article 8 provides the constitutional basis for the special status of the Georgian Orthodox Church and its relationship with the state.[9]

Georgia faces significant shortcomings in ensuring equality and protecting religious minority rights. Major concerns include an excessive entanglement between government and the dominant Apostolic Autocephalous Orthodox Church of Georgia (hereinafter Georgian Orthodox Church, or Orthodox Church) at the expense of discriminatory treatment of other religious

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[1] *See* Michael J. Abramowitz, *Democracy in Crisis*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/freedom-world-2018.

[2] F. J. M. Feldbrugge, *The Law of the Republic of Georgia*, 18 REV. CENT. & E. EUR. L. 367, 374 (1992).

[3] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 78 (quoting the Constitution, "[t]he constitutional bodies shall take all measures within the scope of their competences to ensure the full integration of Georgia into the European Union and the North Atlantic Treaty Organization.").

[4] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Nov. 4. 1950, ETS 5, https://www.jus.uio.no/lm/coe.convention.on.human.rights.1950.and.protocols.to.1966.consoloidated/portrait.pdf.

[5] *See id.* at art. 33-34.

[6] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 78.

[7] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 16. Article 16 states that "1. Everyone has freedom of belief, religion and conscience. 2. These rights may be restricted only in accordance with law for ensuring public safety, or for protecting health or the rights of others, insofar as is necessary in a democratic society. 3. No one shall be persecuted because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon."

[8] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 11. Article 11 states that "[a]ll persons are equal before the law. Any discrimination on the grounds of race, color, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited."

[9] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 8. Article 8 states that **"**[a]long with freedom of belief and religion, the State shall recognize the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia, and its independence from the State. The relationship between the state of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be determined by a constitutional agreement, which shall be in full compliance with the universally recognized principles and norms of international law in the area of human rights and freedoms."

organizations,[10] lack of effective remedies for discrimination, and impunity for hate crimes against religious minority community members.[11]

The United States of America (U.S.) is one of the global front-runners in securing religious freedoms and separation of church and state. The importance of religious freedoms in American history has prompted some American commentators to baptize the freedom of religion as a "progenitor of all other freedoms" within the American system.[12] Additionally, European thinkers such as Alexis de Tocqueville, have admired the unique American innovation of freedom of religion which allowed American puritans to contribute to the equality and advancement of democracy.[13]

Not accidentally, the First Amendment to the U.S. Constitution passed by Congress on September 25, 1789 and ratified on December 15, 1791, provides the basis for the constitutional guarantees for the freedom of religion and non-discrimination based on religion. More precisely, the First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] The so-called Establishment and Free Exercise clauses are among other fundamental rights recognized under the First Amendment, namely, the right to free speech, press, association, assembly and the right to petition the government.[15]

The First Amendment constitutes a foundation of the American liberal democracy. It serves the crucial purposes of maintaining diversity in a pluralistic society and facilitating the search for truth through the free marketplace of ideas, the self-governance of people, the self-fulfillment and autonomy of individual members of society.[16] The religious freedom clauses are an integral part of this philosophical framework and serve similar purposes.

Application of the constitutional provisions on freedom of religion is significantly shaped by the judicial review process in the U.S. and Georgia.

In the U.S., the Supreme Court's interpretation plays a crucial role in American Constitutional law.[17] The Court's constitutional holdings are viewed as having the same level of authority as the Constitution itself and have a binding effect on the lower courts due to the common law doctrine of *stare decisis*.[18] Furthermore, complex constitutional amendment procedure designed to foster stability of the constitution adds particular significance to the Supreme Court's interpretation of the Constitution.

According to the Article III of the U.S. Constitution, the judicial power is vested in the U.S. Supreme Court. Since *Marbury v. Madison*, the Supreme Court reviews the constitutionality

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[10] Mariam Gavtadze et al., *Freedom of Religion or Belief in Georgia. Report. 2010-2019*, TOLERANCE AND DIVERSITY INST. 11 (2020), https://tdi.ge/sites/default/files/tdi-report-freedom_of_religion_in_georgia_2010-2019.pdf.

[11] Women's Initiative Supporting Group, Georgian Young Lawyers Association, and Human Rights Education and Monitoring Center, *Protection of Religious Minorities: Report on the monitoring of the implementation of human rights strategies and action plans for 2016-2017*, https://socialjustice.org.ge/uploads/products/pdf/RELIGIOUS-MINORITIES_1539077176.pdf.

[12] Leo Pfeffer, *Freedom and Separation: America's Contribution to Civilization*, 2(2) J. CHURCH STATE 100, 100-11 (1960).

[13] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 49-54 (Henry Reeve trans., Penn. State ed. 2002), http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf.

[14] U.S. CONST. amend. I.

[15] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW – PRINCIPLE AND POLICIES 1754 (5th ed. 2015) (ebook).

[16] GEOFFREY STONE ET AL., THE FIRST AMENDMENT 9-16 (2d ed. 2016).

[17] CHEMERINSKY, *supra* note 15, at 42.

[18] WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 40-44 (6th ed. 2016).

of executive and legislative acts and ensures the practical implementation of the Supremacy clause of the constitution, which establishes the hierarchy of legislative acts at federal and state levels.[19] The Georgian constitutional review system is similar in a sense that, since 1997, Georgian legislation is subject to the constitutional judicial review. However, this function belongs to the Constitutional Court of Georgia especially established for this purpose and it is a separate jurisdiction from the common courts system.[20]

The major difference between the U.S. and the Georgian judicial review system is that the Constitutional Court of Georgia may only review complaints about the unconstitutionality of the normative acts adopted by relevant legislative or executive bodies and the Court may not review the allegedly unconstitutional application of normative acts where there is no claim about the alleged unconstitutionality of the legislative act itself. Such cases are reviewed and adjudicated by the Supreme Court of Georgia. Only the Constitutional Court of Georgia is entitled to invalidate normative acts based on a violation of a constitutional provision. Under the Article 19.1.e of the Organic Law on the Constitutional Court of Georgia, an individual may file a complaint challenging the normative acts of Georgia for alleged incompatibility with the fundamental human rights and freedoms recognized by Chapter II of the Constitution of Georgia.[21] Besides the individual complaints procedure, the Parliament of Georgia, the President, the Government, and political parties, may challenge a limited number of legal acts dealing with the separation of constitutional powers and constitutionality of elections and referenda under specific conditions.[22] The Court reviews approximately one hundred cases per year.[23] The vast majority of these cases, more than ninety percent, are based on complaints tabled by individuals or legal entities with regard to the human rights provisions of Chapter II of the Constitution.[24]

This article examines and contrasts constitutional legal frameworks in the U.S. and Georgia and their respective application by the U.S. Supreme Court and the Georgian Constitutional Court concerning the establishment of the religion clause in cases challenging constitutionality of tax exemptions for religious organizations. Namely, I studied the U.S. Supreme Court's decisions related to the Establishment and Free Exercise clauses of the First Amendment of the U.S. Constitution and governmental aid to religious organizations, specifically focusing on tax exemptions applicable to religious organizations. Among others, I examined the landmark decisions *Walz v. Tax Comm'n of City of New York*,[25] *Lemon v. Kurtzman*, [26] *Texas Monthly, Inc. v. Bullock,* [27] and *Trinity Lutheran Church of Columbia, Inc. v. Comer* [28] which introduce general rules applicable in this specific field. For Georgia, I examined the Georgian Constitutional Court's decision in *Evangelical-Baptist Church of Georgia and Others v. The Parliament of Georgia*

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[19] *See* Marbury v. Madison, 5 U.S. 137 (1803).
[20] Organic Law of Georgia on the Constitutional Court of Georgia, The Parliament Gazette, No. 45, Nov. 21, 1997, art. 1.
[21] *Id.* at art. 19.1e.
[22] *Id*. at art. 19.1.
[23] *Information on the Constitutional Justice in Georgia*, Constitutional Court of Georgia (2017), https://www.constcourt.ge/en/court/annual-report.
[24] *Id.* at 103.
[25] Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).
[26] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[27] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
[28] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 U.S. 2012 (2017).

(2018), which invalidated a tax exemption regime in favor of the Christian Orthodox Church based on the discrimination based on religion claim.[29]

The methodology of case selection for the comparative constitutional legal analysis relies on Ran Hirschl's differentiation of five approaches. Hirschl focuses on examining "most similar cases," the "most different cases," the "prototypical cases," the "most difficult cases," and the "outlier cases."[30] I used a combined model of the "most similar" and the "prototypical cases" selection methods.[31] I identified similar cases from the U.S. and Georgian jurisprudence that treat the same specific issue of the direct tax exemptions applicable to the religious organizations and excluding tax exemptions applicable to individuals (tax deductions), taking into account the absence of comparable cases in the Georgian jurisdiction. At the same time, while dealing with the abundant U.S. Supreme Court material within this narrow field, I've focused my analysis on more prototypical cases, those that serve as an example of similar future cases.[32]

I chose to examine the application of the Establishment Clause in tax exemption cases for three reasons. First, the Georgian Constitutional Court recently adopted a landmark decision in *Evangelical-Baptist Church of Georgia and Others*[33] and solved a longstanding controversy over the discriminatory tax exemption regime that favored the dominant Christian Orthodox Church, and I was interested in comparing the Georgian and the U.S. legal approach on this specific issue. Second, granting tax exemptions to religious organizations constitutes a suspect governmental action that may be used to circumvent the Establishment Clause by providing excessive financial support to religious organizations and may entail excessive entanglement or endorsement of religion. Thus, by examining the tax exemption regimes, one can have an in-depth understanding of the application of an important constitutional principle. Lastly, the tax exemptions constitute an important part of public aid to religious organizations' funding, and discrimination against some religions through the tax exemption regime may raise issues with the free exercise of religion. There is a significant value in checking the tax exemption regimes from this perspective.

For these reasons, this article seeks to unpack the distinction between constitutionally permissible tax exemption regimes and the tax benefits to religious organizations that are prohibited under the Establishment Clause within the U.S. Supreme Court jurisdiction. This inquiry aims to discern similarities and differences in the approaches of these two distinct legal regimes and draw lessons for a comprehensive legal analysis of the legal rationale of the Georgian Constitutional Court's approach.

This article argues that tax exemption regimes and the constitutional review in the U.S. and Georgia are situated in divergent constitutional paradigms. The two Constitutions similarly protect equality and prohibit discrimination based on religion; however, the constitutional basis for the review of tax exemption challenges differs. Contrary to the U.S. Constitution's first amendment which prohibits establishment of religion, the Georgian Constitution does not provide such safeguard as part of the freedom of religion and the Constitution explicitly endorses one religious organization – the Christian Orthodox Church. In the U.S., the Supreme Court applies the Establishment Clause of the U.S. Constitution, while in Georgia, complaints related to tax

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[29] *LEPL Evangelical-Baptist Church of Geor. and Others v. The Parliament of Geor.,* (2018) Constitutional Court of Georgia N 1 /2/671; Constitutional Court Georgia, *Case Notes of the Constitutional Court of Georgia*, 2 J. CONST. L. 107, 111 (2018).

[30] Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53(1) AM. J. COMP. L. 125, 126-155 (2005).

[31] *Id.*

[32] Constitutional Court of Georgia, *supra* note 29.

[33] Constitutional Court of Georgia, *supra* note 29.

exemptions are examined under the right to equality that explicitly protects against the discrimination based on religion. The major difference between the U.S. and Georgian regimes deals with the tax exemptions exclusively benefiting religious organizations. In the Supreme Court's practice, it is well-established that tax benefits for religious organizations are *per se* not permitted unless they are incidentally benefiting religious organizations.[34] Contrarily, the Georgian Constitutional Court asserts that tax benefits exclusively benefiting religious organizations are allowed unless they discriminate between different religions.[35] As for the levels of scrutiny, the U.S. Supreme Court uses strict scrutiny for facially discriminatory tax exemptions[36] and the Lemon test for facially neutral exemptions,[37] while the Georgian Constitutional Court always uses the strict scrutiny.[38] The meaning of the strict scrutiny itself is articulated in slightly different terms by the two courts. Nevertheless, both courts seek to achieve the same result – ensuring that the intrusion in the constitutionally protected rights serves a compelling interest and is the most minimal infringement possible to achieve its legitimate purpose.

The constitutional and comparative legal scholarship on Georgia's constitutional framework in terms of the relationship between the State and religion has focused on the general description of the Georgian constitutional framework in contemporary and historical perspectives,[39] the State and church relationship in Georgia,[40] and description of the religious organizations' registration framework,[41] while civil society reporting paid particular attention to discriminatory treatment of minority religions in law and in practice.[42] This paper is a first attempt to compare applications of the constitutional provisions in tax exemption jurisprudence of the U.S. Supreme Court and the Georgian Constitutional Court.

In terms of the functionality of this comparative analysis, one of the major functions of comparative law is understood as sensing and appreciating the difference of other legal cultures, identifying commonalities in legal systems, such as rules, categories, or patterns of thought or

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[34] See e.g., Hernandez v. Comm'r. of Internal Revenue, 490 U.S. 680, 695 (1989); *Lemon*, 403 U.S. 602; Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[35] Constitutional Court of Georgia, *supra* note 29, at part II, para. 6.

[36] *E.g.,* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947); *Lemon*, 403 U.S. at 612; *Texas Monthly*, 489 U.S. at 12-13.

[37] *E.g., Lemon,* 403 U.S. at 612; *Hernandez*, 490 U.S. at 695; *Texas Monthly*, 489 U.S. at 12-13.

[38] Constitutional Court of Georgia, December 27, 2010, Citizens Political Unions "New Rights" & "The Conservative Party of Georgia" v. Parliament of Georgia, N1/1/493, part. II, para. 6, Constitutional Court of Georgia, *supra* note 29, at part II, para. 22.

[39] George Papuashvili, *The 1921 Constitution of the Democratic Republic of Georgia: Looking Back After Ninety Years*, 18 EUR. PUB. L. 323, 350 (Jun. 2012); Vakhushti Menabde, *The Third Fundamental Revision of the Constitution of Georgia*, 1 GEORGIAN L. J. 6, 6-16 (2017).

[40] Dimitry Gegenava, *Church-State Relations in the Democratic Republic of Georgia* (1918-1921), 21 LAW STUDIA Z PRAWA WYZNANIOWEGO 255, 255-69 (2018); Karlo Godoladze, *Constitutional Theocracy in Context: The Paradigm of Georgia*, 04(02) HUMAN. SOC. SCI. REV. 95, 195-214 (2015).

[41] Giorgi Meladze and Giorgi Noniashvili, *The Issue of Registration of Religious Organizations in the Georgian Legislation*, 9 CONST. L. REV. 61, 61-77 (2016).

[42] Mariam Gavtadze et al., *Freedom of Religion or Belief in Georgia. Report. 2010-2019*, TOLERANCE DIVERSITY INST. (2020), https://tdi.ge/sites/default/files/tdi-report-freedom_of_religion_in_georgia_2010-2019.pdf; *See also* Ekaterine Lomtatizide & Maia Tsiklauri, *Study of Religious Discrimination and Constitutional Secularism in Georgia*, TOLERANCE DIVERSITY INST. (2014), http://tdi.ge/sites/default/files/study_of_religious_discrimination_and_constitutional_secularism_tdi.pdf.; *Crisis of Secularism and Loyalty Towards the Dominant Group*, HUM. RTS. EDUC. MONITORING CTR. (2013); GEORGIAN DEMOCRATIC INITIATIVE, PROHIBITION OF DISCRIMINATION: ANALYSIS OF THE GEORGIAN LEGISLATION AND PRACTICES (2014).

order that resonate across national borders.[43] This article on the one hand, offers an overview of the Georgian constitutional framework in the area of State-church relations and non-discrimination based on religion, while specifically addressing the constitutionality of the tax exemption regime. On the other hand, it may clarify legal concepts borrowing from the American constitutional law doctrine that could ultimately benefit future strategic litigation in Georgia for the protection of minority religious organizations' rights and ensuring a greater separation between the State and the Christian Orthodox Church.

Following the methodological framework established by Edward J. Eberle,[44] I seek not only to provide a legal overview of the governing constitutional rules and judicial interpretation on the tax exemption regimes in two countries, but also to situate these rules into a larger historical and cultural context paying particular attention on how the rules operate in different societies and drawing concluding comparative observations.

First, I provide a general overview of the Georgian and American historical and socio-cultural context. Second, I review the respective constitutional legal frameworks for the protection of the Freedom of religion or belief and non-discrimination on the ground of religion. Third, I compare the two judicial interpretations of the relevant constitutional clauses in tax exemption cases for religious organizations, specifically focusing on the legal regime of tax exemptions, constitutional basis for challenges and levels of scrutiny employed for the constitutional review of this challenges. I finally draw concluding comparative observations.

I. CONSTITUTIONAL FRAMEWORK

While the First Amendment of the U.S. Constitution and the Supreme Court's interpretation of the Establishment Clause guarantees equal treatment of all religions by the government and separation of the State and church, the Georgian Constitution recognizes a special role of the Christian Orthodox religion, its independence from the State, every person's right to equal protection regardless of the religion or beliefs, and the right to free exercise of religion. While both States share the accommodation approach towards religion, in this section, I examine and contrast the two legal regimes' approaches towards the separation of the State and church focusing on the differentiating factors for each system.

A. Separation of the State and Church and Neutrality as a Differentiating Factor for the U.S.

The First Amendment of the U.S. Constitution provides the basis for the so-called Establishment Clause among other recognized rights, such as the right to free speech, press, assembly, right to petition the government and to free exercise of religion.[45] Specifically, the Establishment Clause of the First Amendment requires that "Congress shall make no law respecting an establishment of religion."[46] This provision has been made applicable to the states through the Fourteenth Amendment and was first incorporated and applied to the states in *Everson v. Board of Education* in 1947.[47] The Free Exercise Clause of the First Amendment states that

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[43] Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 451-86 (2009).
[44] *Id.*
[45] CHEMERINSKY, *supra* note 15, at 1754.
[46] U.S. CONST. amend. I.
[47] CHEMERINSKY, *supra* note 15, at 1755 (citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947)).

"Congress shall make no law […] prohibiting the free exercise thereof [religion]."[48] It prohibits the federal and state governments from enacting laws that discriminate against or excessively interfere with a person's exercise of religion.

The U.S. Supreme Court further clarified the meaning of the Establishment Clause as encompassing the requirement for federal and state governments not to engage in actions that would result in excessive interference or promotion of one or some religions, or religion as such. Namely, in *Larson v. Valente,* the Court stated that the Establishment Clause forbids the government to "pass laws which aid one religion" or that "prefer one religion over another."[49] Similarly, in *Zorach v. Clauson*, the Court said, "[the] Government must be neutral when it comes to competition between sects."[50] In *Gillette v. United States*, the Court further articulated that the government shall not put its imprimatur "on one religion, or on religion as such."[51] In *Epperson v. Arkansas*, the Court specified that the establishment clause also required that the state does not enact laws that "oppose any religion."[52]

To sum up, the Establishment Clause under the U.S. Constitution's First Amendment, as interpreted by the Supreme Court's extensive jurisprudence, requires that the government does not establish an official religion, but also prohibits government actions that unduly favor one religion over another, or unduly burden one religion. Furthermore, while the Free Exercise Clause protects individuals' freedom to exercise their faith without the state's interference, the Establishment Clause refers to limits on the government's authority to enact laws that would result in governmental endorsement of any religion or religion as such.

Thus, the U.S. constitutional framework may be characterized as fitting with the secular model of the church and state relationship, according to the classification of the state-church relations developed by Durham.[53]

B. Endorsement of the Christian Orthodox Church as a Differentiating Factor for Georgia

Conversely, the Georgian constitution's provisions are very different. On one hand, they establish a constitutional distinction between religions, and on the other hand, they guarantee the church's independence from the State, equality for all regardless of religion or belief, and the right to free exercise of religion. The Georgian constitutional framework may be characterized as the so-called "endorsed religion" model of the State-church relations according to the classification developed by Durham.[54] Other classifications refer to this type of relationship as the "preferred religion" model.[55]

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[48] *Everson*, 330 U.S. at 15; U.S. CONST. amend. I.

[49] CHEMERINSKY, *supra* note 16, at 1775 (citing Larson v. Valente, 456 U.S. 228, 246 (1982)).

[50] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[51] Gillette v. U.S., 401 U.S. 437, 450 (1971).

[52] Epperson v. Ark., 393 U.S. 97, 104, 106 (1968).

[53] W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* 2 Religious Human Rights in Global Perspective 1, 1-44 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). "The endorsed church is specially acknowledged, but the country's constitution asserts that other groups are entitled to equal protection. Sometimes the endorsement is relatively innocuous, and remains strictly limited to recognition that a particular religious tradition has played an important role in a country's history and culture. In other cases, endorsement operates in fact as a thinly disguised method of preserving the prerogatives of establishment, while maintaining the formal appearance of a more liberal regime." *Id.* at 20.

[54] *See id.* at 20.

[55] *Compare Nations: Religious Support*, Ass'n of Religion Data Archives, https://www.thearda.com/internationalData/compare5.asp?c=89&c=234&c=89&c=234 (last visited Apr. 23, 2019).

The Georgian constitution explicitly emphasizes the role of one religion. Namely, Article 8 of the Georgian Constitution, as amended following the March 23, 2018 constitutional changes, states:

> Along with freedom of belief and religion, the State shall recogni[z]e the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia, and its independence from the State. The relationship between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be determined by a constitutional agreement, which shall be in full compliance with the universally recogni[z]ed principles and norms of international law in the area of human rights and freedoms.[56]

Article 11 guarantees the principles of equality and non-discrimination, specifically mentioning religion as a prohibited ground of discrimination: "All persons are equal before the law. Any discrimination on the grounds of […] religion, political or other views, […] or on any other grounds shall be prohibited."[57] Moreover, according to Article 16:

> 1. Everyone has freedom of belief, religion and conscience.
> 2. These rights may be restricted only in accordance with law for ensuring public safety, or for protecting health or the rights of others, insofar as is necessary in a democratic society.
> 3. No one shall be persecuted because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon.[58]

There is a striking difference between the 1995 Constitution and its predecessor, the 1921 Constitution of the First Democratic Republic of Georgia. The latter endorsed a strict separation between the State and church and guaranteed complete neutrality of the State vis-à-vis religious organizations ("(t)he state and the church are separate and independent one from the other"), by, inter alia, prohibiting levying taxes for the needs of any religious organization.[59]

The Constitutional Agreement between the State and the Christian Orthodox Church is a clear indication that one religion is privileged. The 1995 Constitution grants the Christian Orthodox Church an exclusive right to negotiate the legal regime under which issues of interest will be adjudicated with the State. This is a very important right in two respects. First, according to the Law on Normative Acts of Georgia, the Constitutional Agreement has a higher place in the hierarchy of legal acts in Georgia as compared to organic and ordinary laws. Thus, the State is bound by the agreement in legislating on the issues covered under the Concordat and may not introduce organic and ordinary laws contradicting the Agreement. Second, the legal framework applicable to all other religious organizations is defined by the organic and ordinary laws. Thus, Concordat may create rights exclusively applicable to the Christian Orthodox Church. The general laws applicable to all religions must comply with the Concordat, and if they don't provide the same rights to other religions, they may be facially discriminatory.

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[56] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 8.
[57] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 11.
[58] CONSTITUTION OF GEORGIA, Aug. 24, 1995, Document N786, art. 16.
[59] CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF GEORGIA, Feb. 21, 1921, art. 142-44.

On the other hand, in contrast with the 1921 Constitution (Art. 142), the 1995 Constitution does not use the term separation of the State and the church. The latter prohibits the State's interference into the independence of one church. According, to Article 8, "[...] the State shall recognize [...] its (the Apostolic Autocephalous Orthodox Church of Georgia) independence from the State."[60] Thus, this provision prevents the State from interfering with the internal affairs of the Orthodox Church, but it does not require that the State should not interfere with other religions' affairs. At the same time, Article 8 does not provide guarantees that the State will not endorse any religion. To the contrary, the whole purpose of Article 8 is the endorsement of one religion ("[a]long with freedom of belief and religion, the State shall recognize the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia [...]").

Until the recent Constitutional Court decision in the *Evangelical-Baptist Church of Georgia*,[61] there has been a disagreement between legal scholars about the interpretation of the constitutional preference towards the Christian Orthodox Church and religion. This case is discussed in further detail below. Some scholars argued that the special religion status provided by the Constitution authorized the government to treat the Christian Orthodox Church under an exclusive privileged legal regime as compared to all the other religions,[62] while for others, Articles 11 (Equality and non-discrimination) and 16 (Freedom of religion and belief), and the reference to freedom of belief and religion within Article 8 precluded the discrimination against religious minorities, even if the constitution granted a special status to the Christian Orthodox Church.[63]

In its landmark decision *Citizen of Georgia Zurab Aroshvili v. Parliament of Georgia*, the Constitutional Court of Georgia held: "the fact that the Constitutional Agreement regulates relations between the State and the Georgian Apostolical Orthodox Church does not preclude the existence of different religious organizations in Georgia, neither it in any way imposes any restrictions on their activities, nor prohibitions incompatible with the constitutional provisions."[64] The case was brought to the Court by a representative of the Orthodox Church in Georgia, a separate church from the Georgian Orthodox Church, challenging a provision of Article 6, paragraph 6 of the Constitutional Agreement between the State and the Orthodox Church, according to which, "State with the consent of the Orthodox Church issues licenses and authorizations for the use of the religious terminology and symbols, and for the production, import or realization of the products related to the religious service."[65] The plaintiff claimed that the relevant Article 6.6 violated the equality and non-discrimination principle of the Constitution as it discriminated against the Orthodox Church in Georgia. To use the word "orthodox" in the name of the organization, and to produce, import or sell its own products, the plaintiff was required to get a license and an authorization from the Georgian Orthodox Church. The court rejected the complaint because of the lack of standing. However, it provided an important interpretation of the

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[60] *Id*. at art. 142.

[61] Constitutional Court of Georgia, *supra* note 29.

[62] არჩილ მეტრეველი, რელიგიური გაერთიანებების სამართლებრივი მდგომარეობა საქართველოში (1995-2014), სადისერტაციო ნაშრომი დოქტორის აკადემიური ხარისხის მოსაპოვებლად, საქართველოს უნივერსიტეტი, 122 (2015) [Archil Metreveli, *Legal Status of Religious Organizations in Georgia (1995-2014),* PhD dissertation, University of Georgia, 122 (2015).].

[63] Lomtatizide & Tsiklauri, *supra* note 42, at 10-6.

[64] Constitutional Court of Georgia, *Citizen of Georgia Zurab Aroshvili v. Parliament of Georg*ia, No. 2/18/206 3 (Geor., Nov. 22, 2002).

[65] Resolution of the Parliament of Georgia on approval of the *Constitutional Agreement between* the *State of Georgia and* the *Georgian Apostolic Orthodox Church*, PARL. OF GEOR. (Oct. 14, 2002), https://forbcaucausus.files.wordpress.com/2014/08/concordat.pdf.

legal meaning of the Constitutional agreement. According to the Court, the constitutional legal regime of the Georgian Orthodox Church did not imply the discrimination of other religious organizations and that the scope of application of the Constitutional Agreement was limited only to the churches and organizations within the Georgian Orthodox Church's official hierarchy and had no legal consequences applicable to any other religious organization.

Although in the *Zurab Aroshvili* case the Constitutional Court clarified the meaning of the Constitutional Agreement with regard to other religions, the Court did not rule on any facially discriminatory laws that granted exclusive privileges to the Christian Orthodox Church based on the provisions of the Constitutional Agreement until 2018.

There are multiple discriminatory norms in Georgian legislation that privilege the Christian Orthodox Church and reference the Constitutional Agreement. An example of such provisions were exclusive tax exemptions benefiting exclusively the Christian Orthodox Church.

In *Evangelical-Baptist Church of Georgia and Others v. The Parliament of Georgia (2018)*, the Georgian Constitutional Court provided a clear interpretation of the Article 9 (currently Article 8) of the Constitution[66] holding that: "The purpose of recognizing the special role of the Orthodox Church in Georgian history is not establishing a supremacy of the Orthodox religious faith with regard to other religions."[67] Thus, in the Court's view, the constitutional clause refers to the role of the Christian Orthodox Church in history. The provision does not create a legal right to supremacy. More importantly, it can in no way be interpreted in practice as overriding the non-discrimination clause of the Constitution. At the same time, the Court recognized that enforcing the constitutional provision about the Church's historical role through adoption of legislation is a compelling State interest and that in some cases, differentiation may be justified under the strict scrutiny rule.[68]

This was an important development for constitutional interpretation, as it was the first occasion for the court to clearly state the scope of application of Article 8 of the Constitution. This also means that we may see more constitutional challenges of the facially discriminatory legislation in the future, based on this interpretation.

To conclude, the U.S. and Georgia Constitutions provide two distinct paradigms of the State-church relations. While the U.S. Constitution upholds the separation of the State and church, the Georgian Constitution endorses one religion, the Christian Orthodox Church, while also guaranteeing the freedom of religion and non-discrimination based on religion. In order to understand the origins of this difference, one should have a closer look into the history and socio-cultural contexts in the two countries.

II. HISTORICAL AND SOCIO-CULTURAL CONTEXT

Constitutional provisions reflect a specific historical and socio-cultural context in a given polity. Thus, in examining proper Constitutional provisions in the U.S. and Georgia, it is necessary to situate each country's constitution in the appropriate historic and socio-cultural context. In this section, I emphasize the description of the Georgian historical context, while also providing a brief overview of the American historical context of the First Amendment, after which I discuss socio-cultural attitudes towards religion in two countries.

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[66] Following the October 13, 2017 amendments to the 1995 Constitution (Document N1324), the order of the articles of the Chapter I. General Provisions changed. The amendments entered into force on December 16, 2018.

[67] Constitutional Court of Georgia, *supra* note 29, at part II, para. 34.

[68] Constitutional Court of Georgia, *supra* note 29, at part II, para. 41.

A. Georgia

Georgian lawmakers and scholars tried to justify the current preferential constitutional framework towards the Christian Orthodox Church by the trauma suffered by the Church during the Soviet rule. However, the modern model is also a demonstration of a significant political weight of the Christian Orthodox Church in the Georgian society and the unwillingness or inability of the democratic process to resist excessive entanglement that negatively affects the status of religious minorities.

Modern constitutional provisions significantly depart from the Georgian First Democratic Republic's founding fathers' conception on the State-church separation and State's neutrality.[69] The reasons may be traced in the seventy-year long Soviet rule repressing traditional religious practices, especially targeting the Christian Orthodox Church as a crucial element in Georgia's independence narrative against the Imperial Russian and later Bolshevik rule.[70]

Georgian Christian Orthodox Church's history is closely tied with that of the Georgian State. In 337 A.D., Georgian King Mirian converted himself and declared Christianity as the Georgian kingdom's official religion.[71] Georgian Church gained autocephaly (dogmatic independence) during the 5th century A.D., and it functioned as an autonomous Holy See. On September 12, 1801, Georgia was annexed by the Russian Empire.[72] In 1811, the Tsarist Russian Empire incorporated Georgian Orthodox Church into the Russian Orthodox Church and abolished its autocephaly.[73] From this moment on, the Georgian independence movement was closely tied with the movement for restauration of the Georgian Church's autocephaly.

Georgia's existence as a modern State was determined by *de facto* and then *de jure* recognition following the 1918 Declaration of Independence by the Members of the League of Nations, such as France, Great Britain, USA and Germany throughout 1918-1922.[74] Following the Bolshevik Revolution of November 7, 1917, and the subsequent civil war in Russia, Georgia seceded from the Russian Empire and declared its independence on May 26, 1918.[75] Multiparty general elections of the Constituent Assembly were held from February 14 to16.[76]

The most important achievement of the Constituent Assembly was the drafting and adoption of Georgia's First Republic's Constitution on February 21, 1921.[77] It established the parliamentary governance system, local self-governance, abolished the death penalty, upheld freedom of speech and belief, separation of the State and church, universal suffrage (including

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[69] *See* Gegenava, *supra* note 40, at 261-62.
[70] *See* Gegenava, *supra* note 40, at 257-58.
[71] Stephen H. Rapp and Paul Crego, *The Conversion of K'art'li. The Shatberdi Variant (Kek. Inst S-1114)* in LANGUAGES AND CULTURES OF EASTERN CHRISTIANITY: GEORGIAN 105 (Stephen H. Rapp & Paul Crego eds., 2012).
[72] Charles King, THE GHOST OF FREEDOM: A HISTORY OF THE CAUCASUS (2008).
[73] Gegenava, *supra* note 40, at 257.
[74] *Exhibition: "First Republic of Georgia: European Way and Soviet Occupation*," INT'L CONFLICT RESOLUTION WORDPRESS (Mar. 20, 2014), https://icres.wordpress.com/2014/03/20/exhibition-soviet-occupation/ (noting that the Democratic Republic of Georgia was *de jure* recognized by: Turkey, Russia, Germany, Switzerland, Belgium, France, Great Britain, Italy, Japan, Austria, Romania, Haiti, Liberia, Mexico, Panama, Siam, and Luxemburg).
[75] Malkhaz Matsaberidze, *The Democratic Republic of Georgia (1918-21) and the search for the Georgian model of democracy* 141, *in* STEPHEN F. JONES, THE MAKING OF MODERN GEORGIA, 1918-–2012: THE FIRST GEORGIAN REPUBLIC AND ITS SUCCESSORS 141 (2014). *See also The Act of Independence of the Democratic Republic of Georgia*, GEORGIAN NAT'L ARCHIVE, www.archives.gove.ge/uploads/other/2/2784.pdg (last visited Dec. 16, 2018).
[76] King, *supra* note 72, at 164.
[77] CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF GEORGIA, Feb. 21, 1921.

equal right to vote for men and women), introduced jury trial, and guaranteed habeas corpus rights.[78]

However, few days after the adoption of Constitution, Russia's Red Army invaded Georgia resulting in the occupation of Georgia's capital on February 25, 1921.[79] As a result, part of the Georgian Government and leading political figures escaped into exile in France.[80] Many members of the constituent assembly and high political officials were executed, arrested or sent into labor camps during the following decade of the Red terror.[81] Following the military occupation, Georgia was incorporated into the Union of Soviet Socialist Republics (USSR) where communist purges equally targeted opposing political and social forces and the Georgian Christian clergy, as a vehicle of Georgian independentism movement. They did not hesitate to arrest the Catholicos Patriarch of the Georgian Orthodox Church, Ambrosi (Ambrosius) Khelaia.[82] They also burnt churches, killed the priests and fiercely prohibited any religious practice, destroying or confiscating church's property.[83] Communist anti-religious policies, also targeted religious communities, such as Muslims, Catholics, Lutheran Evangelic, Evangelic Baptist, Judaic and others.[84] Since 1942, the Communist party authorized the functioning of the Christian Orthodox churches only, while repressing all other religious communities, out of the Communist party's control.[85]

Georgia seceded from the Soviet Union on April 9, 1991, following a nation-wide independentist movement and the referendum. The Declaration of the Restauration of Independence was proclaimed by the decision of the Supreme Council elected through multi-party elections.[86] On December 22, 1991, a civil war broke out and the elected government was overthrown by a military council on January 6, 1992.[87] As a result, the former Foreign Minister of the Soviet Union, Eduard Shevardnadze was appointed as the chief of the interim government and then was elected as President of Georgia.[88] On August 24, 1995, the newly elected Parliament adopted a new Constitution[89] which is still in force has since been amended on several occasions.

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[78] George Papuashvili, *The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years,* 18 EUR. PUB. LAW 323, 350 (2012).

[79] NOE JORDANIA, MON PASSE: MEMOIRE DU PRESIDENT DE LA PREMIERE REPUBLIQUE DE GEORGIE, 1918-1921 [MY PAST, THE MEMOIRES OF THE FIRST GEORGIAN REPUBLIC PRESIDENT, 1918-1921] 90 (Createspace Independent Publishing, 2008) (Fran.).

[80] Andrew Andersen & George Partskhaladze, *La guerre soviéto-géorgienne et la soviétisation de la Géorgie (février-mars 1921)* [The Soviet-Georgian war and Sovietization of Georgia (February-March 1921)], 254 REVUE HISTORIQUE DES ARMEES 67 (2009) (Fran.).

[81] *See* JAMES RYAN, LENIN'S TERROR: THE IDEOLOGICAL ORIGINS OF EARLY SOVIET STATE VIOLENCE (2012).

[82] Przemysław Adamczewski, *The death of Catholicos Ambrosius and its impact on the fate of the Georgian Orthodox Church in Zygmunt Mostowski's opinion*, 51 POLISH ACAD. OF SCI. 73, 75 (2016), https://apcz.umk.pl/czasopisma/index.php/SDR/article/view/SDR.2016.EN2.03/13140.

[83] Madona Kebadze & Maia Burdiashvili, *The peculiarity of soviet repression and its results in 20-30 years of the XX century, in* HUMANITIES IN THE 21ST CENTURY: SCIENTIFIC PROBLEMS AND SEARCHING FOR EFFECTIVE HUMANIST TECHNOLOGIES 67-68 (2017).

[84] Ani Sarkissian, *Religious reestablishment in post-communist polities*, 51 J. OF CHURCH & STATE 472, 479 (2009).

[85] Tatia Tsopurashvili, *Violence in the name of Religion,* TOLERANCE & DIVERSITY INSTITUTE (2018), http://www.tdi.ge/ge/page/religiis-saxelit-zaladobis-problema (last visited Apr. 29, 2019).

[86] Francis X. Clines, *SECESSION DECREED BY SOVIET GEORGIA,* N.Y. TIMES (Apr. 10, 1991), https://www.nytimes.com/1991/04/10/world/secession-decreed-by-soviet-georgia.html.

[87] Michael Dobbs, *Tbilisi Battle Ends As President Flees*, WASH. POST (Jan. 7, 1992), https://www.washingtonpost.com/archive/politics/1992/01/07/tbilisi-battle-ends-as-president-flees/bacd6382-8315-4ef5-87fb-804c6f145b2b/?utm_term=.464dcd042947.

[88] Nina Akhmeteli, *Eduard Shevardnadze: Controversial Legacy to Georgia*, BBC NEWS GEORGIA (July 8, 2014), https://www.bbc.com/news/world-europe-28205380.

[89] CONSTITUTION OF GEORGIA, *supra* note 3.

The role of the Christian Orthodox Church in resisting the Russian Empire and the repressive Soviet Occupation was determinative of the content of the Constitutional Provisions endorsing the Christian Orthodox Church.

B. The United States

The First Amendment to the U.S. Constitution was passed in a specific historical context dominated by the plurality of religions, different levels of State-church entanglement in states, and the concerns over the persecution and coercion on the grounds of religion. There was no predominant religion in the early colonial settlements. Instead, several religious communities coexisted. Specifically, the Anglicans, Puritans, Quakers, Lutherans, Presbyterians, and Jewish communities.[90]

At the same time, the relationship between the colonies and churches was not uniform. In the southern colonies, the Church of England was established by law while other religions were restricted.[91] Puritan establishments in New England had clergy members who were appointed by colonial authorities, colonists were required to pay religious taxes, and the non-conformers were punished.[92] In contrast, northern colonies (Delaware, New Jersey, Pennsylvania, Rhode Island) did not have an established church.[93]

After independence and the adoption of the Constitution, the drafters of the Bill of Rights sought primarily to safeguard equal rights of conscience and religious beliefs. On June 8, 1789, in his introductory speech at the First Congress, James Madison referred to the discussion about religion with the following statement: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[94]

Scholars of American history agree that there was no single position among the founding fathers on the Constitution's Establishment Clause.[95] However, as Justice Brennan rightly remarked in *School District of Abington Township v. Schempp*, "the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition."[96] As Laurence H. Tribe summed it up, there were at least three different conceptions:

> First, the evangelical view (associated primarily with Roger Williams) that "worldly corruptions … might consume the churches if sturdy fences against the wilderness were not maintained"; second, the Jeffersonian view that the church should be walled off from the State in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best

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[90] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE, RELIGION, AND THE FIRST AMENDMENT 1-11 (2d ed. 1994).
[91] *Id.* at 52; *See also* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 16 (2006).
[92] GREENAWALT, *supra* note 91, at 17.
[93] LEVY, *supra* note 90, at 11 (cited in Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2111 (2002)).
[94] 1 ANNALS OF CONG. 451 (1789) (Joseph Gales & William W. Seaton eds., 1834).
[95] *See generally* Ruti Teitel, *Original Intent, History, and Levy's "Establishment Clause,"* 15 L. & SOC. INQUIRY 591, 591-609 (1990).
[96] CHEMERINSKY, *supra* note 15, at 1757 (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 237 (1963)).

> by diffusing and decentralizing power so as to assure competition among sects rather than dominance.[97]

Despite differences in positions, there was widespread agreement that there should be no nationally established church.[98] The Establishment Clause of the first amendment, principally authored by James Madison, reflects this consensus. The underlining principle is that the Establishment Clause is a counterpart of the free competition and that the private parties in religion are to prosper or decline according to their own merits without governmental interference, restriction, or assistance.[99] In a sense, the Establishment Clause is an additional guarantee of the freedom of religion. To use the expression of Justice Brennan, concurring in *School District of Abington Township v. Schempp*, "the Establishment Clause [is] a co-guarantor, with the Free Exercise Clause, of religious liberty."[100]

C. Contrasting Public Attitudes Towards Religion in the U.S. and Georgia

It has been argued that the framers of the Georgian Constitution intended to reward the Georgian Orthodox Church's historical role by including a special provision in the Constitution recognizing the historical role of the Christian Orthodox Church. However, it appears that the public support of the dominant church also plays an important role in interpreting the current constitutional framework of the State-church relationship.

As for the religious affiliation in the two countries, like in the U.S., Christians have a clearly dominant position in Georgia. However, the American religious landscape is much more diverse than the Georgian, where a single religion has a clearly dominant position over other religions altogether and where number of persons non-affiliated to any religion is insignificant. In Georgia, Christian Orthodox Religion alone dominates with eighty percent, followed by Muslims (thirteen percent) and the Armenian Apostolic Church (four percent), while all other religions share the remaining two percent, including other Christian and Jewish religions.[101] In the U.S., Christian denominations altogether represent the majority among Americans (70.6 percent); however, the most-followed single religion is the Evangelical Protestantism with 25.4 percent, followed by Catholic Christianity with 20.8 percent, while the remaining 22.8 percent consider themselves unaffiliated with any denomination.[102]

As for the public attitudes towards religious tolerance, while in the U.S. marriages between persons with different religious affiliations amounted to thirty-nine percent for those who married between 2010-2014,[103] a recent survey found that only seventeen percent of Georgians were ready

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[97] CHEMERINSKY, *supra* note 15, at 1758 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988)).

[98] CHEMERINSKY, *supra* note 15, at 139.

[99] Dean M. Kelly, *Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom, in* HOW DOES THE CONSTITUTION SECURE RELIGIOUS FREEDOM? 11-12 (Robert A. Golwin & Art Kaufman eds., 1986).

[100] *Schempp*, 374 U.S. at 256 (1963) (Brennan, J., concurring).

[101] *Caucasus Barometer 2019*, Georgia, CAUCASUS RES. CTR., https://caucasusbarometer.org/en/cb2019ge/RELGION/ (last visited Apr. 23, 2021).

[102] *Religious Landscape Study*, PEW RES. CTR., https://www.pewforum.org/religious-landscape-study/ (last visited Apr. 22, 2019).

[103] Carlyle Murphy, *Interfaith marriage is common in U.S., particularly among the recently wed*, PEW RES. CTR. (June 2, 2015), https://www.pewresearch.org/fact-tank/2015/06/02/interfaith-marriage/.

to accept a Muslim as a family member and only twenty-seven percent a Jewish individual as a family member.[104]

The above indicates that in the U.S. there is a competitive diversity of religions which includes a significant proportion of non-believers, while in Georgia, Christian Orthodox Religion dominates with eighty percent affiliation and the non-believers represent only one percent.[105] At the same time, there is a lower-level of inter-religion marriages in Georgian society as compared to the U.S. with regard to other religious communities that may suggest a lower level of religious tolerance.

Historical and socio-cultural contexts correlate with the current constitutional legal framework in the U.S. and Georgia. They also explain current empirical comparative data on the State-religion relations in the U.S. and Georgia gathered by the Association of Religion Data Archives (hereinafter ARDA).[106] Based on the data as of 2014 concerning the State regulation, demography, and support to religious groups, ARDA classified the U.S. State-church relationship as an Accommodation model, while the Georgian example was categorized as a Preferred religion model.[107] The next section demonstrates how these two different frameworks are reinforced within the context of tax exemptions for religious organizations.

III. TAX EXEMPTION REGIME

The U.S. and Georgia legal framework operate in distinct paradigms of the State-church relations. While the U.S. Constitution upholds the separation of the State and church, the Georgian Constitution endorses one religion, the Christian Orthodox Church, while also guaranteeing the freedom of religion and non-discrimination based on religion. This difference is reflected in the two countries' legal regimes and constitutional disputes related to tax exemptions to the benefit of religious organizations. In the U.S., tax exemptions constitute a considerable part of Federal and State subsidies to the religious organizations,[108] whereas in Georgia, the State directly funds religious organizations and provides tax exemptions.[109]

In this section, I examine specific legal regimes applicable to tax exemptions for religious organizations, focusing on the general legal regime, the relevant constitutional basis for review, the actual constitutional review standards, and the levels of scrutiny employed by the U.S. Supreme Court and the Georgian Constitutional Court.

The difference in the number of decisions examined by the U.S. Supreme Court and the Georgian Constitutional Court dealing with the tax exemptions benefiting religious organizations is substantial. While the Georgian Constitutional Court has examined only a single complaint on

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[104] *Western Europeans more likely than Central and Eastern Europeans to say they would accept Jews, Muslims into their family*, PEW RES. CTR. (Oct. 24, 2018), https://www.pewforum.org/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/pf-10-29-18_east-west_-00-01/.

[105] *Caucasus Barometer 2019*, *Georgia,* CAUCASUS RES. CTR., https://caucasusbarometer.org/en/cb2019ge/RELGION/ (last visited Apr. 23, 2021).

[106] *Compare Nations*, THE ASS'N OF RELIGION DATA ARCHIVES, https://www.thearda.com/internationalData/compare5.asp?c=89&c=234&c=89&c=234 (last visited Apr. 23, 2019).

[107] *Id.*

[108] *See* Dylan Matthews, *You give religions more than $82.5 billion a year*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/22/you-give-religions-more-than-82-5-billion-a-year/?noredirect=on; *see also* EDWARD ZELINSKY, TAXING THE CHURCH: RELIGIOUS EXEMPTIONS, ENTANGLEMENT AND THE CONSTITUTION (2017).

[109] Godoladze, *supra* note 40, at 198–214.

alleged discrimination dealing with tax exemptions for religious organizations,[110] there are numerous U.S. Supreme Court decisions dealing with different aspects of the tax exemptions.[111] Each country is examined in turn.

A. The U.S. Supreme Court allows only Generally Applicable and Non-discriminatory Tax Exemptions

In the U.S., the first amendment's Establishment clause does not specifically prohibit levying taxes to the benefit of religious organizations, nor does it refer to the specific issue of tax exemptions favoring religious organizations. However, since *Everson v. Board of Education of Ewing Township*, the Supreme Court stated that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[112]

In early jurisprudence, before the adoption of the *Lemon* test in 1971, the Supreme Court did not treat tax exemptions as a public subsidy to the religion. This was the case in *Walz v. Tax Commission of City of New York*,[113] where the court reasoned: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[114] The Court even saw a lesser controversy in tax exemptions with regard to the Establishment Clause than in the case of applying taxes to the religious organizations. In the Court's view, the taxation would result in a greater entanglement between the State and church. Specifically, the majority opinion in *Walz* held:

> There is no genuine nexus between tax exemption and establishment of religion. […] The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.[115]

However, the major factor in upholding a New York statute, exempting realty owned by associations organized exclusively for religious purposes and used exclusively for carrying out such purposes from real property tax, was the fact that the statute did "not single out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[116] Thus, the Court considered that such a tax exemption did not aim at establishing, sponsoring, or supporting, religion and did not result in excessive government entanglement.[117]

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[110] Constitutional Court of Georgia, *supra* note 29.
[111] *E.g., Everson*, 330 U.S. at 16; *Walz*, 397 U.S. and 691; Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
[112] *See Everson*, 330 U.S. at 16; *see also* Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).
[113] *Walz,* 397 U.S. at 691.
[114] *Id.* at 666.
[115] *Id.* at 675-76.
[116] *Id.* at 673.
[117] *Id.* at 674-75.

One year later, in *Lemon v. Kurtzman,*[118] the Supreme Court elaborated a more refined approach towards the scrutiny of the public aid to religious organizations. According to the Lemon test, in order to pass the constitutional scrutiny under the first amendment's Establishment Clause, public aid to religious organizations has to satisfy the following three requirements: 1) whether there is a secular purpose for the assistance, 2) whether the aid has the effect of advancing religion, and 3) whether the particular form of assistance causes excessive government entanglement with religion.[119]

In *Hernandez v. Commissioner,*[120] the Court held that laws that provide benefits specifically to one religion should be analyzed as suspect and that strict scrutiny should apply.[121] If there is no such facial differentiation, accidental benefits of generally applicable laws should be reviewed under the three-prong test developed in *Lemon v. Kurtzman*. This three-prong test is somewhat similar to the Court's decision in *Walz* in that two prongs of the test, the secular purpose and the entanglement prongs, were already present in *Walz*.[122] However, because the Court in *Walz* distinguished tax exemptions from general public aid or subsidy, it was unclear whether the *Lemon* test should apply to tax exemptions. In fact, the dispute in *Lemon* arose not from a tax exemption case, but from a dispute over the Rhode Island program.[123] The Rhode Island program consisted of salary supplements paid to teachers of secular subjects in parochial schools, whereas the Pennsylvania program involved reimbursement of nonpublic schools for teachers' salaries, textbooks, and instructional materials used in the teaching of specific secular subjects.[124] Thus, if the Court did distinguish between this case and tax exemption cases, it is questionable whether the *Lemon* test should be used for assessing tax exemptions compatibility with the Establishment Clause.

The controversy was solved in later Supreme Court jurisprudence that specifically ruled on tax exemption cases. In *Bob Jones University v. United States*, the Court stated that "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'"[125]

In *Bob Jones University*, the Court addressed the denial of tax-exemption to a nonprofit private school for prescribing and enforcing racially discriminatory admission standards. The Court found that denial of tax-exempt status to a nonprofit private school practicing racially discriminatory admission standards on the basis of religious doctrine did not violate the establishment clause.[126] However, it did not explicitly refer to the *Lemon* test.

Over time, the Supreme Court maintained its position about the relevance of public aid jurisprudence to the tax exemption cases. For example, in *Texas Monthly, Inc. v. Bullock*,[127] the Court held that "[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become "indirect and vicarious 'donors,'" despite a dissenting position of Justice

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[118] *Lemon*, 403 U.S. at 602.
[119] *Lemon*, 403 U.S. at 612.
[120] CHEMERINSKY, *supra* note 15, at 1774 (citing Hernandez v. Comm'r. of Internal Revenue, 490 U.S. 680, 695 (1989)).
[121] *Lemon*, 403 U.S. at 602 (strict scrutiny was applied).
[122] *Walz*, 397 U.S. at 673-75.
[123] *Lemon*, 403 U.S. at 603.
[124] *Id.* at 602.
[125] *Bob Jones Univ*., 461 U.S. at 591.
[126] *Id*. at 605.
[127] *See Texas Monthly, Inc*., 489 U.S. at 1.

Scalia joined by Justice Rehnquist and Kennedy.[128] The Court examined a challenge brought by a publisher against a sales tax exemption for periodicals that were published or distributed by a religious faith organization. These periodicals consisted solely of writings promulgating the teaching of the faith. In addition, there were sales exemptions for books that consisted wholly of writings sacred to a religious faith. The challenge brought by the publisher alleged a violation of the Establishment clause, because the sales tax did not apply to other non-profit publishers.[129]

As for the constitutional review under the Establishment Clause, the Court in *Texas Monthly* developed an interesting approach towards the scrutiny of the tax exemptions. First, the Court explicitly referred to the *Lemon* test in the majority opinion, confirming its applicability to the neutral tax exemption cases.[130] Second, in accordance with the *Everson* and *Hernandez's* holdings, the court conducted the strict scrutiny, as the challenged statute was facially discriminatory benefiting solely religious publications made by religious faith organizations. In applying the strict scrutiny, the Court distinguished tax exemptions in *Texas Monthly* from those in *Walz* case, because, unlike the latter which exempted a large variety of charitable organizations (hospitals, libraries, etc.), the Texas statute provided no exemption for secular non-profit or charitable organizations' publications.[131] The Court did not find the State had a compelling interest in granting tax exemptions exclusively for the publication of religious content because the State failed to prove that non granting of exclusive benefits would have affected the religious organizations right to free exercise of religion. The Court invalidated the Texas Law, concluding:

> When Government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and which either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion… it provides an unjustifiable award of assistance to a religious organization.[132]

While the Court did not always rely on the *Lemon* test in examining tax benefits or burdens discriminating based on religion,[133] this test offers a useful insight into the court's approach towards constitutionality of the tax exemptions favoring religious organizations. Moreover, the shift in the position of Supreme Court in considering tax exemptions as a State subsidy also means that the vast jurisprudence of the Supreme Court about the permissibility of public aid to religious organizations became applicable to tax exemption cases. In this regard, a recent landmark decision of the Supreme Court on State aid calls a special attention.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[134] the Court invalidated a Missouri Department of Natural Resources policy that denied competitively awarded grants for purchase of rubber playground surfaces for a religious organization's preschool and daycare center. The importance of the decision lies into introducing a new governing rule for State subsidies, according to which, a policy that "expressly discriminates against otherwise eligible recipients by

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[128] *Id*. at 13.
[129] CHEMERINSKY, *supra* note 15, at 1810.
[130] *See Texas Monthly*, 489 U.S. at 1.
[131] *Texas Monthly*, 489 U.S. at 12-13.
[132] *Id.* at 15 (citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saint v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J. concurring in judgement)).
[133] Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 at § 2 (Originally published in 2006).
[134] *Trinity*, 137 U. S. at 2012-13.

disqualifying them from a public benefit solely because of their religious character [...] imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.".[135] Thus, the Court found that such discrimination cannot sustain a constitutional scrutiny under the Free Exercise Clause. However, in the Footnote 3, the Court distinguished "express discrimination based on religious identity" from "religious uses of funding."[136] Concurring Justice Gorsuch joined by Justice Thomas remained skeptical as for the enforceability of the *religious identity* versus *religious use* distinction,[137] a position shared by some legal scholars.[138]

The importance of the *Trinity* holding for the tax exemptions is paramount as the same reasoning could be applied to another form of governmental aid – tax exemptions. One interpretation of the Trinity holding could be that tax exemptions that exclude religious organizations based on their religious status, would violate the free exercise clause, unless the exclusion passes strict scrutiny.

To conclude, as for the tax exemption regime, the U.S. Constitutional legal framework presumably proscribes and treats as suspect the following categories: 1) tax exemptions favoring exclusively religious organizations over secular charitable organizations, 2) tax exemptions discriminating some religious organizations compared to others; 3) denying generally applicable tax exemptions for religious organizations solely based on their status as a religious organization. By contrast, it validates generally applicable tax exemptions that incidentally benefit religious organizations under certain conditions.

Thus, the constitutional issues of tax exemptions are challenged on the basis of the Establishment Clause of the First Amendment of the Constitution. Once challenged, if tax exemptions either facially discriminate or grant or deny exemption benefits to religious organizations, they will be reviewed under strict scrutiny. However, if these tax exemptions incidentally benefit religious organizations, they will be reviewed under the Lemon test. Lastly, tax exemption related regulations that facially discriminate may be challenged under the Establishment or the Free Exercise Clauses.

B. The Georgian Constitutional Court Allowing Specific Exemptions Designed to Benefit Religious Organizations without Discrimination among Religious Organizations

In Georgia, like in the U.S., the Constitution does not specifically mention any tax exemptions or tax-related issues with regard to religious organizations. Until recently, there have been no constitutional challenges for tax exemptions under the Georgian Tax Code as for the exclusively preferential regime applicable solely to the Christian Orthodox Church.

In the absence of the Constitutional Court's ruling interpreting the special church status clause of Article 8, there has been a legal ambiguity whether this provision justified facially discriminatory provisions in Georgian legislation benefiting exclusively the Christian Orthodox Church, a problem highlighted by multiple human rights monitoring reports.[139]

The controversy arose in cases where on one hand, Article 11 of the Constitution prohibits discrimination based on religion, and on the other hand, the Tax Code contains provisions that

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[135] *Id.* at 2021.
[136] *Id.* at 2024.
[137] *Id*. at 2025 (Gorsuch, J. concurring in part).
[138] John Donovan*, Trinity Lutheran: Equalizing the Playground Rules for Government Aid,* 24 TRINITY L. REV. 24, 49 (2018).
[139] Lomtatizide & Tsiklauri, *supra* note 42, at 19-23.

provide tax exemptions that are solely applicable to the Christian Orthodox Church. Legal scholars defended the position that the special status clause should be interpreted in conjunction with the equal protection and non-discrimination clause of the Constitution and should not be interpreted as a legal basis for discriminating against minority religions.[140] However, in practice, the Georgian Parliament passed several laws securing exclusive privileges for the Christian Orthodox Church in the fields of public land privatization, licensing and accreditation of educational institutions, tax exemptions and other.[141]

The only case examined by the Constitutional Court on the merits[142] concerning constitutionality of privileges granted exclusively to one religious organization dealt with a facially discriminatory law providing a tax exemption for the Christian Orthodox Church. In *Evangelical-Baptist Church of Georgia v. Parliament of Georgia* (2018),[143] the Georgian Constitutional Court invalidated a tax exemption that privileged exclusively the Christian Orthodox Church and denied the same exemption to other religious organizations. According to the Georgian Tax Code (art. 168.2.b), "construction, restoration, and painting of cathedrals and churches commissioned by the Patriarchate of Georgia [Christian Orthodox Church's administrative body], were exempted from [value added tax] without the right of deduction."[144]

Interestingly, the Constitutional court ruled that "Article 14 of the constitution does not prohibit tax exemptions [for religious organizations], nor does it require that tax exemptions should be available. […] Thus, the legislature has alternative options how to prevent discrimination."[145] The Court left the ultimate choice to the legislature: "It is within the authority of the legislative body to decide how to ensure non-discriminatory treatment of otherwise similarly situated persons."[146]

Thus, the Georgian Constitutional Court's position is that the tax benefits are allowed unless they discriminate between otherwise similar persons. In fact, the Georgian Court indicated that to solve the problem, the government had a choice either to widen the scope of tax benefits, or not to allow it for any similarly situated organizations. Interestingly, the Court did not indicate explicitly that envision a tax exemption exclusively benefiting religious organizations religious organizations would raise the issue of discrimination on the ground of religion differentiating those advancing religious beliefs from others, advancing a secular charitable mission.

Regarding the legal basis for a constitutional challenge, the tax exemptions in Georgia were challenged under the equal protection and non-discrimination clause of the Article 11 of the Constitution. The Court found the violation of the equal protection clause and discrimination on the ground of religion. Namely, the Court granted a decision in favor of the Evangelical-Baptist Church of Georgia and eight other religious organizations and also invalidated a provision that granted tax exemption for construction works commissioned by the Christian Orthodox Church while denying the same benefit to minority religious organizations.

Concerning the level of scrutiny, the Court did not articulate a specific scrutiny for discriminatory tax exemptions for religious organization, but rather used a generally applicable scrutiny for equal protection challenges while articulating the meaning of strict scrutiny.

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[140] GEORGIAN DEMOCRATIC INITIATIVE, *supra* note 42, at 15; *see also* Godoladze, *supra* note 40, at 201–14 (2015).
[141] GEORGIAN DEMOCRATIC INITIATIVE, *supra* note 42.
[142] Several earlier complaints, including cases of alleged discriminatory public funding regime, were dismissed for various reasons without any holding on the substance of case, generally due to the lack of standing.
[143] *See* Constitutional Court of Georgia, *supra* note 29.
[144] Constitutional Court of Georgia, *supra* note 29, at part II, para. 44.
[145] Constitutional Court of Georgia, *supra* note 29, at part II, para. 41.
[146] Constitutional Court of Georgia, *supra* note 29, at part II, para. 43.

Georgian Constitutional Court's application of the equal protection clause has been consistent in protecting equality and prohibiting discrimination. However, the type of scrutiny for such challenges has evolved in time. In its earlier decision in *Citizen of Georgia Shota Beridze v. Parliament of Georgia* (2008), the Court used a type of scrutiny similar to the U.S.' intermediate scrutiny. As the Court described, a law that facially discriminates can only be upheld if there are "objective and rational reasons for a differentiation" and the government's action is "rational and proportional, rather than arbitrary."[147]

In the landmark case *Citizens Political Unions "New Rights" and "The Conservative Party of Georgia" v. Parliament of Georgia* (2010), the Constitutional Court articulated general rules on the application of different levels of scrutiny in equal protection challenges.[148] The case itself dealt with alleged discrimination with regard to the access to public administrative resources during election campaign for a number of political parties compared to the incumbent parties. The Court held:

> In cases where the legislation distinguishes based on one of the classical characteristics mentioned in the article 14 of the Constitution, Court must apply strict proportionality scrutiny, while in cases where the distinction is made based on other characteristics, not explicitly referred to in the Constitution, the level of scrutiny will depend on the level of burden the law imposes on a selected group. Namely, if the law imposes a substantial burden, strict scrutiny shall apply, whereas, if the burden is not sufficiently high, rational basis scrutiny will suffice. Court shall determine the level of scrutiny for each case individually, based on the circumstances of the case.[149]

In its landmark decision in *Evangelical-Baptist Church of Georgia and Others v. The Parliament of Georgia (2018),*[150] the Georgian Constitutional Court clearly articulated its interpretation of strict scrutiny with regard to the equal protection clause in a case challenging discrimination on the ground of religion.[151] Namely, the Evangelical-Baptist Church of Georgia and eight other religious organizations challenged a provision of the Georgian Tax Code, article 168.2.b. according to which "construction, restoration and painting of cathedrals and churches commissioned by the Patriarchate of Georgia (Christian Orthodox Church's Administrative body) were exempted from value added tax without right to deduction."[152] The government argued that such facial discrimination was justified by three claims: protecting historic heritage;[153] realizing the special church status clause of the Article 9 of the Georgian Constitution[154] according to which "the State shall recognize the outstanding role of the Apostolic Autocephalous Orthodox Church

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[147] Constitutional Court of Georgia, March 31, 2008, Citizen of Georgia Shota Beridze v. Parliament of Georgia, N2/1/392, part II, para. 2.

[148] Constitutional Court of Georgia, December 27, 2010, Citizens Political Unions "New Rights" & "The Conservative Party of Georgia" v. Parliament of Georgia, N1/1/493, part. II, para. 6.

[149] *Id.* at part II, para. 6.

[150] Constitutional Court of Georgia, *supra* note 29.

[151] Several earlier complaints were dismissed for various reasons without any holding on the substance of case, generally due to the lack of standing of the applicants. *See* Constitutional Court of Georgia, *supra* note 29.

[152] Constitutional Court of Georgia, *supra* note 29, at part I, para 6.

[153] Constitutional Court of Georgia, *supra* note 29, at part I, para. 15.

[154] Constitutional Court of Georgia, *supra* note 29, at part I, para. 15.

of Georgia in the history of Georgia, and its independence from the State;"[155] and preventing tax evasion.[156] The government also claimed that the discrimination did not impose a substantial burden on other churches as they were eligible for value added tax (hereinafter VAT) exemption, but on a slightly different conditions, suggesting that in fact, the VAT tax exemption is already applicable to minority religious organizations under the generally applicable article 168.2.c of the Tax code.[157] A representative of the Revenue service witnessed that in practice, companies contracted by the Christian Orthodox Churches often opted not to use the challenged exemption rule as the ordinary deductible VAT regime was more profitable.[158]

The strict scrutiny rule applied by the Constitutional Court consisted of applying the proportionality principle defined as follows, "in order to pass the scrutiny, a differential treatment [on the grounds enumerated within the Constitutions] must serve a compelling legitimate aim and be an appropriate (suitable), necessary and proportional mean for achieving the legitimate aim."[159] The court defined the appropriateness (suitability) test, as "whether there is a logical relation between the stated legitimate purpose and the differential treatment. To survive the scrutiny, a differential treatment must be substantially related to achieving this purpose, namely, that it must require a differential treatment, at least at a minimal intensity."[160] The court did not articulate the meaning of other two prongs (necessity and proportionality), as in the pending case it found that the discrimination of the minority religious organization was not an appropriate (suitable) mean to achieve the compelling legitimate governmental interest.

The articulation of strict scrutiny in the Georgian Constitutional Court's case is like the well-established European Court of Human Rights proportionality test. The European Court used the proportionality test intensively in evaluating compatibility of a State action with the European Convention on the Protection of Fundamental Rights and Freedoms. The three parts of the "classic" proportionality test used by the European court are the requirement of effectiveness or suitability, the requirement of necessity, and the requirement of proportionality in the strict sense.[161]

In interpreting the Article 9 (currently Article 8) of the Constitution, the court held: "The purpose of recognizing the special role of the Orthodox Church in Georgian history is not establishing a supremacy of the Orthodox religious faith with regard to other religions."[162] The Court held that this provision did not justify discriminatory treatment of other religions in tax exemption regulations. In discussing the tax exemption regime, the Georgian Constitutional legal framework presumably proscribes and treats as suspect only the tax exemptions discriminating some religious organizations compared to others, while did not warn against unconstitutionality of tax exemptions favoring exclusively religious organizations over secular charitable organizations.

The Georgian Constitutional Court did not examine or pronounce a clear position about the constitutionality of denying generally applicable tax exemptions for religious organizations solely based on their status as a religious organization. However, it is unlikely that the court will allow such discrimination on the ground of religion, as any such regulation will hardly pass the

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[155] CONSTITUTION OF GEORGIA, *supra* note 3, as of July 3, 2018, art. 9.
[156] Constitutional Court of Georgia, *supra* note 29, at part I, para. 16.
[157] Constitutional Court of Georgia, *supra* note 29, at part I, para. 12.
[158] Constitutional Court of Georgia, *supra* note 29, at part I, para. 22.
[159] Constitutional Court of Georgia, *supra* note 29, at part I, para. 22.
[160] Constitutional Court of Georgia, *supra* note 29, at part II, para. 25.
[161] Janneke Gerards, *How to improve the Necessity Test of the European Court of Human Rights*, 11(2) INT'L. J. CONST. L. 466, 490 (2013) (quoting Jonas Christofferson).
[162] Constitutional Court of Georgia, *supra* note 29, at part II, para. 34.

strict scrutiny. Discriminatory laws may be challenged under the equal protection and non-discrimination clause of the Article 11 of the Georgian Constitution. As for the constitutional review standards, the tax exemptions that facially discriminate, grant or deny tax exemption benefits to the religious organizations, as well as facially neutral but have discriminatory effects based on religion, will be reviewed under the strict scrutiny.

IV. CONCLUDING COMPARATIVE OBSERVATIONS

In this paper, I examined constitutional legal frameworks of the tax exemptions applicable to religious organizations in American and Georgian jurisdictions. As I demonstrated above, the difference in the historical and socio-cultural contexts have greatly impacted the design of the Constitutional framework of the State-religion relations in two countries. As a result, while the First Amendment of the U.S. Constitution and the Supreme Court's interpretation of the Establishment Clause guarantees equal treatment of all religions by the government and the separation of the state and church, the Georgian Constitution recognizes a special role of the Christian Orthodox religion and guarantees the equal protection regardless of the religion or beliefs.

The recent Georgian Constitutional Court decision in *Evangelical-Baptist Church and others v. Parliament of Georgia* articulated an interpretation of this contradictory regime in favor of the equal protection. Contrary to the U.S. Constitution's prohibition to provide direct exclusive funding for religious organizations, Georgian Constitutional Court in the same decision recognized the deference towards the State to subsidize religious organizations without discriminating among religions.

In terms of the constitutional bases for the tax exemption challenges, while the U.S. Supreme Court relied on the Establishment and Free exercise clauses of the First Amendment to the Constitution in all the examined cases, the Georgian Constitutional Court used only the Equal protection clause for adjudicating such cases.

Concerning the tax exemptions legal regime, the major difference between the U.S. and Georgian regimes deals with the tax exemptions exclusively benefiting religious organizations. The U.S. Supreme Court has well-established that tax benefits for religious organizations *per se* are not permitted unless they are incidentally benefiting religious organizations. Georgian Constitutional Court's position is that tax benefits exclusively benefiting religious organizations are allowed unless they discriminate between different religions. At the same time, the U.S. and Georgian Courts similarly prohibit tax exemptions that discriminate some religious organizations.

As for the prohibition of exclusively denying tax exemptions for the religious organizations, while Georgian Constitutional Court did not examine such a case, it seems that in a potential challenge it will follow the U.S. Supreme Court's position invalidating such discrimination. However, while the U.S. Supreme Court had to refer to the Free Exercise Clause as a counterbalance of the constraints of the Establishment Clause, the Constitutional Court of Georgia may use the equal protection clause that explicitly prohibits discrimination based on religion.

Concerning the levels of scrutiny for examining constitutional challenges against tax exemptions, the U.S. Supreme Court's choice of levels of scrutiny differs from the Georgian Constitutional Court's position in several regards.

First, the Georgian Constitutional Court does not differentiate the levels of scrutiny based on whether the Court deals with a facially discriminatory provision or with a generally applicable

law with discriminatory effect and at all times applies strict scrutiny, while the U.S. Supreme Court has developed a specific Lemon test for the constitutional review of the facially neutral laws.

Also, the plain meaning of the strict scrutiny articulated by the two courts are different, although they seek to achieve the same result - ensuring that the intrusion in the constitutionally protected rights serves a compelling interest and is a minimal infringement possible to achieve its legitimate purpose.

While in the U.S. jurisprudence there should be a compelling governmental interest and the measure restricting a constitutional freedom must be narrowly tailored to pass the strict scrutiny, in Georgian jurisprudence, there should be a substantial relationship between the restriction and the compelling legitimate aim (appropriateness), the restrictive measure should be necessary to achieve its stated purpose (necessity) and it should not impose more burden than necessary to achieve its purpose (proportionality).

BREAKING THE CULTURAL MASCULINITY LINK BETWEEN DOMESTIC AND GENDER-BASED SEXUAL VIOLENCE IN CENTRAL AMERICA

Ann Ciancia*

ABSTRACT

This note focuses on domestic violence within Central America and how to break the cycle of all forms of sexual violence. This note will focus on Mexico and the countries within the Northern Triangle Region of El Salvador, Honduras, and Guatemala. This note discusses how women are killed due to their gender, which is called femicide. Femicide is very common within Central American countries and can be considered warfare. Some men commit femicide due to their masculine quality of machismo. Under machismo culture, men consider themselves to be superior to women due to their dominant masculine quality.

Further, this note will look at the implications of gender-based violence and how a country can implement laws to deter men from killing and committing violence against women. It is difficult to break the mold and the cycle of domestic violence. It is the role of the institutions to convict men who commit femicide and provide victims with justice. There needs to be an overall institutional change on how women are treated because women have a fundamental human right to live and survive. The Central American approach to femicide should be reconsidered and reconstructed.

* J.D. Candidate (2021) at Syracuse University College of Law; M.B.A. Candidate (2021) at Utica College; B.S. in Health Studies, B.A in Philosophy and Spanish (2018) from Utica College. Notes and Comments Editor of the *Journal of Global Rights and Organizations,* Vol. 11. I want to thank my parents, Peter and Suzanne, and my sister, Eve, for their endless support, and Suzette Melendez for her comments and thoughts. I want to dedicate this note to all survivors of sexual violence. Their voices and stories matter.

> "You're not a victim for sharing your story. You are a survivor setting the world on fire with your truth. And you never know who needs your light, your warmth, and raging courage."
>
> - Alex Elle[1]

I. INTRODUCTION

The Latin American region has the highest rate of sexual violence in the world.[2] The United Nations (UN) describes Central America, and specifically Mexico, as extremely dangerous.[3] According to the UN, Central America is the most violent territory in the world for women.[4] Within the context of femicide, many women in Central America are killed due to their gender. Different Central American countries have various definitions for femicide, but overall, it is when an individual commits a murder against a woman or a girl based on her gender. "In the Northern Triangle Region (Honduras, El Salvador, and Guatemala) and Mexico[,] the problem of femicide and violence against women has reached epidemic levels, [which] in many cases…links to [organized] crime."[5] Some organized gangs will use violence against women as a tactic to control the community in which they are located. Femicide can be regarded as warfare and should not be overlooked by the countries' justice systems.

"Two out of every three women killed [in Central America] are victims of femicide."[6] About twelve women are killed by femicide daily within Latin American and Central American regions.[7] A study from 2009 reported that there have been "more than 500 femicides per year in Guatemala since 2001."[8] Researchers believe that the acceptance of femicide killings are linked to the machismo culture in Central America.[9] The machismo culture is a belief that men are superior towards the female gender due to their dominant masculinity. In 2016, the UN reported that as many as ninety-eight percent of femicide cases went unpunished.[10] This number is unacceptable, and policy needs to be implemented to decrease the number of unpunished crimes. Although the UN notes that twenty-four out of thirty-three countries in Latin America enacted laws against domestic violence, only nine passed legislation regarding all forms of violence against women.[11] Although some countries within the overall Latin American region have laws to protect women against domestic violence; there is a divide between the institutions where the majority of

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[1] *Info for Survivors, Family & Friends*, HELP, https://www.helpauckland.org.nz/info-for-survivors-family-and-friends.html.

[2] *Latin Am. is world's most violent region for women: UN*, HINDU BUS. LINE (Nov. 23, 2017), https://www.thehindubusinessline.com/news/world/latin-america-is-worlds-most-violent-region-for-women-un/article9970381.ece#.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Leonie Rauls & Tamar Ziff, *High Rates of Violence Against Women in Latin Am. Despite Femicide Legislation: Possible Steps Forward*, THE DIALOGUE (Oct. 15, 2018), https://www.thedialogue.org/blogs/2018/10/high-rates-of-violence-against-women-in-latin-america-despite-femicide-legislation-possible-steps-forward/.

[7] Rauls, *supra* note 6, at para. 1.

[8] *Understanding & addressing violence against women*, PAN AM. HEALTH ORG. (2012), https://www.paho.org/hq/dmdocuments/2012/vaw-femicide.pdf.

[9] Rauls, *supra* note 6, at para. 1.

[10] Rauls, *supra* note 6, at para. 6.

[11] Rauls, s*upra* note 6, at para. 7.

countries are not recognizing all forms of violence against women. There is a lack of cohesiveness surrounding the definition of femicide and the various forms of sexual violence against women.

Due to the longstanding culture of machismo within the Central American region, victims have not received the justice they deserve. Perpetrators of femicide are less likely to be prosecuted and convicted of the crime due to their masculine quality, described as machismo. Since there is not a consensus of a legislative definition of machismo, it is difficult to prosecute perpetrators of femicide.[12] This divide in defining femicide leads to a biased judgment where the victim receives neither justice nor protection. It is difficult for international law to incorporate an overall and encompassing definition of femicide and protection against female victims of violence.

The decline in convictions of femicide is caused by the normalization of men committing violence against women due to a cultural linkage to masculinity.[13] At times, machismo can often protect men from being prosecuted when committing violence against women due to their gender.[14] This concept brings a sense of normality to the idea of femicide. A challenge exists for the UN to address machismo because there is cultural linkage, rather than a world-wide context, to machismo.

The regions of the Northern Triangle and Mexico see the greatest amount of violence against women in the world.[15] Not only does femicide, domestic violence, and other forms of sexual violence affect a woman physically, but these crimes affect them emotionally and mentally. Although there is a long road ahead to ending sexual violence against women, each nation needs to address this issue systematically.

There is a major issue concerning perpetrators of domestic violence not being convicted for their acts of violence against women in Central American counties. If international law is not binding on a specific country, how can that country be held accountable if they do not hold their individuals accountable for their criminal actions? Central American women have faced inequality regarding gender roles and gender norms. Hypermasculinity, or superior male behavior, is present within this region. This male phenomenon does not lead to proper convictions; therefore, men committing violent crimes against women are not being punished.

Women who are victims of sexual and domestic violence deserve justice and equality. This note will discuss the prevalence of domestic and sexual violence in Mexico and the Northern Triangle Region, which includes Honduras, El Salvador, and Guatemala; and the overall impact of international law governing domestic violence within these countries. This note will focus on femicide and the impact of this crime on each nation concerning the role of machismo. Furthermore, this note will also look at the implementation of gender-based violence and determine whether implementing laws related to domestic violence in these countries will be received positively or be faced with obstacles.

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[12] Rauls, *supra* note 6, at para. 3.

[13] Veronica Lira Ortiz, *The Culture of Machismo in Mex. Harms Women*, MERION W. (Jan. 28, 2018), https://merionwest.com/2018/01/28/the-culture-of-machismo-in-mexico-harms-women/. (The author of this article recollects the first time she was harassed on the streets of Mexico when she was twelve years old. *Id.* Catcalling is problematic in Mexico and other Central American countries due to many not understanding the difference between a joke and harassment. *Id.* As an innocent child, she felt like a piece of meat. *Id.* The man's words stayed with her forever: "Hey pretty, are you alone? I can accompany you wherever you want." *Id.*).

[14] Ortiz, *supra* note 13, at para. 4.

[15] Ortiz, *supra* note 13, at para. 5.

II. FORMS OF SEXUAL AND DOMESTIC VIOLENCE

Different forms of sexual violence can be considered as sexual harassment, sexual assault, rape, and or intimate partner violence. If there is no consent between both parties, then a form of sexual violence has occurred.[16] Consent is when all parties say yes to the sexual acts being performed on them and ask permission to perform actions on the other partner. Sexual violence can affect any gender, but violence against women is more common in Central America.[17] Sexual violence occurs when an individual forces someone into an unwanted sexual activity without consent.[18] Sexual harassment occurs when an individual makes unwanted sexual comments towards another individual.[19] Sexual assault occurs when a perpetrator does not have consent to sexually touch or fondle the other individual.[20] There are different forms of sexual assault and some include: "attempted rape, fondling or unwanted sexual touching, forcing a victim to perform sexual acts, such as oral sex or penetrating the perpetrator's body."[21] Rape is a form of sexual violence where an abuser sexually penetrates a victim without consent.[22] A perpetrator can use different forms of force to rape an individual. In some cases, the abuser can use physical force, emotional or psychological coercion, or threats to hurt the victim.[23]

Intimate partner violence occurs when two individuals are in an intimate relationship together and where one partner commits sexual violence or abuses the other partner.[24] There is a great risk of intimate partner violence to occur when the abusing partner is the main decision-maker.[25] "The terms 'intimate partner sexual abuse' and 'intimate partner sexual assault' encompass a continuum of behaviors from verbal degradation relating to sexuality to felony-level sexual assault and torture."[26] The abusive and coercive types of behavior are usually a pattern for the perpetrator.[27] The forms of violence and abuse can be cyclical, meaning the abuser physically harms the victim, apologizes, promises not to harm them again, and then continues to repeat this cycle. For an abuser to maintain and instill fear over their partner, the abuser must have power and control over the other individual.[28]

Domestic violence is when an individual misuses their power and controls the other in a relationship.[29] This form of violence "arises from a batterer's desire to control and dominate his

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[16] *Sexual Assault*, RAINN, https://www.rainn.org/articles/sexual-assault (last visited Mar. 18, 2020).
[17] *Understanding and Addressing Violence Against Women*, WHO (2012), https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1.
[18] *What is Sexual Violence*?, NAT'L SEXUAL VIOLENCE RSCH. CTR., https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_What-is-sexual-violence_1.pdf (Fact Sheet about the different forms of sexual violence).
[19] *Know Your Right: Sexual Harassment & Sexual Assault under Title IX*, AAUW, https://www.aauw.org/what-we-do/legal-resources/know-your-rights-on-campus/campus-sexual-assault/ (last visited Feb. 21, 2021).
[20] *Id.*
[21] *Sexual Assault*, *supra* note 16, at para. 1.
[22] *Id.*
[23] *Id.*
[24] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MOD. FAM. L.: CASES & MATERIALS 310 (Wolters Kluwer, 6th ed. 2016).
[25] *Id.*
[26] MARY ROTHWELL DAVIS ET AL., LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 70 (6th ed. 2015).
[27] *Id.*
[28] WEISBERG, *supra* note 24, at 312.
[29] Ravneet Kaur and Suneela Garg, *Addressing Domestic Violence Against Women: An Unfinished Agenda*, 33 INDIAN J. OF CMTY. MED. 73, 73-76 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/.

(usually) female partner because he feels entitled to do so, not because he is suddenly angry."[30] The perpetrator instills fear in the victim through power, control, abuse, and other forms of violence.[31] The abuser establishes control in the relationship through violence and other forms of psychological, social, or financial abuse.[32] Domestic violence is a pattern of these abusive behaviors, rather than one incident.[33]

Domestic violence can affect a woman across her entire lifespan from seeing violence as a child between her parents, to being a victim herself. Within a sexually violent relationship, there can be a gender imbalance where one partner is more powerful in physical strength and size.[34] When there are rigid gender roles, it is difficult for a woman to protect herself from a violent partner.[35]

Domestic violence does not only affect women physically, but it also affects them mentally and emotionally. This form of violence can contribute to a female's poor health.[36] The health consequences that result from domestic violence are long term.[37] For example, a woman's reproductive health is affected by domestic violence.[38] Gynecological complications are more prevalent in victims of domestic violence.[39]

Breaking the cycle of domestic violence is very difficult for individuals who face abusive behavior. Victims feel frightened to leave and if they do leave, a victim may feel as if they will be caught by their abuser and receive a more violent beating. There can be a situation that leads up to the abusive incident where a woman feels like she is walking on eggshells around her abuser.[40] Once the abusive incident occurs, the victim is subjected to physical assaults, verbal attacks, rape, and/or being denied access to basic necessities. After the attack, the abuser may start to apologize, be affectionate, and will promise to change and stop hurting the victim.[41] Once the last phase is over, the cycle begins again until the victim breaks their silence and leaves the relationship.

When there is a lack of resources, it can be difficult to break the cycle. There needs to be an acknowledgment from institutions to recognize there is a cultural issue surrounding domestic violence within their country. This problem is rooted in the structure of the institution and depicts inequality.[42] The issue of domestic violence cannot be combated overnight, raising awareness and holding abusers accountable is just the beginning. Breaking the cycle of domestic violence is a part of the global commitment to provide human rights for women. Central America countries do

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[30] WEISBERG, *supra* note 24, at 312.
[31] Kaur, *supra* note 29, at 73.
[32] Kaur, *supra* note 29, at 73.
[33] Kaur, *supra* note 29, at 73. There are situations where domestic violence occurs once or twice, but this is not very common. An abuser could have lost control and wanted to have power over the victim in response to an incident that occurred once. In most cases though, if the abuse has happened more than once, it is very likely the violence will occur again and become more frequent and more severe. Univ. of Mich., *Understanding Abuse*, ABUSE HURTS, http://stopabuse.umich.edu/about/understanding.html (last visited Mar. 18, 2020).
[34] Kaur, *supra* note 29, at 73.
[35] Kaur, *supra* note 29, at 73.
[36] Kaur, *supra* note 29, at 73.
[37] Kaur, *supra* note 29, at 73.
[38] Kaur, *supra* note 29, at 74.
[39] Kaur, *supra* note 29, at 74.
[40] Jennifer Focht, *The Cycle of Domestic Violence*, NAT'L CTR. FOR HEALTH RESEARCH, http://www.center4research.org/cycle-domestic-violence/.
[41] *Id.*
[42] Tamaar Diana Wilson, *Violence against Women in Latin Am.*, 41 LATIN AM. PERSPECTIVES 3, 4 (2014) (discussing the root of domestic violence within Central America).

not begin to respond to the challenge, there will need to be extra support from the global community.

III. SOURCES OF INTERNATIONAL LAW GOVERNING DOMESTIC VIOLENCE

Discussion within the UN

The UN has just recently started to recognize international law on domestic violence.[43] Transformation is required for developing and implementing international domestic violence regulations. "The recognition that domestic violence is a human rights violation under international law required decades of work by activists around the world."[44] In 1980, the Report of the World Conference of the UN Decade for Women: Equality, Development and Peace was the first time the term domestic violence was discussed in an official UN document.[45] A portion of the document states that "legislation should also be enacted and implemented in order to prevent domestic and sexual violence against women. All appropriate measures, including legislative ones, should be taken to allow victims to be fairly treated in all criminal procedures."[46] It is important to keep in mind that domestic violence was discussed internationally only forty years ago.

Adopted in 1993, the Declaration on the Elimination of Violence against Women (DEVAW) recognized that there was an immediate and universal need to protect the rights of women regarding equality, security, integrity, and dignity.[47] This declaration would enhance the principles set out in other international instruments, under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture (CAT) and other Cruel, Inhumane, or Degrading Treatment or Punishment.[48]

Although DEVAW does not have binding legal authority, this document shows a strong international commitment to women and values raising awareness about domestic violence.[49] The DEVAW recognizes that "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over females and discrimination against women by men."[50] DEVAW wants to seize social constructs of inequality generated by men against women.[51] Further, DEVAW encourages states to look into punishing acts of domestic violence, training courses for police officers to handle situations of domestic violence, and implementing legal programs and educational programs to prevent domestic violence.[52]

The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and other international doctrines vocalize a country's duty

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[43] *The Int'l Legal Framework*, STOP VIOLENCE AGAINST WOMEN (2003), http://hrlibrary.umn.edu/svaw/domestic/laws/international.htm.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, U.N. Hum. Rts. Off. of the High Commissioner (Dec. 20, 1993), https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx.
[48] G.A. Res. 48/104, *supra* note 47, at para. 2.
[49] G.A. Res. 48/104, *supra* note 47.
[50] G.A. Res. 48/104, *supra* note 47, para. 6.
[51] G.A. Res. 48/104, *supra* note 47, para. 6.
[52] G.A. Res. 48/104, *supra* note 47, para. 37.

to protect human rights that are violated by domestic violence and other forms of sexual violence.[53] The rights that are expressly violated through domestic violence are: "the right to life, the right to physical and mental integrity, the right to equal protection of the laws and the right to be free from discrimination."[54] Domestic violence is a human rights issue and needs to be addressed as such, in an increasing manner. Victims who are affected by domestic violence are a part of marginalized communities and deserve equality and justice.

The UN is concerned that violence against women is a major obstacle for a woman's equality, education, and other developmental achievements.[55] This declaration realizes the need to change the historical power structure of inequality between men and women.[56] The UN wants to ensure a more equal opportunity for women who face disparity belonging to a minority group, including: "indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict."[57] Although UN Conference Documents are not legally enforceable, they reflect a collaboration of international law focused on addressing issues of domestic violence.[58]

The Protection of Women from Domestic Violence Act was enacted in 2006 and puts into writing a formal definition of domestic violence that all countries a part of the UN can abide by.[59] This domestic violence law, which is applicable in India, can be a potential framework for other countries to follow within Central America. Within this document, there is legislation that provides women with civil remedies and criminal procedures to protect them from violence and future relief for victims.[60] A victim of domestic violence can seek refuge from a perpetrator who commits physical, emotional, verbal, and sexual abuse.[61] The State Governments must ensure protection for these victims who seek protection from forms of sexual violence.[62] This act protects women from abusers who had a relationship together, who resided in the same household together, were married together, or adopted by their abuser.[63]

States need to recognize and take responsibility for acts of violence against women. States have to break many barriers, but "[o]ne of the most significant obstacles to overcome in the effort to define domestic violence as a human rights violation was the traditional view that international law is applicable only to governments and their representatives, but not to private actors as in the case of intimate partner assault."[64] States have a responsibility to protect their citizens from violent

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[53] G.A. Res. 48/104, *supra* note 47, at para. 2.
[54] G.A. Res. 48/104, *supra* note 47, paras. 20-24.
[55] G.A. Res. 48/104, *supra* note 47, at para. 4-6.
[56] G.A. Res. 48/104, *supra* note 47, at para. 4-6.
[57] G.A. Res. 48/104, *supra* note 47, at para. 7.
[58] *The Int'l Legal Framework*, *supra* note 43, at para. 43. Rebecca J. Cook states that "signposts of the direction in which international human rights law is developing and should influence states that have accepted a commitment of progressive development toward enhanced respect for human rights in their international conduct and domestic law." *The Int'l Legal Framework*, *supra* note 43 (citing *The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women*, AM. SOC. OF INT'L L. 29 (1995)).
[59] *Ministry of Law & Justice*, THE GAZETTE OF INDIA (Sept. 14, 2005), https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/asia/protection%20of%20women%20from%20domestic%20violence%20act/india%20-%20protection%20of%20women%20from%20domestic%20violence%20act.pdf?vs=423.
[60] *Ministry of Law & Justice*, *supra* note 59, at 4.
[61] *The Int'l Legal Framework*, *supra* note 43.
[62] *The Int'l Legal Framework*, *supra* note 43.
[63] *Ministry of Law & Justice*, *supra* note 59, at 5.
[64] *The Int'l Legal Framework*, *supra* note 43, at para. 17.

offenses committed by private actors.[65] If a state does not properly act towards protecting their individuals from acts of sexual violence, then that state is violating international obligations.[66] There needs to be consistency across countries to recognize the need to implement legislation surrounding domestic and sexual violence. There is a need for women to be protected and have fundamental human rights.

Legislation Surrounding Domestic Violence within the Regions of Mexico and the Northern Triangle

There has not been a major impact of legislation regarding femicide throughout Honduras. According to the Center for Women's Rights, "there are no policies aimed at reducing violent deaths [of women], there are no public policies aimed at preventing acts of violence against women."[67] Within Honduras, the National Institute of Women (INAM) was developed in 1998 in order to promote and inquire about policies regarding the protection of rights for women.[68] In 2016, INAM created the Ciudad Mujer initiative, "which aims to improve the lives of Honduran women in terms of violence prevention – as well as, economic autonomy, sexual and reproductive health, and collective education – through a network of services offered by the relevant agencies."[69] In 2006, the Reformed Law Against Domestic Violence (*Ley contra la violencia doméstica reformada*) was the only law that addressed violence against women.[70] Since the law came into effect, there has not been a major impact on reducing domestic violence.[71] Honduras is expected to guarantee equality for women through the Law on Equal Opportunities for Women (*Ley de igualdad de oportunidades para la mujer*), but this public policy has yet to be truly applied.[72]

In 2010, El Salvador passed a set of laws called Comprehensive Special Law for a Life without Violence for Women.[73] Governmental organizations are obligated to address forms of violence against women through "prevention, special attention, prosecution and punishment."[74] Since the implementation of these laws, less than half of the government's institutions have applied this law.[75] The Attorney General's office created a Special Protection Unit in 2011 to focus on

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[65] *The Int'l Legal Framework*, *supra* note 43, at para. 17.
[66] *The Int'l Legal Framework*, *supra* note 43, at para. 17.
[67] Andrea Fernández Aponte*, Left in the Dark: Violence Against Women and LGBTI Persons in Honduras and El Salvador*, LATIN AM. WORKING GROUP EDUC. FUND (Mar. 7, 2018), https://www.lawg.org/wp-content/uploads/storage/documents/Between_Dangers_Part_8.pdf.
[68] Aponte, *supra* note 67, at 4.
[69] Aponte, *supra* note 67, at 4.
[70] Aponte, *supra* note 67, at 4.
[71] Aponte, *supra* note 67, at 4.
[72] Aponte, *supra* note 67, at 4. The number of women killed by violence has consistently increased each year. Immigration and Refugee Board of Canada, *Honduras: Domestic violence, including legislation and protection available to victims (2010-November 2013)*, REFWORLD (Dec. 10, 2013), https://www.refworld.org/docid/52ce9dd14.html. The number of victims continues to increase because the perpetrators are not punished or convicted for their actions. *Id.* The femicide rate has increased because most homicides in Honduras go unpunished. *Id.* "Violence against women and impunity for perpetrators continued to be a serious problem." *Id.* Although INAM and other programs are in place in Honduras, they tend to fall short due to a lack of execution and a flaw in the investigation. *Id.*
[73] Angelika Albaladejo, *How Violence Affects Women in El Salvador*, LATIN AM. WORKING GROUP https://www.lawg.org/how-violence-affects-women-in-el-salvador/ (last visited Feb. 22, 2020).
[74] Albaladejo, *supra* note 73, at para. 13.
[75] Albaladejo, *supra* note 73, at para. 13.

gender-based violence.[76] This unit helps with legal representation, investigative reports, and provides individuals with emotional support throughout their cases.[77] While these laws and specialized forces appear to have a positive step forward, many programs are not fully implemented by the government.[78] If government officials are not held accountable, then the goals of these programs and women's safety will not be met.

Several treaties to punish perpetrators of violent acts towards women were ratified in Guatemala.[79] A number of recommendations were discussed in these treaties. There are recommendations to expedite ongoing programming to protect female victims in Guatemala, to promptly investigate violent acts against women and their abusers who commit the crimes, and to include "mandatory training with a gender perspective of all legal and law enforcement officials and health service personnel to ensure that they are able to respond effectively to all forms of violence against women."[80]

Within the Northern Triangle, a program to change biased gender beliefs is in place. Through a campaign called "Enough! Together We Can End Violence Against Women and Girls," activists are working with men and women between the ages of fifteen and twenty-five to change the beliefs surrounding gender norms.[81] This campaign has reached eight Latin American countries, including El Salvador, Guatemala, and Honduras.[82]

In 2007, the Mexican General Law on Women's Access to a Life Free From Violence was established to set precedent recognizing the different forms of violence including but not limited to physical, emotional, economic, and sexual violence.[83] This law establishes the importance of protecting female victims through various avenues of the Special Prosecutor's Office (CAVI), the police, public health organizations, and the National Women's Institute (Inmujeres).[84] If a victim is seeking safety from an abusive and violent incident, CAVI and Inmujeres should provide immediate protection.[85] Two years after the law was enacted, Amnesty International expressed there was little to no impact throughout the states of Mexico.[86] This law has shown an inadequate amount of changes that were promised for victims, including a lack of shelters, disregard for eradicating violence against women, and a lack of overall commitment by state officials.[87] Amnesty International believes it is important to have a guarantee of overall protection for women because "it is essential to create and implement criminal investigation protocols for use by staff of

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[76] *Id.*
[77] *Id.*
[78] Albaladejo, *supra* note 73, at para. 16.
[79] *Guat.: Violence Against Women*, THE ADVOCATES FOR HUM. RTS. (Nov. 17, 2017), https://www.theadvocatesforhumanrights.org/uploads/guatemala_28th_upr_vaw_2.pdf.
[80] *Id.* at 2.
[81] Damaris Ruiz and Belén Sobrino, *Breaking the Mould: changing belief systems & gender norms to eliminate violence against women*, OXFAM (2018), https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620524/rr-breaking-the-mould-250718-summ-en.pdf.
[82] *Id.*
[83] CECILE LACHENAL ET AL., BEYOND DOMESTIC VIOLENCE LAWS IN LATIN AMERICA: CHALLENGES FOR PROTECTION SERVICES FOR SURVIVORS 3 (Apr. 2016), https://fundar.org.mx/mexico/pdf/20160414-Fundar_Domestic-Violence-REP.pdf.
[84] LACHENAL ET AL., *supra* note 83, at 10.
[85] LACHENAL ET AL., *supra* note 83, at 10.
[86] AMNESTY INT'L, *Mexico: Two Years On: The Law to Protect Women Has Had No Impact at State Level* (Jan. 29, 2009), https://www.amnesty.org/en/press-releases/2009/01/m-xico-dos-os-de-aprobada-ley-de-protecci-n-de-mujeres-sin-impacto-en-es/.
[87] *Id.*

the public prosecutor's office, the police and experts when dealing with women filing complaints of abuse."[88]

In the 2016 report of ICESCR, Mexico presented "the Federal Criminal Code and the criminal codes of the thirty two federative entities, which place special emphasis on vulnerable groups, define domestic violence as a serious act that is punishable by a term of imprisonment of between one and seven years and a fine, as well as the loss of rights in respect of the victim, such as inheritance and parental rights, among others."[89] All states define sexual abuse as a crime, but only twenty-seven states criminalize marital rape.[90] Mexico's federal penal code prohibits domestic violence and allocates imprisonment of up to four years for perpetrators.[91] Although Mexico has legislation surrounding sexual abuse and domestic violence; perpetrators of spousal abuse are not criminalized by federal law.[92]

Researchers express that protecting female victims is a societal issue where Mexican laws do not punish the abuser and the laws institutionally fails to protect victims.[93] Through interviews with victims, "it became clear that none of the women who tried to access the protection services through the justice system (Police and CAVI) obtained any proper protection."[94] Police members will sometimes suppress the violence victims experience and shame the woman.

IV. FEMICIDE

Defining Gender-Based Violence

Femicide is the intent to murder a female based on her gender.[95] This gender-based form of violence is usually committed by a man, who was her partner. Femicide is committed due to ongoing forms of physical and emotional abuse. Intimate femicide, also called intimate partner homicide, is when a current or previous husband or partner commits murder.[96] An ongoing study by the London School of Hygiene and Tropical Medicine shows that more than thirty-five percent of women murdered worldwide were reported to be committed by a previous intimate partner.[97]

Another side to femicide is when a woman acts in a violent manner for self-defense. There are cases where women kill their male partners in self-defense.[98] Women are more likely to kill a current partner in self-defense,[99] while men are more likely to kill their separated previous partner.[100] In particular, men are motivated to kill due to rage and jealously, while women are likely to commit murder amidst a heated argument with their partner.[101] Women who are pregnant

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[88] *Id.* at para. 7.
[89] *Mexico: Domestic violence, including legislation; protection & support services offered to victims by the state and civil society, including Mex. City,* REFWORLD (Aug. 11, 2017), https://www.refworld.org/docid/59c116e24.html.
[90] *Id.*
[91] *Mexico*, *supra* note 89, at para. 6.
[92] *Mexico*, *supra* note 89, at para. 6.
[93] LACHENAL ET AL., *supra* note 83.
[94] LACHENAL ET AL., *supra* note 83.
[95] WHO, *supra* note 16, at 1. Femicide can be considered a war crime since women's bodies are used as property by some men.
[96] WHO, *supra* note 17, at 1.
[97] WHO, *supra* note 17, at 1-2.
[98] WHO, *supra* note 17, at 2.
[99] Suzanne Swan et al., *A Review of Research on Women's Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301, 308 (2008).
[100] WHO, *supra* note 17, at 2.
[101] WHO, *supra* note 17, at 2.

are at an increased risk of femicide.[102] Prior abuse by the perpetrator, which can be severe and increasingly frequent, is a major risk factor for being a victim of femicide.[103] Risk factors for perpetrating femicide include unemployment, forcible sexual intercourse on a partner, mental health issues, and substance abuse problems with drugs and alcohol.[104]

Intimate partner violence has long-lasting effects, not only on the woman but on her family as well. If a woman is murdered due to intimate partner violence, her surviving children are often left alone due to one dead parent and the other being incarcerated.[105] Most children will have to move to a different environment, and this can cause stress and other anxieties. Some children are left alone to fend for themselves and to take care of their siblings. Others may move to a grandparent or other older relatives' household; thus, the women are rarely the only victim within a femicide case.[106]

Non-intimate femicide can be committed by someone who is not in an intimate relationship with the victim.[107] This form of femicide is very common within Central America. In the past decade, more than 400 women were brutally murdered in Ciudad de Juárez, a city on the United States-Mexican border.[108] Different Latin and Central American countries have reported that women showed signs of sexual abuse and torture before they were murdered.[109] In El Salvador, there is a prevalence of gang violence against women.[110]

Within Central America, some men kill in the name of honor. A man will murder his partner to protect his family name and reputation.[111] He will kill the woman due to adultery or pregnancy outside of their marriage, or even being raped by another man.[112] Research depicts these killings as cultural traditions instead of major forms of violence against women.[113] This is where femicide can be considered a war crime. The notion of women's bodies being used as territory during past war time, now translates to gender-based violence that is recognized today as femicide.

Femicide within the Regions of Mexico and the Northern Triangle

It can be difficult to charge a perpetrator with femicide. Different Central American countries have different definitions regarding femicide.[114] Within Mexico, for a murder to be considered femicide, a victim must show signs of sexual assault, disfigurement, or had an intimate and close relationship with the perpetrator.[115] Compared to a different country within Central America, Nicaragua has a more inclusive definition that expands femicide to a woman being murdered by gang violence, any relationship with the victim, or if the murder was committed in front of her children.[116] In yet another country in Latin America, a murder occurring in Chile will

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[102] WHO, *supra* note 17, at 2.
[103] WHO, *supra* note 17, at 4.
[104] WHO, *supra* note 17, at 4.
[105] WHO, *supra* note 17, at 2.
[106] WHO, *supra* note 17, at 2.
[107] WHO, *supra* note 17, at 3.
[108] WHO, *supra* note 17, at 3.
[109] WHO, *supra* note 17, at 3.
[110] *See*, Albaladejo, *supra* note 73.
[111] WHO, *supra* note 17, at 2.
[112] WHO, *supra* note 17, at 2
[113] WHO, *supra* note 17, at 3.
[114] Rauls, *supra* note 6, at para. 3.
[115] Rauls, *supra* note 6, at para. 2.
[116] Rauls, *supra* note 6, at para. 2.

be regarded as femicide if the woman needed to be a spouse of the perpetrator.[117] This divide in definitions within the Latin and Central American regions creates a roadblock for justice for victims. If there was a consistent and appropriately comprehensive regional definition for femicide, this would help identify practices to address victims of sexual violence.[118]

More than half of the women of El Salvador have experienced some form of sexual violence in their lifetime.[119] Women are not protected by their country's laws and do not receive support. "Due to ineffective governmental institutions, corruption, and social acceptance, impunity reigns in nearly all cases of violence against women."[120] Women's inequality starts at an institutional level where women are victims of wage theft by gangs, which leads to a higher risk of exploitation.[121] The inequality continues into the home setting where women are faced with the highest levels of violence.[122]

Every sixteen hours, a femicide occurs in El Salvador.[123] The National Civilian Police (PNC) in El Salvador recorded about five cases per day of rape and sexual violence against women in 2015.[124] In the past, sexual violence was mainly committed by family members, but now this violence is evolving into offenses committed by gangs and police forces.[125] Since 2009, more than 2,500 women were murdered in El Salvador due to their gender, which is about 420 femicides per year.[126] Gangs will treat the bodies of women like their territory and or property.[127] Many young girls anticipate they will be raped, kidnapped, or murdered.[128]

In addition to the gangs themselves, police forces stationed outside of gang neighborhoods have also been culprits of sexual violence.[129] In El Salvador, a teenage girl with Down Syndrome was raped by a police officer who was patrolling her neighborhood.[130] In another case, an officer "was arrested in February 2016 on charges of abducting, raping, and threatening the life of a young woman."[131]

Within the first month of 2019, thirty women were murdered in Honduras.[132] Female victims between the ages of four and seventy were killed by their partners or family members.[133] More than 17,000 children have become orphaned due to their mothers being victims of femicide.[134] About ninety five percent of all femicides that occurred in Honduras have gone unpunished.[135]

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[117] Rauls, *supra* note 6, at para. 6.
[118] Rauls, *supra* note 6, at para. 6.
[119] Albaladejo, *supra* note 73, at para. 1.
[120] Albaladejo, *supra* note 73, at para. 2.
[121] Albaladejo, *supra* note 73, at para. 3.
[122] Albaladejo, *supra* note 73, at para. 4.
[123] Albaladejo, *supra* note 73, at para. 11.
[124] Albaladejo, *supra* note 73.
[125] Albaladejo, *supra* note 73.
[126] Albaladejo, *supra* note 73, at para. 11.
[127] Albaladejo, *supra* note 73, at para. 8.
[128] Albaladejo, *supra* note 73.
[129] Albaladejo, *supra* note 73.
[130] Albaladejo, *supra* note 73, at para. 7.
[131] Albaladejo, *supra* note 73.
[132] *Honduras: 30 Femicides in Jan. with 95% Impunity Rate*, TELESUR (Feb. 4, 2019), https://www.telesurenglish.net/news/Honduras-30-Femicides-in-January-with-95-Impunity-Rate-20190204-0015.html.
[133] *Honduras*, *supra* note 132.
[134] *Honduras*, *supra* note 132.
[135] *Honduras*, *supra* note 132.

Guatemala has one of the highest rates of femicide in the world, where more than 6,500 women have been violently killed since 2000[136] and that number is continually increasing. Many men do not value the lives of women in Guatemala, where "violence has reached epidemic proportions, with alarming increases in the murders of women at rates much higher than those of men."[137] Females have been killed by femicide where victims are subjected to inhumane slayings through sexual violence, mutilation, and dismemberment.[138] "Guatemala's femicide rate per 100,000 females is 9.7, the third highest with the highest rate of femicide belonging to El Salvador."[139] In Guatemala and El Salvador, different forms of violence against women have been "used to re-inscribe patriarchy and sustain both dictatorships and democracies, gender-based violence morphed into femicide when peacetime governments became too weak to control extralegal and paramilitary powers."[140]

One socio-political issue that arises due to the lack of consensus combatting gender-based crimes, is the absence of police training regarding femicide.[141] Some members of the police force have difficulty responding to these murders and do not properly identify them as femicides.[142] A study by Mexicans Against Corruption and Impunity shows that only twenty percent of 10,000 murders more than four years old were investigated as femicides.[143] Also, crime scene investigators need to be trained to identify forensic findings.[144] Specifically, Guatemala has a special crime unit that investigates murders against women.[145] More countries need to create task forces that are trained in femicide prosecution methods to provide justice for victims. Institutions need to be held accountable to change the infrastructure surrounding femicide.

Due to a general disagreement over a regional definition of femicide, it is difficult to collect statistics on femicide in the region as a whole.[146] There are likely more deaths due to femicides overall, but these murders may not be considered based on definitional restrictions from the specific country where they occurred. In order to make progress toward achieving justice for victims, there needs to be a consensus with the definition of femicide.[147] Lawmakers can look to reflect upon one country's goal where they created a registry that puts femicide into three categories of intimate femicide, non-intimate femicide, and femicide based on connections.[148] These subcategories could help create a consensus for the definition and would produce more accurate statistics regarding femicide.

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[136] Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update Violence on Against Women in Guatemala*, 10 HASTINGS RACE & POVERTY L. J. 265, 265 (2013).
[137] Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L. J. 161, 163 (2010) (discussing the motivating factor for femicide killings).
[138] Ambar Pardilla, *Patriarchal Power & Gender-Based Violence in Guatemala and El Salvador*, 7 GLOBAL MAJORITY E-J., 38, 38-51 (2016), http://www.bangladeshstudies.org/files/Global_Majority_e_Journal_7_1_Pardilla.pdf.
[139] *Id.* at 44.
[140] David Carey Jr. & M. Gabriela Torres, *Precursors to Femicide: Guat. Women in a Vortex of Violence*, 45 LATIN AM. RSCH. REV. 142, 142 (2010).
[141] Albaladejo, *supra* note 73, at para. 16.
[142] Albaladejo, *supra* note 73, at para. 16.
[143] Albaladejo, *supra* note 73, at para. 16.
[144] Albaladejo, *supra* note 73, at para. 16.
[145] Albaladejo, *supra* note 73, at para. 16.
[146] Albaladejo, *supra* note 73, at para. 16.
[147] Albaladejo, *supra* note 73, at para. 16.
[148] Albaladejo, *supra* note 73, at para. 8.

Combating Femicide – Community policing

Central American countries need to implement effective methods to combat the stigma surrounding the reporting of femicide. One option can be to implement community policing. Police and citizen contact are advocated through community policing. The question arises about how police officers' reporting should be regulated. This becomes "important in a world in which both the police and the public expect police activities to have an impact on crime rates."[149] Criminological research shows that, within the United States, increasing the number of police officers on the streets produces a lower crime rate.[150] The issue within these countries is not the presence of police, but the mistrust between security forces and victims.

Many victims do not feel safe to report their abuser to a police officer because victims have been abused and harassed by police officials. If the police had a presence within the community that was more positive and less invasive, victims might feel more comfortable to report their abusers. Some countries within Central America and South America have implemented community policing because this practice "focuses on the causes of crime by empowering citizens, building police-community partnerships, and better using crime statistics."[151] If there is an increase in a positive presence of police officers throughout the community, this can help victims feel more comfortable to report their abusers.

V. MACHISMO

Defining Cultural Masculinity

Machismo is a cultural problem that has deep historical roots and is challenging to eliminate. This term is a belief that women are subordinates to their male partner and the female needs to provide pleasure for them.[152] Machismo refers to "an attitude or conception that men are, by nature, superior to women."[153] Many men believe it is important to be 'macho' and that this is

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[149] RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE INVESTIGATION AND RIGHT TO COUNSEL 575 (Wolters Kluwer, 3rd ed. 2016).

[150] ALLEN, *supra* note 149.

[151] Enrique Desmond Arias & Mark Ungar, *Community Policing and Latin America's Citizen Security Crisis*, 41 COMPARATIVE POLITICS 409, 409-12 (2009) (discussing the implementation of community policing in Honduras). Within the Central American countries discussed, Honduras has a well-developed community policing based reform. A policing program, called Comunidad Más Segura (CMS), was developed in 2002 to help police officers to conduct more foot patrols within neighborhoods. *Id.* at 412. CMS is believed to have a positive impact within Honduras and is an effective security program. *Id.* A survey was conducted with 237 citizens in four populated cities within Honduras in 2006 and the results showed that "over 90 percent said the police listened to residents more, 89.9 percent expressed more confidence in the police, and 75.9 percent said police-citizen communications had improved." *Id.* According to police officers within the CMS program, crime reporting by citizens had increased. *Id.* Although the program was helpful for some citizens of Honduras, other individuals in different countries may not feel the same way. Where police brutality is present and violence has occurred against their citizens, individuals of a particular country may not respond well to community policing. For community policing to be properly implemented in these communities, there needs to be support from not only police task forces but from the overall government to implement these programs.

[152] Wilson, *supra* note 42, at 4.

[153] Ortiz, *supra* note 13. The author is aware of the positive manifestation surrounding machismo. It is important to understand and recognize the minority viewpoint that machismo does not define an entire culture. Generalizing a culture on defining machismo can be problematic, but it is relevant to bring awareness and address. There is an understanding of the sense of intersectionality dealing with machismo to create a positive social existence. Strong masculinities can create a sense of liberation and transformation. A positive view of machismo can create a social identity for a Latin American man. AÍDA HURTADO & MRINAL SINHA, BEYOND MACHISMO: INTERSECTIONAL LATINO MASCULINITIES (Univ. of Tex. Press, 1st ed. 2016).

a positive characteristic.[154] At an early age, men are taught to withhold their feelings and to act tough. Machismo is a clear sign of inequality within the Central American culture. This term supports the idea that women are second class to men including their rights and developmental opportunities.[155] Machismo imposes specific ways of how men should act and how to be as a man.[156]

The gender-based killings of femicide are linked to the cultural manifestation of machismo. "Women in Latin America have been subjected to various types of gendered violence, among them torture and rape during civil war or under military dictatorships, femicide, and domestic abuse linked to machismo."[157] There are historical roots in machismo that come from previous patriarchal societies and past war times. This way of life and way of thinking has been difficult to change. "[V]iolence against women establishes inequalities in the identities of women, as they are treated viciously and vehemently."[158]

The Significance of Machismo in Central America

In 2011, forty-seven out of 100 women suffered some type of violence in their household within Mexico.[159] Machismo is more prevalent in Mexico out of any other Central and South American countries, due to the culture of Lucha Libre, where it is difficult for equality to be present.[160] Lucha Libre is professional wrestling within Mexico where wrestlers wear a mask to create an alternate super persona. This alternative persona is ingrained in society that men are superior and can do no harm.

It is problematic for perpetrators to be prosecuted due to the government's definition of femicide and lack of inclusive legislation from the result of machismo.[161] Within the Northern Triangle, more than half of Salvadoran women have suffered from some form of violence in their lives.[162] More than a quarter of these women reported that violence was a form of sexual abuse.[163] El Salvador is a unique country where it has a special attention unit for women.[164] The Attorney General's office of El Salvador focused on intrafamilial violence, gender-based violence, discrimination against women.[165]

In a male-dominated society, Guatemala is filled with inequality due to machismo. Violence due to war times has made people in Guatemala and El Salvador acclimated to a common theme of violence throughout.[166] This has led to cycles of violence within each country. During

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[154] Ortiz, *supra* note 13.
[155] Ortiz, *supra* note 13.
[156] Ortiz, *supra* note 13.
[157] Wilson, *supra* note 42, at 4.
[158] Pardilla, *supra* note 138, at 42 (discussing the impact of machismo in Central America).
[159] LACHENAL ET AL., *supra* note 83, at 12.
[160] Ortiz, *supra* note 13.
[161] Rauls, *supra* note 6.
[162] *Inauguran 15a. Unidad de Atención Especializada para Mujeres Víctimas de Violencia*, SECRETARIA DE INCLUSIÓN SOCIAL (Sept. 25, 2015), http://www.inclusionsocial.egobgob.sv/inauguran-15a-unidad-de-atencion-especializada-para-mujeres-victimas-de-violencia/#mobile-nav.
[163] *Id.*
[164] Albaladejo, *supra* note 73, at para. 8.
[165] Albaladejo, *supra* note 73, at para. 8.
[166] Pardilla, *supra* note 138, at 43. Even though the war ended fourteen years ago in Guatemala, women still reap violent repercussions. Musalo et al., *supra* note 137, at 166. Physical and sexual violence was used to terrorize women as a strategy of war. *Id.* Guatemalan militia was never prosecuted nor punished for torturing women during

the civil wars, rape against women was used as a weapon, as a terror tactic, and this form of control did not go away over time.[167] The violence during the civil wars rolled into gang violence, which is heavily present in Guatemala and El Salvador. Gang members instill fear in women and "having gangs as such a staggering force sets off damaging and deadly forms of violence."[168]

The male dominance that is inherently a part of machismo has contributed to femicide in Guatemala and El Salvador. Women are suppressed through domestic violence and the patriarchal roles men play to obtain and sustain control.[169] Many men believe that women belong in the home and that once women want to gain independence by leaving, "men use violence to force women back into limited roles in the home and society."[170] Male dominance has shaped the lack of independence for women and the fear they experience.[171]

The UN identified machismo as one of the leading and main causes of sexual violence against women in Honduras, which leads to femicide.[172] Women in Honduras die by femicide at a rate of 10.2 per 100,000 women.[173] Within Honduras, "[t]he high levels of violence against women are often attributed to gang violence and organized crime, yet the reality is that women are just as vulnerable in their homes."[174] Although there was a decline in femicides in 2017, according to the Violence Observatory of the National Autonomous University of Honduras, the number is still high.[175]

Many challenges arise within machismo, which includes the eradication of violence against women. In order to create change and resolve injustices, there needs to be a change in the belief of gender-based norms. This will lead to the elimination of violence and can bring justice for victims by changing the common perception of how women should be treated. This institutional evolution cannot be changed in a short period of time, but through the implementation of new regulations and laws, in order for future victims to be protected.

VI. RESPONSE TO GENDER-BASED VIOLENCE

Breaking the Silence

Currently, there are sixteen countries in Latin American and the Caribbean that have laws in place to punish men committing violence against women.[176] Although the implementation of laws and legislation is a major steppingstone, there is still a wall to climb. "Without adequate

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the war. *Id.* at 181. During the El Salvadorian Civil War, women were assassinated, tortured, mutilated, and disappeared. Karen Musalo et. al., *El Salvador – A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 YALE J.L. & FEMINISM 3, 16 (2018). State security forces targeted women by raping them and engaging in a mass sexual brutality against women. *Id.* Many attacks occurred in rural communities where "pregnant women were . . . routinely tortured and their babies were taken from them [and] [w]omen's bodies were mutilated by cutting off their breasts or ramming objects into their vaginas." MO HUME, THE POLITICS OF VIOLENCE: GENDER, CONFLICT & COMMUNITY IN EL SALVADOR 58 (Wiley-Blackwell, 2009). Many El Salvadorians believe the current situation of gender equality derives from the violence against women during the war. Musalo et al., *supra* note 137, at 17.

[167] Pardilla, *supra* note 138, at 43.
[168] Pardilla, *supra* note 138, at 44.
[169] Pardilla, *supra* note 138, at 45.
[170] Pardilla, *supra* note 138, at 46.
[171] Pardilla, *supra* note 138, at 46.
[172] *Honduras*, *supra* note 132.
[173] Aponte, *supra* note 67, at 3.
[174] Aponte, *supra* note 67, at 3.
[175] Aponte, *supra* note 67, at 3.
[176] Ruiz, *supra* note 81, at 5.

financing and effective means to prevent, report and punish violence against women, the problem will not go away."[177] There are many challenges that arise to end violence against women. To make progress to change the negative beliefs surrounding gender norms, individuals need to recognize that inequality throughout genders exists.[178] This inequality is the result of a patriarchal system that has led to violence against women.[179] The negative connotation surrounding gender norms is rooted from machismo.[180]

Violence against women is perceived as normal. "Five out of ten women consider that violence against women is normal."[181] Individuals do not believe that if they witness violence being performed that they should intervene. If an assault occurs in public, people are not likely to defend a woman against aggressive acts. The issue of solving these injustices lies within each individual not taking the responsibility to stand up, intervene, and speak out against the violence. "Although eighty four percent of young women and men believe that violence against women is a product of inequalities, they believe that solving the problem is not up to them."[182] Many believe it is up to the government within the country to solve the issue surrounding violence against women.[183] Thus, this normalized perception must be addressed.

Victims Face Obstacles from Receiving Justice

Women do not often report violence because sometimes government officials are among those who commit these violent acts.[184] "Patterns of impunity validate this 'masculinity' within the institutions, which leads to further violence…"[185] In twelve percent of cases reported by women in El Salvador, the alleged abusers were judges, lawyers, prosecutors, and police officers. In a particular case, a woman claimed a PNC officer attacked her, but withdrew her case, even though neighbors witnessed this attack.[186]

In Guatemala, under the Law Against Femicide and Other Forms of Violence Against Women, more than 20,000 cases were filed with the court system in 2011.[187] Less than three percent of the 20,000 cases reached a judgment within the court system.[188] The cases included femicide and other forms of physical and sexual violence against women.[189] A Guatemalan case was sent to the Inter-American Court of Human Rights, where the government provided an ineffective response to the disappearance and subsequent death of a fifteen year old girl.[190] The IACHR reprimanded the Guatemalan government for "creating an environment conducive to the

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177 Ruiz, *supra* note 81, at 5.
178 Ruiz, *supra* note 81, at 5.
179 Ruiz, *supra* note 81, at 5.
180 Ruiz, *supra* note 81, at 10.
181 Ruiz, *supra* note 81, at 5.
182 Ruiz, *supra* note 81, at 6.
183 Ruiz, *supra* note 81, at 6.
184 Albaladejo, *supra* note 73, at para. 16.
185 Albaladejo, *supra* note 73, at para. 16.
186 Albaladejo, *supra* note 73, at para. 16.
187 Ley contra el femicidio y otras formas de violencia contra la mujer [Law Against Femicide & Other Forms of Violence Against Women], Derecto del Congreso [Congressional Decree], (2008) (Guat.).
188 Centro Nacional de Analisis y Documentacion Judicial [Nat'l Judicial Ctr. for Analysis & Documentation] [CENADOJ], Estadisticas por Delitos Contemplados en la Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer [Statistics for Crimes Contemplated in Law Against Femicide & Other Forms of Violence Against Women: Years 2010-2011] (2012) (Guat.).
189 CENADOJ, *supra* note 188.
190 María Isabel Rivero, *Press Release: IACHR Takes Case on Guat. To IA Court HR*, ORG. OF AM. STS. (June 7, 2012), https://www.oas.org/en/iachr/media_center/PReleases/2012/060.asp.

chronic repetition of acts of violence against women."[191] The lack of judicial reform by Guatemala created international attention.

The Office of the Commissioner for Human Rights in Honduras (CONADEH) responded to more than 4,500 complaints from women experiencing human rights violations.[192] CONADEH reported that in the past fifteen years, more than 5,600 women have been murdered due to femicide.[193] There was a 390 percent increase in domestic violence cases between the years 2008 and 2015.[194] Only two out of 400 femicide cases received guilty verdicts in 2016.[195]

As discussed above, it is difficult for victims to come forward due to the cycle of domestic violence. It is tough for a woman to leave a violent relationship due to family commitments such as, their children, financial reasons, and other circumstances. Many believe women should just leave the abusive situation, but do not understand the reasons abused women feel the need to stay. Victims fear they will be abused to a greater extent if they leave the situation, let alone report the abusive behavior. Many women are too scared to leave because they fear they will be killed by their abuser. Women should feel protected by their government, so there is a need to implement laws to help with their safety. Women need to be protected through legislation. "The courts and legal systems still have a vital role to play in ending male impunity and the culture of violence."[196] States need to ensure the safety of victims if they come forward to report and need to implement laws regarding human rights for women. The challenge to eradicate inequality of genders which leads to femicide is not just for the legal system to address, but everyone needs to take charge.

VII. RECOMMENDATIONS AND CONCLUSION

To diminish the effects of machismo and reduce the rates of femicide in Central America, states need to change their policy and legislation. Women experience multitudes of violence committed against them, but they are not seeing change. This change needs to start at the top for the effects to work their way down. The origins of the domain over women and violence against women start at the structural level of the state. The authors from *Evidence and Lessons from Latin America* state that:

> The structural nature of violence is also systematic, women are at a disadvantage in terms of the material conditions of life, but are also at a disadvantage in the wider arenas of ideology, norms, traditions, language, religion, science, philosophy, how humor and eroticism are expressed, indeed in all forms of knowledge and expression that exist in a society.[197]

It is impossible to eliminate violence all around, but a country can start somewhere. A country needs to put forth an effort to change their beliefs surrounding women. The individuals of the state need to hold each other accountable when it concerns equality. If patriarchal violence is not diminished, victims will not receive the justice they deserve.

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[191] *Id.* at para. 1.
[192] Aponte, *supra* note 67, at 3.
[193] Aponte, *supra* note 67, at 3.
[194] Aponte, *supra* note 67, at 3.
[195] Aponte, *supra* note 67, at 3.
[196] Ruiz, *supra* note 81, at 21.
[197] LACHENAL ET AL., *supra* note 83, at 12.

Institutions need to step in to aid with breaking the cycle of violence. There needs to be a more cohesive definition of femicide. This definition needs to be more expansive, not just to include a spouse or gang-related violence, but to encompass more violent circumstances. Countries can look to categorize femicide into three categories actual femicide, non-intimate femicide, and femicide based on connections. This is not the full extent of the response, but creating a more cohesive definition of femicide can place these countries on a more productive path.

Community policing is currently implemented in Honduras and can potentially be utilized within other Central American countries. Police and security officers do not have a positive reputation in Central American communities. If community policing is implemented, victims may feel safer and more open to communicate with police officers. Gang members may feel less inclined to stay present in a neighborhood where community policing is present. Victims may feel more comfortable to contacting a police officer when they are in danger with their abuser.

There needs to be civil remedies and criminal procedures to convict abusers. Women need to feel more comfortable within the legal system to come forward to tell their story and for justice to be afforded to them. Furthermore, abusers need to be convicted for their abusive actions. Men should not be pardoned due to their gender. Women need to have access to the overall fundamental human right of being free from violence.

Victims are left to pick up their pieces due to the criminal justice system not giving them the justice they deserve. Many victims are faced with backlash from their family and their community for coming forward. There needs to be an institutional change concerning to how women are treated for this to change the mindset within the culture and in order to eradicate violence against women. Justice denied to women is justice denied to the society as a whole and will continue to disrupt the social order of these countries.

IMMIGRATION METERING:
BARRIERS TO ASYLUM ALONG THE SOUTHERN BORDER

Hannah K. Gabbard*

ABSTRACT

Since 2016, the Trump administration has actively sought to limit meaningful access to the asylum process in the United States. One current policy implemented along the border of Mexico and the United States is metering. Under the metering policy, United States immigration officers stationed in the pedestrian lane of an international bridge along the international boundary direct arriving asylum seekers back to Mexico where they must wait to assert their claim to asylum protections. Due to the metering policy, asylum seekers waiting in Mexico remain in unsafe and unsanitary conditions. Beyond the physical implications of the metering policy on asylum seekers, this policy undermines the historical purpose of asylum protections and the asylum system at large by effectively eliminating access to the asylum process. The metering policy has widespread effects on individuals, communities, and the asylum system at large but its legality has yet to be judicially determined. This note argues that metering abrogates rule of law because the policy violates both United States domestic law and international human rights principles.

This note focuses on the statutory interpretation of the Immigration and Nationality Act ("INA") as the statute neither expressly permits nor prohibits the metering policy but determining the policy's legality under domestic law turns on this statute. The INA requires inspection of "arriving aliens" by immigration officers for asylum and the courts should construe the statute to allow individuals in the process of arriving at the international border between the United States and Mexico to assert an asylum claim. This note discusses the United States' international obligations of non-refoulement which prevents the return of asylum seekers to a territory where they would face danger or persecution. This note then presents counterarguments to interpretations of domestic and international law principles. Together, the INA and non-refoulement form the basis by which the metering policy violates rule of law.

This note concludes with a discussion of the lasting impacts and consequences of non-resolution of this policy. While the continued practice of the policy certainly poses endless dangers to asylum seekers and the asylum system at large, resolution of the metering policy will not assuredly provide relief to affected individuals and systems.

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* J.D. Candidate (2021) at Syracuse University College of Law; M.A. in International Relations Candidate (2021) at the Maxwell School of Citizenship and Public Affairs; B.A. in Political Science and Global & International Studies (2018) from Loyola University Chicago. Editor-in-Chief of the *Journal of Global Rights and Organizations,* Vol. 11. I would like to thank Professor Andrew Kim for his thoughtful recommendations and guidance, and the staff of the *Journal of Global Rights and Organizations* for their support and unwavering dedication to human rights. Lastly, I would like to thank my family and friends for their constant love and encouragement, without which none of this would have been possible.

I. INTRODUCTION

As a result of the influx of displaced people created in the wake of World War II, the United States instituted an asylum regime to provide protection and support to individuals seeking refuge from war.[1] In an address to Congress in 1947 on the admission of refugees into the United States, President Truman stated that "these victims of war and oppression look hopefully to the democratic countries to help them rebuild their lives and . . . [t]he only civilized course is to enable these people to take new roots in friendly soil."[2] This statement embodied the American spirit at the time – an ethos to provide refuge and protections which would later culminate in asylum status.

In 1951, the international community codified the protection of asylum seekers and refugees in the Convention relating to the Status of Refugees ("Convention").[3] Although initially applied on an ad hoc basis, the United States advanced a legal system to recognize refugees for humanitarian purposes.[4] This was formalized first in 1968 when the United States ratified the Protocol relating to the Status of Refugees ("Protocol"), and later strengthened in 1980 with the passage of statutory provisions aligning domestic law with international obligations.[5] These domestic and international provisions provide different categories of protection to individuals fleeing persecution, including refugee and asylum status.[6] The basis for asylum and refugee status is derived from the statutory definition of a refugee, which designates refugees as individuals seeking protection from "persecution or a well-founded fear of persecution" based on race, religion, and nationality, political opinion, or particular social group.[7] Individuals seeking asylum protections apply once within the United States or at its border.[8]

Under President Trump's administration, the application of the United States' asylum law has been altered by numerous policies that deter individuals from seeking asylum therein.[9] Along the southern border, one policy applied to asylum seekers[10] is called "metering."[11] Metering is a practice implemented by U.S. Customs and Border Protection ("CBP"), which stations immigration officers on the international boundary between the United States and Mexico; these

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[1] *A history: Asylum in the United States*, SOUTHERN POVERTY L. CTR. (Oct. 2, 2018), https://www.splcenter.org/20181002/history-asylum-united-states.

[2] Harry S. Truman, President of the U.S., Special Message to the Congress on Admission of Displaced Persons (July 7, 1947).

[3] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2 (Paul T. Lufkin ed., 3d ed. 1999).

[4] Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 77 (1990).

[5] Anker, *supra* note 3.

[6] *Id.*

[7] *Id.* at 4.

[8] *Id.*

[9] *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact*, AM. IMMIGR. COUNCIL (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf.

[10] In this note, I will utilize the term *asylum seeker*, as opposed to illegal immigrant or alien, in accordance with the U.N. Human Rights Commission's use, which specifically defines asylum seeker as "a general designation for someone who is seeking international protection." UNHCR REFUGEE PROTECTION: A GUIDE TO INT'L REFUGEE L. (HANDBOOK FOR PARLIAMENTARIANS), https://www.unhcr.org/en-us/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html (last visited Feb. 14, 2020).

[11] HILLEL R. SMITH, BEN HARRINGTON & AUDREY SINGER, CONG. RESEARCH SERV., IF11363, PROCESSING ALIENS AT THE U.S.-MEXICO BORDER: RECENT POLICY CHANGES (2019), https://fas.org/sgp/crs/homesec/IF11363.pdf.

CBP officers direct arriving asylum seekers to wait in Mexico, claiming that the port of entry does not have the resources to facilitate asylum processing.[12] Metering, also referred to as queue management,[13] limits the number of refugees who can seek asylum at a port of entry along the United States-Mexico border every day,[14] and has resulted in dangerous security and health conditions for asylum seekers waiting in Mexico. Further, metering contributes to the degradation of both the United States' asylum regime and its global reputation as a country that affords asylum seekers protection.

This note argues that metering is unlawful under both domestic and international law. Specifically, this note demonstrates how the implementation of the metering policy thwarts meaningful claims of asylum and violates the rule of law. These violations necessarily involve many harms to individuals and the asylum regime at large. This note will first detail the policy's history, from its application on an ad hoc basis to its widespread practice as is apparent today. This note includes an overview of the current litigation before the United States Court of Appeals for the Ninth Circuit regarding the metering policy, highlights the main arguments made by both parties, and provides the procedural history of the lower court's ruling. This note next documents how the policy harms individuals' security and health and results in irreparable consequences. This note then discusses the unique systemic harms posed by the metering policy; first, arguing that meaningful access to the asylum process in the United States has been effectively eliminated, and second, that as a border externalization policy, metering has constructively undermined the purpose of asylum protections at large.

This note argues that metering abrogates rule of law because the policy violates the United States' domestic law as well as international human rights principles as applied to asylum seekers who are on the "cusp of physical entry" into the United States.[15] Referencing applicable provisions of the Immigration and Nationality Act, this note demonstrates that United States' interpretation of these provisions is too expansive and instead, interpretation should permit for "arriving aliens" to be eligible for asylum processing. This is supported by the functionality of asylum processing as well as Congressional intent. Moreover, domestic law violations are apparent as immigration officers apply the metering policy on a statutory basis that exceeds their delegated authority. This note then argues that the metering policy violates the international obligation of non-refoulement by turning both Mexican and non-Mexican asylum seekers back to Mexico to await their asylum processing. Lastly, this note concludes with a description of the larger implications of the metering policy and a discussion of the policy's lasting effects on individuals, communities, and the asylum system at large.

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[12] *Id.*

[13] OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HOMELAND SECURITY OIG-20-38, CAPPING REPORT: CBP STRUGGLED TO PROVIDE ADEQUATE DETENTION CONDITIONS DURING 2019 MIGRANT SURGE n. 28 (2020).

[14] *See* Lorelei Laird, *Strangers in a strange land: 'Metering' makes asylum rights meaningless, immigrant advocates say*, ABA J. (July 24, 2019, 6:00 AM), https://www.abajournal.com/web/article/strangers-in-a-strange-land-human-rights-organizations-say-metering-of-asylum-seekers-makes-asylum-rights-meaningless.

[15] HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S REPORTED "METERING" POLICY: LEGAL ISSUES 3 (2019).

II. WHAT ARE THE HARMS OF METERING?

Metering has been employed on an ad hoc basis by the United States government as a reaction to influxes of asylum processing by border agents at ports of entry. However, unlike in previous applications of the policy, the current iteration of the metering policy is highly detrimental to the health and safety of individuals as well as the larger asylum system. Hence, even though metering has been used before and may be legitimately related to constraints on governmental resources, the results of the policy are unparalleled.

The following discussion focuses on the numerous harms resulting from the metering policy including damages to individual security and health while asylum seekers wait in Mexico, and the systemic harm caused by its implementation having "all but eliminated the right to seek asylum."[16] Together, the numerous harms created by this policy result in irreversible and grave harms to persons, communities, and the asylum process at large.

A. Metering in Practice

While metering has gained recognition as a policy widely implemented under the Trump administration, the roots of this policy were planted under the Obama administration.[17] During the summer of 2016 metering was used by CBP in response to an influx of asylum seekers from Haiti arriving in Mexico.[18] At that time an appointment system was created by Mexican immigration authorities in response to a backlog of asylum processing at ports of entry.[19] In conjunction with this limited use of metering under the Obama administration, instances of CBP officers preventing arriving asylum seekers from making claims in the United States on an "ad hoc" basis have been reported by human rights organizations since March 2016.[20] In these instances, there was no standard explanation provided to asylum seekers by CBP officers;[21] instead, explanations ranged from claims that holding cells were at capacity due to lack of resources, to assertions that the United States was no longer offering asylum.[22]

In April 2018, U.S. Attorney General Jeff Sessions announced a "Zero Tolerance Policy" to asylum seekers who crossed between ports of entry.[23] This policy aimed to discourage illegal crossings into the United States and "to reduce the burden of processing asylum claims that Administration officials contend are often fraudulent."[24] Under this policy, all individuals apprehended crossing between ports of entry face federal criminal prosecution.[25] Adult individuals

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[16] Adam Isacson, *"I Can't Believe What's Happening - What We're Becoming": A memo from El Paso and Ciudad Juarez,* WOLA (Dec. 19, 2019), https://www.wola.org/analysis/i-cant-believe-whats-happening-what-were-becoming-a-memo-from-el-paso-and-ciudad-juarez/.

[17] *See* STEPHANIE LEUTERT ET AL., ASYLUM PROCESSING AND WAITLISTS AT THE U.S-MEXICO BORDER 5 (Dec. 2018) https://www.strausscenter.org/wp-content/uploads/Asylum-Processing-and-Waitlists-at-the-U.S.-Mexico-Border-.pdf.

[18] James Fredrick, *'Metering' At The Border*, NAT'L PUB. RADIO (June 29, 2019), https://www.npr.org/2019/06/29/737268856/metering-at-the-border.

[19] *See* Fredrick, *supra* note 18; LEUTERT ET AL., *supra* note 17.

[20] LEUTERT ET AL., *supra* note 17, at 3.

[21] LEUTERT ET AL., *supra* note 17, at 3.

[22] LEUTERT ET AL., *supra* note 17, at 3.

[23] LEUTERT ET AL., *supra* note 17, at 1.

[24] WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY (Feb. 26, 2019).

[25] LEUTERT ET AL., *supra* note 17, at 1.

apprehended were detained in criminal facilities and children were sent to shelters, resulting in issues of family separation that later became and remain significantly publicized.[26] Due to resulting family separation, the Zero Tolerance Policy pushed asylum seekers to cross legally at ports of entry for fear of being separated from their families and facing criminal prosecution. This in turn increased the processing demands at ports of entry. In an Office of Inspector General ("OIG") report from September 2018, the OIG team observed that the "[Department of Homeland Security] was not fully prepared to implement the Zero Tolerance Policy, or to deal with certain effects of the policy following implementation."[27] The timing of the Zero Tolerance Policy coincided with an increasingly uniform practice of turning asylum seekers back to Mexico.[28] In May 2018, CBP began stationing officers midway to the port of entry along the international boundary on the pedestrian footbridge to check for valid travel documents.[29]

Stretching the United States-Mexico border from the west coast of California to the convergence of Texas and the Gulf of Mexico, there are forty-eight border crossings for pedestrians and vehicles.[30] Since 2015, many people primarily from El Salvador, Honduras, and Guatemala but also from further places around the world have traveled through Mexico to seek asylum at the U.S.-Mexico border.[31] Traditionally, asylum seekers traveling on foot from Mexico into the United States would walk north in a pedestrian lane, cross the international boundary as they head towards the port of entry, and there, make a declaration for asylum.[32] Under the metering policy, however, CBP officers are stationed on the apex of the bridge on the international boundary to check travel documents as people walk across the border.[33] In an internal guidance memorandum, CBP field officers were instructed to "establish and operate physical access controls at the borderline, including as close to the U.S.-Mexico border as operationally feasible."[34] Thus, along the international boundary CBP officers established "an assemblage of canopies, jersey barriers, and concertina wire" referred to by the Department of Homeland Security as "border-hardening measures."[35] On certain bridges, the presence of CBP officers is marked with cones, booths, or tents.[36] Immigrants without valid entry documents are told that they cannot proceed into the United States because the port of entry is at capacity.[37] Officers stationed on the bridge "radio the ports of entry" upon the asylum seekers' arrival and are alerted that the port is at

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[26] LEUTERT ET AL., *supra* note 17, at 1; Kandel, *supra* note 24, at 2.

[27] OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY, OIG-18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 4 (2018) [hereinafter OIG REPORT].

[28] LEUTERT ET AL., *supra* note 17, at 3.

[29] LEUTERT ET AL., *supra* note 17, at 3.

[30] No Labels, *Five Facts: The U.S.-Mexico Border*, REAL CLEAR POL'Y (Feb. 1, 2019), https://www.realclearpolicy.com/articles/2019/02/01/five_facts_the_us-mexico_border_111026.html.

[31] Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L. J. 48, 56 (2020).

[32] Robert Moore, *Border Agents Are Using a New Weapon Against Asylum Seekers*, TEX. MONTHLY (June 2, 2018), https://www.texasmonthly.com/politics/immigrant-advocates-question-legality-of-latest-federal-tactics/; OIG REPORT, *supra* note 27.

[33] Moore, *supra* note 32; OIG REPORT, *supra* note 27.

[34] Memorandum from Todd C. Owen, Exec. Assistant Comm'r, Office of Field Operations, Subject: "Metering Guidance" at 202 (Apr. 27, 2018); *Al Otro Lado, Inc. v. McAleenan*, No. 17-cv-o2366, 2019 U.S. Dist. LEXIS 129780 (S.D. Cal. Aug. 2, 2019).

[35] Muzaffar Chishi & Jessica Bolter, *Supreme Court Asylum Ruling Latest Sign Judiciary Is Not the Brake on the Trump Administration that Immigrant-Rights Activists Sought*, MIGRATION POL'Y INST. (Sept. 25, 2019), https://www.migrationpolicy.org/article/supreme-court-not-brake-trump-administration-immigration-actions.

[36] LEUTERT ET AL., *supra* note 17, at 4.

[37] Moore, *supra* note 32.

capacity.[38] Asylum seekers are instructed to stay in Mexico, put their names on a waitlist, and wait until their names are called and accepted from the daily quota of asylum seekers,[39] thus "metering" or regulating the number of asylum seekers that are permitted to enter the United States per day.[40] Asylum seekers are directed to wait in Mexico before they have physically crossed the international boundary.[41]

The list, known in Spanish as "La Lista," has become the first step migrants take to apply for asylum.[42] While the United States government does not manage the list, it does result from the United States' immigration policy.[43] Waitlists are independently managed by a variety of actors, ranging from Mexico's National Migration Institute and civil society organizations to the asylum seekers operating collectively.[44] Additionally, the waitlists vary by city and, in some cases, by each port of entry even within the same city.[45] For example, a rotating team of migrants manages the waitlist in Tijuana for the San Ysidro border crossing and is replaced by other migrants as the list managers' numbers are called by the immigration officers.[46] In November 2019, there were approximately 21,400 asylum seekers on informal waitlists across eleven cities in Mexico.[47] Every day, a CBP officer contacts a person in charge of the list with the number of individuals who can be processed for asylum that day.[48] Once an individual's number is called, they are boarded onto a bus operated by the Mexican government and driven to the United States.[49] Waiting times can be as short as one to three days at border crossings between Reynosa, Tamaulipas, and McAllen, Texas, to as long as six to nine months in cities such as Tijuana and Ciudad Juarez.[50] If an individual is not present when their number is called from the waitlist, they have twenty-four hours before their name is crossed off.[51]

The metering policy as implemented under the Trump administration has not yet been declared either lawful or unlawful by the courts.[52] In 2017, Al Otro Lado, an immigration advocacy organization, brought a lawsuit challenging the lawfulness of the metering policy.[53] The suit was filed in the United States District Court for the Southern District of California on behalf

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[38] LEUTERT ET AL., *supra* note 17, at 3; OIG REPORT, *supra* note 27.
[39] Stephanie Leutert, *What 'Metering' Really Looks Like in South Texas*, LAWFARE (July 17, 2019, 1:46 PM), https://www.lawfareblog.com/what-metering-really-looks-south-texas.
[40] LEUTERT ET AL., *supra* note 17, at 1; OIG REPORT, *supra* note 27.
[41] *See* HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S REPORTED "METERING" POLICY: LEGAL ISSUES 4 (2019); Adam Isacson et al., *"Come Back Later": Challenges for Asylum Seekers Waiting at Ports of Entry,* WOLA (Aug. 2, 2018), https://www.wola.org/analysis/come-back-later-challenges-asylum-seekers-waiting-ports-entry/.
[42] Kirk Semple, *What Is 'La Lista,' Which Controls Migrants' Fates in Tijuana?*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/world/americas/caravan-migrants-tijuana-mexico.html.
[43] *Id.*
[44] LEUTERT ET AL., *supra* note 17.
[45] LEUTERT ET AL., *supra* note 17.
[46] Semple, *supra* note 42.
[47] STRAUSS CTR. FOR INT'L SEC. & L., Metering Update 1 (Nov. 2019).
[48] AM. IMMIGR. COUNCIL, *supra* note 9.
[49] Semple, *supra* note 42.
[50] Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html; AM. IMMIGR. COUNCIL, *supra* note 9.
[51] Semple, *supra* note 42.
[52] Smith, *supra* note 15.
[53] Smith, *supra* note 15.

of six asylum seekers who were denied entry after crossing the border.[54] The case was amended in 2018 to include additional asylum seekers who were turned away "in the middle of the bridge" as they were approaching a United States port of entry.[55] The early stages of litigation focused on whether a metering policy existed where the Department of Justice attorneys argued non-existence and U.S. officials similarly denied any such practice.[56] The Plaintiffs asserted that metering denied them "access to the asylum process" under domestic laws of the Immigration and Naturalization Act, the Administrative Procedure Act ("APA"), the Due Process Clause of the United States Constitution, and the Alien Tort Statute; they also asserted an international claim for the duty of non-refoulement.[57]

In November 2019, the district court granted the Plaintiff's motion for provisional class certification and granted a preliminary injunction on the asylum ban's application to "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."[58] The Government appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit, seeking a stay of the injunction.[59] Although the appeal addressed the preliminary injunction of the asylum ban, the metering policy remained the underlying and original issue being litigated. In March 2020, the Ninth Circuit denied the Government's motion to stay the preliminary injunction, finding that the Government did not meet its burden of showing that the stay was warranted.[60]

Both the district court and the Ninth Circuit reached their conclusions without deciding the legality of the metering policy. In addressing Plaintiff's claim that metering violates the APA, District Court Judge Bashant discussed the unlawfulness of the metering policy;[61] this is as close to a ruling on the merits as has been seen in the litigation thus far. Judge Bashant found that the Plaintiffs sufficiently alleged that the policy is unlawful because it exceeds CBP's authority as delegated by Congress and is a policy to deter asylum seekers based on pretextual justifications.[62] However, in her opinion on the Government's motion to dismiss, Judge Bashant stated that "it is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately" processing asylum seekers at a port of entry.[63]

B. Harms to Individuals

The effects of the metering policy on individuals are widespread, ranging from security to health consequences. Asylum seekers have been targeted based on their status as refugees, as well as other identities.[64] While waiting for their turn to be processed by CBP, asylum seekers are left vulnerable to violent crime such as murder, kidnapping, rape, and human trafficking in Mexico.[65]

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[54] Smith, *supra* note 15.
[55] *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1186.
[56] Koh, *supra* note 31, at 57.
[57] *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1180.
[58] Al Otro Lado v. Wolf, 952 F.3d 999, 1005 (9th Cir. 2020).
[59] *Id.* at 1003.
[60] *Id.* at 1003.
[61] *Id.* at 85.
[62] *Al Otro Lado, Inc.,* U.S. Dist. LEXIS 129780, at 85-86.
[63] *Id.*
[64] HUM. RTS. FIRST, REFUGEE BLOCKADE: THE TRUMP ADMINISTRATION'S OBSTRUCTION OF ASYLUM CLAIMS AT THE BORDER 11 (Dec. 11, 2018), https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf.
[65] *Id.* at 10.

Border cities have experienced an increase in violent crimes throughout 2018 and asylum seekers have reported robberies and kidnappings by cartels.[66] In reports of kidnappings, asylum seekers are taken near the bridges and shelters and held for ransoms starting at $10,000.[67] Other reports indicate that some asylum seekers have been extorted by organized crime groups for a higher number on the waitlists, while still others have been assaulted by Mexican officials.[68] When crimes do occur, individuals and shelters rarely report to the Mexican authorities because some officers have links to criminal organizations.[69]

Moreover, housing conditions for metered individuals waiting in Mexico are precarious and pose various health risks. For many asylum seekers, staying near the bridges is their only option. In border cities with migrant shelters, the shelters are either full or overcrowded.[70] Other asylum seekers decide to stay near the bridges because they fear losing their place on the waitlist.[71] While remaining close to the bridges may provide feelings of safety, the areas surrounding the bridges are overcrowded and unsanitary.[72] Near the Paso del Norte bridge connecting Ciudad Juarez, Mexico and El Paso, Texas, immigrants wait in makeshift tents and under tarps, without access to resources such as water or sanitation.[73] In Matamoros, asylum seekers can either pay to use a bathroom at the bridge or they can relieve themselves closer to the river.[74] Rainwater washing from the river into the camps has spread infectious diarrhea and other gastrointestinal conditions among those living in the camps.[75]

Other harms to people arose as an unintended and antithetical response to the metering policy. In the September 2018 OIG Report, the investigative team found that the metering practice may increase the number of illegal entries into the United States,[76] which only further endangers asylum seekers. The OIG Report indicated that CBP officers experienced an increase in illegal border crossings due to asylum seekers being metered,[77] an account confirmed by apprehended asylum seekers.[78] The OIG Report referenced an anecdote of a woman who "said she had been turned away three times by an officer on the bridge before deciding to take her chances on illegal entry."[79] Faced with the choice of enduring violence while waiting outside shelters and around the ports of entry, "[a]sylum seeking families who decide not to wait in Mexico say they understand the risks of crossing the Rio Grande River."[80] The most publicized narrative of this type of decision-making emerged in June 2019, when a migrant father and his daughter drowned while trying to cross the Rio Grande River after being denied the ability to request asylum and

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[66] *Id.* at 12.
[67] Isacson, *supra* note 16.
[68] Emily Green, *The Hidden Victims of Trump's War on the Border*, VICE (Nov. 27, 2019), https://www.vice.com/en_us/article/gyz4x3/the-hidden-victims-of-trumps-war-on-the-border.
[69] Isacson, *supra* note 16.
[70] LAWFARE, *supra* note 39.
[71] Isacson, *supra* note 16.
[72] *See* Isacson, *supra* note 16; *see also* HUM. RTS. FIRST, *supra* note 64.
[73] Isacson, *supra* note 15; HUM. RTS. FIRST, *supra* note 64, at 10.
[74] LAWFARE, *supra* note 39.
[75] *This American Life: The Out Crowd*, CHI. PUBL. RADIO (Nov. 15, 2019), https://www.thisamericanlife.org/688/the-out-crowd.
[76] OIG REPORT, *supra* note 26, at 7.
[77] OIG REPORT, *supra* note 26, at 7.
[78] OIG REPORT, *supra* note 26, at 7.
[79] OIG REPORT, *supra* note 26, at 7.
[80] Jesse Franzblau, *Funding the Administration's Hateful Border Policies Will Increase Abuse and Inflict More Harm On Migrants*, NAT'L IMMIGR. JUST. CTR. (June 28, 2019), https://immigrantjustice.org/staff/blog/funding-administrations-hateful-border-policies-will-increase-abuse-and-inflict-more.

then waiting for two months on a waitlist in Matamoros, Mexico.[81] After being published in a Mexican newspaper, *La Journada*, the image of the bodies of Oscar Alberto Martinez Ramirez and his daughter Valeria became "a symbol of the large-scale humanitarian crisis at the border."[82] Their bodies were discovered only one-half of a mile from the international bridge where they attempted to assert their claim to asylum.[83]

Remaining in Mexico while awaiting the opportunity to begin asylum proceedings endangers individuals. For some, the danger concerns their personal safety brought on by violent acts committed against them as they wait on the Mexican side of the border. Others face detrimental health outcomes due to a lack of basic human necessities, such as shelter and sanitation facilities. These dangers amount to critical individual harms which the many individuals subjected to the metering policy face.

C. Systemic Harms

The current asylum system is "under unprecedented attack by the Trump administration."[84] The metering policy, alongside other Trump administration's immigration policies, takes a scattershot approach to curtail immigration into the United States. Other immigration policies enacted under the Trump administration include the Migrant Protection Protocols, also known as "Remain in Mexico," the Asylum Transit Ban, and safe third country agreements.[85] Taken together, these policies have "all but eliminated the right to seek asylum in the United States."[86]

Metering is a policy that effectively eliminates meaningful access to the asylum process. Meaningful access to asylum requires adherence to the United States' established mechanism for seeking asylum at the border, and the first step is reaching the port of entry.[87] Without valid travel documents, the asylum seeker becomes an inadmissible noncitizen subject to expedited removal proceedings.[88] Asylum seekers are rerouted from expedited removal proceedings and detained by Immigration and Customs Enforcement ("ICE") upon indicating that they either have a well-founded fear of persecution or have an intent to apply for asylum.[89] If individuals are deemed to

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[81] Lorelei Laird, *Strangers in a Strange Land: 'Metering' Makes Asylum Rights Meaningless, Immigrant Advocates Say* ABA J. (July 24, 2019, 6:00 AM), http://www.abajournal.com/web/article/strangers-in-a-strange-land-human-rights-organizations-say-metering-of-asylum-seekers-makes-asylum-rights-meaningless; Reis Thebault et al. *The Father and Daughter Who Drowned at the Border Were Desperate for a Better Life, Family Says*, WASH. POST (June 26, 2019, 5:12 PM), https://www.washingtonpost.com/world/2019/06/26/father-daughter-who-drowned-border-dove-into-river-desperation/.

[82] *Id.*; *Father Daughter Who Drowned Border Were Desperate Better Life, Family Says* Bill Chappell, *A Father and Daughter Who Drowned at the Border Put Attention on Immigration,* NPR (June 26, 2019, 12:12 PM), https://www.npr.org/2019/06/26/736177694/a-father-and-daughter-drowned-at-the-border-put-attention-on-immigration.

[83] Franzblau, *supra* note 80.

[84] Paul W. Schmidt, *An Overview and Critique of US Immigration and Asylum Policies in the Trump Era*, 7(3) J. MIGRATION. & HUM. SEC. 92, 95 (2019).

[85] AM. IMMIGR. COUNCIL, *supra* note 9; Jason Kao & Denise Lu, *How Trump's Policies are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html.

[86] Isacson, *supra* note 16.

[87] B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 103 (2017).

[88] WILLIAM A. KANDAL & HILLEL R. SMITH, CONG. RESEARCH SERV., IF11074, U.S. IMMIGRATION LAWS FOR ALIENS ARRIVING AT THE BORDER (Jan. 16, 2019).

[89] *See* KANDAL & SMITH, *supra* note 88; *see also* Drake & Gibson, *supra* note 87, at 104.

have a "significant possibility" of the requisite eligibility for an asylum claim, the asylum seeker then begins their asylum application process in the United States.[90]

Once an asylum claim has been initiated, it may take years to resolve, and in the interim to such resolution, asylum applicants may be released from immigration detention facilities to wait in the interior of the United States.[91] President Trump has identified this practice as a "loophole" within immigration law that can only be closed through a multi-pronged approach, geared to reduce any opportunity immigrants may have to access asylum.[92] Metering is a policy used to curtail the opportunity bona fide asylum seekers have to begin their asylum process.[93] By preventing asylum seekers from beginning the process, instructing them to instead place their name on a list and wait in Mexico, the United States government has eliminated asylum access in all practicable ways except in name. Meaningful access to asylum is threatened because individuals are not permitted to approach the port of entry where they can officially assert their claim to seek asylum. Although the metering policy does not restrict the concept of asylum protections, it makes those protection mechanisms unattainable by physically separating individuals from accessing the location at which they are required to assert their rights to asylum.

Furthermore, the metering policy abrogates the protections enshrined by post-World War II refugee and asylum doctrines. Asylum law in the United States evolved as a response to the grave humanitarian concerns which emerged after the end of World War II, and the U.S. has since become a symbolic, global leader on accepting asylum seekers fleeing violence.[94] The United States balanced the growing development of human rights practices with the country's own foreign policy objectives to build a system honoring domestic and international law principles.[95] This balancing resulted in an asylum framework that has sought to uphold the post-World War II purpose of protecting the most vulnerable people fleeing violence and seeking refuge.[96] Over time, the asylum regime has been subject to reforms that have altered the United States' reception of asylum seekers.[97] However, the metering policy has more than merely altered the reception of asylum seekers and has instead completely prevented their reception into the United States. The original purpose of post-World War II asylum and refugee doctrines is undermined because the metering policy prevents the United States from meaningfully protecting vulnerable people who have a "well-founded fear of persecution"[98] through asylum. Through the implementation of the metering policy, vulnerable people are left waiting in dangerous conditions in Mexico and the system is no longer serving the purpose of protecting vulnerable populations fleeing persecution

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[90] Drake & Gibson, *supra* note 87, at 104 (citing 8 C.F.R. § 208.30(e)(3) (2017)).
[91] Isacson, *supra* note 16.
[92] Isacson, *supra* note 16.
[93] Smith, *supra* note 11.
[94] *See generally* Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 77 (1990); *see* AM. IMMIGR. COUNCIL, *An Overview of U.S. Refugee Law and Policy* (Jan. 2020), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy; Michael Posner, *U.S. Should Not Abandon Leadership On Asylum*, FORBES (Nov. 9, 2018), https://www.forbes.com/sites/michaelposner/2018/11/09/u-s-should-not-abandon-leadership-on-asylum/#3b93e317173d.
[95] *See generally* Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 79 (1990).
[96] *See id.* at 74 (concluding that the historical context of immigration policy demonstrates that United States refugee policy has followed different priorities over time, including human rights and foreign policy goals).
[97] MATTHEW J. GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES 161 (Cambridge University Press ed., 2004).
[98] 8 U.S.C. § 1101 (a)(42) (2019).

on "account of race, religion, nationality, membership in a particular social group, or political opinion."[99] Moreover, this policy has contributed to the degradation of the United States' reputation as a nation welcoming to asylum seekers. This is harmful to the asylum system because asylum protections to address an influx of vulnerable peoples are a collective action problem, requiring the participation of countries with the resources to protect these individuals.

Of the many policies enacted to eliminate asylum in the United States, metering is particularly dangerous because it occurs before immigrants can set foot on United States soil. Metering is an example of a border externalization policy; such policies are "extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individuals considering the merits of their protection claims."[100] These policies are enacted with the objective of preventing people from reaching a border to reduce immigration,[101] and can take many forms.[102] For example, in 1981, President Reagan entered into an agreement with the Haitian government to interdict Haitian migrants and return them to Haiti in order to reduce mass migration.[103] These policies have been justified under theories of national security, migration controls, and even humanitarian grounds.[104] Like other border externalization policies, metering stops asylum seekers from claiming asylum by turning them away at the international boundary before they can reach the port of entry.[105] This practice eliminates meaningful access to asylum in the United States and undermines the United States' international role as a country with the capabilities sufficient to offer asylum seekers protection.[106] Taken together, the metering policy has systemically altered the asylum process at large.

III. HOW DOES METERING VIOLATE RULE OF LAW?

Metering abrogates rule of law because the policy violates the United States' domestic law as well as international principles. Rule of law is defined as:

> A principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to laws that are publicly promulgating, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.[107]

Domestic law is violated because the metering policy is executed without a legitimate statutory basis and the cited authority is expansively interpreted to empower executive action. Referenced

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[99] 8 U.S.C. § 1101 (a)(42) (2019).
[100] Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants,* 4 J. MIGRATION. & HUM. SEC. 190, 193 (2016).
[101] Drake & Gibson, *supra* note 87, at 115.
[102] Drake & Gibson, *supra* note 87, at 117.
[103] Donald Kerwin, *The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others In Need of Protection*, 31 REFUGEE SURV. Q. 1, 20 (2012).
[104] *See* Drake & Gibson, *supra* note 87, at 116; Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190, 193 (2016).
[105] *See* Drake & Gibson, *supra* note 87, at 120; *see also* HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S REPORTED "METERING" POLICY: LEGAL ISSUES 2 (2019).
[106] *See* Drake & Gibson, *supra* note 87, at 120.
[107] *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*, CTR. FOR LAW AND MILITARY OPERATIONS 3 (2011), https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf.

statutory authority neither prohibits nor permits the actions implemented by the metering policy. Furthermore, metering violates rule of law because it is barred by the international law principle of non-refoulement and is not narrowed by the holding of *Sale v. Haitian Centers Council* which restricted the United States' extraterritorial obligations of international human rights principles.

A. Statutory Basis for Metering Policy

Metering does not adhere to rule of law because the policy violates U.S domestic law. The legality of the metering policy hinges on an interpretation of the Immigration and Nationality Act ("INA") of 1952. As the statutory authority does not firmly permit or prohibit the measures created under the metering policy, the statutory interpretation should not be broadly construed to permit the government's actions. Moreover, the Government argues for a statutory construction of the policy which does not accurately consider the balance of governmental resources against the health and safety of individual asylum seekers.

As amended, the INA provides a framework for the United States government to grant asylum status to an individual who applies for asylum relief.[108] This individual must first be considered a refugee – "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[109] Requests for asylum can be made either affirmatively or as a defense to removal proceedings.[110]

Section 208 of the INA, codified in Title 8 of the United States Code, governs the rules for asylum eligibility and Section 235 governs the duties of inspection by immigration officers of asylum seekers.[111] Section 208 provides that:

> [a]ny alien who is physically present in the United States or *who arrives in* the United States (whether or not at a designated port of arrival …), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225 (b) of this title.[112]

Furthermore, Section 235 indicates that individuals "who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."[113] Lastly, the Section states that "[i]f an immigration officer determines that an alien . . . *who is arriving in the United States* . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . ."[114]

The INA provides for the inspection of "arriving aliens" by immigration officers for asylum. "Arriving aliens" in this context should be interpreted to include individuals who are in the process of arriving at the international border between the United States and Mexico. Neither

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[108] ANDORRA BRUNO, CONG. RESEARCH SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 1 (2019).
[109] 8 U.S.C. § 1101(a)(42) (2019).
[110] *See* Bruno, *supra* note 108; KANDAL & SMITH, *supra* note 88.
[111] *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://www.uscis.gov/legal-resources/immigration-and-nationality-act (last visited Feb. 14, 2020).
[112] 8 U.S.C. § 1158(a)(1) (2020) (emphasis added).
[113] 8 U.S.C. § 1225(a)(3) (2020).
[114] 8 U.S.C. § 1125(b)(1)(A)(ii) (2020) (emphasis added).

the INA nor any other statutory schemes directly authorize the measures implemented under the metering policy. In the absence of such direct authorizations, the interpretation of provisions of the INA becomes the key to determining the legality of this policy. Sections 208 and 235 of the INA should be construed to permit "arriving aliens" as eligible for asylum as well as inspection by immigration officers because this interpretation more accurately categorizes the actions undertaken by asylum seekers and is supported by Congressional intent.

In *Al Otro Lado, Inc. v. McAleenan*, Judge Bashant utilized statutory interpretation of Section 208 as a basis for granting the preliminary injunction. In the District Court, the Government argued that Section 208 language indicating that an individual "who arrives in the United States" does not apply to potential asylum seekers who are on Mexican soil.[115] Judge Bashant agreed with the Plaintiffs that the statutory language should be read to include individuals who are "in the process of arriving in the United States."[116] Without the metering policy, individuals seeking asylum would walk north in a pedestrian lane of an international bridge from Mexico towards the United States, cross the international boundary and approach a port of entry to declare their asylum claim.[117] Instead, the metering policy interferes with the process of arriving at the border because CBP officers are placed at the apex of the bridge and prevent asylum seekers from crossing into the United States' territory.[118] Thus, the metering policy directly impinges an individual's ability to be "physically present in the United States" under Section 208 and alternatively turns asylum eligibility on the individual "who arrives in" the United States.[119] Asylum seekers metered at the international boundary are at the "cusp of physical entry" into the United States.[120] But for the construction of barriers and the stationing of CBP officers along the international boundary, asylum seekers would walk on the pedestrian bridge north into the United States and reach a port of entry where they could assert their intention to apply for asylum protection in the United States. As the Plaintiffs indicated, "[w]hile the *ultimate decision* to grant asylum is discretionary . . . providing *access* to the asylum process at [ports of entry] is not."[121]

Furthermore, as noted by Judge Bashant, this interpretation of the INA provision is supported within the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996:

> The term "arriving alien" was selected specifically by Congress in order to provide a flexible concept that would include all aliens who are in the process of physical entry past our borders, regardless of whether they are at a designated port of entry, on a seacoast, or at a land border. Thus, an "arriving alien" will in many cases include an alien who, under the current interpretation...would have been found to have made an "entry."[122]

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[115] Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1217 (S.D. Cal. 2019).
[116] *Id.* at 54.
[117] Moore, *supra* note 32; OIG REPORT, *supra* note 27.
[118] Moore, *supra* note 32; OIG REPORT, *supra* note 27.
[119] 8 U.S.C. § 1158 (a)(1) (2020).
[120] Smith, *supra* note 15.
[121] Appellees' Answering Brief at 35, *Al Otro Lado v. Wolf*, No. 19-56417 (9th Cir. filed Feb. 4, 2020).
[122] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 revised portions of the Immigration and Nationality Act; *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 105th Cong. 17 (1997).

This legislative history expressly indicates that metered individuals and others similarly situated should be considered as an "arriving alien" for the purposes of the INA. As this term was meant to be a flexible concept, it should not be restricted to bar individuals who would have approached a port of entry and properly initiated their asylum process had it not been for CBP stationing officers at the location of a bridge which hinders technical entry into the United States.

To these arguments, the Government would highlight that the metering policy rationally relates to the discharge of agency duties required under the INA.[123] The Government claims that the INA requires CBP officers to permit individuals to cross the border "only if the port has the capacity to safely and humanely process her application for admission and hold her for further proceedings."[124] Specifically, the Government argues that the volume of pedestrians entering the port of entry makes officers unable to complete their port management duties.[125] In response, the Plaintiffs concede, and Judge Bashant agrees, that agencies and their officers have competing responsibilities that are difficult to balance when agency resources are limited.[126]

In balancing the facts of governmental capacity against the individuals who are currently affected by this policy, this is not a meritorious argument under the INA. Under administrative law, governmental agencies are restricted to actions delegated by statutory authority.[127] Similarly, governmental agencies do not have other inherent authorities besides their statutory mandate.[128] The INA confers authorities to immigration officers regarding their conduct and responsibilities owed to asylum seekers. The INA does not contain any provisions which allow for immigration officers to perform their duties if the port of entry has the processing capacity to do so. Even if the INA contained such provisions, this counterargument would not stand due to the factual basis of the metering policy. In the OIG Report, the investigators observed that while ports of entry they visited were not overcrowded, the space for asylum seeker processing was limited;[129] this may weigh for or against the Government's lack of capacity claims. Alternatively, when considering the current conditions of asylum seekers waiting in Mexico, the security and health of asylum seekers are greatly endangered by remaining in Mexico.

Justifications and arguments provided for the metering policy abrogate rule of law because they violate interpretations of the INA and Congressional intent. The metering policy imposes an interpretation of the INA which is not fundamentally fair to asylum seekers. The Government's proposed counterarguments are not meritorious because they require a reading of INA provisions that do not exist and cannot be inferred from the agency's delegated authority. Thus, the metering policy is an illegitimate exercise of domestic law.

B. International Human Rights Principle: Non-Refoulement

The metering policy violates rule of law because it is inconsistent with international human rights norms. In November 1968, the United States became a party to the United Nations 1967 Protocol Relating to the Status of Refugees.[130] The Protocol was an amendment to the 1951 United

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[123] *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1212.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1100, 1114 (9th Cir. 2020).
[128] Gorbach v. Reno, 219 F.3d 1087, 1095 (9th Cir. 2000).
[129] OIG REPORT, *supra* note 27, at 7.
[130] UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.

Nations Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"] that gave the principles of the Refugee Convention universal application.[131] A critical principle of the Refugee Convention is non-refoulement. Non-refoulement is codified under Article 33, which prohibits the expulsion or return of "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[132] Article 33 further indicates that the principles of refoulement are not available for individuals who are a security risk to the country in which they are seeking refuge.[133] Lastly, non-refoulement obligations prevent states from returning individuals to a state where they are at risk of "torture or cruel, inhuman or degrading treatment or punishment."[134] The Protocol Relating to the Status of Refugees is not a self-executing international treaty, and as such further domestic legislation is required to implement the force of the terms.[135]

The metering policy violates the international obligations of non-refoulement because metered individuals are forced to wait in Mexico to begin their asylum proceedings. As previously discussed, the conditions in Mexico are particularly dangerous to asylum seekers. Individuals waiting in Mexico may be either Mexican asylum seekers or non-Mexican asylum seekers.[136] Arguments that the metering policy violates the United States' international obligations of non-refoulement change depending on the type of asylum seeker, but the violence and dangers experienced by both classes are similar. For Mexican asylum seekers, application of non-refoulement principles is more direct: by restricting individual access to the asylum process and forcing asylum seekers to wait in Mexico, the United States government is refouling Mexican citizens back to a country "where his life or freedom would be threatened."[137] Unlike Mexican asylum seekers, the impact of non-refoulement obligations on non-Mexican asylum seekers is more complex. For non-Mexican asylum seekers, individuals are fleeing territories such as Guatemala, Honduras, and El Salvador, where they experienced dangers on account of their "race, religion, nationality, membership of a particular social group or political opinion."[138] Returning asylum seekers back to these countries would certainly be a violation of international principles of non-refoulement. Turning individuals back to Mexico to await asylum processing is not as clear cut because individuals must face persecution or risk of persecution in Mexico. However, the United Nations High Commissioner for Refugees ("UNHCR") has found that states cannot implement measures that have the indirect harm of returning individuals to danger.[139] Therefore, non-Mexican asylum seekers should not be returned to Mexico and should instead be properly processed by immigration officials because the conditions in Mexico is dangerous to Mexican and non-Mexican asylum seekers alike.

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[131] United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[132] United Nations Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 137.

[133] *Id.* at art. 33(2).

[134] Frelick et al., *supra* note 100, at 198.

[135] *See* Smith, *supra* note 14; STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2018).

[136] *See US: Mexican Asylum Seekers Ordered to Wait*, HUM. RTS. WATCH (Dec. 23, 2019, 8:00 AM), https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait#.

[137] Refugee Convention, *supra* note 132, at art. 33(1).

[138] *Id.*

[139] United Nations Office of the High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 22 (Jan. 26, 2007) [hereinafter UNHCR], https://www.unhcr.org/4d9486929.pdf.

As a counterargument to the United States' non-refoulement obligations, the Government could look to *Sale v. Haitian Centers Council*. In *Sale v. Haitian Centers Council* (1993), the U.S. Supreme Court decided whether an executive order instructing the U.S. Coast Guard to refoul Haitian vessel passengers violated the INA.[140] The Court ruled that neither the INA nor Article 33 of the Refugee Convention, which together protects refugees from refoulement, applies extraterritorially.[141] In the context of *Sale*, extraterritoriality meant outside of the United States on the high seas.[142] A compelling argument against the United States' extraterritorial obligations under Article 33 for the Court was the published history of Congress and the Executive Branch before the Article's ratification.[143] In particular, discussions during the negotiating conference of the Convention indicated to the Court that Article 33 was meant to be narrowly construed. Furthermore, the *Sale* Court stated that "the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions towards aliens outside its own territory."[144]

In the case of the metering policy, the Government could argue that the United States' international obligations under Article 33 of the Refugee Convention are not triggered because asylum seekers have not yet reached American soil. A deciding court could manage this argument by factually differentiating between the extraterritorial situation in *Sale* and metered individuals along the United States-Mexico border. In *Sale*, asylum seekers were Haitians traveling by boat from Haiti to the United States and were intercepted by the U.S. Coast Guard while en route to the United States.[145] In the case of metering along the southern border, contrarily, asylum seekers are feet away from a port of entry and are physically on the international boundary between the United States and Mexico.[146] Applying *Sale* to the current metering policy, the United States is still compelled to fulfill its Article 33 obligations of non-refoulement.

Lastly, the Government could argue that since the Refugee Convention is a non-self-executing international treaty, "it does not have the force of law" in U.S. courts;[147] Article 33 may still function as an "interpretive guide" to understanding Congressional intent, however.[148] The Congressional intent of the INA, using the Refugee Convention as a guide, would contribute to the statutory construction of INA language regarding "who arrives in the United States" as applying to metered individuals on the doorstep of the United States-Mexico international boundary.[149] Furthermore, since non-refoulement is a customary international law principle, there may be a valid argument that the United States is obligated because of the Refugee Convention's status as a non-self-executing international treaty.[150]

The United States' practice of metering individuals seeking asylum protections violates rule of law because the policy is inconsistent with international human rights norms. Under international obligations of non-refoulement, the United States is barred from returning individuals to countries where they might face persecution on account of their "race, religion, nationality,

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[140] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158 (1993).
[141] *Id.* at 159.
[142] *Id.* at 160.
[143] *Id.* at 178.
[144] *Id.* at 183.
[145] *Sale*, 509 U.S. at 160-165.
[146] OIG REPORT, *supra* note 27.
[147] E. Bay Sanctuary Covenant v. Trump, 349 F. Supp.3d 838, 857 (N.D. Cal. 2018).
[148] *Id.*
[149] 8 U.S.C. §§ 1225, 1158 (2006).
[150] *See US: Mexican Asylum Seekers Ordered to Wait*, HUM. RTS. WATCH (Dec. 23, 2019, 8:00 AM), https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait#.

membership of a particular social group or political opinion."[151] The turnback of both Mexican and non-Mexican asylum seekers violates this international obligation because Mexico's conditions pose severe threats to the lives and freedom of these individuals. The United States government cannot argue that the holding of *Sale* restricts the application of Article 33 because the case at issue is factually distinct from the scenario in *Sale*. Lastly, the Government cannot argue that the Refugee Convention does not apply to actions taken by the United States government because these international principles are also understood as customary international law which does not require governmental ratification.

IV. LOOKING FORWARD

Due to the unresolved legal challenges to the metering policy, individuals continue to be metered resulting in direct and indirect harm to asylum seekers. If a court were to decide the metering policy on the merits, asylum seekers could move forward to assert their claims for asylum protection in the United States. Although this would provide some relief for these individuals, the effects of this policy are widespread and will be felt by border communities and beyond for the immediate future. In addition to causing harm to people, the metering policy has left a larger mark on the asylum regime and the international community's perception of the United States as a place that provides asylum protections for individuals fleeing violence and persecution.

While the metering policy as applied by the Trump administration is notably devastating to asylum seekers, border communities, and asylum institutions, this issue raises a larger question of whether metering practices are believed to be a legitimate means by which a government can regulate asylum processing. For example, the metering policy was implemented under the Obama administration as a means to aid an overcrowded port of entry when thousands of Haitian asylum seekers arrived in Tijuana, Mexico.[152] Both the Obama and Trump administrations consistently weighed government asylum processing resources against the rights of individuals to assert claims for asylum. Reprieve for metered asylum seekers may occur after the end of the Trump administration; due to governmental interests in preserving resources, however, this is not a certain outcome.

The nature of the Trump administration's version of metering as coupled with the United States' many other immigration policies has caused widespread concern for this practice. Asylum protections are purely discretionary, and this discretion specifically targets individuals seeking entry into the United States through the southern border. The outcry by immigration advocates and the media has redirected focus away from the legality of the policy towards the humanitarian issues associated with the policy. In a 2019 debate, former Presidential candidate Julian Castro directly attributed the metering policy to the deaths of Oscar Alberto Martinez Ramirez and his daughter Valeria.[153] While the humanitarian consequences of the metering policy are critical, the legality of this policy must be decided. The ad hoc nature of this policy used under previous administrations requires a legal determination to prevent further obstruction of the asylum process.

Moreover, a resolution regarding the metering policy is critical for asylum because of the current state of events. According to the UNHCR, individuals around the world are displaced now

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[151] Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 137.

[152] *NPR*, *supra* note 18.

[153] Amy Sherman & Miriam Valverde, *Fact-checking Julian Castro's claim that asylum 'metering' caused drowning of father, daughter*, POLITIFACT (June 27, 2019), https://www.politifact.com/article/2019/jun/27/fact-checking-julian-castros-claim-asylum-metering/.

more than ever.[154] In 2019 alone there were nearly 342,000 new asylum seekers and about 37,000 people flee their homes due to conflict and persecution every day.[155] Similar to the refugees and asylum seekers after World War II, today's asylum seekers have sought protection in the United States. In President Truman's address to Congress on accepting refugees, he concluded that:

> We are dealing with a human problem, a world tragedy. Let us remember that these are fellow human beings now living under conditions which frustrate hope; which make it impossible for them to take any steps, unaided, to build for themselves or their children the foundations of a new life. They live in corroding uncertainty of their future. Their fate is in our hands and must now be decided. Let us join in giving them a chance at decent and self-supporting lives.[156]

President Truman's statement applies equally to post-World War II asylum seekers fleeing Europe and today's asylum seekers waiting in Mexico. Since President Truman's declaration to Congress, the United States has developed domestic and international principles designed to protect vulnerable people. These principles must be applied to their fullest extent in order to begin to repair the damage that has been created by the Trump administration's scattershot immigration policies.

This note aims to demonstrate that although the policy is arguably justified as a response to issues of asylum processing resources and governmental capacity, the practice of metering abrogates rule of law due to violations of both domestic and international law. As the INA does not specifically account for the metering policy, interpretations of relevant provisions indicate that "arriving aliens" who would be in the United States to assert their claims for asylum but for the metering policy are eligible for asylum processing and inspection by immigration officers. Congressional intent and the functionality of individuals seeking asylum support this argument. Further, the United States' obligation of non-refoulement under Article 33 of the Refugee Convention and customary international law prohibit the metering practice implemented against both Mexican and non-Mexican asylum seekers.

Faced with an administration that has taken a multi-pronged approach to dismantle asylum protections, understanding the background and legal basis of the metering policy is critical. The metering policy is unique among other immigration policies because it prevents asylum seekers on the "cusp of physical entry" from meaningfully asserting their right to asylum protections guaranteed to them under domestic and international law.[157] Metering is a complex issue which requires a simple and humane resolution: as the policy violates rule of law, the United States government should end the practice of turning back asylum seekers.

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[154] *See* UNHCR, Figures at a Glance (June 19, 2019), https://www.unhcr.org/en-us/figures-at-a-glance.html.
[155] *Id.*
[156] Harry S. Truman, President of the U.S., Special Message to the Congress on Admission of Displaced Persons (July 7, 1947).
[157] SMITH, *supra* note 15.

REFUGEE CRISIS, APPROPRIATION AND PROPERTY: HOW SYRIA CONTROLS DEMOGRAPHICS UNDER THE GUISE OF RECONSTRUCTION

Henry Schall*

ABSTRACT

The Syrian government has passed more than 45 laws relating to housing, land and property since the uprising and civil war began. The laws are being used to redevelop the battered nation's infrastructure, but it comes at a humanitarian price. Specifically, recently passed laws such as Law 10 and Law 3 could have severely drastic effects on the rights of citizens based solely on their political beliefs. These laws allow the Syrian government to take private property and give little to no compensation to the true owners. One, these people who have been forcibly displaced are not getting compensated for these taking. And two, when they lose their homes, they have nowhere else to go and no reason to return to Syria, further exacerbating the refugee crisis. There is already a vast refugee crisis in Syria, and it is on the verge of worsening (5.5 million refugees and 6.1 million internally displaced). Many of these people would love to return home, but these homes are largely unavailable due to the destruction from the war. The Assad regime has passed a large number of reconstruction laws that are supposed to aid in rebuilding Syria. In reality, they are taking homes away from opponents of the government and allowing supports to live there instead. This note seeks first discusses the background of the crisis in Syria and gives a broad survey of the laws the Syrian government is using to control property. Then it discusses the laws and how the Syrian people's rights are violative of international and domestic law. Finally, the note argues that the Assad regime is in fact using these laws to reshape demographics, displacing opposition party members and replacing them with pro Assad individuals.

* J.D. Candidate (2021) at Syracuse University College of Law; Senior Article Editor of the *Journal of Global Rights and Organizations,* Vol. 11. He has several passions within the law. Including interests in national security, international human rights, and elder and health law. He will be graduating with a Certificate of Advanced Study in National Security & Counterterrorism Law from the Institute for Security Policy and Law and currently works for the Elder and Health Law clinic located within the College of Law. After graduation he hopes to continue working in the elder and health law field while also working on calling attention to human rights abuses around the world and supporting initiatives and organizations like the *Journal of Global Rights and Organizations*, that are dedicated to stopping these abuses altogether.

I. INTRODUCTION

The Syrian government has passed more than forty-five laws relating to housing, land, and property since the uprising and civil war began. The laws are being used to redevelop the battered nation's infrastructure, but it comes at a humanitarian price. Specifically, recently passed laws such as Law 10 and Law 3 could have severely drastic effects on the rights of citizens based solely on their political beliefs. These laws allow the Syrian government to take private property and give little to no compensation to the true owners. One, these people who have been forcibly displaced are not getting compensated for these takings. And two, when they lose their homes, they have nowhere else to go and no reason to return to Syria, further exacerbating the refugee crisis.

There is already a vast refugee crisis in Syria, and it is on the verge of worsening (5.5 million refugees and 6.1 million internally displaced people).[1] Many of these people would love to return home, but these homes are largely unavailable due to the destruction from the war. The Assad regime has passed many reconstruction laws that are supposed to aid in rebuilding Syria. In reality, the regime is taking homes away from opponents of the government and rebuilding it to sell it for a huge profit to whoever wants to live there.[2]

This article will explore the Syrian reconstruction laws by comparing them to *Jus Cogens* norms among the international community in addition to the Syrian constitutional right to property. Further, the article will show how the Assad regime is not looking to welcome home the citizens who originally inhabited these areas, but rather is looking to install people who are loyal to the regime and increase Assad's hold in power. Section 2 will discuss the background information concerning the refugee crisis including current struggles refugees face when attempting to return home. Additionally, this section will investigate past reconstruction laws passed by the Assad government. Section 3 will discuss the sources of property law including the current statutory law and the problems with the current law, Syrian constitutional law, and finally international property law. Section 4 will examine Assad's attempt at reshaping demographics through property control including an analysis of law 10 as an instrument to punish critiques of Assad. Section 5 will focus on a call to the international community to respond to the immoral and unnecessary laws and focus on past property confiscation laws and examine lessons that should have been learned.

II. BACKGROUND INFORMATION

a. Conflict and Destruction

The Syrian Civil War began after Bashar al-Assad took power in 2000.[3] Although it was a democratic election, Assad began to deny basic human rights to his people which caused pro-democracy uprising eventually resulting in the bloody war we know today.[4] This war put millions

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[1] Maha Yahya, *What Will It Take for Syrian Refugees to Return Home?*, FOREIGN AFF. (May 28, 2018), https://www.foreignaffairs.com/articles/syria/2018-05-28/what-will-it-take-syrian-refugees-return-home.

[2] Robert Fisk, *Syria's new housing law is a veiled attempt to displace tens of thousands of refugees – but even that won't help the regime win the war*, INDEPENDENT (June 4, 2018, 8:41 AM), https://www.independent.co.uk/voices/bashar-al-assad-syrian-civil-war-law-10-displacement-homes-papers-latest-a8377306.html.

[3] Olivia Dunn, *The Syrian Refugee Crisis: Making a Case for State Obligation and Humanity*, RAMAPO J. L. & SOC'Y 87 (2018).

[4] *Id.*

of civilians lives in danger and denied them access to basic necessities when both sides of the conflict used "civilian suffering" as a war tactic.[5]

Today, the Syrian population makes up less than one percent of the world's population, but Syrians make up 1/3 of all refugees.[6] This huge amount of refugees has destabilized countries in the region, reshaped immigration and asylum policies around the world, and has created a populist backlash in the West.[7] Many of the nations that surround Syria and that hold thousands of refugees are growing tired of the strain it is putting on their economy and are starting to force refugees out.[8] Lebanon has refused to give a significant majority of refugees legal residency and is doing everything in its power to scare them into leaving.[9] Thousands of children are forced to beg on the streets or enter early marriages just to get by.[10] The simple solution would be to have the refugees return now that the war is concluding.[11] However, there are many roadblocks on that path.

Several refugees have been able to return now that the Syrian government is retaking previously contested territory.[12] However, many are reluctant to return for not only fear of destabilized tensions, but also from their own Syrian government.[13] There are hundreds of thousands of refugees who are essentially enemies of the government for innocent acts such as participating as an activist or journalist, or for fleeing to avoid fighting for a corrupt regime they did not believe in.[14] Some are implicated simply because a family member was one of the people opposing the government.[15] For example, Asser went back home to be with his family who could not fulfill the requirements to join him in Germany. Two weeks after returning home, he was called in for questioning and has not been heard from since.[16]

Over the last few decades in Syria, there was a massive migration from the *rif* countryside.[17] This migration was caused by corrupt privatization efforts which had a harmful effect on the rural community and by a three year drought.[18] This strained the urban infrastructure within the cities and forced people to move and settle in the outskirt neighborhoods like Hamuriya, Harasta, and Sheba'a.[19] Settling in the outskirts has now created another barrier for the return to the previous residence. These areas were not governed by traditional laws; instead, land ownership

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[5] Dunn, *supra* note 3.
[6] Yahya, *supra* note 1, at 2.
[7] *Id.* at para. 2
[8] Anchal Vohra, *A Deadly Welcome Awaits Syria's Returning Refugees*, FOREIGN POL'Y 1 (Feb. 6, 2019), https://foreignpolicy.com/2019/02/06/a-deadly-welcome-awaits-syrias-returning-refugees/.
[9] Refik Hodzic, *Plight of Syrian Refugees in Lebanon must not be ignored*, AL JAZEERA (Jan. 26, 2021), https://www.aljazeera.com/opinions/2021/1/26/plight-of-syrian-refugees-in-lebanon-must-not-be-ignored
[10] *Id.*
[11] Yahya, *supra* note 1, at 1.
[12] Jesse Marks, *Why Syrian Refugees are at Risk of a Forced Return to Syria*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/12/syrian-refugees-face-growing-pressure-to-return-to-insecure-conditions-heres-why/.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Vohra, *supra* note 8.
[17] Sune Haugbolle, *Law No. 10: Property, Lawfare, and New Social Order in Syria*, SYRIA UNTOLD (July 26, 2018), https://syriauntold.com/2018/07/26/law-no-10-property-lawfare-and-new-social-order-in-syria/.
[18] Melissa Martin & Martijn Vermeersch, RETURN IS A DREAM, OPTIONS FOR POST-CONFLICT PROPERTY RESTITUTION IN SYRIA 4 (2018), http://syriaaccountability.org/wp-content/uploads/Property-Restitution.pdf.
[19] Haugbolle, *supra* note 17.

was governed by customs that did not leave a paper trail.[20] These customs included renting and purchasing among family members and when a land dispute arose it was handled by local tribe elders and heads of families.[21]

For generations, the government exerted control over all forms of land. Peasants worked on small farms under Ottoman and French rule. In the 1950s, the Baathist government nationalized land for state control. When the Bashar al-Assad regime took over in the 2000s, it gave more leeway to private investors to combat the inequality of the previous five decades.[22] However, there was no regulation put in place to create an equal system and as a result of corruption and mismanagement, money was poured into hotels, restaurants, and boutiques, rather than some form of affordable housing.[23] This led to informal housing being necessary and encouraged by the government.[24] As of the mid-2000s, about forty per cent of the Syrian population lived in informal settlements.[25]

Even if refugees are not facing imprisonment upon return, there really is not much to come back too. Many refugees are scared to return because it is unsafe with the miserable conditions that now remain.[26] The United Nations Institute for Training and Research (UNITAR) did a study of the damage using satellite images taken from their UNITAR's Operational Satellite Applications Program (UNOSAT) program between 2013 and 2017.[27] This study has a four level damage ranking system that ranks damage as either 1) moderately damaged, 2) severely damaged, 3) destroyed, or 4) no visible damage.[28] The study focuses on eight cities in Syria including Raqqa, Idlib, Homs, Hama, Deir ez Zor, Daraa, Damascus, and Aleppo.[29] The study found a total of 109,393 damaged structures of which 37% were moderately damaged and a combined 63% were either severely damaged or destroyed.[30] Aleppo accounted for the largest percentage of damaged buildings with 32.7%, followed by Damascus with 25.4%.[31] A pre-civil war census indicated that Aleppo and Damascus' combined population accounted for 3,843,100 people of the total 21,362,529 in Syria. The total population dropped to a low of 16,945,057 and only rose to 17,500,658 in 2020.[32] Even if these people have the means to return home, there is likely not any home to which they can return.

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[20] Haugbolle, *supra* note 17.
[21] Haugbolle, *supra* note 17.
[22] Martin, *supra* note 18.
[23] Martin, *supra* note 18.
[24] Haugbolle, *supra* note 17.
[25] *Decree 66: The Blueprint for al-Assad's reconstruction of Syria?*, THE NEW HUMANITARIAN (Apr. 20, 2017), https://www.thenewhumanitarian.org/fr/node/259390.
[26] Vohra, *supra* note 8.
[27] Vohra, *supra* note 8.
[28] Vohra, *supra* note 8.
[29] Vohra, *supra* note 8.
[30] Vohra, *supra* note 8.
[31] Ameen Najjar, *Damage Caused by the Syrian Civil War: What the Data Say*, TOWARDS DATA SCIENCE (June 27, 2018), https://towardsdatascience.com/damage-caused-by-the-syrian-civil-war-what-the-data-say-ebad5796fca8.
[32] *Syrian Population 2020*, WORLD POPULATION REV. (last visited Jan. 17, 2020), http://worldpopulationreview.com/countries/syria-population/.

b. Housing, Land, and Property Law (HLP)

Syrian Housing, Land, and Property (HLP) law can seem complicated and hard to follow; however, many HLP laws are used together to facilitate reconstruction processes.[33] Since 2011, the Syrian government has enacted forty-five laws and decrees aimed to aid in its reconstruction vison.[34] These laws include various HLP laws in combination with certain counter-terrorism laws. The older HLP laws include Decree 66/2012, Decree 19/2015, Laws 21/2015 and 23/2015, and the counterterrorism laws include Decrees 11/2016, and Laws 3/2018, 10/2018, and 42/2018. The laws are used in conjunction to create the vision of society that the government wants, which has a vast discriminatory effect on the rightful owners of the property.

Decree 66/2012: Redevelopment of Unauthorized Housing

Decree 66 was the start of the government's attempt at housing control. Basically, this Decree allows the government to "redesign unauthorized or illegal housing areas."[35] As explained above, the unauthorized housing this law applies to is the informal housing that was in fact encouraged and necessary at the time. Assad has already allowed this law to expel various populations in Damascus and has replaced it with the high-end Marota City project. This project got rid of the local working-class population and is replacing it with luxury residential high-rises and shopping centers.[36] According to local authorities, this redevelopment is intended to improve the living conditions of the inhabitants by eliminating informally built properties and replacing them with more modern housing.[37] However, this explanation does not follow the facts for two reasons. One, these lower working-class people cannot afford luxury high-rise apartments; and two, a similar area in terms of housing is not being targeted by this law. The difference between the two areas is who lived there. The designated area for redevelopment was inhabited by pro-opposition citizens, and the similar area not touched is inhabited by pro regime supporters.[38]

Legislative Decree 19/2015

Decree 19 allows local councils to establish private joint stock companies with the objective of managing and investing the assets belonging to those local councils.[39] These companies consist of a chairman and members of local councils.[40] Decree 19 used in conjunction with Decree 66 is now paving the way for massive reconstruction projects around Damascus all with the input and direction of the Assad regime.[41]

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[33] Sage Smiley et. al., *'A new Syria': Law 10 reconstruction projects to commence in Damascus, backed by arsenal of demolition, expropriation legislation*, SYRIA DIRECT (Nov. 19, 2018), https://syriadirect.org/a-new-syria-law-10-reconstruction-projects-to-commence-in-damascus-backed-by-arsenal-of-demolition-expropriation-legislation/.

[34] *Id.*

[35] Joseph Daher, *Decree 66 and the Impact of its National Expansion*, ATLANTIC COUNCIL (Mar. 7, 2018), https://www.atlanticcouncil.org/blogs/syriasource/decree-66-and-the-impact-of-its-national-expansion/.

[36] *Luxury Marota City Project Shows Blueprint for Syria's Rebuilding Plans*, ARAB NEWS (Nov. 5, 2018), https://www.arabnews.com/node/1399411/middle-east.

[37] Daher, *supra* note 35.

[38] Daher, *supra* note 35.

[39] *Syrian Law- Recent Legislation*, SYRIAN L. J., http://www.syria.law/index.php/recent-legislation/ (last visited Feb. 17, 2020).

[40] *Syrian Law- Recent Legislation*, *supra* note 39.

[41] Smiley et al., *supra* note 33.

Law 21/2015 (Building Permit Fees Exemption Law)

Law 21/2015 allows property owners to avoid permit fees if the permits are for conflict-resultant damage from terroristic acts.[42] Of course, this would only apply to people who could prove ownership and the difficulties in that have already been enumerated. What is more striking is that this law would never apply to the zones designated by Decree 66 since those people do not have an option to rebuild, rather they are just given the unknown "share" of what is built on top of what was their property.

Law 23/2015 (Urban Planning Law)

Law 23 defines terms, allows areas to be rezoned or reclassified, and was designed to curb illegal housing settlements and develop urban expansion.[43] Illegal housing has been an epidemic the government has refused to deal with. This law may have been beneficial years ago to help stop the housing problems from becoming so prominent, but now this law can just be used as a tool to continue the appropriation of property, with little to no compensation.

Decree 11/2016 (Property Registration Law)

Decree 11 suspends property registration in land registries that the government deemed were under unstable conditions.[44] Since we have seen the broad definitions of terrorism, likely the application of this suspension decree would be similarly lax; thus, potentially allowing the unnecessary suspension of registration that negatively harms citizens' chances of being able to successfully claim their property.

Law 3/2018 (Removal of Rubble and Debris)

Law 3 allows the removal of rubble of buildings that were damaged from natural or abnormal causes but defines the term "rubble" broadly allowing for whole areas to be declared unfit for habitation.[45] Some have argued that several areas have been designated incorrectly.[46]

Law 19/2012 (Classifying Terrorist Activity)

The Syrian government has also enacted several counterterrorism laws that establish broad definition of the terms "terrorist act," "terrorist organization," and "terrorist support." Specifically, it defined a terrorist act as "every act intended to create panic among people, disturb public security, damage the infrastructure or institutional foundations of the state, that is committed via the use weapons, ammunition, explosives… or via the use of any tool that achieves the same purpose."[47] This broad definition allows the Syrian regime to punish serious acts of terrorism, but can also be used to criminalize peaceful human rights activity and dissent which leads to people being dispossessed of rightfully owned property.[48] Under this definition, a simple protest with picket signs could "disturb public security" if the government chose to enforce it this way. In fact, "acts such as distributing humanitarian aid, participating in protests, and documenting human

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[42] *Syrian Law- Recent Legislation*, *supra* note 39.
[43] *Syrian Law- Recent Legislation*, *supra* note 39.
[44] *Syrian Law- Recent Legislation*, *supra* note 39.
[45] Smiley et al., *supra* note 33.
[46] Smiley et al., *supra* note 33.
[47] *TIMEP Brief: Law No. 19 of 2012: Counter-terrorism Law*, THE TAHRIR INST. FOR MIDDLE E. POL'Y (Jan. 7, 2019), https://timep.org/reports-briefings/timep-brief-law-no-19-of-2012-counter-terrorism-law/.
[48] *Id.*

rights abuses" have all be allegations brought against activists.[49] These activists include four men whose crimes simply include basic expression activities like monitoring online news and publishing the names of the dead and disappeared.[50]

Law 22/2012 (Counterterrorism Court)

Law 22 established a special counter-terrorism court which grants a defendant the right to a defense, but the court is not subject to the normal due process rights that Syrian law requires.[51] This is the court used to enforce Law 19/2012. The deputy Middle East director at Human Rights Watch, Nadim Houry, has stated that there may be a new counterterrorism law, but there is nothing legal about putting peaceful activists on trial without safeguards for acts that have never been considered crimes.[52] This court is used to try both civilians and military personnel on terrorism related charges.[53] Some of the fair trial concerns include lack of appellate review, lack of an open proceeding and even forced confessions through torture.[54]

Two lawyers who represent people before this court were interviewed by Human Rights Watch. One lawyer described that at least 50,000 people have been charged and brought before this court.[55] The other lawyer explained that there were at least 35,000 nonviolent political detainees being tried and that he believed the court was set up just to target the opposition.[56]

Law 63/2012 (Punishments for Terrorism)

Law 63 authorizes officials to seize accused person's moveable and immovable property and issue a travel ban.[57] The Finance Ministry is using the overbroad definition to jail people not formally charged with a crime and even targeting families of identified people.[58] This act of collective punishment violates these people's property rights. Under the Fourth Geneva Convention of 1949, no protected person may be punished for an offense they did not personally commit and all reprisals against protected persons' property is prohibited.[59]

The government has encouraged people to return by widening the scope of the decree to punish families. The government is contradicting its stated intent and showing these families that they are at risk too. There are lists circulating online which contain information of people from once opposition-held territory. These lists include individuals whose assets had been seized, but also contain family member names such as parents, wives, and children.[60] When Human Rights Watch interviewed some of these individuals, they stated they were never notified their property was being affected.[61] They only found out after they tried to access, register, or conduct any

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[49] *Syria: Counterterrorism Court Used to Stifle Dissent*, HUM. RTS. WATCH (June 25, 2013), https://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent.
[50] *Id.*
[51] *TIMEP Brief: Law No. 19 of 2012: Counter-terrorism Law*, *supra* note 47.
[52] *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 49.
[53] *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 49.
[54] *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 49.
[55] *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 49.
[56] *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 49.
[57] *TIMEP Brief: Law No. 19 of 2012: Counter-terrorism Law*, *supra* note 47.
[58] *Syria: Suspects' Families Assets Seized*, HUM. RTS. WATCH (July 16, 2019), https://www.hrw.org/news/2019/07/16/syria-suspects-families-assets-seized.
[59] Geneva Convention Relative to the Treatment of Prisoners of War art. 33, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 310, https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf.
[60] *Syria: Suspects' Families Assets Seized*, *supra* note 58.
[61] *Syria: Suspects' Families Assets Seized*, *supra* note 58.

transaction with their property.[62] One person who was interviewed said he and his family lost their house, car, and factory.[63]

Enforcing a law too broadly can lead to many problems. One problem here is that the property does not solely belong to the people being charged. Many families depend on income from a business. For example, a local pharmacy was boarded up and the key confiscated by the local National Security branch. This person was the brother of an individual labeled a terrorist. The brother went to retrieve the key stating that he did not have contact with the rest of the family and that they depended on the pharmacy, but he was beaten and turned away without the key to his family's business.[64]

III. LAW 10/2018 (THE NEW AND EXPANDED RECONSTRUCTION LAW)

Obviously, reconstruction is necessary to allow people to return. However, there are large problems with a major law passed in 2018 with the main goal of rebuilding the nation. Law 10/2018 was passed to regulate and develop areas of informal settlements and enabling the government to reconstruct these areas for a better future.[65] On the outside, this law looks like a vehicle for the government to undertake necessary expropriation and offer fair compensation for people's affected property, but this is not the case.[66]

Law 10/2018 adds to a legal scheme that enables the government to identify land anywhere in the country and designate it for reconstruction.[67] This scheme is nothing new. Previously, Decree 66/2012 was enacted for this same purpose. Decree 66/2012 is limited to just areas of informal housing. Law 10/2015 makes the entire country susceptible to this seizure of property.

The process starts with the designation of an area as a redevelopment zone.[68] The law however does not set out any criteria for how an area will be designated, nor are any timelines set out.[69] "Once a zone is designated for reconstruction, all owners automatically lose their sole ownership status."[70] Then, authorities request a list of property owners from real estate authorities and land registries. If an owner's name is not on one of these lists, then, they have one year to prove ownership or else receive no compensation at all for the land they were dispossessed of.[71] If proof of ownership is not established, then, the owner is not compensated, and the property reverts to the province, town, or city and there is no right to appeal.[72] If ownership is established, then, the owner still loses the rights to their property. The owner instead receives a share of the total project, which holds uncertain value.[73]

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[62] *Syria: Suspects' Families Assets Seized*, *supra* note 58.
[63] *Syria: Suspects' Families Assets Seized*, *supra* note 58.
[64] *Syria: Suspects' Families Assets Seized*, *supra* note 58.
[65] Haugbolle, *supra* note 17.
[66] Haugbolle, *supra* note 17.
[67] *TIMEP Brief: Law No. 10 of 2018: Housing, Land, and Property*, THE TAHIR INST. FOR MIDDLE E. POL'Y (Dec. 10, 2018), https://timep.org/reports-briefings/timep-brief-law-no-10-of-2018-housing-land-and-property/.
[68] *Q&A: Syria's New Property Law,* HUM. RTS. WATCH (May 29, 2018), https://www.hrw.org/news/2018/05/29/qa-syrias-new-property-law.
[69] *Id.*
[70] Haugbolle, *supra* note 17.
[71] *TIMEP Brief: L. No. 10 of 2018: Housing, Land, and Prop.*, *supra* note 67.
[72] *Q&A: Syria's New Property Law*, *supra* note 68.
[73] *Q&A: Syria's New Property Law*, *supra* note 68.

When this law was first passed, the period to prove ownership was limited to just thirty days.[74] At the outset, this was a radical decision that seemed to have no purpose except to steal property from people, but there was substantial outcry about the impossible to reach thirty-day timeframe and the Law was amended. The law now allows proof to be furnished within one year.[75]

Problems with Law 10/2018

On its face, the law seems needed and potentially a good plan. However, there are several aspects and flaws to this law that will lead to the dispossession of people's property without any just compensation.

The first problem would be that owners lose sole ownership of the property automatically when a new area is designated.[76] Even if the rightful owner can get past the several obstacles and prove prior ownership there is not much they can actually do with their property since they are barred from building or selling anything related to their property.[77] Meaning if they could return and had the means to rebuild their home, they would not be allowed. When ownership is proven the owner receives shares of the new regulatory area and not monetary compensation or any right to the property itself.[78] These shares are supposed to be based on property value, but it is unclear how share percentages will be determined among everyone who is entitled to a share leading to an uncertain future.[79]

There are three options that allow owners to use these shares and create some kind of value, but the ways do not come without flaws and an option has to be picked within one year or the shares are auctioned off and the owner receives no compensation.[80] The first option allows for the owners to establish a joint company to pool together shares which can be used to buy back the property and then build in the regulated area.[81] However, the process of setting up one of these companies is time consuming and expensive.[82] Since there is a one year limit on the exercise of these options before they are sold at public auction, this option is impractical for these land owners.

The second option allows landowners to sell shares to existing companies. Problems associated with this option are the fees involved with these companies. They are high and there is no limit to what fees can be charged. There are also few companies in existence, and many have strong ties to the government facilitating crony capitalism.[83]

The last option allows these landowners, now shareholders, to sell their own shares at public option.[84] These public auctions lead to unfair and uncertain results as well since the shares are often sold for well under market value.[85] Even if everything went according to plan, these landowners are still unfairly compensated for their stolen property.

There are also several practical matters that make this law yield unfair results. In addition to the severe informal housing problem that has plagued Syria in the last couple decades

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[74] *Q&A: Syria's New Property Law*, *supra* note 68.
[75] Haugbolle, *supra* note 17.
[76] Haugbolle, *supra* note 17.
[77] Haugbolle, *supra* note 17.
[78] Martin & Vermeersch, *supra* note 18, at 6.
[79] Martin & Vermeersch, *supra* note 18, at 6.
[80] Martin & Vermeersch, *supra* note 18, at 6.
[81] Martin & Vermeersch, *supra* note 18, at 6.
[82] Martin & Vermeersch, *supra* note 18, at 6.
[83] Martin & Vermeersch, *supra* note 18, at 6-7.
[84] Martin & Vermeersch, *supra* note 18, at 6-7.
[85] Martin & Vermeersch, *supra* note 18, at 6-7.

accounting for roughly forty percent of the affected population's housing, there are also many problems for people who had a formal title to their land.[86] The conflict caused severe damage throughout the country, including to many land registries, some even conspicuously burned on purpose.[87] The Syrian Human Rights Council said about regime purposefully destroyed ownership registries in opposition areas, pointing to the bombing of a property registry building in Homs city at a time when the area was far away from any fighting.[88] There was no major effort to digitize any of these records until 2010, but since this was 1) only for new records and 2) halted by the start of the civil war in 2011, not many were actually digitized.[89] Due to the fact that many land registries were destroyed and only fifty percent of Syrian land was officially registered before the war, it is nearly impossible for anyone without their deeds in hand to prove their ownership.[90]

With the massive refugee crisis caused by the civil war, many Syrians are without basic documents needed for any transaction. Seventy percent of refugees lack basic identification documents and one-third of the refugees who had possessed the proper deeds know they no longer exist.[91] At least half of the other refugees who left their documents behind fear that they will not be there upon their return, either because they were lost during the flight to safety or destroyed in the war.[92]

In addition to the difficulties in proving ownership of property, there are also difficulties in getting back to Syria. Law 10/2018 requires the owner of the property to appear in person to prove land ownership or otherwise designate a family member as a proxy to act on his/her behalf.[93] Returning home for many is an uncertain and risky proposition. Persons that had their property confiscated under Decree 63/2012 and Law 19/2012 receive a strong message that they were not welcome to return.[94] If these people return, they face a significant risk of persecution, arbitrary arrest, and mistreatment by security services.[95] In 2018, many refugees were being forced to return to Syria from Lebanon against United Nations warnings.[96]

People designated for return are supposed to be informed about their current status with the Syrian government, receiving notice if they are wanted as criminals or not so they can decide to return.[97] However, some people are being arrested upon their return despite assurances. For example, Mohammed Al Domani was arrested at the Syrian border during a trip organized by the Lebanon General Security.[98] Another arrest involved Ali Al Shini, who was arrested after being reassured by Syrian reconciliation officials stating that he was not being sought by authorities.[99]

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[86] Valerie Clerc, *Informal settlements in the Syrian conflict: urban planning as a weapon*, 40 ALEXANDRINE PRESS 34, 41 (Aug. 19, 2015).
[87] Mat Nashed, *Syrians struggle to reclaim stolen homes*, DEUTSCHE WELLE (Feb. 5, 2017), https://www.dw.com/en/syrians-struggle-to-reclaim-stolen-homes/a-38663522.
[88] Souriatna, *The Regime Begins to Reap the Rewards of Law No. 10*, THE SYRIAN OBSERVER (June 19, 2018), https://syrianobserver.com/EN/features/20140/the_regime_begins_reap_rewards_law_no.html.
[89] Martin & Vermeersch, *supra* note 18, at 5.
[90] *Q&A: Syria's New Property Law*, *supra* note 68.
[91] Samer Aburass, *Syrian Refugees' Documentation Crisis*, NORWEGIAN REFUGEE COUNCIL (Jan. 26, 2017), https://www.nrc.no/news/2017/january/syraian-refugees-documentation-crisis/.
[92] *Id.*
[93] Martin & Vermeersch, *supra* note 18, at 6.
[94] *Q&A: Syria's New Property Law*, *supra* note 68.
[95] *Q&A: Syria's New Property Law*, *supra* note 68.
[96] Richard Hall, *Some Syrians are Returning home to Arrests as Others Brave the sea*, THE NATIONAL (Sept. 26, 2018).
[97] *Id.*
[98] *Id.*
[99] *Id.*

A Syrian campaigner for Amnesty International stated that many of these returning refugees are viewed by the Syrian government as being pro-opposition and not loyal to the government, causing fear of retaliation.[100] She further stated: "Arbitrary arrests, enforce[d] disappearances, property confiscation, harassment, social stigma, these are the dangers."[101]

Further, designating a proxy is a difficult and potentially dangerous thing to do. The process is time-consuming because it can take a minimum of three months to designate a power of attorney.[102] With a limited amount of time already, this is valuable time lost and another extraneous obstacle to navigate. These representatives also cannot have a criminal record or be classified as a terrorist.[103] This is a major problem because the local authorities can interpret what being a criminal means broadly and link any person with some association with the opposition.[104] This law often targets properties where many displaced persons are from and other areas that have been completely evacuated. This leads to actions being carried out with little to no local input from people about their neighborhood.[105]

Lastly, the overall law involves a large scheme of complicated legal mechanisms that local governments are not well-equipped to handle, and displaced refugees are not able to follow.[106] The conflict has proven to perpetuate rampant fraud and corruption, and the atmosphere is not ready for such large reconstruction projects with no outside oversight.[107]

The Syrian constitution also provides certain protections for property. Article 15 of the current constitution establishes when private property will be protected. Under this Article, private property will be always protected except when the confiscation would be in the public interest or when there is war or disaster.[108] Both exceptions require fair compensation and a final court ruling before the confiscation can commence.[109]

IV. INTERNATIONAL LAW

To date there is no binding form of international property law that exists today, but that does not mean these refugees and displaced persons are without protections. As John Sprankling – a distinguished professor at the McGeorge School of Law – said "a broad… enforceable right to property has been unsuccessful to date" and "remains an aspiration, not a reality."[110] Historically, property law has been governed by legal positivism – property rights only exist where they are recognized by the national government – but there has been a developing form of public/international law in the realm of property.[111]

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[100] *Id.*
[101] Hall, *supra* note 93.
[102] *Syria extends time for post-war property claims under disputed law*, REUTERS (Nov. 12, 2018, 9:25 AM), https://www.reuters.com/article/us-mideast-crisis-syria-property/syria-extends-time-for-post-war-property-claims-under-disputed-law-idUSKCN1NH1OD.
[103] Martin & Vermeersch, *supra* note 18, at 6.
[104] Martin & Vermeersch, *supra* note 18, at 6.
[105] Martin & Vermeersch, *supra* note 18, at 6.
[106] Martin & Vermeersch, *supra* note 18, at 6.
[107] Martin & Vermeersch, *supra* note 18, at 6.
[108] THE SYRIAN CONSTITUTION Feb. 26, 2012, art. 15.
[109] *Id.*
[110] John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461, 468 (2012).
[111] *Id.* at 464-72.

Post-World War II, the world started taking notice and developing a discourse for human rights which included consideration of a global right to property.[112] This led to the adoption of the Universal Declaration of Human Rights in 1948.[113] In this declaration, a right to property is referenced Article 17, which states "Everyone has the right to own property alone as well as in association with others" and that "No one shall be arbitrarily deprived of his property."[114] This being the first time this idea of an international property right was written down, it only carried moral weight. Eventually this idea was included in two proposed treaties, the International Covenant on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights. Although the drafting commission had trouble creating an acceptable formulation, there was broad agreement on the basic principles that 1) there is a right to own property, and 2) no one can be arbitrarily deprived of that property.[115] This still did not create a binding treaty because the complete treaty was rejected by a small margin.[116] The treaty would pass in 1966 but not include the property right.[117]

Interest would be sparked again after the fall of the Berlin Wall. This caused Luis Valencia Rodriguez to write a report with the goal of finding how property rights can enhance the exercise of human rights and freedoms.[118] The 1993 report found that there is no doubt that a universal human right to own property exists, but that it is difficult to establish a universal right to private property because of the barriers to incorporating international law into national law and having the domestic courts give it sufficient weight.[119]

There may not be a binding obligation on nations to follow these property laws, but these are becoming legal norms that nations have an incentive to follow and are vital to the protection of human rights. In 2007 the U.N. Special Rapporteur issued the Basic Principles and Guidelines on Development-Based Evictions and Displacement.[120] The report is still not a binding treaty but can be considered aspirational norms among the international community supported by human rights instruments to which the Syrian state is a party. This report finds a state obligation exists to refrain from forced evictions based on several legal instruments which include:

> Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (art. 11, para. 1), the Convention on the Rights of the Child (art. 27, para. 3), the non-discrimination provisions found in article 14, paragraph 2(h), of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.[121]

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[112] *Id.* at 465.
[113] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (Although this is a nonbinding instrument, its drafters intended it to culminate into a binding treaty eventually.).
[114] *Id.* at para. 17.
[115] Sprankling, *supra* note 110, at 466-67.
[116] Sprankling, *supra* note 110, at 467.
[117] Sprankling, *supra* note 110.
[118] Sprankling, *supra* note 110, at 468.
[119] Sprankling, *supra* note 110, at 468.
[120] *Forced Evictions*, UNITED NATIONS HUM. RTS., https://www.ohchr.org/en/Issues/Housing/Pages/ForcedEvictions.aspx (last visited Mar. 4, 2021).
[121] Miloon Kothari (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), *Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I of the Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 1, U.N. Human

The report finds that forced evictions constitute gross violations of several human rights which include the rights to adequate housing, food, water, and health.[122] It further states that these evictions must be carried with full accordance with international human rights and humanitarian law.[123] Prior to these evictions being executed, the report lists several requirements regarding notice and opportunities to be heard:

> (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.[124]

After evictions take place, the state is then obligated to provide just compensation and enough alternative accommodations or restitution and at a minimum provide adequate food, water, and sanitation.[125]

V. RESHAPING OF DEMOGRAPHICS THROUGH PROPERTY CONTROL

The current Syrian government has been using these types of redevelopment laws for its own benefit and at the expense of its people for decades. Not only is Law 10 already violative of these property owners' rights, Syria is also trying to replace the people who live there with Assad supporters.

There have been several instances where Syria has used these laws to punish regime opponents and reward supporters. In Qaboun, displaced persons were prevented from returning to their properties in former anti-government-held areas.[126] Residents here reported that the government was demolishing their properties with no warning and no alternative housing or compensation.[127] These acts were completed by using Law 10.[128] Two months after Law 10 was issued regime militias used the new law to obtain all the land whose owners were absent, without allowing for any of the procedures in Law 10.[129] The first three regions selected for redevelopment under Law 10 were all at the heart of the opposition to the Assad regime, including places like

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Rights Council, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) [hereinafter *Basic Principles*] (The Syrian Arab Republic is a State Party to all these human rights instruments.).

[122] *Id.* at para. 6.

[123] *Id.* at para. 6.

[124] *Id.* at para. 37.

[125] *Id.* at para. 52.

[126] *Syria: Residents Blocked From Returning*, HUM. RTS. WATCH (Oct. 16, 2018), https://www.hrw.org/news/2018/10/16/syria-residents-blocked-returning.

[127] *Id.*

[128] *Id.*

[129] Souriatna, *supra* note 88.

Baba Amr, Sultaniyyeh, and Jobar in Homs, as well as informal settlements in Aleppo.[130] A reconstruction project was completed under Law 66 – the predecessor to Law 10 – in Damascus, but residents of former opposition territories are being forbidden from residing in the newly built development.[131] The combination of property seizure in these old opposition heavy areas and the new installation of Sunni / Pro-Assad residents is making it almost impossible for these former residents to return home.[132] More demographic change has occurred in the city of Homs through forced displacement and prepossession of property by Assad supporters.[133] A former resident, Abu Rami, said he was able to repair his home from the war's destruction, but then had his property seized by an Alawite shabeeha group and he was threatened with death if he tried to reclaim his property.[134]

VI. SYRIA IS VIOLATING ITS CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS

Looking at Law 10/2018, the Syrian government has failed to live up to any of the standards set forth in the Basic Principles and are violating basic human rights. The law also fails to conform to legal expropriation under Syrian law. The scheme in which property is confiscated under Law 10 might find support under the disaster exception, but it likely cannot meet the final court order or fair compensation requirement. Although it is uncertain, the confiscation of property is likely not followed by just compensation.

The shares simply to not provide an owner with the compensation that was once their house. First, the amount of money the shares will be worth is uncertain. Second, the ability of these refugees and displaced persons being able to arrive in person to prove ownership will be difficult and impossible for many. Third, finding the necessary documents will be challenging since many were destroyed and many others do not know the location of their documents. Of course, these people can attempt to prove their ownership through witness testimony, but this is likely difficult when around half of the Syrian pre-war population has been displaced.

These property ownership decisions are also not intended to be made by a final judicial ruling, or at least not a fair one. An owner can get a judicial ruling by providing the necessary documents, but if an owner has not presented a case for ownership and loses the property, there is no appeal.

The Special Rapporteur on Adequate Housing has laid out several international law norms that relate to a state's obligation to provide enough housing for its citizens. Syria is not in conformity with any of them. For example, the report defines four human rights instruments where that do impose legal obligations on states and finds that these instruments when considered together, impose a duty on states to not unjustly confiscate/evict its people. The report stated that a State can perform forced evictions when it is carried out in accordance with the law and in conformity with the provisions of international human rights treaties.[135] Arguably, Syria is not in

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[130] Emily Stubblefield & Sandra Joireman, *Law, Violence, and Property Expropriation in Syria: Impediments to Restitution and Return,* 8 LAND 1, 7 (Nov. 13, 2019).

[131] Ibrahim Abu Ahmad, *Assad's Law 10: Reshaping Syria's Demographics*, WASH. INST. (Sept. 17, 2018), https://www.washingtoninstitute.org/fikraforum/view/assads-law-10-reshaping-syrias-demographics.

[132] Stubblefield & Joireman, *supra* note 130, at 7.

[133] Al-Souria Net, *Regime Endorses Seizure of Property in Homs by Shiites and Alawites*, THE SYRIAN OBSERVER (Apr. 10, 2015), https://syrianobserver.com/EN/news/30440/regime_endorses_seizure_property_homs_shiites_alawites.html.

[134] *Id.*

[135] Basic Principles, *supra* note 121.

accordance with either set of laws. Above it was established that Law 10 really does not adequately ensure people are being fairly compensated for their property, nor receiving proper judicial treatment required by its constitution. The Basic Principle doctrine also laid out several of the legal instruments that here are binding on Syria which Law 10 is violative of.

First, the Universal Declaration of Human Rights requires that states have to provide an adequate standard of living which includes a right to food, clothing, and housing.[136] Since Law 10 forces people to leave, or does not allow them to come back it is imposing forced evictions on citizens. The Syrian government may be able to argue that this is a necessary reason to preform forced evictions which it arguably is, but what does not conform to this is the lack of adequate alternative housing options. These forced evictions do not encourage people to return to their property and does not ensure an adequate standard of living for its people.

Second, the Convention on the Rights of the Child imposes a duty to assist parents in providing "nutrition, clothing, and housing" for the child.[137] This forced eviction with little alternative means of living accommodations or compensation is not fulfilling this obligation.

Third, the conventions to eliminate discrimination against women and race imposes state obligations to ensure everyone has access to adequate housing.[138] Syria has been discouraging people from coming home and taking away their property without just compensation. This is not fulfilling this obligation either. Although, there is no direct obligation under international law that gives individuals a right to property that cannot be arbitrarily disposed of, there are many other legal mechanisms that can impose a duty on Syria and not allow it to arbitrarily confiscate its citizens property.

Listed above, the Basic Principles also outline five basic elements any lawful eviction program must have that Law 10 mechanisms do not contain. First, a nation must give appropriate notice to affected persons that eviction is being considered. Here, this this first element is not met since notice in a local newspaper really does not seem like enough since there are so many people scattered across the world due to the conflict. The element is also not met since there is never a public hearing, rather an area is designated, and it is already too late, eviction has started.

Second, plans referencing land records and resettlement plans addressing vulnerable groups need to be given out in advance. There is no indication that any resettlement plans are even considered and certainly they are not given out in advance to anyone, yet alone vulnerable individuals.

Third, there needs to be a reasonable time for comment and objection to the proposed plan. This element is also not met since there is no proposed plan, the areas are designated by decree with no time for debate.

Fourth, there needs to be opportunities and efforts to facilitate legal, technical, and other advice. In theory this law may be met since anyone can go and try to prove land ownership because those people have access to an attorney. However, with the practical implications of the refugee crisis and the fear some have of returning, this element is not practically met either.

Lastly, there should be public hearings that allow individuals to challenge the eviction decision and present alternative proposals. This last element is not met either since there is no opportunity to challenge the eviction since the owners lose all ownership rights and receive a share in the new buildings instead and there is no input allowed by these prior owners, the local authorities put the plans together on their own.

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[136] G.A. Res. 2200A (XXI), at art. 11, para. 1 (Dec. 16, 1966).
[137] G.A. Res. 44/25, at art. 27, para. 3 (Nov. 20, 1989).
[138] G.A. Res. 34/180, at art. 14, para. 2(h) (Dec. 18, 1979); G.A. Res. 2106 (XX), at art. 5(e) (Dec. 21, 1965).

VII. CALL TO INTERNATIONAL COMMUNITY TO RESPOND & CONCLUSION

This regime's goal should be to allow all the refugees to return home. Arguably there is an obligation to facilitate their return. There are several United Nations documents supporting a return obligation including:

- *The Universal Declaration of Human Rights* which states that everyone has a right to leave and return to his own country;
- The International Covenant on Civil and Political Rights which establishes the right to return through the right to freedom of movement provision; and
- The Convention Relating to the Status of Refugees which found that "international refugee law and human rights law mutually reinforce each other."[139]

Bashar al-Assad seems to understand this since he has said: "We encourage every Syrian to come back to Syria."[140] However, it is not certain that he really means all Syrians since his regime has showed a zero-tolerance policy for dissenting viewpoints; enacted countless laws that take property away from rightful owners; and even allowed supporters to move in. The international community needs to act. Not only will this effect individual property rights, but the absence of such a large portion of citizens will have a significant impact on elections, justice, and accountability.[141] So far, there has been no outside pressure from the international community to build the conditions for voluntary return.[142] The inclusion of "HLP" rights need to be included in the negotiation process and peace talks to ensure legitimacy and sustainability of any post-conflict outcome.[143]

VIII. CONCLUSION

In conclusion, it seems apparent that the current Syrian regime is unconcerned with allowing refugees to return home. It has imposed impossible burden on refugees and displaced persons for reclaiming property which is leading to complete loss of property for many individuals. This confiscation of property is a violation of domestic and international law and may even have more sinister goals at hand such as demographic reshaping to illegitimately bolster support for the current regime. More help from fellow nations in the international community are needed.

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[139] *Human Rights Watch Policy on the Right to Return*, HUM. RTS. WATCH, https://www.hrw.org/legacy/campaigns/israel/return/ (last visited on Feb. 23, 2020).
[140] Mai El-Sadany, *When Assad asks Syrians to come home, here's what he really means*, THE HILL (Aug. 16, 2018).
[141] Deyaa Alwishdi & Rebecca Hamilton, *Paying Attention to Land Rights in Syria Negotiations*, JUST SECURITY (Apr. 12, 2018).
[142] *Id.*
[143] *Id.*