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

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THE PLANET V. BOLSONARO: HOW AN INTERNATIONAL CRIME OF ECOCIDE COULD AID IN ENFORCING THE UNFCCC

Matthew J. McCartin[1]

I. INTRODUCTION

Curbing the effects of anthropogenic climate change is the biggest challenge ever faced by humanity. If left unaddressed, or under addressed, anthropogenic climate change could pose an existential crisis for civilization. A rise in the global temperature by two degrees celsius, above pre-industrial levels, could lead to a loss of biodiversity,[2] flooding of coastal cities,[3] crop failure,[4] famine,[5] pandemics,[6] and extinction.[7] In the words of American punk band Rise Against, "this is not a test . . . this is cardiac arrest."[8] To prevent such a "cardiac arrest," the planet's rainforests must be preserved and protected because of their critical role as "carbon sinks" for the planet.[9]

The Amazon is one such rainforest that must be preserved and protected if humanity is serious about correcting its course on climate change. The Amazon Rainforest is biologically the richest area on Earth, with about twenty-five percent of global diversity calling the region home.[10]

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[1] Syracuse University College of Law J.D. 2022, Editor-in-Chief of the *Syracuse Journal of International Law and Commerce*. The author wishes to thank Professor Mark Nevitt for facilitating this paper through his Law of the Global Commons course, his feedback, and his never-ending enthusiasm for international law and climate change. The author also wishes to thank Professor C. Cora True-Frost, Christopher Martz, Audrey E. P. Fick, Justin Lange, AJ Strom, Mia Bonardi, and Olivia Moulds for their feedback and ideas. The author may be reached at mmccarti@syr.edu. This article was written prior to the Brazilian Presidential Election of 2022 where President Luiz Inacio Lula da Silva was re-elected, ousting incumbent President Jair Bolsonaro.

[2] *See* Muzafar Shah Habibullah et al., *Impact of Climate Change on Biodiversity Loss: Global Evidence*, 29, ENVTL. SCI. & POLLUTION RES., 1073 (2021), https://link.springer.com/article/10.1007/s11356-021-15702-8 (finding that "all three climate change variables – temperature, precipitation, and the number of natural disasters occurrences – increase biodiversity loss.").

[3] *See* Carol Rasmussen, *Study Projects a Surge in Coastal Flooding, Starting in 2030s*, NAT'L AERONAUTICS & SPACE ADMIN. (July 7, 2021), https://www.jpl.nasa.gov/news/study-projects-a-surge-in-coastal-flooding-starting-in-2030s ((asserting that every U.S. coast will experience "rapidly increasing high-tide floods) by the mid-2030s, "when a lunar cycle will amplify rising sea levels caused by climate change.").

[4] *See* Andrew J. Challinor et al., *Increased Crop Failure Due to Climate Change: Assessing Adaptation Options Using Models and Socio-economic Data for Wheat in China*,, ENVTL. RES. LETTERS (Sept. 29, 2010), https://iopscience.iop.org/article/10.1088/1748-9326/5/3/034012/meta ("Crop failure rates increase with mean temperature, with increases in maximum failure rates being greater than those in median failure rates.").

[5] *See* Andrew Harding, *Madagascar on the Brink of Climate Change-Induced Famine*, BBC (Aug. 25, 2021), https://www.bbc.com/news/world-africa-58303792.

[6] *See How Climate Change is Contributing to Skyrocketing Rates of Infectious Disease*, PROPUBLICA (May 7, 2020), https://www.propublica.org/article/climate-infectious-diseases.

[7] *See* Phoebe Weston, *Top Scientists Warn of "Ghastly Future of Mass Extinction" and Climate Disruption*, THE GUARDIAN (Jan. 13, 2021), https://www.theguardian.com/environment/2021/jan/13/top-scientists-warn-of-ghastly-future-of-mass-extinction-and-climate-disruption-aoe.

[8] RISE AGAINST, *Collapse (Post-Amerika), on* APPEAL TO REASON (Interscope Records 2008).

[9] *See,* Nancy Harris & David Gibbs, *Forests Absorb Twice As Much Carbon As They Emit Each Year*, WORLD RES. INST. (Jan. 21, 2021), https://www.wri.org/insights/forests-absorb-twice-much-carbon-they-emit-each-year.

[10] Doyle Rice, *What would the Earth be like Without the Amazon Rainforest?*, USA TODAY (Aug. 28, 2019), https://www.usatoday.com/story/news/nation/2019/08/28/amazon-rain-forest-what-would-earth-like-without-

Being home to the largest tropical forests on Earth allows the Amazon to serve as a "carbon sink" for the planet.[11] However, deforestation has devastated the Amazon and curtailed its ability to act as a carbon sink.[12] A recent study found that the eastern and southeastern Amazonia have instead been acting as "a net carbon source" due to "more deforestation, warming and moisture stress."[13]

Deforestation of the Amazon has increased by nine and a half percent year-on-year under former President Jair Bolsonaro.[14] Shortly after assuming the Brazilian presidency, Bolsonaro told former U.S. Vice President Al Gore that "he wants to exploit the riches of the Amazon in partnership with the United States."[15] Later in 2019, Brazilian Minister for Foreign Affairs Ernesto Araújo met with former U.S. Secretary of State Mike Pompeo and announced a bilateral agreement that allowed the Amazon Rainforest to open for private sector development.[16]

This article proceeds in four parts and argues that the addition of an international crime of ecocide to the Rome Statute can ensure enforcement of the U.N. Framework Convention on Climate Change ("UNFCCC"). In Part II, the actions of the Bolsonaro regime in the Amazon, as well as the complaint filed with the International Criminal Court ("ICC") alleging that such actions rise to the level of a crime against humanity, are discussed. Part III discusses prior and current attempts to add the crime of "ecocide" to the Rome Statute of the International Criminal Court ("Rome Statute"), as well as new developments that have led to a recognition of the new human right to a clean environment. Lastly, Part IV asserts that the ICC's willingness to investigate and prosecute Bolsonaro for the alleged crime against humanity will gauge the international community's actual willingness to confront climate change and may determine the legitimacy of the ICC moving forward.

II. BRAZIL'S ATTEMPTS TO END DEFORESTATION, THE BOLSONARO REGIME'S REVERSAL, AND A FILING AT THE ICC.

In October 2021, AllRise, an Austrian environmental group, announced[17] that it filed an

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it/2130430001/.

[11] *Role of Amazon as Carbon Sink Declines: Nature Study*, WORLD METEOROLOGICAL ORG. (July 20, 2021), https://public.wmo.int/en/media/news/role-of-amazon-carbon-sink-declines-nature-study.

[12] *See* Xiao Fang et al., *How Deregulation, Drought, and Increasing Fire Impact Amazonian Biodiversity,* 597 NATURE 516, 516-21 (2021); Daniel Stolte, *Study Shows Impacts of Deforestation and Forest Burning on Amazon Biodiversity*, UNIV. ARIZONA (Sept. 1, 2021), https://news.arizona.edu/story/study-shows-impacts-deforestation-and-forest-burning-amazon-biodiversity.

[13] Luciana V. Gatti et al., *Amazonia as a Carbon Source Linked to Deforestation and Climate Change*, 595 NATURE 388, 388 (2021).

[14] *Brazil: Accelerating deforestation of Amazon a direct result of Bolsonaro's policies*, AMNESTY INT'L (Dec. 2, 2020), https://www.amnesty.org/en/latest/press-release/2020/12/brazil-accelerating-deforestation-of-amazon-a-direct-result-of-bolsonaros-policies/.

[15] "*We Want to Exploit the Amazon's Resources with the US"– Bolsonaro to Al Gore*, BRASILWIRE (Aug. 24, 2020), https://www.brasilwire.com/we-want-to-exploit-the-amazons-resources-together-with-the-us-says-bolsonaro-to-al-gore.

[16] *How Wall Street Recolonized Brazil. Part One.*, BRASILWIRE (Oct. 7, 2019), https://www.brasilwire.com/convivial-war-how-wall-street-recolonized-brazil-part-one/.

[17] ThePlanetVs (@ThePlanetVs), TWITTER (Oct. 12, 2021, 2:01 AM), https://twitter.com/ThePlanetVS/status/1447804588518744065?s=20; *see also* Ian Profiri, *Brazil President Accused of 'Crimes Agianst Humanity' for Rainforest Destruction*, JURIST (Oct. 13, 2021), https://www.jurist.org/news/2021/10/environmental-group-

official complaint with the ICC. In this complaint, AllRise accused former Brazilian President Jair Bolsonaro of crimes against humanity for his involvement in the destruction of the Brazilian portion of the Amazon Rainforest.[18] This is the first time that a complaint has sought to explicitly connect deforestation to loss of life. The filing alleged that rampant deforestation under Bolsonaro will indirectly cause approximately 180,000 excess heat-related deaths globally during the twenty-first century.[19]

A. PRIOR EFFORTS TO CURB DEFORESTATION OF THE AMAZON.

Prior to Bolsonaro assuming the presidency, Brazil was on track to drastically curb deforestation rates in the Brazilian Amazon. When elected in 2003, President Luiz Inacio Lula da Silva ("President Lula") launched an effort to address illegal logging and other activities that threatened the Amazon.[20] In 2009 Brazil adopted Law 12.187, which established the National Policy of Climate Change ("PNMC"), and pursued "voluntary actions for the mitigation of greenhouse gasses."[21] Under Law 12.187, Brazil committed to voluntarily reducing emissions to 36.1%-38.9% by 2020 through the reduction of Amazonian deforestation, restoration of grazing land, and changes in agricultural practices among other initiatives.[22]

In 2010, under the leadership of President Lula, Amazon deforestation fell to a new low. From August 2009 to July 2010, only 6,450 square kilometers of rainforest was cleared, which accounted for a fourteen percent decrease when compared to the prior twelve-month period.[23] According to the acting Environment Minister at the time, Izabella Teixeira, this decrease put Brazil on track to cut deforestation to 5,000 square kilometers by 2017.[24]

Two years later, the Brazilian Congress adopted the Brazilian Forest Code (2012 Forest Code)[25] after "one of the greatest political debates in the history of the Brazilian Congress."[26] The

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announces-icc-suit-against-bolsonaro-for-rainforest-destruction/.

[18] AllRise, *Communication Under Article 15 of the Rome Statute of the International Criminal Court Regarding the Commission of Crimes Against Humanity Against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to Present, perpetrated by Brazilian President Jair Messias Bolsonaro and Principal Actors of his Former or Current Administration*, (Oct. 12, 2021), https://drive.google.com/file/d/1o9-mYkCa3CngLF6C3ZE2Zile38-mnjO1/view [hereinafter AllRise Complaint].

[19] *Brazil's Bolsonaro Accused of 'Crimes Against Humanity' at ICC*, FRANCE 24 (Oct. 12, 2021), https://www.france24.com/en/live-news/20211012-brazil-s-bolsonaro-accused-of-crimes-against-humanity-at-icc.

[20] *Reducing Deforestation in Brazil*, CTR. FOR PUB. IMPACT (Apr. 14, 2016), https://www.centreforpublicimpact.org/case-study/reducing-deforestation-in-brazil.

[21] Carlos Ludeña & Maria Netto, *Brazil: Mitigation and Adaptation to Climate Change: Theoretical Framework for the Elaboration of IDB's Strategy in Brazil*, INTER-AM. DEV. BANK [IDB], (Aug. 2011), at 1. https://publications.iadb.org/publications/english/document/Brazil-Mitigation-and-Adaptation-to-Climate-Change.pdf.

[22] *Id.*

[23] *Brazil: Amazon Deforestation Falls to New Low*, BBC (Dec. 1, 2010), https://www.bbc.com/news/world-latin-america-11888875.

[24] *Id.*

[25] Lei No. 12,651, de 25 de Maio de 2012, C.FLOR., 28 de Maio de 2012 (Braz.).

[26] Joana Chiavari & Cristina Leme Lopes, *Amendments to a Provisional Measure Threaten the Implementation of Brazil's new Forest Code*, CLIMATE POL'Y INST. (Mar. 15, 2019), https://www.climatepolicyinitiative.org/publication/amendments-of-a-provisional-measure-threaten-the-implementation-of-brazils-new-forest-code/.

2012 Forest Code, established the Sistema Nacional de Cadastro Ambiental Rural ("SICAR"), a new national land registry, which the government claimed could end illegal deforestation "by greatly reducing the cost of monitoring, enforcement, and compliance."[27] The aim of SICAR was to register 5,000,000 rural properties throughout Brazil by May of 2016; however, only 3,700,000 properties were registered by August 2016.[28] SICAR, as well as other state-run programs such as Cadastro Ambiental Rural, aided landowners in "showcas[ing] compliance with environmental regulations" and aided policy makers in monitoring land use in rural areas.[29]

SICAR had the potential of slowing, or stopping, deforestation in the Brazilian Amazon by creating a land registry, which would allow the government to "link new deforestation to specific landowners."[30] However, SICAR has not drastically curbed deforestation rates, due to deregulation under President Jair Bolsonaro.[31]

B. THE BOLSONARO REGIME'S OFFICIAL POLICY OF DESTRUCTION IN THE AMAZON.

In the 2019 presidential race, Jair Messias Bolsonaro, an ultra-conservative, arguably far right, politician, with the help and support of evangelical Christians, wealthy agribusiness interests, and the weapons lobby (collectively referred to as the "Bible, Beef, and Bullets Caucus"),[32] defeated President Lula. When Bolsonaro took office, he dismantled environmental protections, causing deforestation of the Amazon to rapidly increase.[33]

Under the Bolsonaro regime, deforestation increased "more than thirty percent during the first year of his administration and an additional nine and a half percent during the second year."[34] The destruction of the Brazilian Amazon "is driven largely by criminal networks," known as Rainforest Mafias,[35] who utilize violence and intimidation against protectors of the Amazon.[36]

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[27] Andrea A. Azevedo et al., *Limits of Brazil's Forest Code as a means to end illegal deforestation*, 29 PROC. NAT'L ACAD. SCI. U.S. 7653 (July 3, 2017).

[28] Andrea A. Azevedo et al., *supra* note 27.

[29] Brooks Hays, *Brazil's land Registration Program Has Slowed Deforestation, Study Finds*, UNITED PRESS INT'L (Nov. 1, 2017), https://www.upi.com/Science_News/2017/11/01/Brazils-land-registration-program-has-slowed-deforestation-study-finds/8771509570028/.

[30] Azevedo, *supra* note 27.

[31] Jenny Gonzales, *Brazil Dismantles Environmental Laws via Huge Surge in Executive Acts: Study*, MONGABAY (Aug. 5, 2020), https://news.mongabay.com/2020/08/brazil-end-runs-environmental-laws-via-huge-surge-in-executive-acts-study/.

[32] *See generally* RICHARD LAPPER, BEEF, BIBLE AND BULLETS: BRAZIL IN THE AGE OF BOLSONARO (Manchester Uni. Press eds., 2021) (discussing Bolsonaro's rise to power with the aid of such interests); *See also* Pablo Stefanoni, *Bible, Beef and Bullets*, INT'L POL. SOCIO. (Oct. 26, 2018), *https://www.ips-journal.eu/regions/latin-america/bible-beef-and-bullets-3052/*.

[33] Jake Spring & Lisandra Paraguassu, *Deforestation in Brazil's Amazon Skyrockets to 12-year High Under Bolsonaro*, REUTERS (Nov. 30, 2020, 10:45pm), https://www.reuters.com/article/brazil-environment-idINKBN28B3MV.

[34] *Crisis in the Brazilian Amazon*, HUM. RTS. WATCH (Mar. 11, 2021), https://www.hrw.org/news/2021/03/11/crisis-brazilian-amazon

[35] HUMAN RIGHTS WATCH, RAINFOREST MAFIAS: HOW VIOLENCE AND IMPUNITY FUEL DEFORESTATION IN BRAZIL'S AMAZON, 2 (2019), https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon.

[36] HUMAN RIGHTS WATCH, *supra* note 35, at 5.

Official policies, or a lack thereof, under the Bolsonaro regime allow deforestation to go unchecked. This has led to a rebound of the deforestation rate, which had been steadily declining prior to Bolsonaro assuming the presidency.[37]

The Bolsonaro regime encouraged deforestation of the Amazon by significantly weakening Brazil's environmental agencies and hamstringing their law enforcement capabilities. In 2019, the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis ("IBAMA"), Brazil's environmental agency, "imposed the lowest number of fines for illegal deforestation in at least [eleven] years."[38] Along with the decrease in fines levied by IBAMA, government seizures of illegal timber also fell.[39] In the first four months of Bolsonaro's presidency, only forty cubic meters (the equivalent of ten large trees) worth of illegal timber was confiscated by authorities.[40] This is a stark contrast from the 25,000 cubic meters of illegal timber that was confiscated by authorities the previous year.[41]

In addition to curbing the effectiveness of Brazil's environmental agencies, the Bolsonaro regime gutted protections afforded to the territories of Indigenous Peoples within Brazil, many of whom call the Amazon home.[42] On February 5, 2020, Bolsonaro presented a draft of Bill 191/2020 to the Brazilian Congress which opened Indigenous Lands in Brazil to various types of economic exploitation.[43] The Bill effectively legalized commercial exploitation of resources within Indigenous territories, leading environmentalists to fear that the Bill "would invite even more encroachment on and deforestation of" such land.[44] According to Human Rights Watch, when Indigenous people organized to defend the Amazon from such encroachment and deforestation, they were "threatened, attacked, and. . . murdered by people engaged in illegal deforestation."[45]

In concert with the weakening of environmental agencies and the opening of Indigenous lands for exploitation of natural resources, the Bolsonaro regime created an environment of

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[37] Celso H.L. Silva Junior, et al., *The Brazilian Amazon Deforestation Rate in 2020 is the Greatest of the Decade*, 5 NATURE ECOLOGY & EVOLUTION 144, 144 (2020), *https://www.nature.com/articles/s41559-020-01368-x* (estimating a decrease in deforestation in Brazil by forty-four per cent by 2020, as opposed to Brazil's targeted decrease of eighty per cent.).

[38] Sue Branford & Thais Borges, *Brazil Guts Environmental Agencies, Clears Way for Unchecked Deforestation*, MONGABAY (June 10, 2019), https://news.mongabay.com/2019/06/brazil-guts-environmental-agencies-clears-way-for-unchecked-deforestation/.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See Brazil: Risk of Bloodshed in the Amazon Unless Government Protects Indiginous Peoples from Illegal Land Seizures and Logging*, AMNESTY INT'L (May 7, 2019), https://www.amnesty.org/en/latest/press-release/2019/05/brazil-risk-of-bloodshed-in-the-amazon-unless-government-protects-indigenous-peoples-from-illegal-land-seizures-and-logging/.

[43] *Strategic Minerals for the Brazilian Economy are Outside Indigeous Lands*, INSTITUTO SOCIOAMBIENTAL (Feb. 14, 2020), https://www-socioambiental-org.translate.goog/pt-br/blog/blog-do-monitoramento/minerais-estrategicos-para-economia-brasileira-estao-fora-de-terras-indigenas?utm_source=isa&utm_medium=manchetes&utm_campaign&_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui.

[44] Maria Laura Canineu & Andrea Carvalho, *Bolsonaro's Plan to Legalize Crimes Against Indigenous Peoples*, HUM. RTS. WATCH (Mar. 1, 2020), https://www.hrw.org/news/2020/03/01/bolsonaros-plan-legalize-crimes-against-indigenous-peoples.

[45] *Id.*

impunity for parties engaged in illegal deforestation.[46] As previously stated, much of the illegal deforestation in the Amazon is driven by criminal networks "that have the logistical capacity to coordinate large-scale extraction, processing, and sale of timber," through the deployment of paramilitary groups to protect their economic interests.[47] Over the last decade, 300 people have been killed by these "Rainforest Mafias" for attempting to prevent deforestation efforts in the Amazon.[48] However, only fourteen suspects were charged and tried in connection with such murders.[49]

C. ALLRISE'S THEORY OF CRIMINAL LIABILITY.

In 2016, the ICC Prosecutor ("Prosecutor") released a policy paper on case selection and prioritization ("Policy Paper"). The policy paper stated that the ICC would "give particular consideration to prosecuting Rome Statute crimes" that are committed by means of, or result in, "the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."[50] AllRise predicates its legal argument on the Policy Paper and asserts that the "existential and immediate" threats posed to "global health and security" requires the ICC to investigate Bolsonaro's actions in the Amazon.[51]

I. JURISDICTION OF THE ICC.

Under Article 53(1)(a) of the Rome Statute, the Prosecutor is allowed to initiate an investigation if "[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[52] AllRise argues that the destruction of the Amazon under the Bolsonaro regime falls within the ICC's jurisdiction "as they have been committed and are being committed on the territory of a State Party to the Rome Statute" and fulfill "the requisite elements of Crimes Against Humanity of murder, persecution, and other inhumane acts" in accordance with the Rome Statute.[53]

In addition to asserting that it is within the jurisdiction of the Prosecutor to investigate these allegations, AllRise also asserts that the current political atmosphere in Brazil makes it impossible for Brazilian national authorities to investigate such allegations.[54] Due to a lack of investigative resources afforded to the Brazilian judicial system, the Courts are "paralyzed," and unable to carry

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[46] *See Brazil: Amazon Penalties Suspended Since October*, HUM. RTS. WATCH (May 20, 2020), https://www.hrw.org/news/2020/05/20/brazil-amazon-penalties-suspended-october.

[47] HUMAN RIGHTS WATCH, *supra* note 35.

[48] Imelda Cengic, *Report: Rainforest Mafia Killed 300 People in the Amazon*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (Sept. 18, 2019), https://www.occrp.org/en/daily/10702-report-rainforest-mafia-killed-300-people-in-the-amazon.

[49] *Id.*

[50] OFF. OF THE PROSECUTOR INT'L CRIM. CT., POLICY PAPER ON CASE SELECTION AND PRIORITIZATION ¶ 41 (2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[51] AllRise Complaint, *supra* note 18, ¶ 3.

[52] Rome Statute of the International Criminal Court art. 53(1)(a), *opened for signature* July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2022) [hereinafter Rome Statute].

[53] AllRise Complaint, *supra* note 18, ¶ 47.

[54] AllRise Complaint, *supra* note 18, ¶ 48.

out an adequate investigation into these allegations.[55]

II. ARTICLE 7: CRIMES AGAINST HUMANITY.

The complaint alleges that the actions of President Bolsonaro and his administration are a "widespread attack on the Amazon, its dependents and its defenders that not only result in the persecution, murder and inhumane suffering in the region, but also upon the global population."[56] Further, the complaint alleges that Bolsonaro's "ongoing widespread attack" on the Amazon is contrary to Articles 7 and 25(3)(c) of the Rome Statute for the ICC("Rome Statute").[57] AllRise has brought this to the attention of the ICC, instead of Brazilian courts, because it views the Brazilian judiciary "paralyzed" by the "same overarching political will" that has facilitated the alleged crimes against humanity.[58]

AllRise states that Bolsonaro and "principal actors of his former and current administration" should be held criminally responsible for their actions in the Amazon under Article 7(1)(a),[59] (h),[60] and (k)[61] of the Rome Statute.[62] Article 7(a) – (k) of the Rome Statute define crimes against humanity and sets forth the elements of the crime.[63] To be held liable under Article 7 for crimes against humanity, a defendant must have committed an act articulated in Article 7 as part of a "widespread or systematic attack" that was "directed against any civilian population," and that the defendant had "knowledge of the attack."[64]

To satisfy the "widespread or systematic attack" element of crimes against humanity, AllRise asserts that the Brazilian Legal Amazon and its "Environmental Dependents and Defenders" are under attack by the Bolsonaro regime.[65] Identifying the Amazon as "one of the most vital organs to human and environmental health," AllRise alleges that Bolsonaro has "knowingly facilitated and promoted" a "widespread attack upon it and those who defend and depend on it."[66] Even though both Bolsonaro and his regime possessed "knowledge of the criminal

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[55] AllRise Complaint, *supra* note 18, ¶ 48(a).

[56] Florence Davey-Attlee, *Brazil's Bolsonaro Accused of Crimes Against Humanity at ICC for his Record on the Amazon*, CNN (Oct. 12, 2021), https://www.cnn.com/2021/10/12/americas/brazil-bolsonaro-icc-crimes-against-humanity-intl/index.html.

[57] *Id.*; *See also* Rome Statute, *supra* note 52, at art. 7 (crimes against humanity); Rome Statute, *supra* note 52, at art. 25(3)(c) (aiding and abetting).

[58] AllRise Complaint, *supra* note 18, ¶ 30.

[59] Rome Statute, *supra* note 52, at art. 7(1)(a) (murder).

[60] Rome Statute, *supra* note 52, at art. 7(1)(h) ("Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.").

[61] Rome Statute, *supra* note 52, at art. 7(1)(k) ("Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.").

[62] AllRise Complaint, *supra* note 18, ¶ 24.

[63] Rome Statute, *supra* note 52, at art. 7.

[64] Rome Statute, *supra* note 52, at art. 7(1).

[65] AllRise Complaint, *supra* note 18, ¶ 31.

[66] AllRise Complaint, *supra* note 18, ¶5.

effects of the attack on the civilian population," the regime "intentionally adopted a governmental policy both encouraging and facilitating the commission" of the alleged crimes against humanity.[67]

Of the thirty million people that inhabit the Brazilian Amazon (twelve percent of Brazil's population), seventy percent are "concentrated in the rare urban [centers]," while the remainder are Indigenous communities and "traditional peoples."[68] AllRise asserts that the "survival and history" of these communities "are intimately tied to the ecosystems" of the Amazon; with such communities depending on the Amazon for food, water, shelter, and natural resources.[69]

AllRise alleges that such attacks are pursuant to and in furtherance of an official state policy adopted by the Bolsonaro regime. According to AllRise, upon taking office, Bolsonaro:

> surrounded himself with a team that would facilitate his criminal scheme and who were [fueled] by the same mutually beneficial and/or corrupt motives, namely members of the BBB caucus (*Biblia, Boi e Bala*, meaning Bible, Beef and Bullets), a combination of evangelicals, rich property owners, cattle and meat industry representatives and former members of the security forces, as well as former military people.[70]

In furtherance of his allegiance to the so-called "BBB caucus," the Bolsonaro regime "ruthlessly and single-mindedly" pursued policies that AllRise describes as "anti-environmental, anti-Indigenous, and anti-enforcement."[71]

III. ARTICLE 25(3)(C): AIDING AND ABETTING.

AllRise also seeks to hold other Bolsonaro regime officials responsible for aiding and abetting the commission of such crimes against humanity under Article 25(3)(c) of the Rome Statute.[72] AllRise explicitly names Ricardo Salles, Former Minister of Environment, as a member of the Bolsonaro regime that "knew and intended that severe damage and suffering would be caused to Environmental Dependents and Defenders."[73]

Article 25(3)(c) of the Rome Statute establishes accessorial liability, and allows any person who "aids, abets, or otherwise assists in" the commission or attempted commission of a crime to be held individually responsible and criminally liable if such actions were for the purpose "of facilitating the commission of such a crime."[74] The ICC first had the opportunity to consider Article 25(3)(c) in *Bemba et al*. In that case, Trial Chamber VII stated that while "aiding," "abetting," or "otherwise assisting" are presented disjunctively as independent terms, they

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[67] AllRise Complaint, *supra* note 18, ¶ 56.
[68] AllRise Complaint, *supra* note 18, ¶¶ 31-32.
[69] AllRise Complaint, *supra* note 18, ¶ 32.
[70] AllRise Complaint, *supra* note 18, ¶ 40.
[71] AllRise Complaint, *supra* note 18, ¶ 41.
[72] *See* AllRise Complaint, *supra* note 18, ¶ 45; *See also* Rome Statute, *supra* note 52 at art. 25(3)(c).
[73] AllRise Complaint, *supra* note 18, ¶ 44.
[74] Rome Statute, *supra* note 52, at art. 25(3)(c).

nonetheless "belong to the broader category of assisting in the (attempted) commission of an [offense]."[75]

Under the *Bemba et al.* definition of such accessorial liability, officials from the Bolsonaro regime, particularly Ricardo Salles, are likely to face criminal liability if the ICC accepts AllRise's filing and investigates and prosecutes Bolsonaro for crimes against humanity. With respect to Mr. Salles, "federal police raids targeted [him] and other officials alleged to have allowed illegal wood exports."[76] Following the police raid, a Brazilian Supreme Court Justice authorized an investigation into Mr. Salles to determine "whether he obstructed a police inquiry into illegal logging" in the Amazon.[77]

During his tenure, Mr. Salles was in lockstep with Bolsonaro's support of developing the Amazon, namely through encouraging land grabbing and illegal mining in areas of the Amazon that were protected against such acts.[78] Brazilian prosecutors reacted to the investigation by calling for Mr. Salles to be dismissed from his post. They alleged that Mr. Salles was involved with "countless initiatives that violate the duty to protect the environment."[79] When the Brazilian Supreme Court initiated an investigation into his actions, Mr. Salles abruptly vacated his position.[80]

III. A NEW HUMAN RIGHT? THE RIGHT TO A CLEAN, HEALTHY, AND SUSTAINABLE ENVIRONMENT.

At a recent session of the Human Rights Council ("HRC"), the High Commissioner stated that the "triple planetary threats of climate change, pollution and nature loss" are the "single greatest human rights challenge of our era."[81] At the same session, the HRC adopted a resolution recognizing the human right to a clean, healthy, and sustainable environment.[82] Through this resolution, the HRC affirmed that the promotion of this newly recognized human right requires the "full implementation of the multilateral environmental agreements under the principles of international environmental law."[83] The HRC also appointed a special rapporteur to promote and

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[75] Prosecutor v. Bemba et al., ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, ¶ 87 (Oct. 19, 2016); *See e.g.*, Katerina I. Kappos, *Current Developments at the International Criminal Court*, 16 J. INT'L CRIM. JUST. 16 425,435 (2018); Manuel J. Ventura, *Aiding and Abetting and the International Criminal Court's Bemba et al. Case: The ICC Trial and Appeal Chamber Consider Article 25(3)(c) of the Rome Statute (1998)*, 20 INT'L CRIM. L REV. 1138 (2020).

[76] *Brazil Environment Minister Quits Amid Inquiry Into Illegal Amazon Logging*, THE GUARDIAN (June 23, 2021), https://www.theguardian.com/world/2021/jun/24/brazil-environment-minister-quits-amid-inquiry-into-amazon-logging.

[77] *Id.*

[78] *Id.*

[79] *Brazil Prosecutors Target Minister Over Amazon Destruction*, DEUTSCHE WELLE (July 7, 2020), https://www.dw.com/en/brazil-prosecutors-target-minister-over-amazon-destruction/a-54076374.

[80] THE GUARDIAN, *supra* note 76.

[81] *Access to a Healthy Environment, Declared a Human Right by UN Rights Council,* U.N. NEWS, (Oct. 8, 2021), https://news.un.org/en/story/2021/10/1102582.

[82] Human Rights Council Res. 48/13, U.N. Doc A/HRC/RES/48/13 (Oct. 8, 2021).

[83] *Id.* at 3.

protect human rights in the "context of climate change."[84]

A. THE CRIME OF ECOCIDE.

The HRC is not alone in its effort to address climate change as a human rights issue. There has been an international effort to recognize the crime of ecocide[85] as a fifth international crime through amendment to the Rome Statute.[86] The movement to add ecocide to the Rome Statute seeks to utilize international criminal law to combat environmental damage.

Recognition of the crime of ecocide has long been fought for by academia, lawyers, and popular movements.[87] Environmental devastation from the U.S. military's use of Agent Orange in Vietnam, Laos, and Cambodia, sparked international outrage, and led scientists and environmental activists to call such acts "ecocide."[88] A few decades later, U.K. barrister Polly Higgins proposed including the crime of ecocide as a fifth crime against peace to the UN Law Commission.[89] In *Eradicating Ecocide*, Higgins defined ecocide as "the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[90]

In 2017, Stop Ecocide International ("SEI") was co-founded by Higgins and Jojo Mehta to activate and develop "global cross-sector support" for the addition of ecocide to the Rome Statute.[91] Two years later, SEI established the Stop Ecocide Foundation, a charitable entity of SEI used as the "fundraising vehicle for the campaign."[92] In addition to fundraising, the Stop Ecocide Foundation commissioned an Independent Expert Panel for the Legal Definition of Ecocide.[93] The Independent Expert Panel drafted the following definition of ecocide: "[F]or the purpose of

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[84] Human Rights Council Res. 48/14, U.N. Doc. A/HRC/RES/48/14, (Oct. 8, 2021).

[85] *See* Richard A. Falk, *Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals*, 4 BULL. PEACE PROPOSALS 80, 80-96 (1973); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215 (1996).

[86] *See* Josie Fischels, *How 165 Words Could Make Mass Environmental Destruction An International Crime*, NPR (June 27, 2021, 8:00 AM), https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court; *See also An International Crime of Ecocide: The Proposal, Future Opportunities, and Challenges*, AM. SOC'Y INT'L L. (2021), https://www.asil.org/international-crime-ecocide-proposal-future-opportunities-and-challenges.

[87] *See* Todd Howland, *Chernobyl and Acid Deposition: An Analysis of the Failure of European Cooperation to Protect the Shared Environment*, 2 TEMP. INT'L & COMP. L.J 1 (1988); Gray, *supra* note 85; Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 FORDHAM INT'L L.J. 122, 122-153 (1998).

[88] Trevor Bach, *Inside the Growing Movement to Make Ecocide an International Crime*, AUDUBON (June 17, 2021), https://www.audubon.org/news/inside-growing-movement-make-ecocide-international-crime.

[89] Antonia Zerbisias, *Ecocide Should be Treated Like a War Crime, U.K. Lawyer Says*, THE STAR (Mar. 30, 2012), https://www.thestar.com/news/insight/2012/03/30/ecocide_should_be_treated_like_a_war_crime_uk_lawyer_says.html.

[90] POLLY HIGGINS, ERADICATING ECOCIDE: EXPOSING THE CORPORATE AND POLITICAL PRACTICES DESTROYING THE PLANET AND PROPOSING THE LAWS NEEDED TO ERADICATE ECOCIDE 3 (Shepheard-Walwyn, 1st ed. 2010).

[91] *Who We Are*, STOP ECOCIDE INT'L, https://www.stopecocide.earth/who-we-are- (last visited Sept. 9, 2022).

[92] *Id.*

[93] *Id.*

this [Rome] Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment caused by those acts."[94] The Stop Ecocide Foundation seeks to amend the preamble of the Rome Statute,[95] and codify the crime of ecocide via Article 5(1).[96]

NGOs and academics are not the only supporters of accountability for ecocide. Supporters of such a codified crime, include the Pope[97] and the mass youth movement founder, Greta Thurnberg.[98] Pope Francis proposed making ecocide a sin for Catholics, defining ecocide as "the massive contamination of air, land, and water," or "any action capable of producing an ecological disaster."[99]

Of course, the idea of ecocide has not come without criticism. However, most of the criticism has come from think tanks and organizations that have an interest in maintaining the status quo, such as free market interest groups.[100]

IV. TESTS OF COLLECTIVE ACTION & OF THE ICC.

The ICC's willingness to investigate and prosecute Bolsonaro for crimes against humanity, and for his administration's role in the destruction of the Brazilian Amazon, tests the collective action against climate change and the ICC itself. Firstly, if the international community allows an investigation and prosecution of Bolsonaro to move forward,[101] it would signal that the international community: (1) takes threats to climate change seriously, (2) is committed to the obligations set out in the UNFCCC and its protocols; and (3) views any derogation from those

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[94] *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* , STOP ECOCIDE FOUND. (June 2021), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf, [hereinafter Independent Expert Panel Report].

[95] Independent Expert Panel Report, *supra* note 94. (The addition to the preamble has been drafted as: "Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide.").

[96] *See* Independent Expert Panel Report, *supra* note 94.

[97] *Pope Francis: Destroying the Earth is a Sin and Should be a Crime*, STOP ECOCIDE INT'L (Nov. 18, 2019), https://www.stopecocide.earth/press-releases-summary/pope-francis-destroying-the-earth-is-a-sin-and-should-be-a-crime.

[98] *Greta Thunberg Foundation Donates to the Stop Ecocide Foundation*, STOP ECOCIDE INT'L. (July 20, 2020), https://www.stopecocide.earth/press-releases-summary/gretas-foundation-donates-100k-to-stop-ecocide-foundation-of-gulbenkian-prize-for-humanity-funds.

[99] Nicholas Kusnetz, *As the Climate Crisis Grows, a Movement Gathers to Make 'Ecocide' an International Crime Against the Environment*, INSIDE CLIMATE NEWS (Apr. 7, 2021), https://insideclimatenews.org/news/07042021/climate-crisis-ecocide-vanuatu-the-fifth-crime/.

[100] *See* Wesley J. Smith, *The 'Ecocide' Movement: A Crime Against Humanity*, ACTON INST. (Feb. 9, 2021), https://www.acton.org/religion-liberty/volume-33-number-1/ecocide-movement-crime-against-humanity (claiming that environmental destruction is both a "wealth-producing" and "job-creating" activity and that such an international crime would harm the capitalist status quo).

[101] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 38544, art. 16 (July 1, 2022) (the U.N. Security Council may request that an investigation or prosecution not be commenced or proceeded with. If the U.N. Security Council makes such a request, the Prosecutor of the ICC is prohibited from undertaking such an investigation or prosecution for a period of twelve months.).

obligations as a serious matter. Secondly, an investigation and prosecution by the ICC may legitimize an institution that has been viewed as colonial in nature and ineffective.[102]

A. States' Actual Willingness to Confront Climate Change.

An investigation into, and a prosecution of, Bolsonaro would demonstrate that the international community views the threat posed by climate change as immediate, serious, and not a distant problem for future generations to solve. To this point, States have committed to climate goals, but failure to meet such goals does not carry any legal penalty under the UNFCCC.[103] A lack of an enforcement mechanism allows States that do not meet such objectives to escape real accountability.[104] Due to this lack of accountability, numerous States are currently not on track to meet the goals of the Paris Agreement.[105] Failure to meet the goals set out in the Paris Agreement can spell doom for the ability of humanity to continue to inhabit Earth. An enforcement mechanism is needed to ensure that these goals are met, and human society sets itself on a path to solving this problem.A framework for such an enforcement mechanism has been promulgated by human rights groups through the adoption of a legal definition of the crime of ecocide, which should be adopted by the international community through amendment to the Rome Statute.

I. A Much-needed Enforcement Mechanism.

Many people, and states, view international law as inferior to domestic law because the United Nations is incapable of enforcing such law in all scenarios.[106] International scholars have wrestled with the question of how to implement an accountability mechanism for decades. [107] This is partially due to the lack of enforcement mechanisms in the international legal regime that are commonplace in domestic legal regimes.[108] Due to the lack of enforcement mechanisms, "[n]ational courts form the front line of a system of enforcement."[109] This exportation of

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[102] *See* Helyeh Doutaghi & Jay Ramasubramanyam, *By Not Investigating the U.S. for War Crimes, the International Criminal Court shows Colonialism Still Thrives in International Law*, Carleton Newsroom (Apr. 15, 2019), https://newsroom.carleton.ca/story/icc-colonialism-thrives/.

[103] Nicholas Kusnetz, *Why the Paris Climate Agreement Might be Doomed to Fail*, Inside Climate News (July 28, 2021), https://insideclimatenews.org/news/28072021/pairs-agreement-success-failure/.

[104] *See* Oscar Widerberg & Philipp Pattberg, *Accountability Challenges in the Transnational Regime Complex for Climate Change*, 34 Rev. Pol'y Rsch. 68, 82 (Nov. 30, 2016).

[105] *See* Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, Council on Foreign Rels. (Nov. 17, 2021, 2:30 PM), https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.

[106] *See* Matthew McCartin, *Confronting the Behemoth: China, Human Rights, and the United Nations*, 49 Syracuse J. Int'l L. & Com. (forthcoming 2022) (discussing the inability of the United Nations to hold powerful nations, particularly the permanent members of the Security Council, accountable for grave violations of international human rights law.).

[107] *See e.g.,* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law,* 121 Yale L.J. 252, 256 (2011); Stephen Dicks, *International Enforcement Methods in a Modern System Through the Rainbow Warrior Affair*, Univ. Utah S.J. Quinney Coll. L. (Oct. 7, 2013), *https://law.utah.edu/international-enforcement-methods-in-a-modern-system-through-the-rainbow-warrior-affair/.*

[108] *See* Frederic L. Kirgis, *Enforcing International Law*, Am. Soc'y Int'l L. (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law.

[109] Int'l Law Comm'n Rep. of the Study Group on Fragmentation of Int'l L., U.N. Doc. A/CN.4/L/628 (Aug. 1, 2002); *See also* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 Mich. J. Int'l L. 1, 3 (2002).

enforcement obligations to states has led to the fragmentation of international law,[110] as well as different methods of enforcement.[111]

The fight against the common enemy of a warming planet is global in nature, and therefore, the enforcement of international law regarding the climate must be global in nature, and not left to individual states. An investigation and prosecution of Bolsonaro by the ICC could signal a willingness to enforce international climate change instruments. In the fight against climate change and its catastrophic effects, it is crucial to provide a mechanism for enforcing the obligations under the UNFCCC and its protocols, but also to deter future environmental destruction.

This paper identifies two possible ways in which a prosecution of Bolsonaro for crimes against humanity can ultimately lead to an enforcement mechanism for international climate change instruments. First, the addition of ecocide to the Rome Statute would allow for future prosecutions of destroyers of the environment through the codification of such a crime. Second, if the ICC prosecutes and sentences Bolsonaro, the decision will establish precedent for crimes committed against the environment.

A. THE ADDITION OF ECOCIDE TO THE ROME STATUTE.

International criminal law has steadily developed over the years, but there is still no international criminal law with respect to environmental destruction. In fact, at this time "no treaty exists that codifies environmental law or criminalizes environmental destruction."[112] While the codification of ecocide would not give the ICC jurisdiction to investigate and prosecute environmental destruction *ex facto*,[113] it would give the international community a mechanism for enforcing climate obligations and to deter instances of grave environmental destruction.

The addition of ecocide to the Rome Statute would allow the international community to fight the threat of climate change, and enforce international criminal law on those who commit environmental destruction. It is important for state parties to recognize that they cannot contain warming to two and a half degrees Celsius above pre-industrial levels unless severe penalties are levied against those who actively work against that objective. This is critical, particularly within a capitalist mode of production where most of the world lives within. Corporations, and those few individuals who lead them, will continue to exploit natural resources and emit carbon unless severe sanctions and penalties are levied against them. The addition of ecocide to the Rome Statute would give the ICC the authority to hold such polluters accountable. Such a penalty would serve as a deterrent to those who destroy the environment for their personal economic gain. If endangering the future existence of the human species does not constitute a crime against humanity under the Rome Statute, then the entirety of international criminal law must be re-examined.

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[110] *See* Laurence R. Heifer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 291 (1999); *See also* C. Cora True-Frost, *Listening to Dissonance at the Intersections of International Human Rights Law*, 43 MICH. J. INT'L L. 362, 370 (2022).

[111] Dicks, *supra* note 107.

[112] Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30 FORDHAM ENV'T. L. REV. 1,1 (2019).

[113] Rome Statute, *supra* note 52, at art. 11.

B. THE BOLSONARO PRECEDENT.

The international legal system "knows no system of precedent comparable to that which exists in common law systems,"[114] making it difficult to predict what the ICC would do in a case involving Bolsonaro. While ICC precedence does not carry the same weight as some domestic tribunals, ICC opinions do have some precedential value.[115]

The ICC may be inclined to forgo a prosecution of Bolsonaro because of the controversial nature of the allegations. However, while a prosecution for crimes against humanity arising from environmental destruction may be seen as controversial by some, it will not be the first time the ICC considers a controversial case. In 2013, the ICC opened an investigation into Ahmad al-Faqi al-Mahdi for "his role in directing attacks against and demolishing ancient mausoleums" in Mali.[116] Although al-Mahdi was not the first individual held responsible for targeting and destroying culturally significant buildings and artifacts,[117] former Chief Prosecutor Fatou Bensouda, was still criticized for pursuing such charges.[118]

Ultimately, it was a successful prosecution; al-Mahdi was convicted for the war crime of attacking protected objects as a co-perpetrator and sentenced to nine years of imprisonment.[119] The *al-Mahdi* decision set an important precedent for the ICC and contributed to "the tribunal's overall legitimacy."[120] In the time since *al-Mahdi*, the Prosecutor has developed and published an official policy on cultural heritage.[121]

Like al-Mahdi, a prosecution of Bolsonaro would send a clear signal to the international community that impunity will no longer be tolerated for grave environmental destruction. Additionally, like *al-Mahdi*, the prosecution of Bolsonaro could be seen as a victory for the ICC through its adoption of groundbreaking legal precedent.[122] In order to harden the precedential weight of a Bolsonaro prosecution and conviction, the Prosecutor should develop a policy on crimes against the environment, in a similar fashion to its official policy on cultural heritage.

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[114] Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT'L L.J. 71, 71 (2017), https://harvardilj.org/wp-content/uploads/sites/15/Greenwood-Formatted.pdf.

[115] *See The International Criminal Court: New Legal Precedents*, AUSTL. INST.E INT'L AFFS. (last visited Sept. 3, 2022), https://www.internationalaffairs.org.au/the-international-criminal-court-and-humanitarian-law-new-legal-precedents/.

[116] *The International Criminal Court: New Legal Precedents*, *supra* note 115.

[117] *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, ¶¶ 233-237, Decision on Motion for Judgment of Acquittal (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004); *See also The ICTY and the prosecution of crimes against cultural and religious property*, SENSE – TRANSITIONAL JUST. CTR. (2016), http://heritage.sensecentar.org/.

[118] Owen Bowcott, *ICC's First Cultural Destruction Trial to Open in the Hague*, THE GUARDIAN (Feb. 28, 2016), https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague.

[119] Prosecutor v. al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶¶ 106-111 (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF.

[120] Milena Sterio, *Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case*, 49 CASE W. RES. J. INT'L L. 63, 64 (2017).

[121] OFF. PROSECUTOR, INT'L CRIM. CT., POLICY ON CULTURAL HERITAGE (2021), https://www.icc-cpi.int/items Documents/20210614-otp-policy-cultural-heritage-eng.pdf.

[122] Sterio, *supra* note 120.

B. BEYOND BOLSONARO: THE LEGITIMACY OF THE ICC.

The willingness of the ICC to investigate and prosecute Bolsonaro may signal the utility of the court moving forward. Currently, the ICC has only heard thirty-one cases, issued thirty-eight arrest warrants, detained twenty-one individuals at the ICC detention center, and issued only ten convictions, and four acquittals.[123] Utilizing the ICC as a forum to prosecute grave environmental destruction as crimes against humanity, may offer the international community an enforcement mechanism that has been lacking from the UNFCCC and other international climate agreements.[124] Thus far, states have been reluctant to use international tribunals, such as the International Court of Justice, to litigate non-compliance claims. However, in the wake of Russian President Vladimir Putin's war of aggression in Ukraine, the ICC has been thrust back into the spotlight. The public attention on the ICC today offers the international human rights community the opportunity to seize the political moment and effect real change in the fight against climate change.

If the ICC were to investigate Bolsonaro's actions, and allow a prosecution to go forward, Brazil would very likely support and cooperate with the effort.. Currently, there are calls in Brazil to hold Bolsonaro criminally liable for his administration's handling of the COVID-19 pandemic.[125] Additionally, Bolsonaro faces re-election in 2022, and is currently trailing the very popular former President Lula. President Lula has called Bolsonaro an "agent of genocide,"[126] and would likely support an ICC investigation into, and prosecution of Bolsonaro.

I. THE SPECTER OF COLONIALISM AND THE POSSIBILITY OF A GLOBAL SOUTH SKEWED ENFORCEMENT MECHANISM.

The specter of colonialism has plagued the ICC, and its credibility, since its inception.[127] Global South stakeholders, particularly African member states, have been the driving force behind such accusations.[128] These claims hold water, as the optionality of the Rome Statute, and

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[123] *About the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/about (last visited Sept. 22, 2022).

[124] *See* Scott Barrett, *Climate Treatises and the Imperative of Enforcement*,, 24 OXFORD REV. ECON. POL'Y 239, 239-258 (2008).

[125] Nicholas Reimann, *Investigation Into Brazil's Jair Bolsonaro Recommends Mass Homicide Charges Over Covid Policy*, FORBES (Oct. 19, 2021), https://www.forbes.com/sites/nicholasreimann/2021/10/19/investigation-into-brazils-jair-bolsonaro-recommends-mass-homicide-charges-over-covid-policy/?sh=4c8dfa3d6de3 ("A Brazilian Senate investigation into President Jair Bolsonaro concluded the president's lax Covid policies led to the deaths of more than 300,000 people, according to *The New York Times*, with the report recommending the president be imprisoned and charged with mass homicide as a result.").

[126] Fanny Lothaire, *Former Brazilian President Lula:'Jair Bolsonaro is an Agent of Genocide'*, FRANCE24 (July 24, 2021), https://www.france24.com/en/tv-shows/the-interview/20210724-lula-jair-bolsonaro-is-an-agent-of-genocide.

[127] *See* Everisto Benyera, *How Colonialism's Legacy Continues to Plague the International Criminal Court*, THE CONVERSATION (July 9, 2020), https://theconversation.com/how-colonialisms-legacy-continues-to-plague-the-international-criminal-court-142063.

[128] *See* RES SCHUERCH, THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIAL CLAIM MADE BY AFRICAN STAKEHOLDERS (Gerhard Werle et al. eds. Vol 13. 2017).

consequently the ICC, have allowed Global North human rights violators to skirt justice,[129] while prosecutions of human rights violations from the Global South, particularly Africa,[130] seem to have become the *de facto* mandate of the ICC.[131]

However, the addition of the crime of ecocide to the Rome Statute may not be the best enforcement mechanism for the international community to utilize. This is due to major historical emitters who are not subject to the jurisdiction of the ICC.[132] Because of this, enforcement is likely to be limited to those states who are parties to the Rome Statute. This is likely to perpetuate colonial and imperial critiques of the ICC.[133] To this point, the ICC has almost exclusively prosecuted individuals from Global South States Parties, particularly African States Parties.[134] The addition of ecocide to the Rome Statute may result in an unfair and disproportionate prosecution rate of individuals from African Member States, even though African states account for some of the lowest historical rates of carbon emission.

In addition to accusations of colonialism at the ICC, Global South voices have also criticized international climate change talks, such as COP26, for its colonial attitudes.[135] Professor Vijay Prashard, criticized the United States at COP26 for its "colonial mentality" in climate change talks, saying:

> [The United States] uses 25% of the world's resources. It outsources all production to China and blames it for being a carbon polluter. China produces your buckets, your nuts and bolts, your phones. Why don't you produce your own nuts and bolts? And then we can talk about carbon emissions.[136]

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[129] *See* Helyeh Doutaghi & Jay Ramasubramanyam, *By Not Investigating the U.S. for War Crimes, the International Criminal Court Shows Colonialism Still Thrives in International Law*, THE CONVERSATION (Apr. 15, 2019), https://theconversation.com/by-not-investigating-the-u-s-for-war-crimes-the-international-criminal-court-shows-colonialism-still-thrives-in-international-law-115269.

[130] Thierry Cruvellier, *The ICC, Out of Africa*, N.Y. TIMES (Nov. 6, 2016), https://www.nytimes.com/2016/11/07/opinion/the-icc-out-of-africa.html (discussing the withdrawal of several African states from the ICC on grounds of bias.).

[131] *See* Awol Allo, *The ICC's Problem is Not Overt Racism, it is Eurocentricism*, AL JAZEERA (July 28, 2018), https://www.aljazeera.com/opinions/2018/7/28/the-iccs-problem-is-not-overt-racism-it-is-eurocentricism.

[132] For example, the United States is the largest historical emitter of carbon yet is not a party to the Rome Statute. Therefore, American corporations and individuals could not be held accountable for ecocide, even though the United States is most culpable for historic ecocide. *See* Justin Gillis & Nadja Popovich, *The U.S. Is the Biggest Carbon Polluter in History. It Just Walked Away From the Paris Climate Deal*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/interactive/2017/06/01/ climate/us-biggest-carbon-polluter-in-history-will-it-walk-away-from-the-paris-climate-deal.html; *See also* Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, EUR. COUNCIL ON FOREIGN REL. (Sept. 8, 2020), https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/ (discussing the American position towards the ICC.).

[133] *See supra* Part B(i).

[134] *See* Adjoa Assan, *The ICC and Africa*, AUSTL. INST. INT'L AFFS. (July 2, 2021), https://www.internationalaffairs.org.au/resource/the-icc-and-africa/.

[135] *See* Bai Yunyi, *People are fed up with West's 'lectures' as it claims to be the best judge of everything: Indian scholar*, Global Times (Dec. 27, 2021), https://www.globaltimes.cn/page/202112/1243519.shtml.

[136] COP26 Coal., *Vijay Prashard People's Summit Speech from OUR TIME IS NOW #3*, YOUTUBE (Nov. 10, 2021), https://www.youtube.com/watch?v=Bho6xY-jSuE&ab_channel=COP26Coalition.

An investigation into, and prosecution of Bolsonaro could open the door to future investigations and prosecutions for environmental destruction. Even if the Rome Statute is not amended to include the crime of ecocide,[137] and AllRise's crimes against humanity claim is unsuccessful, such a route to justice may be utilized by other groups to hold other environment destroyers accountable. However, utilizing the ICC as an enforcement mechanism for non-compliance in an environmental context could perpetuate the "colonial mentality" of the Global North, as well as the colonial utilization of the ICC.

The world's largest emitters are not parties to the Rome Statute,[138] meaning their nationals are not subject to the ICC's jurisdiction.[139] If a Bolsonaro prosecution were to open the doors to similar prosecutions in the future, it is likely that those states who are most culpable for environmental destruction would skirt justice simply by refusing to accede to the Rome Statute. The Rome Statute does, however, allow the ICC to exercise jurisdiction over nationals of non-party states in limited circumstances.[140] This will lead to an uneven application of the law, and skewed justice. For example, in the United States, the federal government is unlikely to consent to the prosecution of an American citizen for crimes against humanity predicated on climate destruction, because many are members of powerful corporations[141] who make hefty campaign contributions to the very politicians who would be asked to consent to a prosecution.[142]

Under the Rome Statute as it currently stands, the largest historical emitters of greenhouse gasses, namely the United States and China,[143] would likely go free while violators from the Global South would be prosecuted disproportionately. This would continue in the colonialist tradition of the ICC. However, a new Prosecutor was elected in 2021, and there is hope that the ICC will shift

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[137] Fischels, *supra* note 86.

[138] *See e.g.*, *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Sept. 22, 2022). (discussing the United States' role in establishing the ICC and its unwillingness to accede to the Rome Statute); Dan Zhu, *China, The International Criminal Court, And Global Governance*, AUSTL. INST. OF INT'L AFFS. (Jan. 10, 2020), https://www.internationalaffairs.org.au/australianoutlook/china-the-international-criminal-court-and-global-governance/ (discussing China's relationship with the ICC and its unwillingness to accede to the Rome Statute).

[139] Rome Statute, *supra* note 52, at arts. 12 – 13.

[140] Rome Statute, *supra* note 50, at art. 12 (allowing prosecution of nationals of non-party states if a crime within the ICC's subject matter jurisdiction is committed on the territory of a state party or if the non-party state consents to the prosecution.); *See* Madeline Morris, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States (Conference Remarks)*, 6 INT'L L. STUDENTS ASSOC. J. INT'L & COMPAR. L. 363 (2000).

[141] Georgia Wright et al., *The Dirty Dozen: Meet America's Top Climate Villains*, THE GUARDIAN (Oct. 27, 2021), https://www.theguardian.com/commentisfree/2021/oct/27/climate-crisis-villains-americas-dirty-dozen.

[142] *See e.g.*, Matthew H. Goldberg et al., *Oil and Gas Companies Invest in Legislators That Vote Against the Environment*, 117 PROC. NAT'L ACAD. SCI. U.S. 5111 (2020); Liz Hampton, *U.S. Oil Majors Pitch More Campaign Cash to Democrats as Frack Battle Looms*, REUTERS (Oct. 16, 2020), https://www.reuters.com/article/us-usa-election-oil-donors-idUKKBN27116P; Alan Zibel, *Big Oil's Capitol Hill Allies*, PUB. CITIZEN (Feb. 10, 2021), https://www.citizen.org/article/big-oils-capitol-hill-allies/.

[143] *See Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS (Aug. 12, 2020), https://www.ucsusa.org/resources/each-countrys-share-co2-emissions (showing that China emitted 10.06GT of carbon dioxide in 2018 and the United States emitted 5.41GT of carbon dioxide in 2018. This is in comparison to India, the third largest emitter, who emitted 2.65GT of carbon dioxide in 2018.).

focus away from Africa and towards crimes committed by other states,[144] which provides hope that the ICC will investigate and prosecute Bolsonaro.

V. CONCLUSION

Without addressing climate change, humanity will face immense challenges seldom seen in recorded history. The international community has moved in recent decades to curb the effect of anthropogenic climate change but has yet to provide an enforcement mechanism that effectuates states' obligations under the UNFCCC and its protocols. International criminal law can serve as such an enforcement mechanism through the addition of the crime of ecocide to the Rome Statute or through the prosecution of Jair Bolsonaro and his regime for their roles in the destruction of the Brazilian Amazon.

Since taking power, Bolsonaro has relaxed environmental regulations, weakened agencies responsible for enforcing those regulations, and has created a legal environment in which illegal logging and deforestation operations act with impunity. In addition to illegally destroying the Amazon,"Rainforest Mafias" are responsible for the murder of hundreds of environmental defenders and Indigenous Peoples.

The Bolsonaro regime's actions have not gone without criticism and calls for accountability. The Austrian NGO, AllRise, filed an official complaint with the ICC in which they allege that Bolsonaro's actions rise to the level of crimes against humanity, and called on the ICC to investigate such allegations, and prosecute Bolsonaro, and members of his administration.[145] While an investigation or prosecution is far from certain, the filing does signal a desire for enforcement of climate obligations and punitive measures for individuals who cause great harm to the environment as the international community rallies to curb the effects of climate change.

These new calls for international environmental justice echo prior calls to add the crime of ecocide to the Rome Statute, which would give the ICC jurisdiction to try such cases. It is critical to give such jurisdiction to the ICC because environmental destruction is often not limited within a single state's borders. However, the addition of ecocide to the Rome Statute may not have the intended effects, and instead could reinforce the "colonial mentality" of large polluting states who are not signatories to the Rome Statute, and are therefore not subject to the ICC's jurisdiction.

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[144] *See* Ottilia Anna Maunganidze, *On Shaky Ground, the ICC Must Rebuild With a New Prosecutor*, INST. FOR SEC. STUD. AFR. (Feb. 22, 2021), https://issafrica.org/iss-today/on-shaky-ground-the-icc-must-rebuild-with-a-new-prosecutor.

[145] *Austrian ex-Uber Boss Founds NGO That Charges Brazil's Jair Bolsonaro at International Criminal Court*, THE RIO TIMES (Oct. 12, 2021), https://www.riotimesonline.com/brazil-news/brazil/austrian-ex-uber-boss-founds-environmental-organization-and-takes-brazils-jair-bolsonaro-to-the-international-criminal-court/.

The Situation in Palestine and the Principles of Universality in the Rome Statute

Kelly Adams

I. Introduction

The International Criminal Court ("ICC") released a judgment on February 5, 2021, holding that the State of Palestine ("Palestine") is considered a "state party" under the Rome Statute and the ICC can therefore exercise territorial jurisdiction under Article 12(2)(a) for alleged crimes committed within Palestinian territory.[1] Israel, with the support of the United States, specifically objected to the ICC's jurisdiction over the actions of Israeli nationals in Palestinian territory arguing that Israel is not a State party to the Rome Statute, and Palestine's lack of criminal jurisdiction over Israeli nationals in Palestinian territory renders the Palestinian accession to the Rome Statute irrelevant.[2] The Chamber ruled that an analysis of this argument was not pertinent under an Article 19(3) decision, and accepted the established premise that the ICC functions as a court with limited universal jurisdiction.[3]

II. The Situation in Palestine

Palestine became a party to the Rome State by making an act of accession to the treaty on January 2, 2015, and this act entered into full force on April 1 of that year.[4] Prior to acceding to the Rome Statute, Palestine lodged a declaration of jurisdiction under Article 12(3) regarding "Palestine's acceptance of the jurisdiction of the ICC. . . for the purpose of identifying, prosecuting, and judging authors and accomplices of crimes… committed in the occupied

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[1] ICC-01/18-143, The Situation in Palestine, (Feb. 5, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.
[2] *Id.* at ¶ 30.
[3] *Id.* at ¶ 129.
[4] *Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014*, INT'L CRIM. CT, (Jan. 15, 2015), https://www.icc-cpi.int/news/palestine-declares-acceptance-icc-jurisdiction-13-june-2014.

Palestinian territory, including East Jerusalem, since June 13, 2014."[5] It is not surprising that Palestine selected this specific timeframe to grant ad hoc jurisdiction to the ICC, as the 2014 Gaza conflict occurred over a fifty-day period in July and August of 2014,[6] and this conflict therefore would not fall under the jurisdiction of the ICC without a special declaration under Article 12(3). Two weeks after Palestine lodged this Article 12(3) declaration and acceded to the Statute, the ICC's Office of the Prosecutor ("OTP") opened a "preliminary examination of the situation at hand… in order to establish whether the Rome Statute criteria for opening an investigation are met."[7]

Almost four years later, on December 20, 2019, the OTP issued a statement declaring that "the preliminary examination into the Situation in Palestine has concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met."[8] Acknowledging the uniqueness of Palestinian statehood, however, the OTP requested a ruling from Pre-Trial Chamber I (the "Chamber") to determine

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[5] *Id.*

[6] *Gaza Conflict 2014: War Crimes by Both Sides'*, UN BBC NEWS (Mar. 28, 2021), https://www.bbc.com/news/world-middle-east-33223365.

[7] Rome Statute of the International Criminal Court, art. 11, July 1, 2022, 2187 U.N.T.S. 90. [hereinafter Rome Statute] (As the statute entered into force for Palestine in April of 2015, and Israel is not a party to the statute, the Court would not be able to exert jurisdiction over the 2014 Gaza conflict without a declaration by either Palestine or Israel) *See e.g.*, WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 65-67 (Cambridge University Press 3d ed. 2007) (specifically, the example of Colombia); *State of Palestine*, INT'L CRIM. CT., https://www.icc-cpi.int/palestine (last visited Mar. 28, 2021); *OTP Policy Paper on Preliminary Examinations*, INT'L CRIM. CT. (Nov. 2013), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

[8] *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction,* INT'L CRIM. CT., https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine (last visited Mar. 28, 2021). (The OTP was not the only U.N. agency that drew this conclusion, as the UN OHCHR concluded that there was "substantial information pointing to the possible commission of war crimes by both Israel and Palestine".); *UN Gaza Inquiry Finds Credible Allegations of War Crimes Committed in 2014 by Both Israel and Palestinian Armed Groups,* UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, (June 12, 2021), https://www.ohchr.org/en/un-gaza-inquiry-finds-credible-allegations-of-war-crimes. (This OHCHR inquiry was controversial from the start, and the initial head of the inquiry, William Schabas, left after "Israeli allegation of bias" due to Schabas's past work for the Palestine Liberation Organisation.); *Gaza Conflict 2014: 'War Crimes by Both Sides' – UN*, BBC NEWS (June 22, 2015), https://www.bbc.com/news/world-middle-east-33223365.

whether the ICC could exercise territorial jurisdiction over the situation pursuant to Article 12(2)(a) of the Rome Statute before initiating the full investigation of the 2014 Gaza conflict.[9] Pursuant to Article 19(3), the Court then set a schedule for the submission of observations from a wide array of parties to consider before ruling on the territorial jurisdiction of the situation.[10]

The Court also accepted *amicus curiae* submissions from a wide variety of academics and organizations with various viewpoints.[11] After this year-long process was complete, the Pre-Trial Chamber I rendered its decision regarding the scope of the Court's territorial jurisdiction over the Situation in Palestine.[12] The Chamber, by majority, held that the Court did have the power to exercise territorial jurisdiction in Palestine per Article 12(2)(a), and this jurisdiction "extends to the territories occupied by Israel since 1967", which includes Gaza, the West Bank, and East Jerusalem.[13]

The Chamber first addressed preliminary issues raised by various parties in order to remove them from the determining issue.[14] The Chamber responded to questions of general justiciability by noting that the questions put forth by the OTP in this case "clearly raise legal questions regarding the Court's jurisdiction" and were therefore justiciable.[15] The Chamber also addressed concerns regarding the impact of proceedings on Israel's right to territorial sovereignty. Although Israel refused to participate in the proceedings and any decision by the

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[9] *State of Palestine*, *supra* note 7. (The OTP requested this ruling pursuant to art. 19 ¶ 3 of the Rome Statute, which allows the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility.); *See also* Rome Statute, *supra* note 7, at art. 19.
[10] *State of Palestine*, *supra* note 6.
[11] ICC-01/18-143, *supra* note 1, at para. 24-25.
[12] ICC-01/18-143, *supra* note 1, at para. 24-25.
[13] ICC-01/18-143, *supra* note 1, at para. 60.
[14] ICC-01/18-143, *supra* note 1, at para. 27.
[15] ICC-01/18-143, *supra* note 1, at para. 28-29.

Court would directly affect the state, the Chamber held that concerns related to Israel's territorial sovereignty were unfounded because the "present decision is strictly limited to the question of jurisdiction set forth in the Prosecutor's Request and does not entail any determination on the border disputes between Palestine and Israel."[16]

The Chamber then addressed the question of whether Article 19(3) applies "in relation to an investigation that has, in principle, already been initiated by the Prosecutor."[17] The Chamber considered the ordinary meaning of the text of Article 19(3), noting that the OTP's request fell under the ordinary meaning of the phrase "a question of jurisdiction" and that the text of Article 19(3) places no temporal limitations on when the Prosecutor may make a request from the Court under the article.[18] The Chamber then considered the context of Article 19(3) of the Rome Statute. Since Articles 19(1) and (2) of the Rome Statute do not contain limiting language, and Article 19(3) does, the Chamber concluded that the mechanism in Article 19(3) was intended to extend to situations that are not yet considered to be a "case."[19] The Chamber considered the object and purpose of the Rome Statute, including the fact that the Court is not allowed to exert jurisdiction beyond what is vested to it by the Statute. Finally, the Court found that the Statute confirmed that it is appropriate to move forward with a determination of the issues of territorial jurisdiction presented by the OTP.[20]

The Chamber addressed the merits of the issue by separating the analysis into two issues: whether Palestine fulfilled the requirement set forth by Article 12(2)(a) to be "[t]he State on the

[16] ICC-01/18-143, *supra* note 1, at para. 29.
[17] ICC-01/18-143, *supra* note 1, at para. 31.
[18] ICC-01/18-143, *supra* note 1, at para. 69.
[19] ICC-01/18-143, *supra* note 1, at para. 73-75.
[20] ICC-01/18-143, *supra* note 1, at para. 73-75.

territory of which the conduct in question occurred,"[21] and if so, what is to be considered the "territorial jurisdiction" of Palestine.[22] Relying on the accepted Vienna Convention on the Law of Treaties' ("VCLT") standards for treaty interpretation, as well as the contents of the United Nations General Assembly Resolution 67/19, the Court concluded that Palestine is a State for the purposes of article 12(2)(a).[23] The scope of the territorial jurisdiction granted to the Court per Palestine's article 12(3) declaration extends to the territories "occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem."[24]

In analyzing the first issue, the Chamber primarily looked to the chapeau of articles 12(2)(a), 125(3), and 126(2).[25] Since neither the explicit text of article 12(2)(a), the Rules of Procedure and Evidence, nor the Regulations of the Court provides a definition for the word "state", the Chamber used the definition provided in the chapeau.[26] This definition provides that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court."[27] This chapeau is interpreted to mean that the word "State" in Article 12(2)(a) should be defined in relation to the Rome Statute and its parties, and "does not… require a determination as to whether that entity fulfills the prerequisites of statehood under general international law."[28]

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[21] Rome Statute, *supra* note 6, at art. 12(2)(A).
[22] ICC-01/18-143, *supra* note 1, at para 38.
[23] ICC-01/18-143, *supra* note 1, at para. 88.
[24] ICC-01/18-143, *supra* note 1, at para. 51.
[25] ICC-01/18-143, *supra* note 1, at para. 94. (The Court uses Art. 31(1) of the Vienna Convention of the Law of Treaties, which requires the Court to "interpret article 12(2)(a) in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Statute".).
[26] ICC-01/18-143, *supra* note 1, at para. 88.
[27] ICC-01/18-143, *supra* note 1, at para. 40.
[28] ICC-01/18-143, *supra* note 1, at para. 40.

To determine whether Palestine is considered a State party, the Chamber evaluated the procedure detailed in the Statute regarding Article 125(3) and the accession process.[29] It concluded that Palestine followed the correct procedure when depositing its instruments of accession with the United Nations Secretary-General.[30]

Although Palestine had properly deposited its instruments of accession with the Secretary-General, this does not automatically render accession to the Statute. Article 125(3) of the Rome Statute states that the statute is "open to accession by all states", in the Chamber's view, accession to the Rome Statute for a particular entity is guided by the accepted determination of the General Assembly regarding that particular entity.[31] The Chamber determines that since "the General Assembly has accepted Palestine as a non-Member observer State in the United Nations… Palestine would be able to become a party to any treaties that are open to 'any State' or 'all States' deposited with the Secretary-General."[32] Therefore, because Palestine followed the correct procedure as determined by the Rome Statute, Palestine was properly considered a state party to the Rome State, and is included in the definition of a "State" in reference to Article 12(2)(a).[33]

This determination that Palestine is a "State" as intended by Article 12(2)(a) meant that the Court could exercise territorial jurisdiction when "the conduct in question occurred" within the territory of Palestine.[34]

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[29] ICC-01/18-143, *supra* note 1, at para. 95–103.
[30] ICC-01/18-143, *supra* note 1, at para. 42.
[31] Rome Statute, *supra* note 7, at art. 125(3); ICC-01/18-143, *supra* note 1, at para. 97–98.
[32] ICC-01/18-143, *supra* note 1, at para. 95.
[33] The Court also considers other topics, including the object and purpose of the statute, and ultimately concludes that these further considerations support the conclusion that Palestine falls within the meaning of the word "State" in reference to Art. 12(2)(a). ICC-01/18-143, *supra* note 1, at para. 104-113.
[34] Rome Statute, *supra* note 7, at art 12(2)(a).

This led to the second issue, which was "the delimitation of the territory of Palestine for the sole purpose of defining the Court's territorial jurisdiction."[35] Referencing both General Assembly Resolution 67/19 and "other similarly-worded resolutions", the Chamber notes that the General Assembly referenced "the rights of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967.*"[36] As the accession procedure determines the entity that may become a State Party to the Rome Statute, the Chamber again turned to the accession documents to determine the territory of Palestine.[37] Since General Assembly Resolution 67/19 states that Palestine was a non-Member observer State and recognized the rights of Palestinian people "in their State of Palestine on the Palestinian territory occupied since 1967," the Chamber concluded that the territory of Palestine as defined by the Rome Statute includes the territory occupied since 1967.[38]

The final issue addressed by the majority was a challenge put forth in a legal memorandum issued by Israel on December 20, 2019.[39] Israel argued that "a fundamental precondition to jurisdiction enshrined in the Rome Statute" is that a State has "criminal jurisdiction over its territory and nationals" and has "delegated such jurisdiction to the Court."[40] Per the Oslo Accords, Palestine does not have criminal jurisdiction over Israeli nationals in the Occupied Palestinian Territory.[41] Israel views the ICC as a court of delegated jurisdiction rather than a

[35] ICC-01/18-143, *supra* note 1, at para. 113.
[36] ICC-01/18-143, *supra* note 1, at para. 116.
[37] ICC-01/18-143, *supra* note 1, at para. 114–123.
[38] ICC-01/18-143, *supra* note 1, at para. 116–18.
[39] *The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation in Palestine,"* Attorney General Guidelines, para. 4 (Dec. 20, 2019), https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf.
[40] *Id.*
[41] A/51/889, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo II") (Sept. 28, 1995).

court based upon the principle of universality,[42] and argues that the Court cannot exert jurisdiction over Israeli nationals acting within Palestinian territory because Palestine's accession and declaration of ad hoc jurisdiction per the Rome Statute did not transfer criminal jurisdiction over Israeli nationals to the Court.[43]

The Chamber addressed this argument only for "the sake of completeness," suggesting that it did not see significant merit in the defense.[44] The Chamber observed that domestic criminal courts "sometimes have to determine the extent of the territory of States in order to identify the extent of their territorial jurisdiction", but that this domestic determination is never construed to be an international determination of the State's territory.[45] The Chamber then cited to the 2018 "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" regarding the situation in Myanmar, which affirmed the Permanent Court of International Justice's stance that the "territoriality of criminal law… is not an absolute principle of international law and by no means coincides with territorial sovereignty."[46] Then, referencing the Appeals Chamber determination in the *Situation in Afghanistan*, the Chamber found that this type of jurisdictional challenge was not relevant to a decision regarding jurisdiction brought by under a 19(3)[47] request and therefore does not resolve the issue.[48]

Although the Chamber quickly dismissed Israel's argument regarding Palestine's ability to delegate domestic criminal jurisdiction, this novel jurisdictional theory is likely to appear

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[42] *See* Press Release, U.S. Dept. of State, The United States Opposes The ICC Investigation Into the Palestinian Situation (Mar. 3, 2021).
[43] Attorney General Guidelines, *supra* note 39, at para. 4–6.
[44] ICC-01/18-143, *supra* note 1, at para. 124.
[45] ICC-01/18-143, *supra* note 1, at para. 124.
[46] ICC-01/18-143, *supra* note 1, at para. 61.
[47] ICC-01/18-143, *supra* note 1, at para. 62 (quoting The Lotus Case, France v. Turkey, 1927 P.C.I.J., Ser. A, No. 10).
[48] ICC-01/18-143, *supra* note 1, at para. 128–29.

before the Court in the future. The Situation in Palestine presents unique considerations to the ICC due to the enduring conflict between Israel and Palestine, but it is certainly not the only situation in which a State party to the ICC has made agreements limiting or prohibiting criminal jurisdiction over individuals based on their State nationality; two examples include the United States's numerous Status of Forces Agreements ("SOFA") regarding U.S. military forces operating abroad,[49] and the North Atlantic Treaty Organization ("NATO")'s SOFA agreement.[50] Although these types of agreements are not unique, a closer analysis of Israel's argument in the *Situation in Palestine* concludes that these agreements bear no weight on the ICC's ability to exercise jurisdiction via Article 12(2)(a).

III. The History of Jurisdiction and Criminal Tribunals

Prior to the establishment of the ICC, there were four main documents from which the drafters of the Rome Statute could model the Rome Statute and the jurisdiction of the ICC; the Nuremberg Charter, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), the Charter for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and the Charter for the International Criminal Tribunal for Rwanda ("ICTR"). The first of its kind, the Nuremberg Charter was established specifically for the "just and prompt trial and punishment of the major war criminals of the European Axis."[51] Territorial jurisdiction was not of much concern to the Tribunal, as Article 6 of the Charter vests jurisdiction in the Tribunal to "try and punish persons who, acting in the interests of the

[49] R. CHUCK MASON, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED, CONGRESSIONAL RESEARCH SERVICE (2012), https://sgp.fas.org/crs/natsec/RL34531.pdf.
[50] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792 https://www.nato.int/cps/en/natohq/official_texts_17265.htm.
[51] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, [CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL], art. 1, March 15, 1951, 82 U.N.T.C. 280 https://www.refworld.org/docid/47fdfb34d.html.

European Axis countries, whether as individuals or as members of organisations" who committed "any of the following crimes," which included "crimes against peace," "war crimes," and "crimes against humanity."[52] This idea that "any combination of States can set up an international penal tribunal with a view to carrying out the same mission on a multinational level" laid the foundation for the principle of universality, which was further solidified by the Genocide Convention.[53]

Although the Genocide Convention does not explicitly call for universal jurisdiction, it has grown to be regarded as customary international law due to the widespread adoption of portions of the treaty as well as the general level of international concern regarding the crime of genocide.[54] It implicitly invokes the principles for universal jurisdiction by allowing any State party to the Convention to call upon the competent organs of the United Nations to take such action that State believes to be appropriate for the prevention and suppression of acts of genocide.[55] While the Genocide Convention embraced universality in its territorial jurisdiction delegated to claims brought under the treaty, the subject-matter jurisdiction of these claims was extremely limited; Article 2 defines "genocide" as any of five acts "committed with the intent to

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[52] *Id*. at art. 6.

[53] Yoram Dinstein, *The Universality Principle and War Crimes*, 71 INT'L L. STUD. 17, 26 (1998).

[54] Convention on the Prevention and Punishment of the Crime of Genocide, at art. IV (Dec. 9, 1948) G.A. Res. 260 A (III) [hereinafter Genocide Convention]; *See also* Amina Adana, *Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How Genocide Became a Crime Subject to Universal Jurisdiction*, EJIL:TALK! (May 16, 2019), https://www.ejiltalk.org/symposium-on-the-genocide-convention-reflecting-on-the-genocide-convention-at-70-how-genocide-became-a-crime-subject-to-universal-jurisdiction/.

[55] Genocide Convention, *supra* note 54, at art. VIII. One recent application of this universal jurisdiction is seen in *The Gambia v. Myanmar* case that, at the time of this writing, is currently pending before the International Court of Justice; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Judgement, 2022 I.C.J Rep. , ¶ __, (July 22), https://www.icj-cij.org/en/case/178. The Gambia brought this case to the ICJ because they believed that "a conflict exists between it and Myanmar regarding the interpretation and application of the[Genocide] Convention based on how the government of Myanmar was treating the Rohingya population", and the Gambia believes this treatment has risen "to the level of genocidal acts"; *See also* D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?,* AM. SOC. OF INT'L LAW (Feb. 27, 2020), https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean.

destroy, in whole or in part, a national, ethnical, racial or religious group," and does not allow for jurisdiction over claims of war crimes or crimes against humanity.[56]

The ICTY, which was established by a Security Council resolution after the Bosnian War in the early 1990's, asserted jurisdiction over a multitude of "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[57] This statute did not include a provision establishing jurisdiction over individuals based on their nationality, but instead established in Article 6 that the "International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute", vesting the tribunal with the power to prosecute suspected perpetrators regardless of their nationality.[58] This lack of nationality-based jurisdiction allowed the tribunal to prosecute anyone involved in the alleged crimes of the Bosnian war, regardless of their state.

One difference between the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Rome Statute of the International Criminal Court is the fact that the ICTY was established through various Security Council resolutions, meaning that there were no State parties to consider. It would not have made sense for the Statute of the ICTY to include a provision establishing personal jurisdiction over individuals who are nationals of "State parties" (as was included in the Rome Statute), because there were no state parties to the Statute of the ICTY. The jurisdiction of the ICTR blends the approach taken by the ICTY and

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[56] Genocide Convention, *supra* note 54, at art. II.

[57] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. I, May 25, 1993, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (The specific crimes included in the subject-matter jurisdiction of the ICTY include "Grave breaches of the Geneva conventions of 1949" (Art. II), "Violations of the laws or customs of war" (Art. III), "Genocide" (Art. IV), and "Crimes against humanity" (Art. V) The drafters of the ICTY embraced the same advantages known to the drafters of the Nuremberg Statute in the sense that the tribunal was created in response to a specific incident.).

[58] *See,* U.N., *Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Art. 6, (Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

the approach taken in Article 12 of the Rome Statute. Article 1 of the Statute of the ICTR again limits the subject-matter jurisdiction to various "serious violations of international humanitarian law", but broadens the territorial jurisdiction past the state lines of Rwanda.[59] To ensure that the ICTY had the power to investigate and prosecute all crimes related to the situation, Article 1 vests the tribunal with the power to prosecute crimes "committed in the territory of Rwanda," as well as, the ability to prosecute crimes committed by "Rwandan citizens" in "the territory of neighboring States" between specific dates.[60]

These statutes, and the varying principles of universality upon which they were built, provided the foundation on which the Rome Statute was developed.[61] First, universal jurisdiction exists in matters referred directly to the Court by the Security Council.[62] From the viewpoint of Professor Leila Sadat, the Rome Statute acts less as a traditional treaty and more as a constitution in international law, and "the power and legitimacy of these norms w[ere] premised on the well-accepted theory of universal jurisdiction that derives from the idea that when criminal activity rises to a certain level of harm... all States may apply their laws to the act."[63] In his *Introduction to the International Criminal Court*, Professor William Schabas notes that the original discussions in Rome regarding the intended jurisdiction of an international criminal court focused heavily on the concept of universality.[64] Many states, including the Czech Republic, Germany, and Costa Rica all supported the idea that the Court

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[59] U.N. Office of Legal Affairs, *Statute of the International Tribunal for Rwanda,* Art 1, Dec. 32, 1994, https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.
[60] *Id.*
[61] Genocide Convention, *supra* note 54, at art. II.
[62] Leila Nadya Sadat & S. Richard Carden, *The New Int'l Crim. Ct: An Uneasy Revolution*, 88 GEO. L. J. 381, 404 (2000).
[63] *See* Sadat & Carden, *supra* note 62, at 405-407.
[64] WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 61 (Cambridge University Press, 3rd ed. 2007).

should have universal jurisdiction over the "core crimes of genocide, crimes against humanity and war crimes," and that this new international court should "have the authority to try anybody found on the territory of a State Party, even if the crime had been committed elsewhere and if the accused was not a national of a State Party."[65]

This proposal of universal jurisdiction of the ICC was met with concern from other negotiating states stemming from two issues; first, that universal jurisdiction would be likely to discourage ratifications, and second, in particular, the United States threatened that it would have to oppose the Court entirely if universal jurisdiction "were to be incorporated in the Statute."[66] The preservation of the prosecution of U.S. forces to U.S. domestic courts was of utmost importance to the United States during the negotiations and drafting of the Rome Statute, and the creation of an international criminal court with universal jurisdiction would have impacted this ability.[67]

David Scheffer, the United States ambassador at the time, noted that the U.S. "repeated this requirement in every negotiating forum until the final days of Rome in July 1998."[68] These negotiations "began as an explicit 'carve-out' of the Status of Force Agreements" that the United States was desperate to protect, and slowly morphed into the text that is now known as Article 98(2) of the Rome Statute.[69] The United States intended this phrase to be

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[65] SCHABAS, *supra* note 64, at 61; *See Also,* UN Doc. A/CONF.183/SR.3, UN Doc. A/CONF.183/SR.4, UN Doc. A/CONF1.83/SR.6, UN.Doc. A/CONF.183/SR.8.

[66] SCHABAS, *supra* note 64, at 62.

[67] DAVID SCHEFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNAL, 171-175 (Detailed Record ed., 2012); *See also,* Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. OF TRANSNAT'L. L. 371 (2017).

[68] SCHEFER, *supra* note 67, at 171–175.

[69] SCHEFER, *supra* note 67, at 171–175. *See also* Rome Statute, *supra* note 7, at art. 98(2). ("Cooperation with respect to waiver of immunity and consent to surrender", prohibits the Court from proceeding with a "request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that

interpreted in a way that would consider the United States to be a "sending State" when sending soldiers abroad, and therefore the statute would require the consent of the United States before any American suspect "could be surrendered to the International Criminal Court for prosecution."[70] The inclusion of this provision "absorbed little negotiation time" in Rome, because most of the participants in the negotiation did not consider it to be of "utmost political sensitivity" and there was a general understanding that the language applied to Status of Force Agreements.[71]

After securing the inclusion of Article 98(2), however, the United States strongly prioritized the development of SOFAs and eventually negotiated "more than one hundred" agreements that would theoretically fall under the exception laid out in Article 98(2).[72] Naturally, many proponents of the Court were concerned by the United States's conduct, as it seemed to contradict the official U.S. policy regarding their efforts to "promote real justice"; however, Schabas concluded that the U.S. view of Article 98(2) was "inaccurate" and the Article 98(2) agreements "in no way sought to achieve immunity from investigation and prosecution where appropriate."[73] And, even with the inclusion of Article 98(2), the United States has yet to become a State party to the Rome Statute.[74] This campaign reflected the United States' deep disagreement with the inclusion of the principles of universality within the Rome Statute and its general desire to distance itself from any exercise of ICC jurisdiction.

State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.").

[70] SCHEFER, *supra* note 67, at 175.

[71] Newton, *supra* note 67, at 393.

[72] Newton, *supra* note 67, at 393.

[73] Newton, *supra* note 67, at 394 *citing* WILLIAM SCHABAS, INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, 1045 (2d ed. 2010).

[74] *See, e.g., The United States Does not Recognize the Jurisdiction of the International Criminal Court*, NPR (April 16, 2022), available at https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court.

Although the United States strongly advocated for an ICC that was not built upon the foundational principles of universal jurisdiction, this position does not reflect the views presented during the negotiations in Rome nor the ultimate construction of the Rome Statute.

IV. Critique of the Pre-Trial Chamber I's Decision in the *Situation in Palestine* Regarding the Underlying Principles of ICC Jurisdiction

In its legal memo addressing the *Situation in Palestine*, Israel argued that the ICC was unable to establish territorial jurisdiction over Israeli nationals acting in Palestinian territory because Palestine itself was unable to exert jurisdiction over Israel nationals acting in Palestinian territory.[75] The Chamber did not conduct an extensive analysis in response to this supposition; citing the Appeals Chamber in the *Situation in Afghanistan*, the Chamber held that this argument was not "pertinent to the present proceedings" and that interested States may raise the issue "based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute."[76] Both the *Situation in Palestine* and the *Situation in Afghanistan* had Article 19 jurisdictional challenges brought to the Court by the OTP, and in both there were determinations that the issue was not pertinent in either situation implies that the challenge must be brought under Article 19(2)(b) or (c).[77] The Chamber provides little insight into their reasoning that Israel's jurisdictional

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[75] *See* ICC-01/18-143, *supra* note 1, at para. 126. This supposition was not limited only to Israel, as there were various arguments put forth regarding the degree of influence of the Oslo Accords on the Chambers' decision. Some victim observances and amici curiae briefs argued for a complete prohibition on the exercise of jurisdiction due to the *nemo dat quad non habe*t rule, and other victim observances and amici curiae briefs argued that the Oslo Accords may affect "matters of cooperation with the Court." Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.

[76] ICC-01/18-143, *supra* note 1, at para. 124, 129.

[77] Rome Statute, *supra* note 7, at art. 19(2)(a). These are the only two provisions in Art. 19 that permit a State to bring a challenge. The argument could potentially be advanced by "an accused or a person for whom a warrant of arrest or a summons to appear has been issued", but the Court specifically referenced a "State" bringing the argument in *Palestine* and *Afghanistan*. Therefore, it follows that the Court was not referring to Art. 19(3)(a) in

challenge is not proper under a 19(3) request. There were certainly reasons why, in this particular situation, it may have been better for the Court to leave Israel's challenge to another day. First, Israel put forth this challenge in a legal memorandum issued from the Attorney General's office and not in any specific request directed at the ICC.[78] Second, Israel did not make it clear that this was intended to be a challenge to jurisdiction as understood by Article 19(2)(b) or (c), and since Article 19(4) places strict limitations on the number of Article 19 challenges a single state may bring, it may have created an unfair result for the Chamber to have ruled on this challenge without ensuring that Israel was able to put forth a fully-developed argument.[79] However, as the Chamber did not list any specific details as to why it was not pertinent to address the issue in a 19(3) request, there is no clarity as to the Chamber's reasoning.[80]

The Court was correct to disregard Israel's interpretation of the jurisdiction of the Rome Statute and should reject this interpretation in any future decisions in which similar arguments are raised. Although the United States may have thought differently, the jurisdiction of the ICC was generally negotiated in Rome through the lens of universality and

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Palestine or *Afghanistan*. Art. 19(2)(b) permits a challenge to the admissibility of a case or the jurisdiction of the Court to be brought by a "State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case", and Art. 19(2)(c) permits the same challenges brought by a "State from which acceptance of jurisdiction is required under article 12." Rome Statute, *supra* note 7, at art. 19(2)(b)-(c). Art. 19(5) requires that a State bringing a challenge under 19(2)(b) or 9(c) bring the challenge "at the earliest opportunity", and Art. 19(7) requires that the Prosecutor "suspend the investigation until such time as the Court makes a determination" once a 19(2)(b) or (c) challenge is brought. Rome Statute, Art. 19(5); Rome Statute, *supra* note 7, at art. 19(7). Since the Chamber did not address Israel's challenge to jurisdiction in the Prosecutor's 19(3) request, Israel could delay an investigation by bringing this same jurisdictional challenge under Art. 19(2)(c). As the text of Art. 19(2)(c) reads "A *State* from which acceptance of jurisdiction is required under article 12", it does not appear that a State needs to be party to the Rome Statute to bring this type of challenge; Rome Statute, *supra* note 7, at art. 19(2)(c). Since the *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'* determined that the OTP does have the territorial jurisdiction under Art. 12(2)(a) to move forward with the investigation of actions committed by Israeli nationals, Israel can be considered a "state" who is being required to accept the jurisdiction of art. 12.

[78] Attorney General Guidelines, *supra* note 39.

[79] Rome Statute, *supra* note 7, at art. 19(4).

[80] ICC-01/18-143, *supra* note 1, at para. 128-129.

there was little, if any, discussion of whether State parties were delegating their criminal jurisdiction to the ICC by acceding to the Rome Statute.[81] Further, this argument does not match the object and purpose of the Rome Statute. The very first article of the Rome Statute establishes the existence of an International Criminal Court that is "a permanent institution" and has "the power to exercise its jurisdiction over persons for the most serious crimes of international concern."[82] The concept of "the most serious crimes of international concern" derives from the *Barcelona Traction* concept of "*erga omnes* obligations," which, simply stated, are obligations that all states owe to each other,[83] and at least some of the crimes covered by the subject-matter jurisdiction of the Court are considered *erga omnes* obligations.[84] Further, the jurisdiction of the three prior statutes regarding international criminal jurisdiction all exhibit a pattern of broad, universal jurisdiction, over a very limited set of criminal circumstances.[85] Aside from the concern that a complete universal jurisdiction may discourage state ratification of the Treaty,[86] the drafters in Rome were influenced by the United States's threat to "oppose the Court actively" if universal jurisdiction were included.[87] Contrary to Newton's statement that the intent of the drafters in Rome was to establish a treaty that simply transferred a state party's criminal jurisdiction to an international

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[81] SCHABAS, *supra* note 64, at 61-62.

[82] Rome Statute, *supra* note 7, at art. 1.

[83] Craig Eggett & Sarah Thin, *Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion*, EJIL:TALK! (May 28, 2021, 4:25 PM), https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/.

[84] *Id*.

[85] *See* State of Palestine, *supra* note 7.

[86] Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 INT'L & COMPAR. L. Q. 49, 68 (2007). (This was a relevant concern because "[w]ith fewer ratifying States, the burden of financing the ICC would have fallen on fewer States, which would probably have led to a smaller budget for the Court, and thus fewer instances in which it could take action.").

[87] SCHABAS, *supra* note 64, at 62.

tribunal,[88] the intent of Rome was to create an international tribunal that had broader power to impose liability for significant violations of international norms than any one state party to the treaty.[89] Although the jurisdiction provided for in the Rome Statute is narrower than that of the preceding international criminal tribunals due to the consensual element of the Court, it is evidence that the Rome Statute was built on a framework of universal jurisdiction.[90]

The drafters had a compelling reason for approaching the Rome Statute from the lens of universal jurisdiction; an international criminal court with a piecemeal, delegated jurisdiction would be much less effective than a court that could exercise a broader, more universal jurisdiction.[91] In the current Rome Statute, Article 12(2)(a) provides the only mechanism with which the Court can exercise jurisdiction over anything related to a third non-party State, and that is when the alleged act or acts occur in the territory of a party State.[92] If the Court were to limit its scope to exclude any individuals of a state which had signed some type of SOFA or other jurisdiction-limiting agreement, protected individuals would be free to commit any of the crimes within the subject-matter jurisdiction of the ICC and the State in which the crimes were committed may have little recourse. Regardless of the effect on the State party, the perpetrators of these "most serious crimes of international concern" would experience the impunity that the Rome Statute was specifically drafted to erase.[93] As there are states who

[88] *See* Newton, *supra* note 67, at 373.
[89] Sadat & Carden, *supra* note 62, at 381.
[90] *See* SCHABAS, *supra* note 64, at 60-62.
[91] Bekou & Cryer, *supra* note 86, at 68.
[92] Rome Statute, *supra* note 7, at art. 12(3).
[93] Rome Statute, *supra* note 7, at art. 1.

have made many jurisdiction-limiting bilateral agreements, accepting this limitation on the Court would potentially leave many individuals without any path to retribution.[94]

The theoretical basis for Israel's argument, on the other hand, is limited. Aside from the United States' arguments made during the Rome negotiations,[95] there is little support for the supposition that the underlying basis of ICC jurisdiction is derived from the criminal jurisdiction of State parties. In 1999, Professor Madeline Morris was the first scholar to address the potential legal ramifications of the jurisdictional decisions made during the Rome Conference in her remarks regarding *The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States*. She noted that "if the conduct forming the basis for the indictment was an official act taken pursuant to state policy and under state authority, then the case will, in effect, be an adjudication of the lawfulness of the state's acts and policies."[96] From her perspective, in ICC cases addressing state-sanctioned acts, the ICC ultimately becomes an institution adjudicating legal disputes between states; and, in cases where both states are not State parties to the Rome Statute, there are multiple potential issues relating to the exercise of this "compulsory jurisdiction."[97] Israel's argument in the *Situation in Palestine* does not advance these same concerns.[98] As the *Situation in Palestine* has not yet produced any cases, it would be premature to advance an argument that ICC review of state-sanctioned action presents any of the issues which concerned Professor Morris.

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[94] *See* MASON, *supra* note 49; (discussing the hundreds of SOFA agreements made by the United States. Further, ICC ruling that accepting this argument may inspire powerful states, like the United States, to limit or entirely withhold assistance from smaller states unless those states agree to sign a SOFA. Once a state has entered enough SOFAs around the world, that state would be in a position to take whatever action it pleased without worrying about criminal liability under the ICC.).

[95] Rome Statute, *supra* note 7, at art. 10.

[96] Madeline Morris, *The Jurisdiction of the International Criminal Court Over Nationals of Non- Party States (Conference Remarks)*, 6 ISLA J. OF INT'L & COMP. L. 363, 364 (1999).

[97] *Id.* at 364–365.

[98] Attorney General Guidelines, *supra* note 39.

The argument advanced by Israel in the *Situation in Palestine* has also been put forth by Professor Michael Newton in his article *How the International Criminal Court Threatens Treaty Norms*.[99] Newton asserts that the negotiators in Rome "expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values" and instead intended the jurisdiction of the ICC to derive "solely from the delegation by State Parties of their own sovereign prerogatives."[100] In situations when Article 12(2)(b) jurisdiction has been invoked, it is becoming common for non-party States to put forth some type of statement in line with Professor Newton's argument; Israel in the *Situation in Palestine,* the United States in the *Situation in Afghanistan,* and Myanmar in the *Situation in Bangladesh/Myanmar* all advanced similar positions regarding the ICC's exercise of jurisdiction over the nationals of non-party States.[101] In each of these cases, the Chamber has dismissed the argument in some way or another.[102]

V. Conclusion

Although an ICC that lacks universal jurisdiction may be appealing to a non-party State which finds itself in the middle of an investigation, the argument is not supported by the negotiation history in Rome nor by academics in the field. The ICC was not created by delegation of jurisdiction from party States; to the contrary, the creation of the Rome Statute

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[99] Newton, *supra* note 67.

[100] Newton, *supra* note 67.

[101] Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4, Mar. 5, 2020, https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF.; Decision on the "Prosecution's Requestion for a Ruling on the Jurisdiction under Article 19(3) of the Statute", No. ICC- RoC46(3)-01/18, https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF, para. 34-35. The specific crime in question was the Art. 7 crime of deportation, which, by its very nature, usually starts in the territory of one state and ends in the territory of another. In the case at hand, the deportations were alleged to have started in Myanmar, a non-party state to the Rome Statute, and ended in Bangladesh, a party state to the Rome Statute.

[102] Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, *supra* note 101; Decision on the "Prosecution's Requestion for a Ruling on the Jurisdiction under Article 19(3) of the Statute."

instead marked "a decision to reequilibrate the constitutional, organic structure of international law."[103] If Israel does challenge the Court's jurisdiction with a 19(2)(c) action based on this premise of conferred criminal jurisdiction, the Court should reject this argument. A lack of limited universal jurisdiction would limit the Court's ability to carry out its object and purpose, and the Chamber's decision in the *Situation in Palestine* does not mean that Israel has no way to prevent the Court from exercising jurisdiction over Israeli nationals. Perhaps recognizing that the ICC's exertion of jurisdiction over nationals of non-party states may pose questions regarding state sovereignty, the drafters of the Rome Statute included a specific mechanism in which any State, party or not, can claim exclusive jurisdiction over a situation presented to the Court. Article 17(1)(a) establishes that a case before the Court is inadmissible, regardless of the Court's Article 12 powers, when "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[104] If Israel would like to remove the ICC's power to investigate potential crimes committed by Israeli nationals in the territory of Palestine as defined under the Rome Statute, Israel could commence a domestic investigation into the alleged war crimes to determine whether there is criminal culpability that must be prosecuted. As stated in the Attorney General's legal memorandum, Israel is "an early and passionate advocate" for holding the perpetrators of "heinous crimes that deeply shock the conscience of humanity" accountable for their actions.[105] By commencing an investigation in good faith, the ICC would no longer have jurisdiction over the matter.

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[103] Sadat & Carden, *supra* note 62, at 395.
[104] Rome Statute, *supra* note 7, at art. 17(1)(a).
[105] Attorney General Guidelines, *supra* note 39.

THE ABSENCE OF HEALTH MONITORING SYSTEMS IN PRISONS: EVOLVING UNDERSTANDINGS OF THE EIGHTH AMENDMENT.

Matthew Mayers[1]

ABSTRACT

This note focuses on the lack of health surveillance systems in United States (U.S.) state and federal prisons. Health surveillance, as applied in prisons, is integral in monitoring communicable health ailments such as human immunodeficiency virus (HIV), hepatitis C virus (HCV), and the novel coronavirus disease (COVID-19). While some European countries adopted varying prison health monitoring systems, U.S. prisons lack routine standardized health surveillance systems.

In this note, I will discuss the need for the Eighth Amendment to evolve in accordance with the emergence of digital health technologies. I will discuss how existing U.S. Eighth Amendment jurisprudence fails to protect incarcerated persons from cruel and unusual prison conditions arising from the absence of routine health monitoring in prisons. Further, this note will identify recommendations for evolving the understandings of Eighth Amendment standards via applications of European and U.S. jurisprudence. The note concludes on the need for digital health technologies in prisons to be instituted in a manner that promotes equity, privacy, and transparency.

[1] J.D./M.A. Candidate (2023) at Syracuse University College of Law and the Maxwell School; Associate Articles Editor of the *Journal of Global Rights and Organizations*, Vol. 12. I am incredibly grateful for Professors Paula Johnson, Lauryn Gouldin, and Monica Todd, as well as family and friends who have shared their insight, support, and wisdom throughout my law school journey and note writing process. This note is dedicated to the individuals who have been disproportionately harmed by the injustices of the criminal justice system.

I. INTRODUCTION

A year after the U.S. shutdown resulting from COVID-19, COVID-19 related deaths in U.S. prisons doubled.[2] Mass incarceration has contributed to densely packed prison conditions contributing to disproportionately high rates of COVID-19 infections, as well as "chronic health problems including diabetes, high blood pressure," HIV, "substance use and mental health problems" among incarcerated populations.[3] Due to a lack of health surveillance in prisons, the true scope of this public health crisis in prisons remains unknown. U.S. prisons have consequently become "death making institutions."[4]

Under International Human Rights Law, "states are required to have robust public health surveillance measures in order to safeguard the rights to life and health."[5] The U.S. Supreme Court held that the Eighth Amendment should take its meaning from "the evolving standards of decency that mark the progress of a maturing society."[6] Under the principle of equivalence, European courts have held that prison health services should be equivalent to what is offered in communities. Despite these principles and standards set forth under International Human Rights Law, there is an absence of robust health surveillance and monitoring systems in U.S. prisons.

Accordingly, health officials are unable to offer informed and timely, equitable, non-discriminatory, and adequate health treatment for individuals who are incarcerated. As such, the applications of the evolving standards of decency principle and the principle of equivalence,

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[2] Jennifer Valentino-DeVries & Allie Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, THE NEW YORK TIMES (Feb. 19, 2023), https://www.nytimes.com/2023/02/19/us/covid-prison-deaths.html.

[3] *Health*, PRISON POL'Y INITATIVE, https://www.prisonpolicy.org/health.html#briefings (last visited Mar. 14, 2021).

[4] Leah Wang & Wendy Sawyer, *New Data: State Prisons are Increasingly Deadly Places*, PRISON POL'Y INITATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/.

[5] Sharifah Sekalala, et al., *Analyzing the Human Rights Impact of Increased Digital Public Health Surveillance During the COVID-19 Crisis*, 22 HEALTH & HUM. RTS. J. 7, 12 (2020).

[6] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

warrants the need for modern cruel and unusual punishment jurisprudence to evolve in accordance with the global availability of emerging health surveillance technologies.

II. WHAT IS PUBLIC HEALTH SURVEILLANCE?

Public health surveillance is the "the ongoing, systematic collection, analysis, and interpretation of health data essential to the planning, implementation, and evaluation of public health practice, closely integrated with the timely dissemination of [this information] to those who need to know and act upon that information"[7] Data recorded in public health surveillance systems include the detection of a health condition and quality monitoring of health services to inform public health decision making such as "health promotion, quality improvement, and resource allocation."[8] To effectuate such a dynamic, a health monitoring system must include an objective and a method.[9]

Although the initial overall focus of health surveillance systems have been on infectious diseases, such systems have been used digitally to monitor and address "health determinants (e.g., risk behaviors, health care services, and socioeconomic factors)" and relevant outcomes for mental health and injuries.[10] For example, the Major League Baseball Health and Injury Tracking System are two non-public health entities that adopted an electronically data driven surveillance system to monitor work-related injuries.[11]

Digital health surveillance systems have also been used to monitor infectious diseases. In West Africa, during the 2014-2016 Ebola outbreaks, mobile phone data was used for contact

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[7] Samuel L. Groseclose & David L. Buckeridge, *Public Health Surveillance Systems: Recent Advances in Their Use and Evaluation*, 38 ANNU. REV. PUB. HEALTH 57, 58 (2017).
[8] *Id.*
[9] *Id.* at 59.
[10] *Id.*
[11] *Id.*

tracing efforts to monitor travel patterns.[12] Similarly, Taiwan used mobile phone data for contact tracing efforts for COVID-19.[13] The documented efficacies of health surveillance in disease prevention, combatting virus transmission, promoting quality health conditions is demonstrative of the critical need to adopt such systems in prisons.[14] It is also indicative of the need for the standard of adequate healthcare in prison to evolve.

III. HEALTH MONITORING SYSTEMS IN PRISONS

A. THE NEED FOR STANDARDIZED HEALTH MONITORING SYSTEMS IN PRISONS

Health illnesses remain one of the highest causes of death in prisons.[15] These disparities are explained from the fact that incarceration is a risk factor for mental and physical health diagnosis.[16] These figures especially impact Black Americans considering they are incarcerated in state prisons at a rate of five times more than that of White Americans.[17] Even two weeks following release, formerly incarcerated individuals have a twelve times higher risk of death compared to the general population.[18] It is thus reasonable to assert that prisons can be "death making institutions" because they serve as institutional determinants of health.[19] A routine and standardized health monitoring system however can "inform the development and implementation of preventive interventions, disease-containment efforts, proportionate and

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12 Sekalala et al., *supra* note 5, at 9.

13 Sekalala et al., *supra* note 5, at 15 (noting that Taiwan used smartphone location data to identify individuals who have violated COVID-19 quarantine rules).

14 *See* Sekalala et al., *supra* note 5, at 11 (identifying the need to balance the privacy and human rights challenges of digital health surveillance with the benefits of real time data collection).

15 Wang & Sawyer, *supra* note 4 (noting that although "illness" is identified as the highest cause of death in prison, "illness" an incorrect label since natural causes and systemic neglect of health and aging become swallowed up in that definition).

16 Meghan Peterson & Lauren Brinkley-Rubinstein, *Incarceration is a Health Threat. Why Isn't It Monitored Like One?*, HEALTH AFFS. (Oct. 19, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20211014.242754/full/.

17 *Id.*

18 *Id.*

19 Wang & Sawyer, *supra* note 4.

equitable resource allocation, and the acquisition of specialized public health and medical expertise to work in criminal justice settings."[20]

Providing health surveillance data to the public is harmonious with a democratic government.[21] In other words, transparency fosters public trust by offering the public opportunities to make independent evaluations of U.S. prison health data.[22] Transparency also promotes equitable care by allowing incarcerated populations, the public, and health providers to compare the actualities of health outcomes, services, and diagnosis in prisons to what is prevalent in the community.[23]

The lack of health surveillance is however particularly harmful towards all Black communities across genders and the lesbian, gay, bisexual, transgender, and queer (LGBTQ+) community. Particularly, the absence of such data perpetuates harms against Black men since they are overrepresented in the U.S. prison population.[24] The same applies to Black women since they represent most of the women who are incarcerated.[25] Likewise, although there is limited data on LGBTQ+ prison populations, the most recent National Inmate Survey from 2011-2012 showed the LGBTQ+ persons are "incarcerated at a rate over three times that of the total adult population."[26] There is also limited prison data on Black trans people.[27] The 2011 National

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[20] Ingrid A. Binswanger et al., *Principles to Guide National Data Collection on the Health of Persons in the Criminal Justice System*, 134 PUB. HEALTH REP. 34, 37 (2019).

[21] Binswanger et al., *supra* note 20, at 41.

[22] Binswanger et al., *supra* note 20, at 41.

[23] Binswanger et al., *supra* note 20, at 39.

[24] Alexi Jones, *New BJS data: Prison Incarceration Rates Inch Down, but Racial Equity and Real Decarceration Still Decades Away*, PRISON POL'Y INITIATIVE, (Oct. 30, 2020), https://www.prisonpolicy.org/blog/2020/10/30/prisoners_in_2019/ (referring to Black men, but not distinguishing cis or trans men).

[25] PAULA C. JOHNSON, INNER LIVES 20 (2004) (referring to Black women, but not distinguishing between cis or trans women).

[26] Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POL'Y INITIATIVE (Mar. 2, 2021), https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/.

[27] *See* Alexi Jones, *supra* note 26.

Transgender Discrimination survey showed however, "that [one] in [six] trans people have been incarcerated at some point, and nearly half ([forty-seven percent]) of Black trans people have been incarcerated."[28] Overall, the need for health surveillance systems in prisons is especially relevant for the populations that are disproportionately impacted by the health harms imposed by prison conditions.

B. THE PRESENT STATE OF HEALTH MONITORING IN U.S. PRISONS

There is an overwhelming absence of "real-time data on the criminal legal system's breadth."[29] It is therefore unclear the exact number of persons presently incarcerated in U.S. state and federal prisons.[30] The existing monitoring system for U.S. prisons is the Bureau of Justice Statistics (BJS).[31] Reports of the BJS are published in the Correctional Populations in the United States series.[32] Though these reports are issued periodically, they are published with a significant delay. The report covering prison populations from 2017 to 2018, for example, was released in 2020.[33] Also, for 2019 populations, the report was released in summer of 2021.[34] In January of 2022, the BJS published a report detailing the 2019-2020 impact COVID-19 has had on prisons.[35] The report identified a forty-six percent increase in prison related deaths from 2019 to 2020.[36] Timely issuance of these reports are a matter of life and death. Delays in publishing these reports bar the opportunity for health officials to respond to public health crises in real-time. It is

[28] *See* Alexi Jones, supra note 26.
[29] Peterson & Brinkley-Rubinstein, *supra* note 16.
[30] Peterson & Brinkley-Rubinstein, *supra* note 16.
[31] *See* Binswanger et al., *supra* note 20.
[32] *See* Binswanger et al., *supra* note 20.
[33] Peterson & Brinkley-Rubinstein, *supra* note 16
[34] Peterson & Brinkley-Rubinstein, *supra* note 16.
[35] Wendy Sawyer, *New data: The Changes in Prisons, Jails, Probation, and Parole in the First Year of the Pandemic*, PRISON POL'Y INITATIVE (Jan. 11, 2022), https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/.
[36] E. ANN CARSON, Prisoners in 2020 - Statistical Tables, BUREAU OF JUST. STAT., 1, 2 (2021).

unacceptable that attempts to address the COVID-19 crisis in prisons relies on 2018 data.[37] It is of no surprise why there has been insufficient real-time data identifying the vaccination status of incarcerated persons.[38] Relying on data from previous years provides an inaccurate depiction of the current state of the incarcerated population's health. Failing to track such data is also likely to result in further diagnosis of preventable illnesses among staff and incarcerated persons.

In addition to the BJS, some U.S. state departments of corrections issue reports on health data.[39] However, some of these reports, only capture point-in-time populations, are released "sporadically", are unreliable, and are not uniform.[40] These reports generally capture information from the date in which the survey was conducted.[41] Thus, individuals "who cycle through short sentences. . .will not be reflected in the point-in-time population."[42] These reports are consequently likely to underestimate public health issues in prisons. COVID-19 data similarly faces underestimations since some states, such as Texas, fail to consistently update their COVID-19 tracking data.[43] Resultingly, the current state of U.S. state and federal prison health monitoring remains inadequate as it is unlikely to capture the full scope of the public health crisis in prisons.

IV. CONTRIBUTING FACTORS CONCERNING THE CURRENT STATE OF HEALTH MONITORING IN PRISONS

A. RACIAL AND SOCIETAL APATHY

37 *See*, Peterson & Brinkley-Rubinstein, *supra* note 16.
38 Peterson & Brinkley-Rubinstein, *supra* note 16.
39 Peterson & Brinkley-Rubinstein, supra note 16; *See also* Michael Ollove, Some States Are Cloaking Prison COVID Data, PEW (Oct. 27, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/10/27/some-states-are-cloaking-prison-covid-data.
40 Peterson & Brinkley-Rubinstein, *supra* note 16.
41 Peterson & Brinkley-Rubinstein, *supra* note 16.
42 Peterson & Brinkley-Rubinstein, *supra* note 16.
43 Peterson & Brinkley-Rubinstein, *supra* note 16.

Prison health conditions are largely attributed to the historical racist views of punishment for Black populations. These views continue to inform contemporary perspectives of punishment. Historically, criminal penalties were based on the racial distinctions made between indentured servants and slaves.[44] Slaves were often subjected to harsher punishments in the form of the death penalty and beatings.[45] Similarly Black Americans are incarcerated five times that of white Americans, and receive harsher criminal penalties.[46] Slaves were also often undereducated in an effort to hinder their ability to advocate for better health.[47] Incarcerated persons are likewise often undereducated, lack health literacy, and thus are hindered in advocating for better prison health conditions.[48]

Contemporary views of punishment are reflective of a racial apathy towards the harmful realities of prison health. Non-Black Americans often miscalculate the weight and impact of racism by suggesting that it is equally damaging to non-Black Americans.[49] Accordingly, inequalities are underestimated and Black Americans are blamed for the harmful racist effects of laws and policies.[50] As such, the societal apathy towards racism in the form of inadequate prison health conditions has become "easy" for non-Black Americans to ignore because it is not

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[44] JOHNSON, *supra* note 25, at 20, ("[O]ne's darker skin became a justification for Whites to subject Blacks to a depravity that had never been used against indentured servants.").

[45] JOHNSON, *supra* note 25, at 2.

[46] AMERICAN CIVIL LIBERTIES UNION AND THE SENTENCING PROJECT, RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2022) (noting that these disparities are coupled with Black Americans more likely to receive longer sentences, have higher bond set, assessed to be a flight risk, and less likely to receive favorable plea deals).

[47] HARRIET A. WASHINGTON, MEDICAL APARTHEID THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 18 (Anchor Books Broadway Books Edition, 2008).

[48] Kristie B. Hadden et al., *Health Literacy Among a Formerly Incarcerated Population Using Data from the Transitions Clinic Network*, 95 J. OF URB. HEALTH 547, 548 (2018).

[49] Clea Simon, *Facing the Denial of American racism*, THE HARVARD GAZETTE, (Jun. 5, 2020), https://news.harvard.edu/gazette/story/2020/06/facing-the-denial-of-american-racism/.

[50] *Id.*

something they have to encounter on a daily basis.[51] Angela Davis identifies this apathy as the societal excuse of absolving oneself of the "responsibility of seriously engaging with the problems of our society, especially those produced by racism and increasingly, global capitalism."[52]

Despite the societal apathy towards prison conditions, inhumane conditions in prisons is not a form of punishment nor is it part of a prison sentence.[53] Nevertheless, U.S. culture justifies its apathy towards populations it deems deserving of punishment through tough on crime laws.[54] Bipartisan support of these laws perpetuates mass incarceration by capitalizing off of the public's overestimated fear of crime.[55] Such treatment has also been constitutionally justified, "[e]ven the 13th Amendment excluded inmates from its protection: Involuntary servitude was abolished 'except as a punishment for crime whereof the party shall have been duly convicted.'"[56] Hence, modern jurisprudence of the Eighth Amendment must evolve and not continue to adopt the racist practices of neglect towards the incarcerated population's health and humanity.

B. PRISON HEALTH STAFFING

Incompetent health staffing and the lack of health reporting from prison health staff contributes to the lack of routine health surveillance in prisons. In federal prisons, the department that oversees integral health policies and standards for prison health, the Health Services

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[51] Taylor Corley, *Incarcerated People Deserve Human Rights*, VIKING FUSION, (Oct. 15, 2020), https://vikingfusion.com/2020/10/15/incarcerated-people-deserve-human-rights/

[52] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (Seven Stories Press 2003).

[53] Wang & Sawyer, *supra* note 4.

[54] Alan Greenblatt, *America Has a Health-Care Crisis — in Prisons*, GOVERNING THE FUTURE OF STATES AND LOCALITIES, (July 29, 2019), https://www.governing.com/archive/gov-prison-health-care.html.

[55] RACHEL BARKOW, PRISONER OF POLITICS, 92, (Belknap Press: An Imprint of Harvard University Press, 1st ed. 2019).

[56] Spencer J. Weinreich, *Why Prisoner Abuse and Deprivation Persists in America*, WASH. POST., (Mar. 7, 2019), https://www.washingtonpost.com/outlook/2019/03/07/why-prisoner-abuse-deprivation-persists-america/.

Division, has faced critique from prison advocates and even union leaders.[57] These complaints detailed how leaders in the unit lacked the necessary training and education to lead health units.[58] As a result of this incompetence, the Bureau of Prisons (BOP) failed to follow its pandemic plan and has pressured correctional staff to return to work despite testing positive with COVID-19.[59] Consequently, "50,000 federal prisoners tested positive for COVID-19 as of last week, and at least 258 have died."[60]

Similarly, "[f]rom California to Alabama, news reports and public records show that [state] prisons routinely hire underqualified and even disgraced medical staff."[61] For example, Illinois' Department of Corrections "reported in May 2020 that it had hired a communicable and infectious disease coordinator."[62] This individual however, "had no training in infection control and only eight months of relevant work experience."[63] The report also provided that some physicians in prisons "do not have the proper credentials" and have had their "license permanently revoked by the state licensing board."[64] Thus, the parties responsible for creating prison health monitoring systems often lack the necessary health qualifications to develop robust systems.

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[57] Keri Blakinger, *Prisons Have a Health Care Issue—And It Starts at the Top*, Critics Say, THE MARSHALL PROJECT, (July 1, 2021), https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say.

[58] *Id.*

[59] *Id.*

[60] Blakinger, *supra* note 57.

[61] Blakinger, *supra* note 57.

[62] Chloe Hilles, *Health care in Illinois prisons is deficient: Report*, INJUSTICE WATCH (Oct. 21, 2021), https://www.injusticewatch.org/news/prisons-and-jails/2021/health-care-illinois-prisons-monitor-report/.

[63] *Id.*

[64] *See Id.*

Prison staff are also disincentivized from reporting accurate accounts of health conditions in prisons.[65] As a result, some states have cut back on data reporting because they think the data could be used against them.[66] The Georgia Department of Corrections, for example, decided to stop reporting on COVID-19 data all together.[67] The Illinois Department of Corrections has "stonewalled" efforts for health data collection to ensure prison health compliance.[68] Public health groups such as the Corrections and Oversight Project at the LBJ School of Public Affairs at the University of Texas, have been monitoring COVID-19 data among U.S. prisons.[69] The report indicated that a minority of states offer public health monitoring data and a majority of states scored C's and D's for COVID-19 health monitoring.[70] Following the publication of this report, states have cut back on reporting prison health data.[71] Thus, prison health services continue to be unmonitored.

V. THE PRESENT STATE OF HEALTH MONITORING IN EUROPEAN PRISONS

Existing health surveillance systems in European prisons offer opportunities of surveillance systems that U.S. prisons can reasonably adopt. The most inclusive health surveillance system in European prisons is the Health in Prisons European Database (HIPED). Compared to the BJS, the HIPED collects a broader range of public health data among forty-one member states in Europe.[72] HIPED collects data regarding mortality, disease screening, as well

[65] Ollove, *supra* note 39.
[66] Ollove, *supra* note 39.
[67] Ollove, *supra* note 39.
[68] Hilles, *supra* note 62.
[69] Ollove, *supra* note 39.
[70] Ollove, *supra* note 39.
[71] Ollove, *supra* note 39.
[72] *See* table 1 at Binswanger et al., *supra* note 20, at 35.

as the treatment and prevention of communicable and noncommunicable diseases.[73] Other European territories, such as the Republic of Ireland (ROI) and the UK vary in their respective health surveillance in prisons.[74] The UK for example utilizes a data system called SystmOne for reporting infectious disease testing and treatment, vaccine coverage, cancer screening, and health behaviors.[75] ROI utilizes Prisoner Health Management System (PHMS) to report on healthcare quality, communicable diseases, and health risks.[76] Ultimately, the outdated data collection efforts in U.S. prisons are inadequate compared to the modern digital data collection tools in European prisons.

A. LIMITATIONS OF EUROPEAN PRISON HEALTH DATA COLLECTION

Though Europe has adopted varying digital health surveillance systems, the World Health Organization (WHO) has reported that Europe's data collection efforts for prison health limitations are "poor" and that "[p]rison authorities in Europe are not doing enough to monitor the health of inmates, meaning prisoners are more likely to suffer untreated conditions and are released without adequate support."[77] These limitations are reflected in HIPED, SystmOne, and PHMS since they provide delayed publications of data and data among European regions is collected variably.[78] Though HIPED collects a large variety of public health variables, this data however, is only reflective of 2016-2017 survey data.[79] Also, reports of SystmOne and PHMS

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[73] *Health in Prisons European Database (HIPED)*, WHO, (last visited Mar. 3, 2022), https://apps.who.int/gho/data/node.prisons.

[74] S. Perrett, et al., *The Five Nations Model for Prison Health Surveillance: Lessons from Practice Across the UK and Republic of Ireland*, 42 J. OF PUB. HEALTH 561, 566 (2019) [hereinafter *The Five Nations Model for Prison Health Surveillance*].

[75] *Id.*

[76] *Id.*

[77] *Europe's Prisons Failing to Monitor Inmates' Health: WHO*, FRANCE 24, (Nov. 21 2019), https://www.france24.com/en/20191121-europe-s-prisons-failing-to-monitor-inmates-health-who.

[78] *Health in Prisons European Database (HIPED)*, *supra* note 73.

[79] *Health in Prisons European Database (HIPED)*, *supra* note 73.

are issued on a quarterly and monthly basis, respectively.[80] Unlike HIPED, SystmOne and PHMS possess some level of real-time data collection.[81] Real-time data collection for these systems are limited however, due to it being in its primitive stages of implementation and inconsistencies across the UK and ROI.[82]

Without real-time data collection and timely publication of health surveillance reports, policymakers and health officials are continuously unable to develop evidence-based policies that effectively target the needs of the prison population. The WHO recommends that European "[M]ember States. . .improve their national data-collection systems to ensure that the health status of people in prison are fully understood and services that improve the health outcomes of this population are delivered."[83] Despite Europe's efforts for implementing contemporary prison health monitoring systems, like the U.S., real-time data collection is critical in fostering a healthcare environment that mirrors the community.

VI. COMPARISON OF THE STANDARDS

A. CURRENT STATE OF EUROPEAN "INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT" JURISPRUDENCE

Contrary to Europe, the U.S. does not clearly interpret or apply the principle of equivalence. The international guidelines provided by the United Nations (UN) and the WHO define the principle of equivalence as the minimal standard of prison health delivery to "encourage all prison health services, including health promotion services, to reach standards

[80] *The Five Nations Model for Prison Health Surveillance*, *supra* note 74, at 565-66.
[81] *The Five Nations Model for Prison Health Surveillance*, *supra* note 74, at 563.
[82] *The Five Nations Model for Prison Health Surveillance*, *supra* note 74, at 563-68.
[83] WORLD HEALTH ORG., STATUS REPORT ON PRISON HEALTH IN THE WHO EUROPEAN REGION IX (2019) [hereinafter WHO].

equivalent to those in the wider community."[84] Unlike the U.S., the forty-seven member states of Europe via the Council of Europe's Committee of Prevention of Torture ("CPT") and European Prison Rules offer more specific guidelines defining this principle.[85] The CPT provides that "[a] prison health service should be able to provide medical treatment and nursing care. . .in conditions comparable to those enjoyed by patients in the outside community."[86] Also, European Prison Rules, per Prison Service Order 3200, requires "medical services in prison. . .organi[z]ed in close relationship with the general health administration of the community or nation."[87] Although the U.S. can establish similar guidelines via case law, the U.S. Supreme Court has yet to define adequate care or equivalency of care.[88] Without clear guidance, the U.S. can either adopt Europe's interpretation or develop an interpretation of their own.

The European equivalent of the U.S.' cruel and unusual punishment jurisprudence derives from Article 3 (Art. 3) of the European Convention on Human Rights. Art. 3 provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."[89] In accordance with Art. 3, Europe's monitoring mechanism, the CPT, works to prevent inhumane treatment among prisons in 47 ratified member states.[90] The CPT assesses prison health through the lens of the principle of equivalence and "[has] unlimited access to places of detention, and the right to move inside such places without restriction. . . [and] interview persons

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[84] Fabrice Jotterand & Tenzin Wangmo, *The Principle of Equivalence Reconsidered: Assessing the Relevance of the Principle of Equivalence in Prison Medicine*, 14 THE AM. J. OF BIOETHICS 4, 4 (2014).

[85] *Id.* at 6-7.

[86] *Id.*

[87] ALESSANDRO MACULAN ET AL., PRISON IN EUROPE: OVERVIEW AND TRENDS 1, 20 (2013).

[88] Gregory J. Dober, *Equivalence of Care Difficult to Attain in U.S. Prisons*, 14 THE AM. J. OF BIOETHICS 17, 18 (2014).

[89] European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms art. 3. 2013.

[90] Prevention of Torture and Other Forms of Ill-Treatment, Council of Europe Portal https://www.coe.int/en/web/civil-society/prevention-of-torture-and-other-forms-of-ill-treatment-cpt, (last visited Feb. 27, 2023).

deprived of their liberty in private, and communicate freely with anyone who can provide information."[91] Unfortunately, similar to the BJS, there is no "fixed time limit" for an issuance of a published CPT report and "there is no legal obligation for the state to publish the report"[92] This lack of transparency remains problematic in informing the public about health compliance and prison condition issues among EU prisons.

B. Application of European Jurisprudence to the U.S.

The principle of equivalence warrants a reevaluation of the U.S.' Eighth Amendment jurisprudence. The application of the principle suggests that U.S. prisons can model health monitoring systems after community-based digital public health surveillance. Yet, such application is barred since U.S. courts tend to defer to prison health administration regarding Eighth Amendment claims and have not recognized the need for equivalent care in the form of digital health technologies.[93] Proponents of the principle of equivalence, nevertheless, must be mindful of the significant differences between prison and community healthcare. Prison populations for example are distinguished because they are more susceptible to diseases such as HIV, tuberculosis, and Hepatitis C compared to their community counterparts.[94] Incarcerated persons are further distinguished by their lack of patient autonomy.[95] Specifically, prisons require mandatory medical checkups and screenings, and incarcerated persons have a more restricted selection of health services.[96] Considering these differences, the standards of prison

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[91] *Id.*

[92] Frequently asked Questions, COUNCIL OF EUR. PORTAL, https://www.coe.int/en/web/cpt/faqs#response, (last visited Dec. 26, 2022).

[93] *See* Binswanger et al., *supra* note 20, at 39 (distinguishing between the adoption of the principle of equivalence in Europe compared to the U.S. to argue that health recordation in prisons should be implemented through the lens of health equity).

[94] Gerard Niveau, *Relevance and Limits of the Principle of ''Equivalence of Care'' in Prison Medicine*, 33 J. MED. ETHICS 610, 611 (2007).

[95] Niveau, *supra* note 94.

[96] Niveau, *supra* note 94.

health conditions must change equitably, instead of equivalently, in relation to contemporary community health standards.

VII. CURRENT STATE OF U.S. "CRUEL AND UNUSUAL PUNISHMENT" JURISPRUDENCE

A. DEFERENCE

The lack of health monitoring systems in U.S. prisons can be explained by the deference courts give to prison officials pertaining to the operations of prison health systems. The U.S. Constitution vests prison administrations a broad range of discretion in bestowing and revoking behavioral incentives for incarcerated persons.[97] This discretion has been interpreted as significant deference towards the professional judgment of prison administration.[98] This deference, however, is limited in accordance with incarcerated individual's constitutional rights. As such, the constitutional rights of incarcerated persons cannot be infringed upon in the interest of prison administration.[99]

B. DELIBERATE INDIFFERENCE AND WRIT OF HABEAS CORPUS

In the U.S., the two available remedies for addressing unconstitutional prison conditions due to the absence of equitable health care are the deliberate indifference standard and writ of habeas corpus.[100] The writ of habeas corpus is the procedural vehicle for an incarcerated person to challenge the lawfulness of their custody.[101] Specifically, one can be released if their detention conditions violate U.S. law, treaties, or the U.S. Constitution.[102] The standard for establishing whether the government has violated their constitutional obligations to provide healthcare for

[97] *McKune v. Lile*, 536 U.S. 24, 39 (2002).
[98] *Beard v. Banks*, 548 U.S. 521, 535 (2006).
[99] *Brown v. Plata*, 563 U.S. 499, 511 (2011).
[100] *Estelle v. Gamble*, 429 U.S. 98, 106 (1976).
[101] 28 U.S.C.S. § 2254(c)(3) (1996).
[102] 28 U.S.C.S. § 2254(c)(3) (1996).

incarcerated persons is deliberate indifference.[103] Deliberate indifference requires a showing that an incarcerated person has a serious medical need and a showing of the government's deliberate indifference to that need.[104] Despite this recognition, state and federal courts have not adapted their articulation of the aforementioned remedies in accordance with contemporary health technologies and equitable prison healthcare.

C. U.S. "CRUEL AND UNUSUAL PUNISHMENT" JURISPRUDENCE IN STATE COURT

State and federal U.S. courts have consistently denied habeas relief where an incarcerated person has contracted COVID-19 virus while imprisoned.[105] In 2020, Edward Mackenzie contracted COVID-19 while incarcerated at Adirondack Correctional Facility (ACF), a state prison managed by New York State Department of Corrections and Community Supervision (DOCCS).[106] Mackenzie petitioned for habeas relief since the facility was "scant" of cleaning and hygiene supplies, lacked COVID-19 monitoring and enforcement, and did not offer routine COVID-19 testing and tracing.[107] The Supreme Court of New York Essex County denied Mackenzie's habeas corpus claim and reasoned that Mackenzie failed to show that the ACF prison officials acted "unreasonably with regard to his serious medical needs."[108] While the court found the prison's COVID-19 monitoring efforts to be "imperfect", it was not unreasonable given the circumstances.[109] Ironically, the court also rested its decision on the assumption that there were no known cases of COVID-19 at ACF at the time of the case.[110] However, there were

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[103] *Estelle*, 429 U.S. at 106
[104] *Id.*
[105] *People ex rel. Mackenzie v. Tedford*, No. CV20-0499, 2021 WL 162374 *1, *5 (N.Y. Sup. Ct. Jan. 18, 2021).
[106] *Id*.
[107] *Id*. at *6.
[108] *Id*. at *7.
[109] *People ex rel. Mackenzie v. Tedford*, No. CV20-0499, 2021 WL 162374 *1,*7 (N.Y. Sup. Ct. Jan. 18, 2021).
[110] *Tedford*, No. CV20-0499, 2021 WL 162374, at *5.

no known cases because, according to Mackenzie, ACF was not monitoring COVID-19 effectively.[111]

D. U.S. "CRUEL AND UNUSUAL PUNISHMENT" JURISPRUDENCE IN FEDERAL COURT

Federal Correctional Institution, Elkton, a federal prison in Lisbon, Ohio, faced a major COVID-19 outbreak in April 2020.[112] Four petitioners sought habeas relief under 28 U.S.C. §2241, injunctive relief (in the alternative under 28 U.S.C. §1331), and the Eighth Amendment.[113] The court granted a preliminary injunction requiring the prison to identify all persons for compassionate release, transfer furlough, and parole.[114] Individuals ineligible for transfer to community settings were required to be transferred to a prison facility that would allow for social distancing or single cell placement.[115] At the time of the case, the actual numbers of infected incarcerated individuals were unknown due to "shockingly limited available testing" and COVID-19 surveillance.[116] For example, the facility only had "[fifty] COVID-19 swab test[s]".[117] The Judge presiding the case said the inadequate health surveillance systems and testing of the prison was an "example of th[e] deliberate indifference" of the prison officials.[118]

After the victory in the lower court, and after a series of appeals, the Sixth Circuit granted various motions to stay all proceedings and vacated the injunction.[119] By 2021, the case was

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111 *Tedford*, No. CV20-0499, 2021 WL 162374 at *7.
112 Keri Blakinger & Keegan Hamilton, *"I Begged Them To Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, THE MARSHALL PROJECT, (June 18, 2020), https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps.
113 *Wilson v. Williams*, 455 F. Supp. 3d 471, 475 (N.D. Ohio 2020).
114 *Id.* at 481.
115 *Id.*
116 *Id*. at 471.
117 *Id.*
118 *Id.* at 479.
119 *Wilson v. Williams,* 961 F.3d 832, 845 (6th Cir. 2020).

closed following a stipulation for dismissal.[120] Judge Givvons of the Sixth Circuit reasoned that while the objective component of the deliberate-indifference test was "easily satisfied", the petitioners failed the subjective component.[121] Judge Givvons said the subjective component of deliberate indifference was not satisfied because the BOP "implemented a six-phase action plan for COVID which included screening, education, and regular disinfectant and providing masks."[122] Chief Judge Cole's dissent, however, stated that the decision was "more jarring" since the six-phase action plan was "far less impressive than its title suggest[s]" and Congress and the Attorney General have pleaded for the BOP "to take more aggressive measures to address the virus in its facilities."[123] The Sixth Circuit's decision provides another example of U.S. courts' willingness to defer to prison officials' administration of health services to incarcerated populations.

VIII. RECOMMENDATIONS: REEVALUATING U.S. "CRUEL AND UNUSUAL PUNISHMENT" JURISPRUDENCE

A. THE EVOLVING STANDARDS OF DECENCY PRINCIPLE

Emerging health monitoring technologies call for the Eighth Amendment to be interpreted from the evolving standards of decency that mark the progress of a maturing society. The United States Supreme Court has interpreted this principle to mean that the "words of the [Eighth] Amendment are not precise, and that their scope is not static."[124]

The Court has notably applied the evolving standards of decency to death penalty cases.[125] For example, in the 1972 case, *Furman v. Georgia*, the Court agreed that society had

[120] *Wilson*, 961 F.3d at 845.
[121] *Id.*
[122] *Id.* at 841.
[123] *Id.* at 847-48.
[124] *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).
[125] *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

progressed beyond the infliction of capital punishment on Furman for accidentally killing a victim during a burglary.[126] In 2008, the Court also held in *Kennedy v. Louisiana* that capital punishment is inappropriate and nonproportional to nonmurder offenses.[127] In *Kennedy*, the evolving standards principle narrowed the death penalty, despite there being a small legislative trend conforming with the Court's decision and despite the Court's decision being in conflict with Louisiana's legislation that supported capital punishment for child rapists.[128] Recently, in the 2012 case *Miller v. Alabama*, the Court applied the evolving standards of decency to establish that life without parole for juvenile murderers constitutes cruel and unusual punishment.[129] The aforementioned examples demonstrate opportunities for the Court to apply the evolving standards of decency in accordance with maturation of societal values, regardless of how strong the national consensus may be conflicting with state legislation.

The Court, however, has inconsistently used the evolving standards of decency principle to reflect contemporary standards.[130] Originalists such as Justices Burger, Blackmun, and Scalia believed that issues the principle seeks to address should be left to state legislatures, as opposed to the judiciary.[131] This perspective does not resolve the public health crisis in prisons since states have yet to issue legislation requiring standardized health surveillance in prisons. Thus, the onus is also on the judiciary to reevaluate their understanding of the Eighth Amendment in accordance with the evolving standards of decency principle.

B. CONTEMPORARY DIGITAL HEALTH SURVEILLANCE SYSTEMS AND APPLICATIONS OF THE EVOLVING STANDARDS OF DECENCY PRINCIPLE AND PRINCIPLE OF EQUIVALENCE

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[126] *Georgia*, 408 U.S. at 239.
[127] *Kennedy v. Louisiana*, 554 U.S. 412, 444 (2008).
[128] *Id.* at 431.
[129] *Miller v. Alabama*, 567 U.S. 465, 495-96 (2012).
[130] Matthew C. Matusiak et al., *The Progression of "Evolving Standards of Decency" in U.S. Supreme Court Decisions* 39 CRIM. JUST. REV. 253, 258 (2014).
[131] *Id.*

The global availability of digital health monitoring systems provides opportunities for the standard of cruel and unusual punishment to evolve per the applications of the evolving standards of decency and the principle of equivalence. In addition to the surveillance systems in European prisons, the U.S. can model health surveillance systems after digital technologies that have been used to monitor COVID-19 transmission in communities, as well as the health and behavior of those incarcerated. Though these technologies can be implemented into prisons, it does not mean they should. Specifically, the feasibility of implementing such technologies in prisons demonstrates the need for the concept of "inadequate prison conditions" to evolve. Moreover, if such technologies were to be implemented, they must be implemented harmoniously with constitutional and human rights standards rooted in fairness, privacy, and autonomy.

In accordance with the WHO's recommendations of utilizing digital tools for combatting COVID-19, researchers have agreed that there are unique opportunities for digital data surveillance tools such as artificial intelligence (AI) that uses deep learning, big data, and block chain technology for COVID-19 contact tracing and rapid reporting. [132] This sort of technology can be used in communities to monitor healthcare trends and community health risks.[133] Symptoms for COVID-19, for example, have been tracked via thermal imaging and infrared sensors in private U.S. and Canadian companies and public spaces in Taiwan and Singapore.[134] Additionally, the WHO's electronic tool, Go.Data, utilizes real time data to monitor health outbreaks by visualizing contact tracing and chains of transmission data to promote efficient

[132] Daniel Shu Wei Ting et al., *Digital Technology and COVID-19*, 26 NATURE MED. 459, 459 (2020).
[133] *Id.*
[134] *Id.*

analysis of such data to better understand public health outbreaks.[135] The data is mined via third parties through crowdsourcing and machine learning.[136] The tool is reportedly "easy to use", open sourced, can be used offline, and serves to promote timely access to health information to prevent the spread of a disease.[137] Such AI algorithms can serve as an initial screening tool for suspected COVID-19 cases."[138]

Considering the financial and privacy concerns, it may appear unfeasible to implement artificial intelligence and data tracking technologies in prisons for health surveillance purposes.[139] Prisons globally, however, have already embarked on the trend of "smart incarceration."[140] Prisons in Hong Kong, for example, make incarcerated individuals wear Fitbits to track their location and monitor health items such as heart rates.[141] Hong Kong prisons are also seeking to implement AI systems to monitor "abnormal behavior."[142] U.S. prisons, meanwhile, have been reluctant to implement digital surveillance to monitor the health of incarcerated persons.[143] Instead, U.S. prisons have adopted AI systems that utilize Natural Language Processing (NLP) to monitor prison calls.[144]

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[135] Sekalala, et al., *supra* note 5, at 9.

[136] Sekalala, et al., *supra* note 5, at 9.

[137] *About Go.Data*, WHO, https://www.who.int/tools/godata/about (last visited Mar. 17, 2022).

[138] Shu Wei Ting et al., *supra* note 132, at 460.

[139] Jayson Hawkins, *Artificial Intelligence for Surveillance Spreading to Prisons Around the Globe*, PRISON LEGAL NEWS, (Apr. 1 2020), https://www.prisonlegalnews.org/news/2020/apr/1/artificial-intelligence-surveillance-spreading-prisons-around-globe/ ("[C]ritics have raised concerns about subjecting American prisons to the all-seeing Chinese panopticon model. The utter lack of privacy while living 24/7 under the unblinking gaze of cameras could be detrimental to rehabilitation, as would a reduction in human interaction if recording equipment were used to replace guards. . .annual fees [for digital surveillance in prison] typically run in excess of $500,000 per unit with a 1,000-prisoner capacity.").

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

Applying the principle of equivalence equitably allows for emerging digital health technologies to be effectively used in the prison context. Electronic tools such as Go.Data can be adopted in prisons to promptly collect a complex array of data from prison health services to immediately report such information to public health and government officials. The promptness of such reporting can offer opportunities to curb the spread of communicable diseases particularly prevalent in prisons such as HIV, HCV, and COVID-19. This tool can also visualize chains of transmission among prison staff and incarcerated persons in real time to allow for prompt and efficient public health decision making. Considering the poor state of prison health administration is partly due to inadequate training and education of staff, easy to use digital health systems such as Go.Data can be particularly accessible to prison health staff.[145]

The rise of the availability of digital health surveillance technologies has resulted in a large number of third party actors having access to personal health data.[146] Additionally, while digital systems such as Go.Data offer real time visualizations of disease transmissions, it also can "harm vulnerable users by identifying their physical locations."[147] Concerns regarding privacy and bias can be addressed through evidence based research, transparency, and implementing digital health technologies via a human rights lens.[148] Transparent surveillance tools allow individuals who are incarcerated to offer consent, monitor the data being captured, and "seek redress in instances where there are perceived violations of human rights."[149] Transparency can be achieved by data collectors informing the surveilled population of the data being collected,

[145] *See* Blakinger, *supra* note 57.
[146] Sekalala et al., *supra* note 5, at 11.
[147] *See* Sekalala et al., *supra* note 5, at 11.
[148] *See* Sekalala et al., *supra* note 5, at 13.
[149] Sekalala et al., *supra* note 5, at 13.

where the data is stored, and the benefits of capturing such data.[150] Sunset clauses also promote transparency by informing individuals ahead of time of the duration of data collection and when the data will be deleted.[151] Fostering participation from a diverse array of individuals currently and formerly incarcerated also allows for additional oversight and greater accountability from third parties and data collectors. These methods of oversight offer opportunities for states to implement surveillance tools guided by expertise. Ultimately, greater transparency and safeguards to privacy provides increased judicial scrutiny and available remedies in the event of human rights violations.[152]

C. JUDICIAL REFORM

For the Eighth Amendment to evolve, norms of punishment must evolve. Thus, the judiciary must refrain from continuously excusing the government's obligation to provide adequate healthcare to incarcerated individuals.[153] The failure for courts to scrutinize this institutional cruelty perpetuates "conditions whereby society's most despised population, a population disproportionately comprised of people of color, may routinely suffer systematic abuses of state power without any meaningful check."[154] A meaningful check on the judiciary can be provided via judicial reform.

Judges have an affirmative duty to rule impartially, but have historically "favored the interests of the rich and powerful over society's most vulnerable."[155] Incarcerated populations however, are unable to address this issue because they are stripped of their rights, lack political

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[150] *See* Sekalala et al., *supra* note 5, at 13.

[151] Sekalala et al., *supra* note 5, at 15.

[152] Sekalala et al., *supra* note 5, at 15.

[153] Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 NYU L. REV. 881, 978 (2009).

[154] *Id.*

[155] Danielle Root & Sam Berger, *Structural Reforms to the Federal Judiciary Restoring Independence and Fairness to the Court,* CAP, (May 8, 2019), https://www.americanprogress.org/article/structural-reforms-federal-judiciary/.

clout, and it is "socially and politically acceptable" to hate, deride, and exploit those who are incarcerated.[156] Prison health reform efforts must therefore provide a voice for incarcerated populations through imposed term limits and increased diversity on the bench. A judiciary that reflects individuals from diverse lived experiences serves as a mechanism of empathy towards those who face systemic abuses imposed by prisons.[157] The judiciary's pursuit of absolute neutrality is fallacious. Instead, the judiciary should promote a culture of balancing their "instinctive sympathy" towards victims with those subject to abhorrent prison conditions.[158] The judiciary's consistent deference to prison health administration is breeding grounds for institutional cruelty.[159] This deference bars the advancement of the Eighth Amendment jurisprudence.

D. JUDICIAL ACTION AHEAD OF LEGISLATURE

The shortcomings of Senator Elizabeth Warren's 2020 "COVID-19 in Corrections Data Transparency Act" signals the need for judicial action ahead of the legislature. This act would have mandated COVID-19 reporting "in federal, state and local correctional facilities."[160] Early developments of this legislation issued penalties due to noncompliance in the form of ten percent reductions of Byrne Grants.[161] Byrne Grants are federal "funds available to state and local

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[156] Dolovich, *supra* note 153, at 975.

[157] Root & Berger, *supra* note 155 ("As described by Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit, it is 'inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them.'").

[158] Dolovich, *supra* note 153, at 978.

[159] Dolovich, *supra* note 153, at 978 (noting that institutional cruelty refers to when judges, like prison officials, become "agents of cruelty" towards incarcerated persons through "repeated exposure to prisoners in a context that denies their shared humanity.").

[160] *Warren, Pressley, Murray, Booker, Garcia, Clarke, Kelly Introduce the COVID-19 in Corrections Data Transparency Act*, ELIZABETH WARREN (Feb. 1, 2022), https://www.warren.senate.gov/newsroom/press-releases/warren-pressley-murray-booker-garcia-clarke-kelly-introduce-the-covid-19-in-corrections-data-transparency-act.

[161] Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV., (Nov. 16, 2020), https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/.

jurisdictions to support law enforcement and other criminal legal policies."[162] For context, the Byrne grant was $255.7 million in 2015. Assuming an equal distribution among 1,143 eligible jurisdictions (which would average to $223,710 per jurisdiction), a ten percent reduction would amount to $22,371.[163] Accordingly, policy advocates suggest that such a penalty is inefficient in offering an incentive of data transparency among prisons.[164] Considering Congress has limited tools at their disposal to promote compliance, larger measures like "threaten[ed] forfeiture of 100 percent of Byrne funds" or "tripling of attorneys' fees for any case where litigation is required to shake loose information that would have been openly reported had the legislative requirements been followed" are alternative suggestions.[165] In accordance with *Kennedy* however, the Court can exercise its discretion in giving little weight to the lack of legislative support in applying the evolving standards of decency principle in the context of health surveillance in prisons.[166]

E. EXECUTIVE ORDERS

Originalists on the Court suggest that the evolving standards of decency principle can be best effectuated via the legislature.[167] This is unrealistic since laws promoting prison health conditions have largely been unsuccessful.[168] Biden's 2021 COVID playbook promised to release an executive order requiring the BOP to "evaluate their COVID-19 protocols, release data on the spread of COVID-19 in facilities, and use federal grant programs to create incentives

[162] *Id.*
[163] *Id.*
[164] Dolovich, *supra* note 153.
[165] Dolovich, *supra* note 153.
[166] *Kennedy v. Louisiana*, 554 U.S. 412, 431 (2008).
[167] Matthew C. Matusiak et al., *supra* note 130.
[168] *See generally*, *Dolovich*, supra note 153 (explaining that Senator Elizabeth Warren's legislation mandating standardized COVID-19 reporting in federal, state, and local correctional facilities was not signed into law).

for state and local facilities to adhere to sound public health guidance."[169] The executive order however, did not materialize.[170] Considering state prisons are led by state authorities, the Executive branch does not have the unilateral authority to address the lack of health surveillance in U.S. prisons.[171] President Biden, however, can serve as a proponent for Eighth Amendment evolution by issuing executive orders mandating prison health data transparency of the BOP.

IX. CONCLUSION

Prison health conditions are abysmal due to a legal, political, and cultural neglect for those who are incarcerated. Such culture continues to be perpetuated by racism and societal apathy towards incarcerated populations. A temporary remedy for addressing this issue is by having the Eighth Amendment be a legal recourse via equitable applications of the evolving standards of decency principle and principle of equivalence. For such principles to be effectuated, there must be an acknowledgement of the evolution of quality health systems available in the community. These principles can also be promoted through support from the three branches of government. If digital health surveillance is implemented in prisons, it must be implemented in a way that safeguards privacy, autonomy, and equity.

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[169] PRESIDENT JOSEPH R. BIDEN, JR., NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 1, 103 (The White House 2021).

[170] Nicholas Florko, *Despite Biden's Big Promises and a Far Better Understanding of the Virus, Covid-19 is Still Raging Through the Nation's Prisons*, STAT, (Feb. 2, 2022), https://www.statnews.com/2022/02/02/biden-promises-covid19-prisons/.

[171] Florko, *supra* note 170.

Japan's "Daiyo Kangoku" Justice System – Are Fundamental Rights Being Substituted for Confessions and Convictions?

By: Sallie Moppert[1]

Abstract

The Constitution of Japan provides for several fundamental rights in Chapter III, the "Rights and Duties of the People," with the rights related to the law and legal system enumerated in Articles 31-40. However, many calls have been made to abolish the Japanese system of Daiyo Kangoku, which translates to mean "substitute prisons," for violating several of the articles granting fundamental rights. Those arrested can be detained in police custody for over 20 days and be subjected to interrogations for hours on end and at any time during their detention, all without access to counsel on behalf of the accused, essentially resulting in the accused becoming "hostages" of law enforcement. In addition, the Daiyo Kangoku system has been deemed to be a "breeding ground" for false confessions, as well as allegedly allowing the police to resort to tactics of torture and other types of inhumane treatment.

On its face, the evidence would appear that the Daiyo Kangoku system of Japan is unconstitutional, as it violates multiple fundamental rights. However, there are still supporters of the system, many of which, unsurprisingly, fall on the side of law or law enforcement, such as the police and Ministry of Justice. One of the biggest arguments in support of the Daiyo Kangoku system is the country's reported 99.9% conviction rate accompanied by one of the top ten lowest crime rates throughout the world at approximately 22.19 per 100,000 people. In examining these statistics, the question then becomes: how accurate are these figures? Have they been skewed in any way to overinflate the success of the Daiyo Kangoku system?

This note will examine the history of the Japanese legal system, demonstrating how the methodologies of the Daiyo Kangoku system have been deeply rooted throughout the system's history and evolution. An examination of the present day Daiyo Kangoku practices will be discussed, along with the roles of law enforcement and prosecutors within the system. These practices will be viewed in conjunction with the rights guaranteed by the Japanese Constitution to determine if they violate the fundamental rights of the people. In addition, arguments in support of these practices by relying on the country's crime and conviction rates will be reviewed to determine if the statistics are true as they are presented or if they have been inflated beyond what it truly should be.

Any challenges to the fundamental rights granted under the Constitution will be examined in detail by comparison with country-specific and international human rights, as well as through the multiple accounts of individuals that have been involved in the Daiyo Kangoku system. After all of the information has been detailed, this note will conclude with a recommendation on whether or not the Daiyo Kangoku system should be abolished or if it is as successful as portrayed and should remain in practice.

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[1] J.D. Candidate (2024) at Syracuse University College of Law; Notes and Comments Editor of the *Journal of Global Rights and Organizations*, Volume 13; Associate Articles Editor of the *Journal of Global Rights and Organization*s, Vol. 12. I would like to thank my family for their endless support and always reading any of the writing drafts I put in front of them, whether it be a school paper or one of my mystery stories. I would also like to thank Professor Aliza Milner and Tiffany Love for their guidance and feedback, which helped make this paper something I can be proud to share with JGRO, the SUCOL community, and beyond.

I. INTRODUCTION

The recent arrest and subsequent extended detention of Carlos Ghosn, the former Nissan executive, brought the justice system of Japan into the international spotlight. Ghosn openly criticized the justice system of the country, referring to himself as a "hostage"[2] and the legal system of Japan as a "hostage justice system."[3] The statements from Ghosn and his legal team provided a glimpse into the practices of the Japanese justice system, some of which have come under fire from human rights organizations, civil liberties groups, and members of the legal system.[4]

The Constitution of Japan provides for several fundamental rights in Chapter III, the "Rights and Duties of the People," with the rights related to the law and legal system enumerated in Articles 31-40.[5] However, many calls have been made to abolish the Japanese system of Daiyo Kangoku, or "substitute prisons,"[6] for violating several of the articles granting fundamental rights. Those arrested can be detained in police custody for over twenty days and be subjected to interrogations for hours on end at any time during their detention, all without access to counsel, resulting in the accused becoming "hostages" of law enforcement.[7] In addition, the Daiyo Kangoku system has been deemed to be a "breeding ground" for false confessions,[8] as

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[2] *Ghosn: Decision to Flee was Hardest of my Life*, BBC NEWS (Jan. 8, 2020), https://www.bbc.com/news/business-51035206.

[3] *Interview: Justice Minister Denies "Hostage Justice," Vows to Bring Ghosn to Justice*, NIPPON.COM (Jan. 30, 2020), https://www.nippon.com/en/news/fnn20200120001/interview-justice-minister-denies-hostage-justice--vows-to-bring-ghosn-to-justice.html.

[4] *See* CHIYO KOBAYASHI & BRAD ADAMS, RESOLVED: JAPAN'S JUSTICE SYSTEM IS FAIR, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (2020).

[5] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).

[6] *Japan: Mainali Case Must Lead to Reform of Daiyo Kangoku System*, AMNESTY INT'L JAPAN (Aug. 2, 2012), https://www.amnesty.or.jp/en/news/2012/0802_3341.html.

[7] JAPAN FED'N BAR ASS'NS, JAPAN'S 'SUBSTITUTE PRISON' SHOCKS THE WORLD, (2nd ed., 2008).

[8] JAPAN FED'N BAR ASS'NS, *supra* note 7.

well as allegedly allowing the police to resort to tactics of torture and other inhumane treatment to secure a confession from the accused.[9]

On its face, the evidence would appear that the Daiyo Kangoku system of Japan is unconstitutional, as it violates multiple fundamental rights. However, there are still supporters for the system, many of which, unsurprisingly, fall on the side of law or law enforcement, such as the police[10] and Japan's Ministry of Justice.[11] One of the biggest arguments in support of the Daiyo Kangoku system is the reported 99.9% conviction rate of the country[12] accompanied by one of the top ten lowest crime rates among countries throughout the world at approximately 22.19 per 100,000 people.[13] In examining these statistics, the questions then become: how accurate are these figures? Have they been skewed in any way to overinflate the success of the Daiyo Kangoku system?

This note will examine the history of the Japanese legal system leading up to the development of the Daiyo Kangoku system. This note will then discuss the practices of the system by law enforcement and by court officials such as prosecutors. The practices will be examined in light of the rights enumerated in the Japanese Constitution to determine if they do, in fact, violate any of the fundamental rights. Challenges to the fundamental rights will be further examined in this note through the review of multiple accounts of individuals who were subjected

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[9] AMNESTY INT'L, HUMAN RIGHTS CONCERNS IN JAPAN, AMNESTY INTERNATIONAL SUBMISSION TO THE UN UNIVERSAL PERIODIC REVIEW 5 (Oct.- Nov. 2012).

[10] Teresa Watanabe, *COLUMN ONE: Victims of a Safe Society: Behind Japan's Low Crime Rate and Civilized Streets is a Criminal Justice System Criticized as the Most Backward in the Industrialized World,* L.A. TIMES (Feb. 27, 1992), https://www.latimes.com/archives/la-xpm-1992-02-27-mn-4092-story.html.

[11] *See 'Hostage Justice'? Japan Fights Back with an Internet FAQ*, REUTERS, https://www.reuters.com/article/us-japan-ghosn-justice-idUSKBN1ZK0L2 (Jan. 21, 2020).

[12] Murai Toshikuni & Muraoka Keiichi, *Order in the Court: Explaining Japan's 99.9% Conviction Rate*, NIPPON.COM, (Jan. 18, 2019), https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html.

[13] *Crime Rate by Country 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/crime-rate-by-country (last visited Jan. 29, 2023).

to the Daiyo Kangoku system. This note will also review the practices of law enforcement and prosecutors as well as the 99.9% conviction rate of Japan to determine if the statistics are accurate or skewed. Finally, this note will conclude with a recommendation on whether to keep or abolish the Daiyo Kangoku system in Japan.

II. HISTORY OF JAPAN'S LEGAL SYSTEM

A) Pre-Western Japan

The legal system of Japan has a long, rich history that included many changes in its focus and format. The earliest inhabitants of Japan were nomadic tribes that migrated across the area that would eventually become the island of Japan once the Ice Age ended and the ice bridges disconnected Japan from the Asian continent.[14] The tribes eventually settled across the country, setting up various small clans in villages, typically consisting of less than 500 people.[15] In Japan's early history, dating back to approximately the Fifth Century, the country's contact with its geographical neighbor, Korea, had a major influence on the former tribal style nation by introducing it to Chinese culture, changing their traditional clan or tribal-style culture and practices.[16]

Feudalism began to develop in Japan when Minamoto no Yoritomo declared himself the military dictator of Japan, known as the Shōgun, and replaced the Japanese Emperor as the dominant figure of power in the country.[17] When the feudalistic system developed in Japan, it was a blend of the administrative system used in China, along with the traditional clan or tribe

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[14] Cass Xavier, *History of Japan: The Feudal Era to the Founding of Modern Periods*, HIST. COOP. (May 13, 2019), https://historycooperative.org/the-history-of-japan/.
[15] *Id.*
[16] Harold G. Wren, *The Legal System of Pre-Western Japan*, 20 HASTINGS L.J. 217, 217 (1968).
[17] Mark Cartwright, *Feudalism in Medieval Japan*, WORLD HIST. ENCYCLOPEDIA (Aug. 26, 2019), https://www.worldhistory.org/article/1438/feudalism-in-medieval-japan/.

style of Japan.[18] This intermingling of systems could also be discerned from the development of Japanese law, as it was also influenced by the codified law of China integrating with the common or customary law of tribes and clans found in feudal Japan.[19] During the Seventh Century, Japan adopted a set of legal codes that were based on the Chinese legal codes and heavily influenced by the doctrines and values of Confucianism.[20]

The two main concepts of Confucianism are "jen," which means human-heartedness or goodness, and "li," meaning the rules or actions that help to promote jen and the importance of a social order in order for jen to be expressed.[21] Li also emphasizes the importance of the five key relationships (father and son; older and younger brother; husband and wife; older and younger friend; and ruler and subject) and how observing propriety and respect of these relationships was fundamental to society and social order.[22] With elements of Confucianism permeating the Japanese legal system, a focus on settling matters between parties that would promote jen instead of discovering the actual truth of the matter was created.[23] There were no lawyers during this time period, with most of the focus being placed on an amicable resolution of the dispute between parties and this emphasis on the upkeep of societal harmony instead of an individual's rights had lasting impacts on the judicial system.[24] The interpretation of the laws was based on the individual facts of the case, not the laws themselves; this is because the laws were typically not recorded for reference or for study since the law was considered to be "customary" and was

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[18] Wren, *supra* note 16, at 218.
[19] Wren, *supra* note 16, at 218.
[20] Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 L. AND CONTEMP. PROBS. 129, 145 (1989).
[21] *Philosophy 312: Oriental Philosophy Main Concepts of Confucianism*, Lander Univ., https://philosophy.lander.edu/oriental/main.html.
[22] ROGER R. KELLER, LIGHT AND TRUTH: A LATTER-DAY SAINT GUIDE TO WORLD RELIGIONS 129 (2012).
[23] Wren, *supra* note 16, at 220.
[24] Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 Nw. J. of Int'l L. & Bus. 517, 518 (1983).

expected to be known by the general populace [25] (though there was some codification of law through edicts issued by the Shōgun during the Tokugawa period).[26]

Chinese influence mixed with traditional Japanese tribal style was the norm throughout many centuries, with the biggest change in the Japanese legal system not arriving until the Tokugawa regime gained power in Japan in the 1600s.[27] The influence of Chinese culture was rooted out of Japanese culture in favor of the country's traditional governing style and law at the conclusion of the Twelfth Century.[28] When the Minamoto clan seized power from the Taira clan in 1192, the Minamoto clan leader, Yoritomo introduced a feudalistic-military style of government that existed throughout Japan's history until westernization occurred centuries later.[29] At the head of this new style of government was the military leader known as the Shōgun.[30] Stemming from the term "seii taishōgun," which translates to "military protector" or "barbarian-subduing generalissimo," the Shōgun were appointed by the Emperor.[31] As feudalism took control of the country, the Shōgun eventually controlled the country in military, administrative, and judicial capacities while the Emperor and Imperial Government served as a figurehead or symbol of the country's sovereignty.[32]

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[25] Wren, *supra* note 16, at 226.
[26] *Unifying and Governing Early Modern Japan: Edicts of Toyotomi Hideyoshi and the Early Tokugawa Shôguns*, COLUMBIA UNIV., E. ASIAN CURRICULUM PROJECT. http://www.columbia.edu/itc/eacp/japan/japanworkbook/traditional/tedicts.htm (last visited Jan. 23, 2023). [hereinafter "*Unifying*"].
[27] *Unifying*, *supra* note 26.
[28] *Unifying*, *supra* note 26.
[29] *Aug 21, 1192 CE: First Shogunate in Japan*, NAT'L GEOGRAPHIC https://www.nationalgeographic.org/thisday/aug21/first-shogunate-japan/family/ (last visited Jan. 23, 2022).
[30] Wren, *supra* note 16, at 218.
[31] Mark Cartwright, *Shogun*, WORLD HIST. ENCYCLOPEDIA (July 3, 2019), https://www.worldhistory.org/Shogun.
[32] *Shogunate*, BRITANNICA, https://www.britannica.com/topic/shogunate (last visited Oct. 31, 2021).

The Shōgun and accompanying military class, the samurai, created a moral code of conduct and some written law called the "bushido," or code of chivalry.[33] The system of bushido was also influenced by the concepts of Confucianism, as well as Buddhism.[34] As Confucianism and its concepts were incorporated into the development of the Shōgun and samurai codes, it is not surprising to find that they also carried over into the laws and regulations that developed during the feudalistic period. The laws during the feudalistic period were used as a means to achieve governmental interests, as well as to maintain a strict code of social order and emphasize proper social behavior and adherence to the relationships crucial to Confucianism and, thus, to social order.[35]

The Tokugawa regime began in 1603 and occurred during a critical time in Japan's history.[36] During the middle of the 1500's, Japan had its first contact with the Western world when Jesuit missionaries converted hundreds of thousands of Japanese to Christianity; the Tokugawa rulers enforced the complete seclusion of the country from the rest of the world out of the fear of conquest by Europeans.[37] Free from the influences of the outside world, the law that developed in Japan during this time was primarily customary or case law.[38]

In regards to the law, the Tokugawa regime had the greatest influence in the area of criminal law, with remnants of its influence still being seen and felt within the present-day Daiyo Kangoku system. The hierarchical feudal structure allowed for the complete control of the individual through the police state.[39] Under the Confucian principle of "make people obey, never

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[33] Luney, Jr., *supra* note 20, at 145.
[34] Luney, Jr., *supra* note 20, at 145.
[35] Yoshiyuki Noda, *Introduction to Japanese Law*, 35-37 (Anthony H. Angelo, 2nd ed., 1976).
[36] Wren, *supra* note 16.
[37] Wren, *supra* note 16, at 219.
[38] Wren, *supra* note 16, at 219.
[39] Wren, *supra* note 16, at 229.

make them know," the Tokugawa regime took a military-style focus of social and moral harmony and stability.[40] Instead of individual rights, Japanese society was more concerned with the "group," which could include the state, the class, the locality, or the family.[41] Within the hierarchical feudal structure, each province was divided into a "mura" or village that contained fifty families who were then subdivided further into groups of five.[42]

An elder, "kumi-oya," served as the head of the smaller groups of five.[43] The "ban-gashira," as the watch-chief of the village, would monitor the members and report to the elder any infractions that occurred,[44] such as a violation of the 1588 edict of Toyotomi Hideyoshi that prohibited farmers from having weapons in their possession.[45] The headman of groups within villages upon receiving the report of a crime, would complete a preliminary investigation and, if necessary, take the accused before a magistrate.[46] Similar to how the Daiyo Kangoku system relies heavily on confessions, so too did the "trial" that the accused faced, as the trial essentially consisted of taking the confession of the accused and nothing more.[47] To obtain such a confession, should it not come willingly or if the magistrate deemed that it had not been reached, the Tokugawa criminal law regime contained four stages of torture that could be used against the accused.[48] These included: 1) scourging (the accused's arms are twisted behind their back up to the shoulder and was then beaten with a "scourge" or heavy stick/rope), 2) "hugging the stone"

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[40] Wren, *supra* note 16, at 231.
[41] AJGM Sanders, *The reception of Western law in Japan*, 28 THE COMPAR. & INT'L L.J. OF S. AFR. 280, 282 (1995).
[42] Wren, *supra* note 16, at 232.
[43] Wren, *supra* note 16, at 233.
[44] Wren, *supra* note 16, at 233.
[45] *Unifying*, *supra* note 26.
[46] Wren, *supra* note 16, at 233.
[47] Wren, *supra* note 16, at 233.
[48] David D. Friedman, *The Tokuagawa Shogunate: 265 years of peace, isolation and prosperity*, http://www.daviddfriedman.com/Academic/Course_Pages/legal_systems_very_different_12/Papers_12/JLM-TokugawaPaper.htm (last visited Nov. 7, 2021).

(having hundred-plus pound granite slabs piled upon the limbs of the accused one by one), 3) the "lobster" (the accused was tied up in the shape of a ball, arms behind their back and legs pulled up to the chin), 4) suspension (the accused was hoisted up by a rope by their arms, which were twisted behind their back). [49] These types of practices survived until the end of the Tokugawa regime, which ended the hierarchical feudalistic system at the same time.

B) The End of the Feudalistic System

The Feudalistic system of Pre-Western Japan ended around 1867.[50] A key impetus for the end of feudalism was the forced end of Japan's policy of isolationism, specifically with the arrival of Commodore Matthew Perry in 1852, who was tasked with forcing the opening of Japanese ports to America for trading purposes.[51] In March 1854, after months of negotiation, combined with the threat against Japan's capital by Perry and his fleet, and the illness of the Shōgun Tokugawa Ieyoshi leading to political unrest and indecision, the Convention of Kanagawa was signed, albeit under duress.[52] The treaty required Japan to admit American ships to ports in the cities of Shimoda and Hakodate, as well as accept an American consul at Shimoda.[53]

The imposition of such unequal treaties, paired with continued political unrest and famines occurring between the Eighteenth and Nineteenth centuries, led to an anti-Tokugawa regime sentiment. In 1867, the Choshu and Satsuma clans came together and combined their

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[49] Friedman*, supra* note *48.*

[50] SUP. CT. OF JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 2019, 4 (2021).

[51] *From the Edo Period to Meiji Restoration in Japan*, COURSE HERO, https://courses.lumenlearning.com/boundless-worldhistory/chapter/from-the-edo-period-to-meiji-restoration-in-japan/ (last visited Nov. 21, 2021).

[52] *Id.*

[53] *Treaty of Kanagawa*, BRITANNICA, (Mar. 24, 2022), https://www.britannica.com/event/Treaty-of-Kanagawa.

forces to finally topple the Tokugawa regime.[54] The Shōgunate lost power and the emperor was restored as the head of Japan, with Emperor Meiji taking control, signifying the start of the Meiji Restoration period.[55]

The Meiji Restoration period led to the modernization of Japan in many facets, including in criminal justice. The country moved away from prior practices like the four stages of torture found under the Tokugawa Regime and embraced a more Westernized style of criminal justice.[56] For example, in 1880, Japan adopted the Chizaiho criminal procedure law, which was modeled after the Napoleonic criminal code in France.[57] This was revised in 1890 and became known as the Code of Criminal Procedure, which is still the name for the modern day Japanese criminal justice system.[58] The judicial system itself was established in 1890 by the Court Organization Law, or "Saibansho," and was modeled after the judicial systems of France and Germany.[59]

The modern Constitution of Japan was adopted by the country in 1947 while the country was under Allied Powers control following its surrender in World War II.[60] It included protections of human rights and secured a fair and lawful system of justice for the people, including the right to life and liberty, the right to counsel, and protections against torture and cruel punishments.[61] Alongside the Constitution of Japan, the Court Act was enacted in 1947 and established four types of courts in Japan (high courts, district courts, family courts, and summary

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[54] *Meiji Restoration*, HISTORY, (Jan. 11, 2023), https://www.history.com/topics/asian-history/meiji-restoration.
[55] *The Meiji Restoration and Modernization*, ASIA FOR EDUCATORS, http://afe.easia.columbia.edu/special/japan_1750_meiji.htm (last visited Jan. 22, 2023).
[56] SUP. CT. OF JAPAN, *supra* note 50, at 4.
[57] SUP. CT. OF JAPAN, *supra* note 50, at 4.
[58] SUP. CT. OF JAPAN, *supra* note 50, at 4.
[59] Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & CONTEMP. PROBS. 135, 137 (1990) [hereinafter *The Judiciary: Its Organization and Status*].
[60] Lynn Parisi, *Lessons on the Japanese Constitution*, STAN. PROGRAM ON INT'L AND CROSS-CULTURAL EDUC., (Nov. 2002), https://spice.fsi.stanford.edu/docs/lessons_on_the_japanese_constitution.
[61] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).

courts).[62] The Act also implemented Articles 76-82 in Chapter IV of the Constitution, which is the section dedicated to the judiciary.[63]

While the Constitution itself has not been amended since its inception in 1947 [64], the criminal justice system has been reformed with new requirements and initiatives with the goal of providing speedier proceedings and a more reliable justice system.[65] One of the more recent and notable changes was the introduction of the Saiban-In system in 2009.[66] Similar to the jury system in the United States, Saiban-In allows for members of the public to participate and weigh in on the judgment in cases such as murder, manslaughter, arson, and a few other types of criminal cases.[67] The six members of the Saiban-In panel work alongside three judges to conduct fact-finding in cases, as well as determine a guilty person's sentence.[68] All matters of legal interpretation, however, rest with the three judges on the panel.[69]

III. HOW THE CRIMINAL JUSTICE SYSTEM WORKS

An individual's journey within the Japanese criminal justice system begins like any other system, with an arrest.[70] The Code of Criminal Procedure outlines three types of arrests that can be made: 1) an arrest based on an arrest warrant issued by a judge; 2) an emergency arrest made for an individual who committed a serious crime when, based on the urgency of the situation,

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[62] SUP. CT.'S IN JAPAN (2020), https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf.
[63] *The Judiciary: Its Organization and Status*, *supra* note 59, at 137.
[64] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[65] SUP. CT. OF JAPAN, *supra* note 50, at 4.
[66] SUP. CT. OF JAPAN, *supra* note 50, at 4.
[67] Mai Kemmochi, *Five Years of the Saiban-In System in Japan*, PACE L. LIBR. (Nov. 13, 2014), https://lawlibrary.blogs.pace.edu/2014/11/13/five-years-of-the-saiban-in-system-in-japan/#:~:text=%E2%80%9CSaiban-in%E2%80%9D%20is%20a%20special%20position%20introduced%20in%202009,and%20decide%20a%20judgment%20with%20three%20professional%20judges.
[68] SUP. CT. OF JAPAN, *supra* note 50, at 7.
[69] SUP. CT. OF JAPAN, *supra* note 50, at 7.
[70] JAPAN FED'N BAR ASS'NS, *supra* note 7.

investigators cannot wait for an arrest warrant to be issued (the warrant is then sought from a judge after the emergency arrest is made); and 3) on-the-spot arrest for when a person is caught during or immediately after the commission of a crime.[71] Arrests can be made by the police, which is the general procedure, or by the public prosecutor, the latter of which will be discussed in more detail in Section IV-B.[72] Upon an individual's arrest, the police inform the arrestee of their basic rights and the pertinent facts of the crime for which they are being arrested.[73] Unlike the Miranda Rights required to be read to suspects in the United States,[74] the basic rights that Japanese arrestees are informed of only consist of the right against self-incrimination (per Article 38 of the Constitution) and the ability to appoint an attorney (per Article 204(2) of the Criminal Code of Procedure).[75]

Following the initial arrest of an individual by the police, the arrestee is then referred to a public prosecutor for their decision on whether or not to release the arrestee or continue the detainment.[76] The referral must take place within forty-eight hours of the arrest.[77] The prosecutor has twenty-four hours in which to determine if the arrestee should be released or if a petition should be made in front of a judge to extend the detainment.[78]

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[71] SUP. CT. OF JAPAN, *supra* note 50, at 13.

[72] Gōhara Nobuo, Japanese "*Prosecutors' Justice" on Trial*, NIPPON (June 15, 2020), https://www.nippon.com/en/in-depth/a06802/.

[73] SUP. CT. OF JAPAN, *supra* note 50, at 13.

[74] Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 L. HUM. BEHAV. 124 (2008). (discussing the five required components of the Miranda Warnings, which include the right to remain silent, the risks associated with waiving the right to remain silent, the right to counsel, the appointment of counsel for indigent individuals, and that these rights may be asserted at any time on an ongoing basis throughout an interrogation).

[75] Code of Crim. Proc. (Part I and Part II). HTTPS://WWW.JAPANESELAWTRANSLATION.GO.JP/EN/LAWS/VIEW/2056/EN#JE_PT2CH1AT1.

[76] *Questions and Answers on Criminal Procedure*, CTS. IN JAPAN https://www.courts.go.jp/english/judicial_sys/FAQ_on_criminal_procedure/index.html (last visited Nov. 28, 2021).

[77] *Id.*

[78] *Id.*

According to the Code of Criminal Procedure (Article 207), the extended detention of an arrestee can only be justified under certain circumstances.[79] There must be probable cause that the arrestee committed a crime, and one of the following three criteria must be met: 1) the arrestee has no fixed residence; 2) there is probable cause to believe that the arrestee may conceal or destroy evidence; or 3) the arrestee is a flight risk.[80] If a judge determines that an individual's circumstances require extended detention, they then issue a detention warrant.[81] With the issuance of a detention warrant, arrestees may then be held up to twenty-three days for a single crime.[82]

An important distinction to note in the detention procedures is the phrase "a single crime." This means that an arrestee may be rearrested after the initial detention period expires, with the only difference being that he or she is arrested for a different crime from the one charged at the time of initial arrest.[83] Referred to as "serial arrests," or "bekken taiho," the re-arrest of an individual can prolong their period of detention to well beyond the twenty-three day total allowed under the Japanese Code of Criminal Procedure.[84] This practice was recently demonstrated through the multiple arrests of Carlos Ghosn, who had been arrested over four times on multiple charges, even despite having made bail only a month prior to his fourth arrest.[85]

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[79] Code of Crim. Proc. (Part I and Part II), *supra* note 75.
[80] Code of Crim. Proc. (Part I and Part II), *supra* note 75.
[81] SUP. CT. OF JAPAN, *supra* note 50, at 14.
[82] *Frequently Asked Questions on the Japanese Criminal Justice System*, THE MINISTRY OF JUST. https://www.moj.go.jp/EN/hisho/kouhou/20200120enQandA.html (last visited Dec. 2, 2021).
[83] Bruce E. Aronson & David T. Johnson, *Comparative Reflections on the Carlos Ghosn Case and Japanese Criminal Justice*, The Asia-Pacific J. 1, 9 (2020).
[84] *See* Aronson & Johnson, *supra* note 83.
[85] Aronson & Johnson, *supra* note 83.

IV. THE DAIYO KANGOKU SYSTEM

A) Development of the Substitute Prison System

Out of a growing concern that Japan could be claimed as a colony by one of the more modernized and advanced countries such as the United States or Britain, Japan moved toward industrialization and modernization to build up its economic strength while protecting its independence.[86] This rapid industrialization led not only to Japan becoming an industrial power with a flourishing population, but also the development of substitute prisons.[87] The increasing population required proper independent detention facilities, which could not be constructed fast enough to house suspects.[88] As a result of the increasing demand for prison facilities, the police were allowed to keep suspects in their custody until the necessary facilities could be built. [89] The use of such substitute prisons was first mentioned in the 1908 Prison Law, Article 1(3), which stated that "[c]ells belonging to police stations may be used to substitute for prisons."[90]

The Prison Law of Japan primarily remained untouched for over a century. [91] The first major change that occurred was in 2007 when the Law on Penal Facilities and the Treatment of Inmates came into effect.[92] With regards to the practices of Daiyo Kangoku, however, things remained the same and the system was still in effect in full force; the only change that the new law made was to modify the word "prison" for "penal institution" and "substitute prison" for "substitute penal institution."[93] Although the terminology may have changed, the system itself remained unchanged and continues to be used in modern law enforcement practices.

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[86] Kawai Atsushi, *Japan's Industrial Revolution*, NIPPON (July 10, 2019), https://www.nippon.com/en/japan-topics/b06904/japan%E2%80%99s-industrial-revolution.html.
[87] Saul Takahashi, *Japan's Authoritarian Criminal Justice System*, COUNTERPUNCH (June 2, 2014), https://www.counterpunch.org/2014/06/02/japans-authoritarian-criminal-justice-system/.
[88] Takahashi, *supra* note 87.
[89] Takahashi, *supra* note 87.
[90] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 2.
[91] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 2.
[92] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 2.
[93] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 2.

Several lawyers, other criminal justice professionals, and scholars have spoken out about the need to change or abolish the substitute prison system, but the system still remains mostly unchanged.[94] The human rights organization, Amnesty International, submitted a report on the Daiyo Kangoku system to the Committee Against Torture in 2007, highlighting several issues and violations of human rights found in the substitute prison system.[95] The report included recommendations on abolishing or reforming the Daiyo Kangoku system to protect against torture and other forms of inhumane treatment.[96] However, in its follow up report in 2013, Amnesty International noted that "in the intervening years since its initial review in 2007 Japan has made little or no progress in implementing recommendations made by the Committee."[97] This shows that the Daiyo Kangoku system remains firmly in place in Japan and any attempts to abolish or reform the system have thus far been unsuccessful.

B) Practices within the Daiyo Kangoku System

The practices within the Daiyo Kangoku system have come under scrutiny for various human rights violations and the poor treatment of individuals within the system. A key aspect of Daiyo Kangoku that has become a gateway to major issues and criticisms of its practices is the heavy reliance on confessions. Confessions from those arrested are referred to as the "king of evidence," because, as described by Jeff Kingston, a professor from Temple University in Tokyo, Japan, "[I]f you can get someone to confess to a crime, the court is going to find them

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[94] *Call to Eliminate Japan's "Hostage Justice" System by Japanese Legal Professionals*, HUM. RTS. WATCH (Apr. 10, 2019.), https://www.hrw.org/news/2019/04/10/call-eliminate-japans-hostage-justice-system-japanese-legal-professionals#.

[95] *Japan: Briefing to the UN Committee Against Torture*, AMNESTY INT'L (May 2013), https://www.amnesty.org/en/wp-content/uploads/2021/06/asa220062013en.pdf.

[96] *Id.*

[97] AMNESTY INT'L, *supra* note 95, at 5.

guilty."[98] Plea bargaining in the Japanese criminal justice system is in its infancy, it was enacted in 2018 as a part of the 2016 amendment to the Criminal Procedure Code, and currently only covers crimes that would be considered "white collar."[99] The first case to involve plea bargaining was completed in 2020.[100] Both prosecutors and police still rely heavily on extracting confessions from suspects to secure a guilty verdict and non-white collar crime arrestees have no bargaining power to help reduce their sentences or avoid charges altogether through plea bargaining.[101] This focus on confessions has earned the Daiyo Kangoku system the title of a "Confession Extraction System."[102]

While reliance on confessions itself is not a crime, the methods employed to secure them could be described as such. The confessions that are extracted are often alleged to be false ones, resulting from inappropriate and coercive interrogation techniques, prolonged interrogations, poor prison conditions, and not having the assistance of counsel.[103] These false confessions can be attributed to the idea that those arrested are held "hostage" by the police or prosecutors and can be subjected to continuous hours of interrogation throughout their extended period of detention without the ability to leave the room during the interrogation or terminate the questioning. [104]

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[98] Mariko Oi, *Japan Crime: Why do Innocent People Confess?*, BBC NEWS (Jan. 2, 2013), https://www.bbc.com/news/magazine-20810572.

[99] Takayuki Inoue & John Lane, *Court Rules in Japan's First Plea Bargaining Case*, LEXOLOGY (Sept. 14, 2020), https://www.lexology.com/commentary/white-collar-crime/japan/nagashima-ohno-tsunematsu/court-rules-in-japans-first-plea-bargaining-case. (White collar crimes included crimes such as fraud, bribery, embezzlement and certain tax related offenses).

[100] *Id.*

[101] David T. Johnson, *Japan's Prosecution System*, 41 CRIME & JUST. 35, 43-44 (2012).

[102] JAPAN FED'N BAR ASS'NS, *supra* note 7.

[103] JAPAN FED'N BAR ASS'NS, *supra* note 7.

[104] PALGRAVE MACMILLAN, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002), http://home.uchicago.edu/~tginsburg/pdf/articles/TheJapaneseAdversarySystemInContext.pdf.

Article 319 of the Code of Criminal Procedure prevents any confession obtained through tortuous means from being used as evidence.[105] However, this has not prevented law enforcement officials from resorting to such tactics to secure a confession. In 2006, a police captain from the Ehime Prefectural Police leaked a document called the "Guidelines for the Interrogation of Suspects," which revealed the techniques and guidelines to be used by police during interrogations to weaken and control suspects while in detention.[106] The Japanese Federation of Bar Associations detailed some of the guidelines found in the report, which included interrogating suspects for numerous hours without breaks or leaving the room, talking to suspects endlessly, and keeping the suspect in the interrogation room as much as possible.[107] Defense lawyer Goto Sodato stated that most individuals cannot handle the intense pressure from such tactics, and when combined with endless interrogations, end up confessing due to the continued stress weakening their strength and mental faculties.[108]

Beyond these techniques, records from the Japanese Federation of Bar Associations ("JFBA") also include details of physical violence and torture by police on suspects in detainment.[109] "Kicking, beating, blows to the head, hair-pulling, application of burning tongs to the palms or neck, and beatings with shoes, have not been uncommon."[110] The JFBA also notes that police have utilized sleep deprivation against suspects in conjunction with lengthy interrogations that occur throughout both day and night hours.[111]

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[105] SUP. CT. OF JAPAN, *supra* note 50, at 27.
[106] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 5.
[107] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 6.
[108] *See* Aronson & Johnson, *supra* note 83.
[109] Gary P. Leupp, *Japanese Justice: The Police Detention and Prison Systems*, PRISON LEGAL NEWS (June 15, 1996), https://www.prisonlegalnews.org/news/1996/jun/15/japanese-justice-the-police-detention-and-prison-systems/.
[110] *Id.*
[111] *Id.*

Another method employed in the Daiyo Kangoku system to solicit confessions from suspects is to limit the contact between arrestees and attorneys. Although Article 37 of the Japanese Constitution guarantees the right to have access to competent counsel,[112] Amnesty International and the JFBA have reported that the access of counsel to their clients while in detention is restricted or, where permitted, is censored and monitored.[113] Article 39 of the Code of Criminal Procedure authorizes the police and prosecutors to restrict meetings with counsel by allowing them to "when it is necessary for investigation, designate the date, place and time of interview."[114] The right to counsel under Article 272 of the Code of Criminal Procedure is further restricted because it only applies to suspects that have been charged, rather than those that are being detained and interrogated, but have not yet been charged.[115]

The restrictions on the access to counsel have been explained by the Japanese Ministry of Justice as a method used to assist investigators in uncovering the truth.[116] The Ministry of Justice explains that the presence of lawyers during interrogations could make it "difficult" to discover the truth during interrogations, instead utilizing and relying on video and audio recordings during interrogations to ensure no human rights violations.[117] The use of such technology to record interrogations is a new requirement, with the mandate only going into effect after its passage in June 2016 as a part of Japan's reform of its Code of Criminal Procedure. [118] Currently, mandatory recordings of interrogations are only required for crimes that are punishable by death

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[112] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).

[113] *Prison Conditions in Japan*, HUM. RTS. WATCH (Mar. 1, 1995), https://www.refworld.org/docid/3ae6a7ee4.html. [hereinafter "Prison Conditions"].

[114] *Id.*

[115] *Id.*

[116] THE MINISTRY OF JUST., *supra* note 82.

[117] THE MINISTRY OF JUST., *supra* note 82.

[118] THE LAW LIBRARY OF CONGRESS, JAPAN: 2016 CRIMINAL JUSTICE SYSTEM REFORM (2016), https://tile.loc.gov/storage-services/service/ll/llglrd/2016590063/2016590063.pdf.

or imprisonment for an indefinite period of time, crimes punishable by a minimum of one year in prison and in which a victim was killed as a result of an intentional crime, and crimes that are being investigated by prosecutors without the assistance of the police.[119] Presently, the crimes that qualify for mandatory recordings only make up approximately 3% of crimes that occur in Japan.[120]

For the crimes in which recording is not mandatory, there is the option for video recording to be waived.[121] The Act to Amend Parts of Criminal Code Procedure and Other Acts lists several instances in which video recording can be waived: if the video recording technology is broken down; if the arrestee refuses to have his or her statement recorded; if the investigator determines that the suspect will not be forthcoming with information due to being recorded; if a gang member is involved in the case and would likely be subject to retaliation; or if the investigator determines that a suspect would be unlikely to divulge information for fear of retaliation from others involved in the crime or from family.[122]

Outside of the police, prosecutors also actively participate in the Daiyo Kangoku system through their own investigations and interrogations.[123] In some areas of Japan, such as the district prosecutor's offices in Tokyo, Osaka and Nagoya, there are Special Investigation Departments known as the Tokusōbu that assist the prosecutors in conducting their own investigations.[124] The Tokusōbu typically investigate crimes that have no clear victims or those that may involve political or business leaders, such as bribery, tax evasion, election finance law

119 *Id.* at 4.
120 *Id.* at 4.
121 *Id.*
122 *Id.*
123 Johnson, *supra* note 101.
124 Nobuo, *supra* note 72.

violations, and other similar crimes.[125] Before the special investigation can commence, a recommendation must be sent up through the chain of command and reviewed by highest ranking prosecutorial officials before receiving the green light to proceed.[126] Since those investigated by the Tokusōbu require vast resources and permissions to make an arrest, the prosecutors utilize many of the tactics and measures used by the police to also secure a confession and subsequently a guilty verdict because to receive anything other than a conviction would "be to admit that the entire organization had failed in its judgment."[127]

V. HUMAN RIGHTS VIOLATIONS

The Daiyo Kangoku system has been scrutinized by various human rights organizations for alleged violations of human rights; the Human Rights Watch, for example, highlights the denial of physical freedom, the right to remain silent, and the right to a fair trial as only a few of the practices within the Daiyo Kangoku system that infringe on the rights of the individual and violate the Constitution of Japan.[128] The Constitution guarantees several rights to individuals concerning the criminal justice and court systems, as well as broadly with inalienable rights that are guaranteed to all.[129]

A) Japanese Constitution

Chapter III of the Constitution has several articles concerning these rights. Article 11, for example, guarantees that all individuals shall not have their fundamental rights interfered with or be prevented from exercising/enjoying said rights.[130] Article 31 further states that no individual

[125] Nobuo, *supra* note 72.
[126] Nobuo, *supra* note 72.
[127] Nobuo, *supra* note 72.
[128] Prison Conditions, *supra* note 113.
[129] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[130] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).

will be deprived of their life or liberty, nor will any criminal penalty be imposed except as imposed in accordance with the law.[131] It can be stated that a person's liberty is jeopardized under the Daiyo Kangoku system. Liberty is a freedom, the freedom to act or speak without restraint, or the freedom or power to do something of one's choosing. The practice of keeping an arrestee in detainment in itself is not a violation of liberty, but the extended detainment that could be bolstered by multiple rearrests under bekken taiho, could be considered as such, especially when taken in conjunction with the inability to end interrogations, meet with counsel, or any of the other various prohibitions in the system.

Article 34 also coincides with the previously mentioned Articles, guaranteeing that no person shall be arrested or detained without being informed of the charges against them or without the immediate assistance of counsel, as well as not being detained without adequate cause.[132] Specifically focusing on the right to access to counsel, the Ministry of Justice of Japan has openly admitted how the presence of counsel in an interrogation is not always permitted because of the effect that it allegedly has on obtaining the "truth" during such sessions.[133] And even if permitted, as discussed by Human Rights Watch, communications between a detainee and their counsel are typically limited and monitored,[134] severely crippling its effectiveness.

Articles 36 and 38 can be potentially linked, as Article 36 prevents the infliction of torture and cruel punishments and Article 38 deals with confessions.[135] It includes the prohibition of a person being compelled to testify against themselves, obtaining confessions through compulsion, torture or threats, and being convicted in cases where the only proof is the

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[131] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[132] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[133] THE MINISTRY OF JUST., *supra* note 77.
[134] *Prison Conditions*, *supra* note 113.
[135] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).

confession they gave.[136] If the records from the JFBA are any indication, then there are some police officials that are violating these Articles and committing inhumane acts against detainees for the sole purpose of obtaining a confession, as it is viewed as critical evidence in criminal proceedings.[137] Article 38 also includes a protection against confessions being used against an individual if the confession was given after "prolonged arrest or detention" because the confession will not be admitted into evidence.[138]

Japan's twenty-three day maximum allowed detention, not including any bekken taiho rearrests, is far longer than most countries across the world. France has a period after arrest upon which a detainee must be charged for twenty-four hours ("arrest period"), with a maximum extension of an additional twenty-four hours.[139] Austria has a maximum arrest period of forty-eight hours, Italy has a maximum arrest period of twenty-four hours, and the United Kingdom has a maximum arrest period of twenty-four hours, with a maximum allowed extension of an additional seventy-two hours.[140] Comparing the arrest time and additional maximum extension periods of other countries demonstrates that Japan's Daiyo Kangoku practices of a twenty-three day detention period should be considered as a prolonged arrest or detention, making any confessions obtained during that time inadmissible.[141]

B) International Law and Human Rights Standards

Outside of the Japanese Constitution, there are also complaints of the Daiyo Kangoku system violating international human rights standards. The Universal Declaration of Human

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[136] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[137] Leupp, *supra* note 109.
[138] Nihonkoku Kenpō [Kenpō] [Constitution], (Japan).
[139] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 6.
[140] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 3.
[141] JAPAN FED'N BAR ASS'NS, *supra* note 7.

Rights ("Declaration"), passed in 1948 by the United Nations General Assembly, describes the human rights that are to be universally protected and this information has been translated into over five hundred languages, including Japanese.[142] Many of the Articles in the Declaration are similar to those guaranteed by the Japanese Constitution: Article 3 guarantees the right to life, liberty and security of person; Article 5 prohibits torture and cruel/inhumane punishment; and Article 9 guarantees protection against arbitrary arrest, detention and exile.[143] Article 11 of the Declaration relates to penal offenses more directly, guaranteeing a presumption of innocence until proven guilty at a public trial where the accused had the full assistance of counsel.[144] Similar to how the practices in the Daiyo Kangoku system would violate the Articles in the Japanese Constitution, they would also violate the Articles of the Declaration on an international scale.

Although the contradictions between the guaranteed rights on both a national and international scale and the practices of the hostage justice system are evident, little has been done to change the system besides a superficial name change.[145]

VI. JAPAN'S 99% CONVICTION RATE

If, by all appearances, the Daiyo Kangoku system appears to be in violation of a multitude of human rights on both a national and international scale, then why does the system persist in Japan? One of the main arguments in defense of Daiyo Kangoku is the unusually high conviction rate in Japan, which comes in at over 99%.[146] In his article discussing the conviction rate of Japan in the wake of the Carlos Ghosn incident, Professor Bruce Aronson from the U.S. –

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[142] G.A. Res. 217 (III)A, Universal Declaration of Human Rights, (Dec. 10, 1948) https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[143] *Id.*
[144] *Id.*
[145] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 2.
[146] Oi, supra note 98.

Asia Law Institute at New York University summarized why there is support for Daiyo Kangoku in relation to the country's superior conviction rate: "It is hard to call Japan's system a 'failure' when it has among the lowest rates of crime, incarceration and gun ownership in the world."[147]

However, the 99% conviction rate can be misleading as proof that the Daiyo Kangoku system is effective. In 2018, the Japanese Ministry of Justice reported that, out of all of the arrests that were made that year, only 37% of those cases were actually taken on by prosecutors for further action.[148] The reason for such selectivity is that there is a primary focus on only taking on cases in which a guilty verdict is essentially guaranteed, resulting in approximately 60% of cases ending up with no indictment being brought.[149] The reason for such a low number of cases actually resulting in an indictment is because prosecutors are alleged to only be concerned with "losing a case" and "tarnishing their reputation" should a case result in an acquittal rather than the actual implementation of justice.[150] The assumption is that prosecutors and the criminal justice system do not err in their judgment when it comes to bringing charges against an individual and anything less than a guilty verdict or a confession would destroy this visage of infallibility.[151]

This is especially true in cases involving the Tokusōbu, or the Special Investigation Departments in select cities in Japan, since these inquiries were made at the discretion of the public prosecutors themselves.[152] There is little to no chance that the arrestee in a Tokusōbu case

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[147] Bruce Aronson, *Carlos Ghosn and Japan's "99% Conviction Rate": Examining Japan's Criminal Justice System from a Comparative Perspective*, USALI E. W. STUD. (June 18, 2021), https://usali.org/comparative-views-of-japanese-criminal-justice/carlos-ghosn-and-japans-99-per-cent-conviction-ratenbsp-examining-japans-criminal-justice-system-from-a-comparative-perspective.
[148] KOBAYASHI & ADAMS, *supra* note 4.
[149] Toshikuni & Keiichi, *supra* note 12.
[150] Toshikuni & Keiichi, *supra* note 12.
[151] Nobuo, *supra* note 72.
[152] Nobuo, *supra* note 72.

will be released or acquitted, as any and all resources are used by the prosecutors to ensure that a conviction occurs.[153] Should a case from a Tokusōbu investigation result in an acquittal, the verdict will very likely be overturned in a higher court.[154] The reason for such actions by the courts and the prosecutors is because prosecutors will almost never "acknowledge their mistake and drop the charges" because "to do so would be to admit that the entire organization had failed in its judgment."[155] In addition, because the arrestees who are subjected to extended detention are almost always found guilty, the court and prosecutors are able to avoid any charges of human rights violations that could be alleged if the arrestee was acquitted and freed from incarceration.[156]

The conviction rate of Japan is deceptive because of the low percentage of cases that are actually taken on by prosecutors for further action and it also includes cases where defendants pleaded guilty.[157] If the rates of other countries, such as the United States, were calculated in a similar manner to the way Japan's conviction rate was calculated, the United States would have a similarly high percentage of about 99%.[158] Therefore, the justification that Daiyo Kangoku is effective because it results in such a high conviction rate is not entirely accurate and thus cannot be used as a reason to continue using the system in Japan.

VII. CASES OF DAIYO KANGOKU

While the Daiyo Kangoku system can be viewed as either positive or negative on paper, the real test for the system is to examine the experiences of those who had been involved in

[153] Nobuo, *supra* note 72.
[154] Nobuo, *supra* note 72.
[155] Nobuo, *supra* note 72.
[156] Nobuo, *supra* note 72.
[157] Aronson, *supra* note 147.
[158] Aronson, *supra* note 147.

Daiyo Kangoku firsthand. Are the human rights violations alleged against the system true, or are they inflated accounts of a select few who had bad experiences?

A) Muraki Atsuko

In 2009, the former chief of the Bureau of Equal Employment, Children, and Families in the Ministry of Health, Labor, and Welfare, Muraki Atsuko, was arrested and charged with participation in a postal fraud case. [159] The Osaka District Public Prosecutor's Office, after a special investigation, arrested Atsuko after alleging that she fraudulently granted the use of a special postal discount.[160] After being arrested in June 2009, Atsuko was held in detention for over four months, during which time she maintained her innocence.[161] During her extended detention, Atsuko was interrogated for twenty days and was "under the constant pressure by her interrogators to sign interrogation reports containing statements that she never made."[162]

At trial, the case against Atsuko fell apart and the evidence of her innocence came to light, as the prosecutors that were a part of the investigation team admitted to deliberately destroying all of their investigation notes.[163] The key witness against her, Kamimura Tsutomu, one of Atsuko's subordinates who implicated Atsuko in his own confession, retracted his statement about her part in the fraud scheme, claiming that it was made under duress and was fabricated.[164] The trial demonstrated the great lengths that the prosecutors, and the criminal

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[159] *Railroaded: One Woman's Battle Against Japan's "Hostage Justice"*, NIPPON.COM (Mar. 27, 2019), https://www.nippon.com/en/people/e00156/railroaded-one-woman%E2%80%99s-battle-against-japan%E2%80%99s-hostage-justice.html.
[160] *Id.*
[161] Nobuo, *supra* note 72.
[162] NIPPON.COM, *supra* note 159.
[163] NIPPON.COM, *supra* note 159.
[164] NIPPON.COM, *supra* note 159.

justice system as a whole, would go to secure a conviction: Tsutomu was coerced into giving a false confession against Atsuko, prosecutors admitted to destroying evidence, concealing exonerating evidence, and contaminating evidence by altering data on a floppy disk.[165]

The unscrupulous practices used by the prosecutors in the Daiyo Kangoku system were highlighted in the Atsuko case. Being not only a high profile case because it was a special investigations case, but also because it involved a public official, special attention was paid to the experiences of Atsuko. Three investigators from the prosecutor's office were charged with the destruction of evidence in addition to other charges related to their conduct in the case,[166] and the lead prosecutor was later sentenced to prison.[167] And, for the first time in history, the Supreme Public Prosecutors Office issued Atsuko an apology over what transpired in her case, thus acknowledging that a Tokusōbu investigation had resulted in a miscarriage of justice.[168]

B) Keiko Aoki

In 1995, the eleven-year-old daughter of Keiko Aoki, Megumi, tragically died in a house fire and, in 1999 Aoki and her husband were arrested on suspicion of murder and conspiracy for Megumi's death. [169] After Aoki and her husband, Boku, were arrested, both were subjected to numerous hours of interrogations and coercive interrogation tactics.[170] Throughout her questioning, Aoki was not allowed to consult with a lawyer until after she would have confessed

[165] NIPPON.COM, *supra* note 159.
[166] NIPPON.COM, *supra* note 159.
[167] Nobuo, *supra* note 72.
[168] Nobuo, *supra* note 72.
[169] *Keiko Aoki*, Innocents Database, http://forejustice.org/db/Aoki--Keiko-.html (last visited Jan. 24, 2022).
[170] *Id.*

to the crime.[171] Aoki recalled "I was told I was evil, a horrible mother who killed her own daughter to get the life insurance money."[172]

Eventually, Aoki was informed that Boku had given a confession, which he later recanted and claimed was a result of coercion by the interrogators.[173] After learning about Boku's confession, Aoki stated that she "gave up" and "wrote a confession dictated by the police."[174] "They made me so confused and upset…I thought that if I wrote everything they told me to, they would quickly release me…To be put in that situation from morning to night, where no one is listening to you for hours, being repeatedly told the same thing. Only people that have gone through this can understand how painful it is," Aoki explained regarding her false confession.[175]

Both Aoki and Boku were sentenced to life in prison and their sentences were upheld after an appeal in 2006.[176] In 2009, Aoki and Boku petitioned for retrials of their case and their petitions were finally granted in 2012 and later upheld in 2015 by the Osaka High Court.[177] In August of 2016, after they were separately retried, the Osaka District Court announced the acquittals of both Aoki and Boku.[178] The presiding judge stated that Boku's coerced confession was not credible evidence of his guilt in Megumi's death, nor was there any credibility to Aoki's confession.[179] "There is a possibility that the two were forced into making false confessions after (investigators) instilled fear in them and applied excessive psychological pressure," Judge Goichi

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[171] Karishma Vyas, *Japan: Forced Confessions and Wrong Convictions*, AL-JAZEERA (Oct. 10, 2016), https://www.aljazeera.com/features/2016/10/10/japan-forced-confessions-and-wrong-convictions/.
[172] *Id.*
[173] Innocents Database, *supra* note 169.
[174] Vvas, *supra* note 171.
[175] Karishma Vvas, *supra* note 171.
[176] Innocents Database, *supra* note 169.
[177] Innocents Database, *supra* note 169.
[178] Innocents Database, *supra* note 169.
[179] Innocents Database, *supra* note 169.

Nishino explained.[180] As a result of the falsely coerced confessions, Aoki served over twenty years in prison for the murder of her daughter, which she did not commit.[181]

C) Fukawa Case

The Fukawa case began in 1967 in Fukawa, a part of the Ibaraki Prefecture, after a robbery and murder took place and the victim, a carpenter, was found strangled in his home. [182] Witness statements alleged that there were two men, one tall and one short, who were seen near the victim's house on the night of the crime.[183] The police investigated over 180 men in the area and found only two that did not have an alibi: Shoji Sakurai and Takao Sugiyama.[184] In October of that same year, both Sakurai and Sugiyama were arrested and interrogated for their supposed involvement in the crime. [185]

Sakurai and Sugiyama were placed in Daiyo Kangoku substitute prisons and interrogated for several hours over a period of days.[186] After over five days of interrogation, Sakurai caved to the pressure from his interrogators and confessed.[187] Armed with Sakurai's false confession, the investigators used this evidence to force Sugiyama to confess as well.[188] Both men retracted their confessions when later interrogated by the prosecutors, who instructed police to return the two men to their cells and begin interrogations again.[189] The police used the same tactics as before, resulting in another set of false confessions from Sakurai and Sugiyama.[190]

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[180] Innocents Database, *supra* note 169.
[181] Vvas, *supra* note 171.
[182] Kana Sasakura, *Another False Confession Case – Fukawa Case*, THE CONVICTIONS BLOG (July 3, 2012), https://wrongfulconvictionsblog.org/2012/07/03/another-false-confession-case-fukawa-case/.
[183] Sasakura, *supra* note 182.
[184] Sasakura, *supra* note 182.
[185] Sasakura, *supra* note 182.
[186] Sasakura, *supra* note 182.
[187] Sasakura, *supra* note 182.
[188] Sasakura, *supra* note 182.
[189] Sasakura, *supra* note 182.
[190] Sasakura, *supra* note 182.

Upon going to trial, Sakurai and Sugiyama maintained their innocence but the court ultimately convicted both men on their false confessions, as there was no direct or physical evidence linking either man to the scene, and the statements of witnesses putting two men near the scene of the crime.[191] In addition, the confessions that were used in the trials against them contained various contradictions and changed over the course of the interrogations.[192] They were both convicted and the trial court sentenced them to life in prison.[193] Sakurai and Sugiyama appealed their case, but their appeal was denied in 1978 thus confirming their life sentences.[194]

After a motion for a retrial was denied in 1983, both Sakurai and Sugiyama were released on parole in 1996.[195] It wasn't until 2008 that the Tokyo High Court upheld the decision of a lower court to grant a retrial to Sakurai and Sugiyama after examining both old evidence from the original case and new evidence that was brought to the attention of the courts.[196] Prosecutors appealed the decision for a retrial, but ultimately lost and Sakurai and Sugiyama were able to bring their case back to court.[197] Their retrials began in 2010 and, after forty-five years in prison for a crime they didn't commit, Sakurai and Sugiyama were acquitted of the 1967 robbery and murder.[198] In a statement regarding the acquittal of the two men of the Fukawa case, Kenji Utsunomiya, the President of the JFBA, said: "[Sakurai and Sugiyama] were convicted based merely on fragile oral evidence including false confessions induced by fraudulent and threatening interrogations conducted in substitute prisons, the so-called 'Daiyo-kangoku' and

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[191] Sasakura, *supra* note 182.
[192] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 3.
[193] Sasakura, *supra* note 182.
[194] JAPAN FED'N BAR ASS'NS, *supra* note 7, at 3.
[195] Sasakura, *supra* note 182.
[196] Makoto Miyazaki, *Statement on Retrial of Fukawa Case*, JAPAN FED'N BAR ASS'NS, (Dec. 15, 2009), https://www.nichibenren.or.jp/en/document/statements/20091215.html.
[197] Sasakura, *supra* note 182.
[198] Sasakura, *supra* note 182.

eyewitness testimony which was apparently changed at the instigation of the investigators."[199] The JFBA also stated that the organization will continue its work to remedy miscarriages of justice caused by forced confessions elicited as a result of Daiyo Kangoku practices.[200]

D) Masaru Okunishi

Although it took over four decades for Sakurai and Sugiyama to be exonerated for the crimes they were convicted of due to Daiyo Kangoku practices, others were not so fortunate. Masaru Okunishi was one of those unfortunate individuals. Okunishi was arrested in 1961 in connection with seventeen poisonings at a community meeting in Nabari, Mie Prefecture, which resulted in five deaths and twelve additional individuals becoming ill.[201] Two of the victims who died from the poisoned wine were Okunishi's wife and his mistress.[202] The morning after the mass poisoning occurred, Okunishi, a local farmer who had attended the community meeting that night, was brought in for questioning by the police.[203] He was interrogated for over five days without being able to consult with a lawyer and he eventually confessed to the crime, initially telling interrogators that he did so to "end a love triangle" that he had between himself, his wife and his mistress.[204]

Examinations were performed on the wine glasses from the incident and the presence of an agricultural chemical was confirmed, but there was no direct evidence linking Okunishi to the

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[199] Kenji Utsunomiya, *Statement on Acquittal in the Retrial of the Fukawa Case*, JAPAN FED'N BAR ASS'NS, (May 24, 2011), https://www.nichibenren.or.jp/en/document/statements/20110524.html.
[200] *Id.*
[201] *Japan: 40 years on death row*, AMNESTY INT'L (Mar. 27, 2012), https://www.amnesty.org/en/latest/news/2012/03/japan-years-death-row/.
[202] *Id.*
[203] *Id.*
[204] Kana Sasakura, *Masaru Okunishi, Death Row Inmate seeking Retrial Dies at 89*, THE WRONGFUL CONVICTIONS BLOG (Oct. 22, 2015), https://wrongfulconvictionsblog.org/2015/10/22/masaru-okunishi-death-row-inmate-seeking-retrial-dies-at-89/.

crime.[205] This, in conjunction with Okunishi retracting his confession after claiming he was coerced into giving a false confession,[206] led to the Tsu District Court acquitting the farmer, citing a lack of evidence to convict him.[207] The prosecution appealed the acquittal and the case was reexamined by a higher court, which ultimately overturned the acquittal and sentenced Okunishi to death in 1969.[208] The Supreme Court upheld the decision in 1972.[209]

In the over forty years since the Supreme Court confirmed his death sentence, Okunishi continued to fight to clear his name.[210] He brought forth numerous appeals for a retrial, but all efforts were rejected. [211] In 2005, things looked as though they may change in the farmer's favor when he was granted a retrial after further testing of the wine glasses showed that the agricultural chemical found in them did not match the one that Okunishi claimed he used in his coerced confession. [212] A challenge to the granted retrial was brought by the prosecution and, in 2006, the Nagoya High Court reversed its decision to grant the retrial.[213] Okunishi brought additional motions for retrial, but the two new motions were also denied, totaling eight attempts to secure a new trial to prove his innocence.[214]

Okunishi remained in solitary confinement on death row since 1972 and continued to fight for his innocence.[215] In May of 2015, Okunishi's counsel announced that they had filed

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[205] AMNESTY INT'L, *supra* note 201.
[206] Alec Jordan, *Guilty Until Proven Innocent: Forced Confessions in the Japanese Legal System*, TOKYO WEEKENDER (July 21, 2017), https://www.tokyoweekender.com/2014/12/guilty-until-proven-innocent-forced-confessions-in-the-japanese-legal-system/.
[207] AMNESTY INT'L, supra note 201.
[208] AMNESTY INT'L, supra note 201.
[209] AMNESTY INT'L, *supra* note 201.
[210] AMNESTY INT'L, *supra* note 201.
[211] AMNESTY INT'L, *supra* note 201.
[212] Jordan, *supra* note 206.
[213] AMNESTY INT'L, *supra* note 201.
[214] Jordan, *supra* note 206.
[215] AMNESTY INT'L, *supra* note 201.

their ninth petition for a retrial.[216] That petition became moot, however, when Okunishi, due to failing health conditions, passed away in October of that same year.[217] The forced conviction Okunishi was coerced into giving over fifty years earlier due to Daiyo Kangoku practices ended up haunting the farmer for the remainder of his life and resulted in him still trying to maintain his innocence even upon his death.

VIII. SHOULD DAIYO KANGOKU BE ABOLISHED?

The practices of Daiyo Kangoku within the Japanese criminal justice system have been a part of the country's traditions for centuries. But even though something is so heavily rooted in tradition, its longstanding persistence does not necessarily make it the best choice for the future. Mark Twain stated that "the less there is to justify a traditional custom, the harder it is to get rid of it."[218] This seems to be the case with Daiyo Kangoku, as there is very little evidence to support its continuation. The inhumane conditions, criminal practices, human rights violations and the long-lasting real world implications that those entangled in the system experience are, in fact, evidence to the contrary. Supporters of the Daiyo Kangoku system argue that the idealistically high conviction rate of the country is proof enough that the criminal justice system, which includes Daiyo Kangoku, works very well and should not be changed. However, a closer examination of these numbers and statistics demonstrates how this information is skewed and other countries, should their conviction rates be calculated in much the same way, would have similar conviction rates. In examining all of the evidence brought forth, it is imperative that the Daiyo Kangoku system be abolished and new procedures and rules put in place to protect the

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[216] AMNESTY INT'L, *supra* note 201.

[217] *Death Row Inmate Seeking Retrial Over 1961 Wine-Poisoning Murders Dies at 89*, THE JAPAN TIMES (Oct. 4, 2015), https://www.japantimes.co.jp/news/2015/10/04/national/crime-legal/death-row-inmate-seeking-retrial-1961-wine-poisoning-murders-dies-89/#.VimaF7vovwo.

[218] *Tradition Quotes*, GOODREADS, https://www.goodreads.com/quotes/tag/tradition.

rights of the accused, especially the innocents that become ensnared in the web of deception, coercion and inhumane treatment.

IX. CONCLUSION

Japan is a country that is deeply rooted in tradition. Its long history has created a culture that has great reverence for its ancestry and past. One such practice that should not be held in such high regard is the Daiyo Kangoku, or substitute prison, system. While confessions, as the so-called 'king of evidence', can be important in the criminal justice system, resorting to tactics that include torture, inhumane conditions, criminal treatment, and deprivation of fundamental human rights make those confessions essentially useless. As technology continues to advance, investigators are given access to new weapons and examinations to fight crime and identify criminals; the practices in the criminal justice system should evolve as well. To prevent future innocents from becoming a casualty of the Daiyo Kangoku system, the Japanese criminal justice system should abolish the substitute prison system and instead focus on using advanced crime scene investigation technology and fair interrogation techniques rather than leaning so heavily on falsely coerced confessions. In addition, the accused should also be granted the fundamental rights guaranteed by the Japanese Constitution and international human rights standards to ensure that there are little to no miscarriages of justice. By making such adjustments and moving forward without the Daiyo Kangoku system, Japan may be able to, one day without skewing the numbers, achieve its 99% conviction rate.

MAGDALENE LAUNDRIES AND SYMPHYSIOTOMY IN IRELAND: SCHEMES OF REDRESS AND THEIR SHORTCOMINGS

Angelica Judge[1]

ABSTRACT

This Note focuses on the many women who have been imprisoned in Magdalene Laundries and have undergone the procedure known as symphysiotomy in 20th century Ireland. Two redress schemes, The Magdalene Restorative Justice Ex-Gratia Scheme and The Surgical Symphysiotomy Ex-Gratia Payment Scheme Report have been created by the Irish government to compensate the survivors of these practices and this Note analyzes the adequacy of both. They will be referred to as the "Quirke" and "Harris" Reports, respectively. Several women have been denied access to compensation with little to no avenues for appeal due to the administrative nature of both schemes. Therefore, this Note proposes legislative changes to address these issues.

Further, this Note addresses the inherent misogyny in the differences between these schemes and the Catholic Church's influence in both the laundries and symphysiotomy. Although the State has made progress in admitting its involvement in Magdalene Laundries and in creating redress schemes, women deserve a clear enumeration of their rights, as well as procedures for when their rights are infringed upon.

[1] J.D. candidate (2023) at Syracuse University College of Law; Associate Articles Editor of the *Journal of Global Rights and Organizations*, Vol. 12. I want to thank all my friends and family for their support in both writing this Note and law school itself. I especially want to thank my Opa, Donald Sipes, who taught me to care for others, and if he were still alive today, would be cheering me on during the whole process. I want to dedicate this Note to the survivors of Magdalene Laundries and symphysiotomy in Ireland because if it were not for their advocacy and strength, their stories would not continue to cause change today.

I. Introduction

This Note posits that the schemes of redress implemented by the Irish government for the commitment of women into Magdalene Laundries and the performance of symphysiotomies on women in childbirth as insufficient. The main issues this Note addresses are the use of Alternative Dispute Resolution (ADR) instead of an appeals process, the victims' forfeiture of a pathway to litigation to receive compensation, and a lack of civil or criminal accountability to the government and church members for their facilitation of these practices. This paper proceeds in six parts. Part I is the introduction to the issues, Part II explains the role that Magdalene Laundries played in Irish history, followed by Part III which does the same for symphysiotomy. Part IV depicts the redressability schemes of the laundries, Part V depicts the scheme for symphysiotomy, and Part VI provides for recent developments, followed by the conclusion and suggestions for improvement in Part VII.

Several institutions within the Republic of Ireland, known as Magdalene Laundries, often imprisoned women for being considered socially deviant, sometimes indefinitely.[2] Several of these women and girls were sent to laundries for being unwed mothers, but many more were sent for mere suspicion of sexual activity out of wedlock, or promiscuous behavior.[3] This is tied to the heavy influence of the Catholic Church in all aspects of Irish society during the 20th century.[4]

In addition, the significant influence of the Catholic Church in Irish culture was evident in other aspects of women's lives.[5] For example, a procedure known as symphysiotomy was

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[2] *See* Erin Blakemore, *How Ireland Turned 'Fallen Women' Into Slaves*, HIST.: HIST. STORIES (July 21, 2019), https://www.history.com/news/magdalene-laundry-ireland-asylum-abuse.
[3] *Id.*
[4] *See* Pádraig McAuliffe, *Comprehending Ireland's Post-Catholic Redress Practice as a Form of Transitional Justice*, 6 OXFORD J. OF L. AND RELIGION. 451, 451-73 (2017).
[5] *Id.*

practiced between the 1940s and 1980s, despite being seen as outdated and unnecessary in the medical field in this era.[6] This procedure included "doctors slic[ing] through the cartilage and ligaments of the pelvic joints to widen the pelvis for vaginal birth."[7] Symphysiotomy was often performed without informed consent and had the potential to cause life-long debilitating pain at the discretion of their physician.[8]

Given the number of victims affected by laundries and symphysiotomy at a time where medical advancements were rapidly improving and social norms were straying from the influence of the Church, it is appalling that such archaic practices continued for so long. One potential rationale is that it happened behind closed doors in the name of tradition. Or, perhaps because they started out as socially acceptable practices, no one felt the need to advocate for these women. Lastly, maybe Irish society believed these women and girls deserved their punishment. There were several societal reckonings during the 1900s, and in Ireland, this meant that women finally forced the government to not only listen, but apologize, and accept responsibility for its role in their trauma.

Due to the advocacy of several organizations, through means such as sharing the stories of these victims and their families, there was immense pressure on the Irish government to create a form of legal redress for the infringement of women's rights. In addition to advocacy, reports of state involvement in the funding of laundries, such as the *McAleese* Report, as well as the role of the state in imprisoning women contributed to this pressure.[9] In 2013, The Magdalen Restorative Justice *Ex-Gratia* Scheme, or the *Quirke* Report, was published, which laid out

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[6] Liz Dunphy, *Focus on Redress: Symphysiotomy, the 'Mass Medical Experiment' that Butchered Young Women*, IRISH EXAM'R (June 29, 2021, 6:30 AM), https://www.irishexaminer.com/news/spotlight/arid-40324274.html.
[7] *Id.*
[8] *Id.*
[9] Henry McDonald, *Magdalene Laundries: Ireland Accepts State Guilt in Scandal*, THE GUARDIAN (Feb. 5, 2013, 11:25 EST), https://www.theguardian.com/world/2013/feb/05/magdalene-laundries-ireland-state-guilt.

means of redress for certain victims of the laundries.[10] This was later amended to include two more institutions in 2018.[11] For victims of symphysiotomy, *The Surgical Symphysiotomy Ex Gratia Payment Scheme*, created in 2016[12], was a large improvement from the previous method of suppression. However this scheme is lacking in very similar ways to that of the Magdalene Laundries. The United Nations International Covenant on Civil and Political Rights expressed concern about symphysiotomy in Ireland, and advocated for the victims' ability to challenge the redress scheme, and to allow victims to bring criminal charges against those that still perform the procedure.[13] These reports and payment schemes were written several years ago and were only the beginning of an imperfect system attempting to right the Irish government's wrongs.

This note addresses the lack of appropriate redress from the *ex gratia* schemes for victims of the Magdalene Laundries and symphysiotomy. It argues for the schemes to be adopted as legislation to allow victims a cause of action against the government to account for inadequate compensation, provide a clear avenue for appeal, and for criminal charges to be brought against living facilitators of these acts, within reason.

II. History of Magdalene Laundries

Throughout history, women in Ireland faced significantly different treatment than their male counterparts for several reasons. Given the very conservative religious nature within the country and the customs typically accompanied by that, there was a stigma against sexual behavior and social deviance by women and girls.[14] This included unwed mothers, or women

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[10] MR. JUSTICE JOHN QUIRKE, THE MAGDALEN COMMISSION REPORT (IR. 2013).

[11] GOV'T OF IR., THE MAGDALEN COMMISSION, TERMS OF AN EX GRATIA SCHEME FOR WOMEN WHO WERE ADMITTED TO AND WORKED IN MAGDALEN LAUNDRIES (2018).

[12] JUDGE MAUREEN HARDING CLARK, THE SURGICAL SYMPHYSIOTOMY *EX GRATIA* PAYMENT SCHEME (2016) (Ir.).

[13] Int'l Covenant on Civ. & Pol.l Rts., Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of Ireland*, at 4, U.N. Doc. CCPR/C/IRL/CO/4 (August 19, 2014).

[14] McAuliffe, *supra* note 4, at 457.

accused of or suspected of sexual behavior.[15] Since Ireland became an independent country in 1922, up until the last laundry closed in 1996, at least 10,000 women were reportedly imprisoned and forced into difficult unpaid labor.[16] However, this figure is merely an estimate given the lack of available or reliable records.[17] Laundries were not a new phenomenon in 1922 and were not unique to Ireland[18], but that does not minimize the pain that thousands of women were subjected to at the hands of the Catholic Church, as well as their own government. A significant moment in history that drew people's attention to the laundries was when the Sisters of Our Lady of Charity decided to sell some of their land in Dublin at the Donnybrook laundry.[19] In 1992, they applied for permits to have bodies at their cemetery moved and a mass grave of 155 unknown women was subsequently discovered.[20] This scandal led to many Irish women coming forward and telling their stories of the laundries for the first time and public outrage followed.[21]

There were several means by which women and girls would be placed in these institutions. Many were sent by the court as a condition of probation, transferred from Mother and Baby Homes, by "social workers, members of the clergy, the Gardai (police), hospitals, local authorities, County Councils, [and] psychiatric hospitals."[22] In addition, evidence was found that some girls were sent to laundries because they were victims of abuse.[23] When a female was given to a Magdalene Laundry by her family or someone that knew her personally, this was

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[15] McAuliffe, *supra* note 4, at 458.
[16] *About the Magdalene Laundries*, JUST. FOR MAGDALENES RSCH., http://jfmresearch.com/home/preserving-magdalene-history/about-the-magdalene-laundries/ (Last visited Sept. 25, 2022).
[17] *Id.*
[18] GOV'T OF IR., REPORT OF INTER-DEPARTMENTAL COMMITTEE TO ESTABLISH THE FACTS OF STATE INVOLVEMENT WITH THE MAGDALEN LAUNDRIES 15 (2013).
[19] Blakemore, *supra* note 2.
[20] Blakemore, *supra* note 2.
[21] Blakemore, *supra* note 2.
[22] JUST. FOR MAGDALENES RSCH., *supra* note 16.
[23] JUST. FOR MAGDALENES RSCH., *supra* note 16.

referred to as a "voluntary" committal.[24] The women who were "referred" were often sent to laundries while they awaited trial or in lieu of a prison sentence.[25] If women were sent to a laundry due to pregnancy out of wedlock, often when those babies were born, they were given to other families without any consent from the mother.[26] It is extremely troubling that when a woman or girl was sent by a family member on her behalf, it was considered "voluntary." This is stripping a woman of her bodily autonomy and allowing others to speak for her in the eyes of the government and the Church.

In discussing the history and relevance of Magdalene Laundries, it is necessary to mention Mother and Baby Homes which are another dark part of Ireland's history that led to significant shame and the death of thousands of children.[27] These were institutions where unmarried women and girls were sent to give birth and were later compelled to give up their children.[28] Similar to the laundries, they were run by religious orders and funded by the state.[29] Attention was brought to these homes in 2017 when remains of nearly 800 babies and children were uncovered in an unmarked grave in County Galway.[30] The media attention from the discovery and victim advocacy groups, likely led to public pressure on the Irish Government to publish the 2021 Report that addressed the mistreatment of the victims and the State's involvement.[31] The Report also found that some of the women and girls sent to the homes were

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[24] Leah Lefler, *Magdalene Laundries in Ireland and Across the Western World*, OWLCATION (July 29, 2021), https://owlcation.com/humanities/Magdalene-Laundries-in-Ireland-and-Across-the-Western-World.
[25] Lefler, *supra* note 24.
[26] Blakemore, supra note 2.
[27] Kara Fox, *Ireland's 'Brutally Misogynistic Culture' Saw the Death of 9,000 Children in Mother and Baby Homes, Report Finds*,CNN (Jan. 13, 2021, 11:25 AM) https://www.cnn.com/2021/01/12/europe/ireland-mother-baby-homes-final-report-intl/index.html.
[28] Megan Specia, *Report Gives Glimpse Into Horrors of Ireland's Mother and Baby Homes*, N.Y. TIMES (Jan. 13, 2021) https://www.nytimes.com/2021/01/12/world/europe/ireland-mother-baby-home-report.html.
[29] Specia, *supra* note 28.
[30] Specia, *supra* note 28.
[31] Specia, *supra* note 28.

subject to "unethical vaccine trials and traumatic emotional abuse."[32] This is all relevant because *The Executive Summary of the Final Report of the Commission of Investigation into Mother and Baby Homes* notes that 313 women are recorded as being transferred to a Magdalene Laundry after giving birth.[33] Mother and Baby Homes are another example of gender disparity in Ireland that likely can be attributed to culture and compulsion to suppress sexuality.

The conditions in the Magdalene Laundries were "prison-like."[34] Women and girls were forced to do lace-making, needlework, or laundry in order to purify themselves and there were several reports of "shaven heads, institutional uniforms, bread and water diets, restricted visiting, supervised correspondence, solitary confinement and even flogging."[35] By using dehumanizing tactics, the laundries were both physically and psychologically traumatizing women who often were not convicted of any crime.[36] Initially, the idea was to teach women skills that they would utilize once they were released.[37] One of these tactics was to change the names of women and girls who entered the laundries.[38] The conditions worsened and the Laundries became a place to send women that a largely Catholic population either did not approve of, or did not know what to do with.[39] Although it is surprising that the last Magdalene Laundry closed its doors in 1996, they were able to continue for so long because they provided an inexpensive laundry service for

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[32] Specia, *supra* note 28.
[33] GOV'T OF IR., *Executive Summary,* FINAL REPORT OF THE COMM'N OF INVESTIGATION INTO MOTHER AND BABY HOMES 1, 46 (2021).
[34] Blakemore, *supra* note 2.
[35] *See* Blakemore, *supra* note 2.
[36] Blakemore, *supra* note 2.
[37] Blakemore, *supra* note 2.
[38] Jennifer O'Connell, *It Was Not Just in Gilead Where Women Were Stripped of Their Names*, THE IRISH TIMES (Oct. 5, 2019, 6:00 AM) https://www.irishtimes.com/life-and-style/people/jennifer-o-connell-it-was-not-just-in-gilead-that-women-were-stripped-of-their-names-1.4031110 (arguing that the stripping of victims' names does not only occur in fiction and that names and labels are used to dehumanize victims).
[39] Blakemore, *supra* note 2.

their communities.[40] The Irish government itself financially benefited from the exploitative labor of these women, which led to the public pressure to accept responsibility and provide compensation for the several women still alive that withstood the systemic pain of the laundries.[41]

The pervasiveness of the Magdalene Laundries after the Republic of Ireland gained independence was also exacerbated by the gendered notion of punishment and confinement.[42] Mercy was often the reason given for not giving female offenders the death penalty.[43] Instead, several women began their sentence in prison, then were transferred to laundries for an indefinite period.[44]

III. History of Symphysiotomy

Symphysiotomy is a procedure that dates back to the 18th century that is performed on women in childbirth when their labor is obstructed.[45] To conduct a symphysiotomy, "doctors slice through the cartilage and ligaments of the pelvic joints to widen the pelvis for vaginal birth."[46] In more severe cases, a pubiotomy was performed, which is when the pelvic bone is

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[40] JUST. FOR MAGDALENES RSCH., *supra* note 16.

[41] JUST. FOR MAGDALENES RSCH., *supra* note 16.

[42] Lynsey Black, *"On the other hand the accused is a Woman…": Women and the Death Penalty in Post-Independence Ireland*, 36 L. AND HIST. REV. 139, 141 (Feb. 1, 2018) (discussing Ireland's history of imprisoning women at different rates compared to men and how Magdalene Laundries were common institutions for female prisoners to be diverted to as opposed to prison or the death penalty).

[43] *See Id*. at 146.

[44] *See Id*. at 166.

[45] *See* SURVIVORS OF SYMPHYSIOTOMY, SUBMISSION TO THE UNITED NATIONS RAPPORTEUR ON VIOLENCE AGAINST WOMEN: MISTREATMENT AND VIOLENCE AGAINST WOMEN IN REPRODUCTIVE HEALTHCARE DURING CHILDBIRTH 7, (2019), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/SurvivorsSymphysiotomy.pdf.

[46] Dunphy, *supra* note 6.

sawn through entirely.[47] This was exceedingly painful for women that endured it, and it could lead to life-long pain and incapacitation.[48]

Although once popular, symphysiotomy was outlived by the cesarean section which when performed correctly, is significantly less risky.[49] However, despite the advances in medical care during childbirth, several doctors in Ireland continued to perform this procedure, with approximately 1,500 women between 1944 and 1984 undergoing this unnecessary surgery resulting in long-term consequences.[50] The Catholic Church insisted on continuing this procedure because of their preference for vaginal childbirth and, similar to placement in laundries, this was often done without the consent of the mother.[51]

These long-term effects are demonstrated by victims like Mary[52], who in 1981 was pregnant with her and her husband's first child.[53] Mary was in labor for a while and was in a significant amount of pain.[54] When her and her baby's heartbeat dropped, a doctor came in for an exam.[55] Without consulting Mary about her condition or options, this doctor – who was not previously a part of her delivery – tied up her legs and performed a symphysiotomy while four nurses watched her suffer in agony.[56] Following the birth, she had to lie still with a corset around her hips for five straight days and could not move or hold her daughter.[57] Mary and her husband

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[47] Dunphy, *supra* note 6.
[48] Dunphy, *supra* note 6.
[49] *See* SURVIVORS OF SYMPHYSIOTOMY, *supra* note 45, at 8.
[50] *See* SURVIVORS OF SYMPHYSIOTOMY, *supra* note 45, at 8.
[51] Homa Khaleeli, *Symphysiotomy - Ireland's Brutal Alternative to Cesareans*, THE GUARDIAN (Dec. 12, 2014 9:00 AM EST) https://www.theguardian.com/lifeandstyle/2014/dec/12/symphysiotomy-irelands-brutal-alternative-to-caesareans.
[52] The victim's name was changed by the publication to protect her confidentiality.
[53] Khaleeli, *supra* note 51.
[54] Khaleeli, *supra* note 51.
[55] Khaleeli, *supra* note 51.
[56] Khaleeli, *supra* note 51.
[57] Khaleeli, *supra* note 51.

had three more children after the birth of their first daughter and decades later Mary still has chronic pain and has difficulty controlling the lower half of her body, among other symptoms.[58]

Mary's situation is unfortunate but not unique.[59] Rita McCann, an eighty-eight year old woman who was subjected to symphysiotomy nearly sixty years before telling her story, was still having nightmares about her treatment by medical professionals.[60] During childbirth, she was given little information about what was happening to her, and she suffered chronic pain, among other issues, for several years.[61] By bravely sharing their stories, women like Mary and Rita are emblematic of the estimated 1,500 women that have suffered and lost their bodily autonomy in this way.[62]

Women who are victims of symphysiotomy and the Magdalene Laundries share a common trauma of choices being made for them regarding their bodily autonomy at the hands of stigma and the Catholic Church. The government of Ireland has recognized the hardship of these women and girls and have taken steps to make amends, but some critics believe that they have not gone far enough.[63]

IV. Redressability Scheme for Magdalene Laundries in Ireland During the 20th Century

The McAleese Report

The Justice for Magdalene's (JFM) organization whose mission is to advocate for survivors of laundries, made a request that the Irish Human Rights Commission conduct a

[58] Khaleeli, *supra* note 51.
[59] *See* Khaleeli, *supra* note 51.
[60] Khaleeli, *supra* note 51.
[61] Khaleeli, *supra* note 51.
[62] *See* SURVIVORS OF SYMPHYSIOTOMY, *supra* note 45, at 8
[63] *See* McAuliffe, *supra* note 4, at 472.

formal inquiry into the Magdalene Laundries in July 2010.[64] The main recommendation in this request was to investigate state involvement in the laundries.[65] If state involvement was discovered, JFM requested the government provide redress to those that were affected.[66] Following immense public pressure, Senator Martin McAleese was selected to chair an inter-departmental committee to investigate these claims in 2011.[67] This led to the well-known *McAleese* Report, which unearthed information that JFM and others had been saying all along; that the government of Ireland participated in the heinous system that indefinitely imprisoned women throughout the 20th century.[68]

The Irish Government's Participation and Funding of the Laundries

More specifically, the Report outlined three ways that the government participated in locking these women away. The first was through the criminal justice system which included women on remand, on probation, on a temporary release from prison, or an early release from prison.[69] McAleese stressed that a large majority of women placed in laundries by the criminal justice system were for very minor crimes.[70] Here, the State involvement is obvious. By directly placing women in these institutions as a means of punishment, the State evaded the responsibility of rehabilitating these women as well as having to fund their incarceration.

The second route of entry into laundries was through industrial and reformatory schools. Girls found to be a part of this pipeline were either through direct transfers from schools, or

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[64] Patsy McGarry, *Statutory Investigation Into Magdalene Laundries Still Needed, Says Report*, THE IRISH TIMES (June 19, 2013, 1:00 AM) https://www.irishtimes.com/news/statutory-investigation-into-magdalene-laundries-still-needed-says-report-1.1434148.
[65] *Id.*
[66] McGarry, *supra* note 64.
[67] McGarry, *supra* note 64.
[68] MARTIN MCALEESE, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE TO ESTABLISH THE FACTS OF STATE INVOLVEMENT WITH THE MAGDALEN LAUNDRIES (2013) (Ir.)
[69] MCALEESE, *supra* note 68 at 204.
[70] MCALEESE, *supra* note 68 at 204.

indirect transfers where they would be dismissed from a school and would appear at a laundry in the following years.[71]

Lastly, some women and girls were placed in laundries by the State through health authorities and social services.[72] This would include local authorities, County and City Homes, health authorities, social services, hospitals, Mother and Baby Homes, psychiatric hospitals, and institutions for the intellectually disabled.[73] Once State involvement was uncovered, the government was forced to address the concerns of survivors.

Beyond the Irish government actively sending women to Magdalene Laundries, another significant unveiling in the *McAleese* Report was that the Irish government directly funded the laundries.[74] When it came to contracts with the laundries, the Report stated that the laundries were chosen by the Irish government because they were the lowest bidder.[75] That should have been a clue that there was an exploitative system creating cheap labor.

There are several examples of the Irish Government supporting the laundries. First, the McAleese Committee found grants were provided by the Government to individual women and classes of individuals in laundries under section 35 of the Public Assistance Act of 1939.[76] More specifically, the Committee found payments by the government for the purpose of providing a service that is generally furnished by the government, insinuating that these laundries were providing a public service.[77] In addition, payments were made for remand and probation cases,

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[71] MCALEESE, *supra* note 68 at 327.
[72] MCALEESE, *supra* note 68 at 434.
[73] MCALEESE, *supra* note 68 at 437.
[74] MCALEESE, *supra* note 68, at 595.
[75] MCALEESE, *supra* note 68 at 656.
[76] MCALEESE, *supra* note 68 at 597.
[77] MCALEESE, *supra* note 68 at 596.

as well as some in support of homeless or disabled persons.[78] The earliest payment of this kind was in 1928 and the most recent being in 1991.[79] Of course, this is only what the Irish government has a surviving record of, as the committee prefaces this Report by saying the laundries did not keep adequate records.[80] It is possible that more funds were exchanged, but what is available paints a significant picture of the part these institutions played in society in the eyes of the government.

The most troubling conclusion was the existence of State contracts that directly exploited the labor of these women. The *McAleese* Report began its analysis of this section by qualifying that it was a standard practice by the government to erase certain records after several years.[81] Some of these periods were as short as seven years, leaving the records of government involvement unclear at best.[82] However, it is clear that in one laundry at Sean McDermott Street in Dublin between 1960 and 1966, the Departments of Industry & Commerce, Finance, Local Government, Health, Social Welfare, and Education all benefited from the women's exploitative labor.[83] The Report also found that "State contracts amounted to an average eighteen percent of the total business of the [McDermott Street] laundry and was worth £46,449 in business over the six years - around €150,000 in today's money."[84] This was only one of the several examples of how the state benefited from the women's labor, and is a significant depiction of the government's role in these institutions.

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[78] MCALEESE, *supra* note 68 at 596.
[79] MCALEESE, *supra* note 68 at 643, 654.
[80] MCALEESE, *supra* note 68 at 595.
[81] MCALEESE, *supra* note 68, at 657.
[82] MCALEESE, *supra* note 68, at 657.
[83] *See* MCALEESE, *supra* note 68, at 663.
[84] Christine Bohan, *Government Departments Used Magdalene Laundries to do Their Washing*, THE J. IE (Feb. 6, 2013, 6:30AM), https://www.thejournal.ie/state-contracts-magdalene-laundries-783731-Feb2013/.

Lastly, there is evidence of charitable tax exemptions granted to multiple laundries at different points in time.[85] This may not be surprising based on the charitable nature of many religious institutions. However, "during the time-period under examination by the Committee, there was no ongoing review or monitoring to ensure that bodies assigned a charity number continued to operate for charitable purposes."[86] Therefore, there was very little evidence of oversight by the government to ensure that the charities deserved to maintain their standing after the exemptions were granted. Furthermore, the lack of oversight allowed these institutions to not only profit from government funds, but also to evade paying taxes in the regions they resided in. In order to right these wrongs, the government turned to *ex gratia* payment.

The Quirke Report

The *McAleese* Report was followed by the *Quirke* Report, which outlined The Magdalene Commission's plan of redress for the victims.[87] An *ex gratia* payment is from either a government or an organization for damages or claims, but is considered voluntary and does not necessarily require the admittance of fault.[88] Here, the commission used a non-adversarial *ex gratia* payment scheme to compensate victims, and utilized alternative dispute resolution (ADR) to determine eligibility.[89]

[85] MCALEESE, *supra* note 68, at 752.
[86] MCALEESE, *supra* note 68, at 752.
[87] Quirke, *supra* note 10, at 1.
[88] Caroline Barton, *Ex-Gratia Payment*, INVESTOPEDIA, https://www.investopedia.com/terms/e/ex-gratia-payment.asp (last visited Sept. 18, 2022).
[89] Quirke, *supra* note 10, at 2, 5.

If an applicant proved she was in one or more laundries, the amount of time she spent there would directly correlate to her compensation.[90] The total damages the applicant would be granted was based on a combination of a general payment and a work payment.[91] Factors such as "education, perceived reputation, subsequent health, lifestyle, confidence and self-esteem" were considered when determining an appropriate amount.[92] Once the woman proved she was incarcerated, the minimum payment she received would be as if she was working in a laundry for up to three months; thus totaling an €11,500 payment, comprised of a €10,000 general payment and a €1,500 work payment.[93] Payments increased incrementally by €1,000 for each additional month an applicant proved she was in a laundry.[94] This payment scheme continued until the ten-year mark, where an applicant was forced to cap their compensation at €100,000 (€40,000 for the general payment and €60,000 for the work payment).[95] Other benefits are offered as part of this redress recommendation, such as access to the benefits granted by a Health Amendment Act (HAA) card, the equivalent of a state pension, and tax breaks for large sums.[96] However, this Note will not be addressing these areas in detail.

Although it is framed in a gracious light in the *Quirke* Report, by only allowing for ADR to determine redress, victims are not given a pathway to litigation. To the Commission's credit, it emphasized extensive ways in which they consulted with 337 survivors,[97] but these payments were only allowed if survivors revoked their right to further litigation.[98] By doing this, the State

[90] *See* Quirke, *supra* note 10, at 9.
[91] Quirke, *supra* note 10, at 10.
[92] Quirke, *supra* note 10, at 9.
[93] Quirke, *supra* note 10, at 10.
[94] Quirke, *supra* note 10, at 9.
[95] Quirke, *supra* note 10, at 10.
[96] *See* Quirke, *supra* note 10, at 7–11.
[97] Quirke, *supra* note 10, at 5.
[98] Quirke, *supra* note 10, at 2.

has again infringed on women's ability to make their own decisions. Additionally, advocacy groups have criticized that victim testimony was not given the weight it was owed, considering the abuse that women endured in these institutions.[99] The government is attempting to appear cooperative by fully documenting and exposing the treatment of the laundries, thereby placing a rose-colored lens over this horrific history.

Another significant concern amongst the victims of the Magdalene Laundries is the requirement of documentation.[100] Peter Tyndall, the Ombudsman who is the public official in charge of investigating administrations, received twenty-seven complaints in November 2017 regarding the faulty implementation of this scheme, and further investigation ensued.[101] Although the policy was to be very receptive to applicants for payment, Tyndall, as well as survivor advocates, had concerns that victims likely would not have many documents to present, if at all, of their imprisonment.[102] By not allowing merely the testimony of women that were held in laundries to suffice in certain cases, several women, especially those that were held as young girls, are deprived of compensation. The State should be opening as many doors as possible for women to be paid for their lost years, not closing them.

The Ombudsman's Report states that there is no known documentation at all from the St. Patrick's Refuge, Dun Laoghaire laundries, which shows how large of a barrier this requirement can be.[103] While there is a lack of documentation in certain laundries such as the Dun Laoghaire

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[99] Ruadhán Mac Cormaic, *UN Watchdog Criticizes Magdalene report for Lack of Independence*, THE IRISH TIMES (JUNE 3, 2013, 1:00 AM), https://www.irishtimes.com/news/un-watchdog-criticises-magdalene-report-for-lack-of-independence-1.1415043.

[100] OFF. OF THE OMBUDSMAN, GOV'T OF IR., OPPORTUNITY LOST- AN INVESTIGATION BY THE OMBUDSMAN INTO THE ADMIN. OF THE MAGDALEN RESTORATIVE JUST. SCHEME (2017).

[101] *Id.* at 39.

[102] *Id.* at 8.

[103] *See* OFF. OF THE OMBUDSMAN, *supra* note 100, at 39.

Laundry, it would be very easy to disprove a false claim since it is customary for research to be done before allowing women to receive compensation.[104] If there is any proof of their freedom during the time in question, then further inquiry is necessary. However, an additional inquiry should be conducted by the government because of its access to extensive resources compared to an ordinary citizen. Therefore, any concern of false allegations is misguided.

Despite many reports, scandals and discoveries that began Magdalene Laundries redress scheme for, they remain relevant for discussion because of the lack of actual compensation provided. This is not to minimize the enormous feat it was for survivors to be granted a State apology and a means of redress, but instead to highlight how it has merely transformed into performative action instead of a real solution.

It is true that the *Quirke* Report was lacking and was updated in 2018 to address certain faults in the initial document. However, in cases like *M.K.L v. The Minister for Justice and Equality* and *D.C. v. The Minister for Justice and Equality*, we can see how even in 2017, two survivors of the laundries were forced to appeal their rejections in the Irish court system just to have their applications reviewed.[105] The common issue both plaintiffs faced in these cases was their eligibility to appeal their rejection from the *Quirke* redress scheme.[106] It is undisputed that the first applicant worked in an institution that was on the same campus as a laundry.[107] However, the government considered this work site to be legally separate from the laundry because the redress scheme specifically applies only to institutions listed within it.[108] Similarly,

[104] *See* Quirke, *supra* note 10, at 20.
[105] M.K.L. v. Minister for Just. and Equal. [2017] IEHC 389 (H. Ct.) (Ir.).
[106] *Id.* at para. 1–2.
[107] M.K.L., IEHC 389 at para. 22.
[108] *Id.* at para. 23.

the second applicant worked at an industrial school for several years, and intermittently worked in two Magdalene Laundries.[109]

Due to these cases being interpreted as an administrative matter as opposed to statutory interpretation, the court concluded that their only authority was to determine if the scheme was applied fairly.[110] In fact, it stated that "it would only be in exceptional circumstances that the court would interfere with a decision on eligibility or an award."[111] By the government implementing a scheme that would allow for very little judicial oversight, as opposed to an act voted on by elected representatives, the court cannot conduct an at-length legal analysis to determine eligibility.[112] The court in particular noted that the only mention of an appeals process in the Report was "a simple appeal process to a single agreed independent person . . . to resolve disagreement or dissatisfaction with preliminary decisions made by the Scheme's administrator . . . ."[113] However, there is no mention of who this independent person is or what type of evidence must be submitted on the survivors' behalf.

By refusing to pass a law that entitles these women to a cause of action if compensation is denied, there will continue to be women like those in this case who spend two years litigating for money they are entitled to from labor they performed decades ago. Therefore, a path to litigation should be granted for victims given their unique experiences that cannot be summed up in a single graph or an exhaustive list of locations. Litigation would also provide a symbolic addition to redress for the victims because it would validate their trauma by at least granting them their day in court and could possibly set a favorable precedent for other victims. In

[109] M.K.L., IEHC 389 at para. 24.
[110] *Id*. at para 26.
[111] *Id.*
[112] M.K.L., IEHC 389 at para. 31.
[113] *Id.* at para. 20. (Quoting Quirke, *supra* note 10, at 12).

addition, since the government of Ireland itself has admitted its significant involvement in this system, it is their responsibility to go further. If the *Quirke* Report was transformed into legislation, it must also allow for victims who have already agreed to the coercive ADR provision and received some or all their payments, to have the same access to litigation when appropriate.

V. Redressability Scheme for Symphysiotomy in Ireland in the 20th Century

The Harris Report

With regard to symphysiotomy, the compensation scheme focused heavily on long-term medical effects, medical records, and the lack of consent element.[114] The figures and levels of compensation sound very generous, especially due to the emphasis the government put on attention to detail and its sympathetic review of each case.[115] However, once it is proven that a procedure has taken place, without informed consent, it is also true that a doctor has allowed an outdated religious practice to infringe on a mother's bodily autonomy. That is where the damages should lie. Similar to the word "voluntary" being used to describe women's commitment to Magdalene Laundries, an "elective symphysiotomy" merely means in advance of labor, not necessarily a consenting patient.[116]

Only roughly 350 women were expected to apply, but the committee received about 600 applications, even with only an approximately four-week window.[117] The scheme is divided in Categories 1A, 1B, and 1C, and payments increase incrementally based on the amount of harm done.[118] The threshold for compensation under Category 1A is only to prove that a

[114] *See* CLARK, *supra* note 12, at 100.
[115] CLARK, *supra* note 12, at 28.
[116] CLARK, *supra* note 12, at 7.
[117] CLARK, *supra* note 12, at 8.
[118] CLARK, *supra* note 12, at 6.

symphysiotomy had occurred on the patient.[119] Given the pain and recovery involved in this procedure, the compensation was designed to address discomfort for a period of three years.[120] Every applicant that could show they had undergone symphysiotomy was automatically entitled to a €50,000 payment.[121] This was regardless of whether or not the patient suffered further disabilities than the expected recovery of the surgery.[122]

Next, under Category 1B, the patient must additionally show "significant disability."[123] This vague term "was defined as medically verified physical symptoms or conditions directly attributable to symphysiotomy and which had lasted for more than three years."[124] By verification, the scheme goes on to explain that the disability must be identified, and the evidence must be objective.[125] If an applicant met this threshold, they would be entitled to a €100,000 payment.[126]

Lastly, under Category 1C, any woman who had endured an elective symphysiotomy or a cesarean section immediately followed by a symphysiotomy, assuming they had evidence of such, would automatically be granted €100,000.[127] An additional €50,000 would be included if significant disability followed the combined procedures.[128]

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[119] CLARK, *supra* note 12, at 6.
[120] CLARK, *supra* note 12, at 6.
[121] CLARK, *supra* note 12, at 6.
[122] CLARK, *supra* note 12, at 6–7.
[123] CLARK, *supra* note 12, at 7.
[124] CLARK, *supra* note 12, at 7.
[125] CLARK, *supra* note 12, at 7.
[126] CLARK, *supra* note 12, at 7.
[127] CLARK, *supra* note 12, at 7.
[128] CLARK, *supra*, note 12, at 7.

Since pubiotomy is a separate and more rigorous procedure, it was treated slightly differently.[129] A pubiotomy without further proving disability entitled the patient to €100,000, while proof of further disability entitled the patient to €150,000.[130]

Almost 600 applications were received, but 185 of them were denied because they were unable to establish their claim.[131] In total, 399 women, at the time of this Report in 2016, received awards, with most of them being for €50,000.[132]

There are significant distinctions between the symphysiotomy redress scheme and the Magdalene Laundries scheme. First, the payments for the victims of the laundries varied much more based on the applicant than those applying for symphysiotomy redress. For example, the *Quirke* Report provided a table for varying levels of compensation starting at €11,500 and capped at €100,000.[133] The €11,500 figure is for victims that were imprisoned for three months or less which is minor compared to many women's stories.[134] A symphysiotomy patient that has not proven long-term symptoms is automatically given €50,000.[135]

Although a painful and unnecessary medical procedure is well deserving of compensation, the government is drawing a distinction between victims of Magdalene Laundries and symphysiotomy. By providing significantly less money for depriving a person of their liberty for longer than the recovery period of symphysiotomy, it is continuing the narrative of gender disparity in Ireland. The government of Ireland is prioritizing compensation for injuries related to childbirth and the family, while the victims of the laundries are essentially receiving a paycheck,

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[129] *See generally* Dunphy, *supra* note 6 (stating that a pubiotomy is the severing or sawing of the pelvic bone and is a "more extreme" case than symphysiotomy).
[130] CLARK, *supra* note 12, at 8.
[131] CLARK, *supra* note 12, at 10.
[132] CLARK, *supra* note 12, at 10.
[133] Quirke, *supra* note 10, at 10.
[134] Quirke, *supra* note 10, at 10.
[135] Quirke, *supra* note 10, at 10.

without adequate recognition of the loss of liberty. According to the symphysiotomy scheme, there was no evidence to suggest that religion played a higher role in these medical procedures than obstetric preference.[136] However, it is almost impossible to substantively account for the inherent bias that a physician in such a religious and gendered culture has when attempting to differentiate between his/her practice and values. This is especially true when there is seemingly little oversight.

VI. Recent Developments and Suggestions in Compensation for Victims of Magdalene Laundries and Symphysiotomy

In recent years, more women have been granted the opportunity to have their applications to the Magdalene Laundry redress scheme reassessed.[137] The Ombudsman Peter Tyndall's Report discussed above, emphasized that a substantial barrier to certain victims receiving compensation was women who resided in one of fourteen adjoining institutions that were not listed in the initial redress scheme.[138] This is like the claims made in *M.K.L. v. The Minister for Justice and Equality* and *D.C. v. The Minister for Justice and Equality*, with the difference being that the Ombudsman is an agent of the Irish government who has more jurisdiction than the Irish judicial system to handle administrative matters. The rationale for this was not clear in the *McAleese* Report, but it excluded a significant number of victims.[139] This was evident when seventy-nine women applied on a new fast-track by the Irish government, fifty-two of which had been previously denied on those grounds.[140]

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[136] CLARK, *supra* note 12, at 15.

[137] Sarah Mac Donald, *Extension of Compensation to Women of Ireland's 'Magdalene Laundries' adds to Healing*, GLOB. SISTER'S REP. (Dec. 13, 2018) https://www.globalsistersreport.org/news/trends/extension-compensation-women-irelands-magdalene-laundries-adds-healing-55700.

[138] *Id.*

[139] *Id.*

[140] Mac Donald, *supra* note 137.

What is missing from the broad strides made by advocacy groups and inter-departmental committees is criminal investigation in the Republic of Ireland. There has been movement with advocacy groups in Northern Ireland attempting to attract attention by the International Criminal Court (ICC) for similar institutions.[141] A prominent legal firm in Belfast submitted a fifty-page report to the ICC in 2021 seeking a preliminary examination into "whether the institutional abuse exposed in recent State-commissioned reports and inquiries amounted to 'crimes against humanity.'"[142] A significant focus of this inquiry was the State-centric nature of the activity and the failure of the State to inspect or regulate both Magdalene Laundries and Mother and Baby Homes.[143] Severe criticism arose regarding the report after commission member Mary Daly announced that personal testimonies would not be included after several years of investigation.[144] Although this follows the objective nature of the *McAleese* and *Quirke* Reports, advocates were calling for committee members to appear before the Oireachtas[145] and answer questions on their findings.[146] One could argue that it is not the government's job to publish the personal stories of the victims, and that it likely would not change the amount of compensation provided to them. However, it has already been determined that appropriate documentation is hard to come by, and without the sharing of survivors' stories, it is unlikely that the redressability schemes would have been created at all.

The actions taken by the Belfast law firm in attempting to involve the ICC raise the issue of accountability from a different angle. If there are survivors that are still alive dealing with

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[141] Maresa Fagan, *ICC Asked to Investigate Mother and Baby Homes and Magdalene Laundries*, IRISH EXAM'R (May 18, 2021, 7:30AM) https://www.irishexaminer.com/news/arid-40291748.html.
[142] Fagan, *supra* note 141.
[143] Fagan, *supra* note 141.
[144] Fagan, *supra* note 141.
[145] The Parliament of the Republic of Ireland.
[146] Fagan, *supra* note 141.

ailments today, some of the perpetrators likely are as well. When a Dublin reporter met with two nuns who had worked in Magdalene Laundries for a radio interview in 2013, the Irish people were provided a rare opportunity to hear the Church's side of the story. When the nuns, referred to as "Sister A" and "Sister B," were asked on an Irish public broadcast whether they would apologize, they were distraught.[147] Sister A described their role in the laundries as "providing a free service for the country," as well as shelter and access to food.[148] In agreement with Sister A, Sister B added "All the shame of the era is being dumped on the religious orders . . . the sins of society are being placed on us."[149] These women, and likely many others, saw their role as that of a savior that helped these women survive. Seemingly, all the focus has been on whether the victims of these practices were paid for their involuntary sacrifice, but people like Sister A and Sister B have never been prosecuted and may still even work within the church. Therefore, it is not too late for the Irish government to use what documentation they were able to find, and hold those accountable that took the lives away of so many women and girls.

In terms of civil redress by the government of Ireland, there are several potential avenues for improving Magdalene Laundry and symphysiotomy schemes. First, the government should publish all their research from their investigation, not merely their conclusions. By doing this, the survivors' stories that critics feel are lacking from the narrative of these reports will be available to everyone. Ever since the closing of several institutions in the 1990s, committees have been created to address the newest trending human rights abuses, but it has been framed in a way that caters to bureaucracy. Although many of the victims understandably want financial

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[147] Claire Mc Cormack, *Nuns Claim No Role in Irish Laundry Scandal*, WOMEN'S ENEWS (May 29, 2013) https://womensenews.org/2013/05/nuns-claim-no-role-in-irish-laundry-scandal/.
[148] *Id.*
[149] *Id.*

and healthcare compensation for their struggles, validation is also important in the healing process.

Further, a cause of action is essential for the victims to have more agency in an unequal power balance between them and the State. Although in the *McAleese* Report the method of redress is framed as being cooperative, it took until 2018 for some women to reapply and be considered for compensation.[150] Litigation is often seen as an inefficient and time-consuming option, but it puts pressure on the government to act within a certain timeframe. These women are only growing older and sicker as time goes on, and by waiting until the next human rights abuse is discovered to shift focus, the government escapes accountability.

VII. Conclusion and Recommendations

Magdalene Laundries

Although both placement in Magdalene Laundries and symphysiotomy have caused a significant amount of pain to the women of Ireland, they have not been treated equally in terms of redress. It is estimated that 1,500 women experienced symphysiotomy in the 1940s to the 1980s.[151] This is significantly lower than the 10,000 women estimated to have passed through the laundries since 1922.[152] In addition, merely proving that a woman has undergone a symphysiotomy entitled her to a minimum of €50,000 under the *Harris* scheme,[153] while proving a woman was imprisoned in a laundry for three months or less only entitled a woman to €11,500.[154] With this in mind, as well as the other arguments put forth in this Note, I argue that this is emblematic of inherent gender bias in Irish culture. Magdalene Laundries have deprived

[150] Mac Donald, *supra* note 137.
[151] Khaleeli, *supra* note 51.
[152] Blakemore, *supra* note 2.
[153] CLARK, *supra* note 12, at 6.
[154] Quirke, *supra* note 10, at 10.

significantly more liberty and allowed for secretive punishment of behavior that was often not criminal in nature, but directly contradicted the principles of the Catholic Church. On the other hand, symphysiotomy directly infringes on a woman's bodily rights during childbirth. By compensating symphysiotomy significantly higher than forced labor and imprisonment, the government of Ireland is showing their bias in valuing pregnancy above valuing women.

To address this discrepancy, as well as the lack of adequate appeals for rejection from redress, both the *Harris* and *Quirke* Reports should be created into legislation by the Houses of the Oireachtas. On the Irish government's website where the *Quirke* Report can be found, it says "the Government accepted in principle all of the recommendations in the *Quirke* Report."[155] However, no further clarification is given as to what is meant by "accepted." By not clearly making this scheme law, in addition to only allowing ADR as opposed to litigation, cases like *M.K.L. v. The Minister for Justice and Equality; D.C. v. The Minister for Justice and Equality* are set up to fail. For example, the court referred to the scheme as "set up by the Government [a]s a public scheme and the administrators have a duty to apply fair procedures," but "the court should not usurp the functions of the administrators of the scheme in deciding it's essential components such as eligibility and awards."[156] In other words, the court found that given this is a government adopted scheme, it is administrative in nature and the court only has jurisdiction to interfere if the decision by the committee is exceedingly unfair. These women are forced to accept the terms of the government to receive compensation if they are allowed to have any at all.

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[155] *The Magdalen Restorative Justice Ex-Gratia Scheme*, GOV.IE (Feb. 7, 2022) https://www.gov.ie/en/service/8fe41a-the-magdalen-restorative-justice-ex-gratia-scheme/. .
[156] M.K.L. v. Minister for Just. and Equal. [2017] IEHC 389 (H. Ct.) (Ir.).

The laundry scheme has been referenced in legislation since its acceptance but has not been granted legislative status itself. For example, in 2015, the Oireachtas passed the Redress for Women Resident in Certain Institutions Act, which amends existing laws to allow certain groups access to health services without charge.[157] A similar amendment was also passed in 2019 to add further institutions to the scheme and add language regarding nursing homes.[158] If the Oireachtas is capable of amending either the scheme or other acts to accommodate the scheme, there is no excuse for why there is no clear cause of action or process to appeal. To go a step further, there is no excuse as to why the entire document is not passed through the Oireachtas as opposed to remaining an exercise of administrative power. That would give elected officials the benefit of hindsight and debate the true shortcomings of the scheme. In 2013, the scheme was adopted with a sense of urgency with the hope of sending out payments efficiently.[159] However, since there have been women rejected without a clear cause of action to appeal, the focus should no longer be efficiency, but rather compassion.

Because of how the scheme is written, it makes it seem like the government is doing these women a favor by awarding them compensation, as opposed to putting into law that they are entitled to it, which would allow for traditional judicial review. This should be done to allow for judicial recourse if a woman has been denied from either redress scheme and feels as though it was done unfairly. In addition, a law would force the committee to clear up any confusion regarding procedure of appeal and what evidence should be presented by the survivor to make their case on appeal. In *M.K.L. v. The Minister for Justice and Equality* and *D.C. v. The Minister*

[157] Redress for Women Resident in Certain Institutions Act 2015 (Act. No. 8/ 2015) (Ir.), https://www.irishstatutebook.ie/eli/2015/act/8/enacted/en/print#sec2.
[158] Redress for Women Resident in Certain Institutions (Amendment) Act 2019 (Act. No. 26/ 2019) (Ir.), https://www.irishstatutebook.ie/eli/2019/act/26/section/4/enacted/en/html.
[159] Quirke, *supra* note 10, at 1.

for Justice and Equality, the court noted that there was only one mention of an appeals process in the *Quirke* Report, and its vagueness led to these two women not having a way to send further evidence proving their captivity.[160]

Symphysiotomy

With regard to symphysiotomy, the *Harris* Report does not mention the word appeal once in its 273 pages. Although I argued that this scheme was more generous than that of the Magdalene Laundries in terms of amount given per eligible applicant, of the nearly 600 women who had applied for compensation, 173 applicants were deemed ineligible.[161] This means that almost one-third of applicants were denied with no clear avenue for appeal. For Category 1A, the women only had to prove a procedure had occurred, but after decades have gone by in a culture that is inherently skeptical of women, to not even offer the possibility of an appeal, does these women a disservice. The government website where this scheme can be found used similar language to that of the *Quirke* Report: "The Surgical Symphysiotomy Ex-gratia Payment Scheme. . . was approved by [the] Government."[162] Assuming that the word "approved" indicates the same level of administrative bureaucracy as "accepted", women are left with the same frustration and inability to pursue legal action if turned away.

After all that these women have been through and the proven State involvement in that suffering, the legal pathway for their compensation should be fair and simple. The administrative nature of both the *Quirke* Report and the *Harris* Report leads to procedural difficulties such as lacking a pathway to appeal or ability to litigate their settlement amounts in court. To avoid these issues, legislation should be granted that entitles survivors of Magdalene Laundries and

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[160] Minister for Just. and Equal., *supra* note 105, at para 21.
[161] CLARK, *supra* note 12, at 91.
[162] *The Surgical Symphysiotomy ex Gratia Payment Scheme Report*, GOV'T OF IR. (Oct. 16, 2020) https://www.gov.ie/en/publication/544fc6-the-surgical-symphysiotomy-ex-gratia-payment-scheme-report/.

symphysiotomy in Ireland their day in court if they decide to have it. In addition, efforts to pursue criminal charges against perpetrators in the national and international systems should continue to be addressed to the degree necessary to ensure that justice has been done. A misogynistic culture in Ireland has wronged so many women and the longer the government waits to fully address it, the worse it will be for the survivors and their families.

MAKING HOUSES HOMES: IMPROVING ACCESSIBILITY OF THE BUILT ENVIRONMENT UNDER DOMESTIC AND INTERNATIONAL LAW

Jessica Senzer*

ABSTRACT

This note focuses on inaccessibility of the built environment and how the United States insufficiently protects persons with disabilities from such inaccessibility. This note will focus on protections afforded to persons with disabilities in the United States by examining judicial interpretation of what constitutes a reasonable accommodation and modification under the Fair Housing Act and Americans with Disabilities Act. It will also focus on protections afforded to persons with disabilities in countries that have ratified the Convention on the Rights of Persons with Disabilities by examining judicial interpretation of what constitutes a reasonable accommodation and modification in ratifying nations.

Even though the United States has these two laws in place, persons with disabilities still face significant inaccessibility of the built environment, particularly persons with physical disabilities. This note will examine how American disability laws differ from the United Nations' Convention on the Rights of Persons with Disabilities. This note will then focus on how the United States can learn from the Convention on the Rights of Persons with Disabilities, which provides greater protections to persons with disabilities with regards to accessibility of the built environment. This note will provide recommendations for how the United States can modify its policies and laws to better ensure accessibility of the built environment for persons with disabilities. No person should be precluded from accessing the built environment because of disability, and the United States should take steps to remedy this overwhelmingly present issue.

*J.D. Candidate (2023) at Syracuse University College of Law; Associate Articles Editor of the *Journal of Global Rights and Organizations,* Vol. 12. I want to thank Professor Robin Paul Malloy for his constant support, guidance, and feedback throughout this note writing process. I want to dedicate this note to Rebecca Koltun, whose strength, perseverance, and attitude inspired me to write this note and advocate for greater protections for persons with disabilities. Nobody should be precluded from navigating the built environment, regardless of disability.

I. INTRODUCTION

The rights of persons with disabilities never have and never will be a minute issue. Globally, fifteen percent of the world's population has some type of disability.[1] Persons with disabilities live in every country in the world and make up the world's largest and most disadvantaged minority.[2] In the United States alone, twenty percent of people have a disability, and twenty-six percent of American adults are disabled in some way.[3] Of those twenty-six percent of American adults, more than half have mobility impairments that require use of a wheelchair.[4] The importance of disability inclusion has been highlighted in the past three decades, notably by the passing of the Americans with Disabilities Act ("ADA") in 1990 and the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") in 2006.[5] Both the ADA and the CRPD afford protections to individuals with disabilities.[6] The ADA is controlling in the United States and the CRPD applies in countries that have ratified the CRPD and modified their laws to comply with it.[7] The ADA and the CRPD were passed for similar purposes.[8]

While persons with disabilities face discrimination generally, there are also specific areas in which there is great discrimination. Specifically, individuals with disabilities are

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[1] *Disability Inclusion*, WORLD BANK, https://www.worldbank.org/en/topic/disability (Apr. 14, 2022).
[2] *Fact Sheet on Persons with Disabilities,* UNITED NATIONS ENABLE, https://www.un.org/disabilities/documents/toolaction/pwdfs.pdf (last visited Mar. 17, 2022).
[3] *Disability Impacts All of Us*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (Sept. 16, 2020).
[4] Robin Paul Malloy, *Advancing Accessible Communities*, 27 VA J. SOC. POL'Y & L. 232, 237 (2020).
[5] Arlene S. Kanter, *The Americans With Disabilities Act at 25 Years: Lessons to Learn From the Convention on the Rights of People With Disabilities*, 63 DRAKE L. REV. 819, 825 (2015).
[6] *See generally* Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1)-(4); G.A. Res. 61/106, art. 1 (Dec. 13, 2006) [hereinafter CRPD].
[7] *Information and Technical Assistance on the Americans with Disabilities Act*, UNITED STATES DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, https://www.ada.gov/ada_intro.htm (NOV. 4, 2022); CRPD, art. 33 (Dec. 13, 2006).
[8] *See Information and Technical Assistance on the Americans with Disabilities Act*, *supra* note 7; *See* CRPD, art. 33.

disadvantaged when it comes to navigating the built environment, which is partially attributable to disability rights advocates and property lawyers' clashing motives.[9] Disability rights advocates tirelessly promote inclusion and elimination of discrimination towards persons with disabilities.[10] Contrarily, property, development, land use, and zoning lawyers seek to preserve private property rights, which often requires exclusion in some capacity.[11] The clash between disability rights advocates and property lawyers makes it difficult to ensure greater accessibility for persons with disabilities.[12]

Further, it is inherently difficult to create a built environment for a population of persons with vastly different needs, including disabled and nondisabled persons.[13] In recent years, there has been a strong global focus on accessibility challenges that persons with physical disabilities face.[14] While this strong focus has brought much attention to the concept of inclusive design for all, it has not pushed architectural design professionals to go beyond the minimum requirements to make the built environment accessible.[15] Because built environments are inaccessible, persons with disabilities often must seek reasonable accommodations and/or modifications so that they may navigate these environments.[16] Across the globe, nations and their laws define reasonable accommodations and modifications differently, therefore affecting the protections persons with disabilities have under these laws.[17]

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[9] Malloy, *supra* note 4, at 234.
[10] Matteo Zallio & P. John Clarkson, *Inclusion, Diversity, Equity and Accessibility in the Built Environment: A Study of Architectural Design Practice*, 206 BLDG. & ENV'T 1, 2 (Dec. 2021).
[11] Malloy, *supra* note 4, at 234.
[12] *See* Malloy, *supra* note 4, at 234.
[13] *See* Malloy, *supra* note 4, at 234.
[14] *See* Zallio & Clarkson, *supra* note 10, at 1.
[15] Zallio & Clarkson, *supra* note 10, at 2.
[16] *See* Malloy, *supra* note 4, at 249–50 (an example of a reasonable accommodation would be a request to work from home due to disability, while an example of a reasonable modification would be a request for an entity to expand the width of its entrance doorway based on disability).
[17] *See* Kanter, *supra* note 5, at 823–25.

This note will address how reasonable accommodations and modifications language is interpreted with respect to private-home expansion. It will then address the interpretations of this language and resulting protections in the United States and in countries that have ratified the CRPD. Thus, this note will evaluate the reasonable accommodations and modifications language as it appears in the United States' primary disability legislations, the ADA and the Fair Housing Act ("FHA"), and the corresponding provisions of the CRPD.

II. THE ADA AND THE CRPD; PURPOSES ALIKE, JUDICIAL INTERPRETATION DIFFERENT

Both the ADA and the CRPD have as their stated purpose the elimination of discrimination against persons with disabilities.[18] Specifically, the ADA seeks to " [provide] a clear and comprehensive national mandate" for eliminating disability discrimination, by creating "clear, strong, consistent, enforceable standards addressing" disability discrimination, to ensure the Federal government plays a role in enforcing the Act.[19] Similarly, the CRPD seeks to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[20] However, the similar language of the ADA and CRPD does not mean the legislation and convention provide the same level of protection to individuals with disabilities, as protections afforded can only go as far as judicial interpretation will allow.

a. The ADA and FHA; Their Protections for Persons with Disabilities

The ADA is divided into five titles, but Titles II and III are most relevant to making the built environment and private homes more accessible.[21] Title II of the ADA is important

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[18] *See* Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1)-(4); *See* CRPD, art. 1.
[19] 42 U.S.C. § 12101(b)(1)-(4).
[20] G.A. Res. 61/106, *supra* note 18, at art. 2.
[21] *See e.g.*, 42 U.S.C. § 12101; Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L. J 699, 735 (2009).

regarding private home expansion because it applies to state and local governments, which have the police power to create planning and zoning laws that affect the accessibility of homes and availability of accessible homes.[22] Title III of the ADA, while not entirely correlated to private housing, is still relevant since it applies to places of public accommodation, and some housing arrangements are places of public accommodation.[23]

However, most relevant to the accessibility of private housing under American law is the FHA, as amended by the 1988 Fair Housing Amendments Act ("FHAA").[24] The FHA was passed in the mid-1960's and applies to both public and private housing and prohibits housing discrimination on factors such as race and national origin.[25] Yet, the FHA failed to prohibit housing discrimination based on disability, so the FHAA was passed in 1988 to remedy this issue.[26] Today, the FHA prohibits discrimination based on disability by prohibiting "municipalities and other local government entities from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate."[27]

Under both the FHA and ADA, an individual must qualify as disabled to have standing to bring a claim.[28] Under the ADA, a person is disabled if they (1) have a mental or physical impairment that substantially limits their performance of one or more major life activities, (2) have a record of a disability, or (3) are regarded as having a disability.[29] Under the FHA, a person may qualify as disabled under the same criteria as the ADA, despite the FHA referring to

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[22] Malloy, *supra* note 21, at 708, 739.
[23] Malloy, *supra* note 21, at 708.
[24] William H. Grogan, *The Tension Between Local Zoning and the Development of Elderly Housing: Analyzing the Use of the Fair Housing Act and the Americans with Disabilities Act to Override Zoning Decisions,* 33 SUFFOLK UNIV. L. REV. 317, 321-22. (2000).
[25] *Id.* at 327.
[26] *Id*. at 327.
[27] *Id.* at 328.
[28] *Id.* at 340, 348.
[29] 42 U.S.C. §12102(1)(A-C).

qualifying individuals as handicapped rather than disabled.[30] Once a person establishes that they qualify as disabled or handicapped,[31] they may bring a claim of disability discrimination under the ADA, FHA, or both.[32] The ADA and FHA provide protections to persons with disabilities by generally prohibiting discrimination based on disability.[33] Both require covered entities to make reasonable accommodations or modifications when necessary.[34] Thus, courts often interpret reasonable accommodations and modifications in the same manner under both the ADA and the FHA.[35]

b. The CRPD; Protections Afforded to Persons with Disabilities

Unlike the ADA and FHA, the CRPD consists of fifty articles and provides broader protections to disabled persons by promoting equality rather than providing avenues of relief for individuals with disabilities.[36] Despite the difference in the scope of protections afforded to individuals with disabilities under the ADA and the CRPD, one aspect is unquestionable; both the ADA and the CRPD recognize the intersection between disability law and property law.[37] This intersectionality exists because property and land use laws often affect the accessibility of built environments which therefore affects persons with disabilities.[38] When persons with disabilities find built environments inaccessible, they can challenge existing communal zoning and land use laws, and therefore property laws, to make the built environment more accessible.[39]

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[30] Malloy, *supra* note 4, at 249; Grogan, *supra* note 24, at 328.
[31] The term "disabled" will be used to refer to persons with disabilities.
[32] ROBIN PAUL MALLOY, LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES 40 (2015).
[33] Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B).
[34] *Id.*
[35] Malloy, *supra* note 4, at 249.
[36] *See generally* CRPD, *supra* note 18.
[37] Malloy, *supra* note 4, at 233.
[38] Malloy, *supra* note 4, at 233.
[39] Malloy, *supra* note 4, at 249.

After evaluating how American courts and ratifying countries of the CRPD have interpreted the ADA, FHA, and CRPD, this note will illustrate why CRPD ratifying nations afford greater protections to persons with disabilities than the United States. It will then provide recommendations for the United States to adopt to ensure greater accessibility of the built environment for persons with disabilities.

III. PROTECTIONS AFFORDED TO PERSONS WITH DISABILITIES SEEKING TO ALTER THEIR PRIVATE PROPERTY IN THE UNITED STATES AND NATIONS THAT HAVE RATIFIED THE CRPD

While there are governing laws in the United States and abroad that work to eliminate inaccessibility of the built environment, other laws incidentally promote inaccessibility. Property and land use law can raise significant concerns when it comes to accessibility of the built environment.[40] Land use and zoning laws aim to protect the health, safety, welfare, and morals of the public, by focusing on the organization and management of land uses.[41] Thus, zoning codes often fail to account for issues concerning safety and accessibility for persons with disabilities, particularly disabilities related to mobility impairment.[42] Since property and land use laws incidentally lead to inaccessible built environments, different nations have different laws in place to protect persons with disabilities from such inaccessibility.

a. How the United States' FHA and ADA Protect Persons with Disabilities

When a disabled citizen wants to expand their private home to make it accessible in the United States, they must often obtain a variance or an exception to an existing zoning code.[43] These variances are obtained by petitioning the local Zoning Board of Appeal ("ZBA"), a local

[40] Malloy, *supra* note 4, at 233.
[41] Malloy, *supra* note 4, at 233.
[42] Malloy, *supra* note 4, at 238.
[43] Malloy, *supra* note 4, at 250.

government entity.[44] Because ZBAs are local government entities and expansions and modifications of private homes are regulated by zoning codes, they are covered under Title II of the ADA, which applies to the programs, services, and activities of state and local governments, as well as under the FHA.[45] That said, the way that the FHA and ADA protect persons with disabilities depends on judicial interpretation of certain language in the statutes, specifically "reasonable accommodations" and "reasonable modifications."[46] While American courts now recognize that the FHA and Title II of the ADA afford protections to persons with disabilities when expanding private homes, this has not always been true.[47]

In 1999, less than a decade after the passing of the ADA, the Ninth Circuit Court of Appeals addressed the question of whether the FHA and ADA afforded protections to persons with disabilities regarding private home expansion.[48] Defendant, the City of Antioch ("The City"), claimed that Title II of the ADA did not apply to plaintiffs, Bay Area Addiction Research & Treatment, Inc., because Title II did not apply to the zoning practices plaintiffs alleged were discriminatory.[49] Despite many attempts to invalidate the application of Title II of the ADA to plaintiffs' claim against the defendant's zoning ordinance, the Court of Appeals held that Title II did apply to zoning ordinances so long as the plaintiffs are covered by the ADA.[50]

Six years later, citing the *City of Antioch,* the United States District Court for the District of Maine ("Maine Court") also held that Title II of the ADA applied to zoning laws.[51] In *Fuller-*

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[44] Malloy, *supra* note 4, at 250.
[45] 42 U.S.C. §12131(1)(A-C).
[46] *See* Malloy, *supra* note 4, at 246.
[47] *Fuller-McMahan v. City of Rockland*, 2005 U.S. Dist. LEXIS 13956 *1, *18 (D. Me. July 12, 2005).
[48] *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 727 (9th Cir. 1999).
[49] *Id*. at 728.
[50] *Id.* at 732.
[51] *City of Rockland*, 2005 U.S. Dist. LEXIS 13956 at *17.

McMahan v. City of Rockland, the Maine Court recognized that its appellate body, the First Circuit Court of Appeals, did not yet rule on "the question of whether Title II of the ADA applies to zoning decisions."[52] However, the Maine Court noted that the *City of Antioch* court came to its ambiguous holding in 1985, five years before the passing of the ADA, inferring that the Ninth Circuit might have held differently if the ADA existed at that time.[53] Thus, since it was not bound by the Ninth Circuit's holding, the Maine Court held that Title II of the ADA does apply to zoning.[54]

Two years after the Maine Court affirmed the *City of Antioch* court's holding, the Third Circuit Court of Appeals came to a similar conclusion.[55] In *New Directions Treatment Servs. v. City of Reading,* plaintiff, New Directions Treatment Services ("New Directions") sought a permit to locate a new treatment facility in the City of Reading.[56] However, New Directions was prohibited from doing so based on a Pennsylvania statute that singled out methadone clinics, which New Directions' treatment facility was considered.[57] Under this statute, the City of Reading could vote to deny New Directions the requested permit, which it did.[58] New Directions, along with methadone patients, sued the City of Reading, alleging, among other claims, that the statute violated Title II of the ADA.[59] Here, citing the Sixth and Ninth Circuits, the Court held that, in some circumstances, a zoning law could violate Title II of the ADA.[60] Thus, there is no question that, if a plaintiff qualifies as disabled under the ADA, the discriminating entity is also

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[52] *City of Rockland*, 2005 U.S. Dist. LEXIS 13956 at *17.
[53] *Id*. at *18.
[54] *Id*.
[55] *New Directions Treatment Servs. v. City of Reading,* 490 F.3d 293, 305 (3d Cir. 2007).
[56] *Id*. at 295.
[57] *Id*.
[58] *Id*.
[59] *City of Reading,* 490 F.3d at 299.
[60] *Id.* at 305.

covered by the ADA, and if discrimination based on disability occurs, the plaintiff can bring ADA claims regarding zoning ordinances that adversely affect their right to expand the private home in the United States.[61]

While American courts now recognize that Title II of the ADA applies to zoning laws that impact a homeowner's request for reasonable accommodations or modifications, protections afforded under Title II of the ADA only apply in the United States. Outside of the United States, 156 countries ratified the CRPD, which is like the ADA in that it affords protections to persons with disabilities.[62] However, the CRPD differs from the ADA because of Article 9, which covers accessibility of private homes for individuals with disabilities upfront, while the ADA more generally prevents disability discrimination.[63] Under Article 9, such protections are only afforded by way of reasonable accommodations, as defined by Article 5 of the CRPD.[64] Therefore, while both the ADA and the CRPD call for implementation of reasonable accommodations to protect disabled individuals, the scope of interpretation of the "reasonable accommodations" language and protections afforded to disabled people differs in the US and internationally.[65]

IV. NOTWITHSTANDING THE SIMILAR WORDING OF THE FHA, ADA, AND CRPD, VARYING JUDICIAL INTERPRETATION HAS RESULTED IN DISPARATE PROTECTIONS AFFORDED UNDER THESE ACTS

According to the FHA, when zoning boards or housing authorities are determining the reasonableness of a requested accommodation or modification, the disabled claimant has the

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[61] 42 U.S.C. § 12132 ; 28 C.F.R. § 35.150(a)(3) (2022); *See generally Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *See also Fuller-McMahan v. City of Rockland*, 2005 U.S. Dist. LEXIS 13956 *1, *18 (D. Me. July 12, 2005); *See also New Directions Treatment Servs. v. City of Reading,* 490 F.3d 293, 299 (3d. Cir. 2007)..

[62] Kanter*, supra* note 5, at 841-42.

[63] *See Bay Area Addiction Rsch. and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *See also Fuller-McMahan v. City of Rockland*, 2005 U.S. Dist. WL 1645765, *1, *17 (D. Me. July 12, 2005); *See also New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293 (3rd Cir. 2007).

[64] Kanter, *supra* note 5, at 854-56.

[65] *See* Kanter, *supra* note 5.

burden of proving three criteria.[66] First, a disabled claimant must prove that their request is reasonable when a cost and benefit analysis is applied.[67] Second, they must prove that the requested accommodation or modification is necessary to address their disability using the "but for" test, or by showing that "but for the accommodation, the plaintiff is likely to be denied an equal opportunity to enjoy the housing of his choice."[68] Third, a disabled claimant must prove that the zoning board or housing authorities' granting of the requested accommodation or modification will not fundamentally alter the program, service, or activity being challenged.[69] If all three criteria are met, and the zoning board or housing authority cannot effectively rebut the disabled claimant's claim, then reasonable accommodations or modifications must be made by the appropriate zoning board or housing authority.[70] Under the ADA, the burden of proof similarly falls on the disabled claimant to demonstrate the reasonableness of the requested accommodation.[71]

Under Title II of the ADA and Department of Justice's ("DOJ") Regulations, state and local government entities must make any reasonable accommodations and modifications for qualified individuals with disabilities to prevent preclusion from services or the participation in programs or activities that they offer.[72]

The ADA defines a reasonable accommodation as any "modification to rules, policies, or practices" within the entity, and a reasonable modification involves the "removal of architectural, communication, or transportation barriers," and "provision of auxiliary aids and services" for

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[66] Malloy, *supra* note 4 at 250.
[67] Malloy, *supra* note 4 at 250.
[68] Malloy, *supra* note 4, at 250; Disability Rights Pennsylvania, *Discriminatory Zoning and The Fair Housing Act*, 12 (n.d.)
[69] Malloy, *supra* note 4, at 250.
[70] Malloy, *supra* note 4, at 250.
[71] Malloy, *supra* note 4, at 249.
[72] 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(a) (2016).

disabled individuals when necessary.[73] Modifications and accommodations are reasonable under Title II of the ADA when they will not cause the entity an undue burden.[74] An accommodation or modification is an undue burden if it would cost an entity "significant difficulty or expense," and courts may consider many factors, such as the nature and cost of the action, and the entity's financial resources.[75] Additionally, an accommodation or modification is unreasonable if it would fundamentally alter the nature of the entity's services or programs.[76] Thus, disabled claimants are entitled to reasonable accommodations or modifications under Title II of the ADA so long as they will not cost the entity an undue burden or fundamentally alter the services or programs being offered.[77] It is by way of these modifications and accommodations that disabled individuals are protected from disability discrimination in the United States.[78] However, if a covered entity can rebut a claimant's claim of reasonableness, they can escape responsibility for providing the requested accommodation or modification.[79]

Similarly, under Article 5 of the CRPD, reasonable accommodations must be made for persons with disabilities, and the disabled person bears the burden of proving the reasonableness of the requested accommodation or modification.[80] The CRPD defines a reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular care, to ensure to persons with

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[73] 42 U.S.C. §12131(2).
[74] 28 C.F.R. §35.150(a)(3) (2016).
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *See*, MALLOY, *supra* note 32, at 74-77.
[79] MALLOY, *supra* note 32, at 82. (An example of when a covered entity can rebut a claim of reasonableness is when a disabled individual requests that an inaccessible building build an elevator to make it more accessible, but the entity would need to spend more money on making this modification than it has to spend to begin with).
[80] ANDREA BRODERICK, REPORT ON REASONABLE ACCOMMODATION UNDER THE CRPD: THE GEORGIAN CONTEXT 8 (USAID ed., 2017).

disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[81] Thus, similar to the ADA, the CRPD finds that a requested accommodation or modification is reasonable so long as it does not impose a "disproportionate or undue burden" upon the discriminatory actor.[82] Also similar to the FHA and ADA, the discriminating entity can rebut a disabled claimant's proof of reasonableness and escape responsibility for making the accommodation or modification.[83] While the FHA, ADA, and CRPD all require modifications/accommodations, the way that American courts and courts of countries that have ratified the CRPD interpret this "reasonable accommodations" language is vastly different, thus affecting how disabled individuals are protected.

a. American Courts Interpret the "Reasonable Accommodation" and "Reasonable Modification Language" Narrowly.

Courts interpreting the ADA and the CRPD differ in how they understand what constitutes a reasonable accommodation. However, American courts interpreting the reasonable accommodation and modification language under the ADA and the FHA, tend to apply this language very narrowly, leading American courts to often hold that a requested accommodation or modification is unreasonable.

In 2006, almost two decades after the ADA was passed, a Wisconsin District Court held that under the ADA, defendant, the City of Milwaukee, had to grant a zoning ordinance exception to plaintiff, Wisconsin Community Services, a "private, non-profit organization that provides a variety of inpatient and outpatient services to individuals afflicted with severe mental illnesses."[84] Plaintiff applied for a zoning ordinance to move its mental health clinic to a different

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[81] G.A. Res. 61/106, art. 2 (Dec. 13, 2006).
[82] *Id*.
[83] BRODERICK, *supra* note 80, at 8.
[84] *Wisconsin Cmty. Servs. v. City of Milwaukee,* 465 F.3d 737, 740 (7th Cir. 2006)

area of Milwaukee.[85] However, the City of Milwaukee appealed the District Court's decision, and the Court of Appeals reversed and remanded the case, holding that the zoning ordinance exception was not necessarily a reasonable accommodation because it was not "necessary."[86] The Court of Appeals defined an accommodation as being necessary "when it allows the disabled to obtain benefits they ordinarily could not have by reason of their disabilities, and not because of some quality they share with the public generally."[87] In other words, when requesting a reasonable accommodation or modification under the FHA and ADA, a claimant bears the burden of proving that, but for their disability, they would be able to access desired benefits or services provided by the defendant entity.[88] Here, because the plaintiff could not prove that the disabilities suffered by the patients were not the cause-in-fact of their "inability to find a larger building," the requested accommodation for a zoning ordinance to move to a larger building was not a reasonable request.[89] This high standard of a disabled claimant proving absolute necessity has appeared in other American courts.

In Pennsylvania in 2010, years after the passing of the FHA and ADA plaintiffs Jeanne and Robert McKivitz, applied for a Certificate of Occupancy to convert their property into a three-quarter house[90] for disabled individuals.[91] Plaintiffs brought claims under the ADA, the Rehabilitation Act, and the FHA against defendants William J. Savatt and the Township of Stowe for denying the permit.[92] Claims were brought under the Rehabilitation Act because the

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[85] *Id.* at 740.
[86] *City of Milwaukee*, 465 F.3d at 755.
[87] *Id*. at 754.
[88] *Id.* at 752.
[89] *City of Milwaukee*, 465 F.3d at 755.
[90] Chris Elkins, *Three Quarter Houses*, ADVANCED RECOVERY SYS., (Feb. 27, 2020) https://www.drugrehab.com/recovery/sober-living-homes/three-quarter-houses/ (defining a three-quarter house as a transitional housing unit that provides a lower level of supervision than a traditional halfway house).
[91] *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 810 (W.D. Pa. 2010).
[92] *Id.* at 813.

act prevents discrimination based on disability by prohibiting any program or activity that receives federal funding, from excluding disabled persons from benefiting from or participating in offered services.[93]

The United States District Court for the Western District of Pennsylvania (the "Pennsylvania Court") held that the governing standards under the ADA, FHA, and Rehabilitation Act were inherently similar , and evaluated the "reasonable accommodations" standard under the requirements of the FHA.[94] Under the FHA, "an accommodation is statutorily required when it is both reasonable and necessary to provide handicapped individuals with an equal opportunity to use and enjoy housing."[95] Thus, in determining whether defendants improperly denied plaintiffs the certificate of occupancy, the Pennsylvania Court held that the plaintiffs were not discriminated against.[96] The Pennsylvania Court explained that plaintiffs could not prove a nexus between granting the Certificate of Occupancy and the necessity of providing "handicapped individuals" an equal opportunity to live in the facility in a residential area.[97] As demonstrated by the Pennsylvania Court, the standard for proving that an accommodation or modification must be made under Title II of the ADA is high.[98] The standard is high because one must prove absolute necessity in order to prevail, and courts are not likely to find necessity.[99]

First, it is difficult to prove that an accommodation or modification must be made. Additionally, the DOJ's Regulations for Implementing Title II of the ADA, as previously

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[93] *Twp. of Stowe*, 769 F. Supp. 2d at 813-814.
[94] *Id*. at 824.
[95] *Id.* at 824.
[96] *Twp. of Stowe*, 769 F. Supp. 2d at 837.
[97] *Id.* at 827.
[98] *See generally Twp. of Stowe*, 769 F. Supp. 2d 803 (W.D. Pa. 2010).
[99] *Twp. of Stowe*, 769 F. Supp. 2d at 827.

mentioned, provide defenses for Defendants in its language.[100] A requested accommodation or modification is unreasonable if it will cause a discriminating entity an undue burden, or "significant difficulty or expense," or "fundamentally alter the nature of the program."[101] In evaluating whether a modification or accommodation is reasonable, courts will consider factors such as the nature and cost of the action, and the entity's financial resources.[102] Thus, it is difficult for plaintiffs to prove reasonableness of an accommodation or modification, and even if plaintiffs prove such, defendants can still fall back on the DOJ's codified undue burden and fundamental alteration.[103]

In 2015, after hearing defendant City of Blue Ash's defense against plaintiff Ingrid Anderson's claims under the ADA and FHA, the Sixth Circuit Court of Appeals reversed the District Court's decision, finding that the requested accommodation fundamentally altered the city's zoning scheme.[104] Plaintiff requested to keep a miniature horse at her home as a service animal for her disabled daughter, who had a mobility disability.[105] Defendant passed an ordinance banning horses from residential property, and plaintiff, who was criminally convicted for violating the ordinance, claimed she was permitted to have the miniature horse under Title II of the ADA.[106] The District Court held that plaintiff did not have a valid ADA claim against the City of Blue Ash, Ohio, for allowance of a miniature horse on property would "fundamentally alter the zoning scheme," and therefore was not a reasonable accommodation.[107] The Court of

[100] 28 C.F.R. § 35.150(a)(3).
[101] 28 C.F.R. § 35.150(a)(3).
[102] *Id.*
[103] *Id*.
[104] *Anderson v. City of Blue Ash*, 798 F.3d 338, 363 (6th Cir. 2015).
[105] *City of Blue Ash*, 798 F.3d at 346.
[106] *Id.*
[107] *Id*. at 362

Appeals reversed the District Court's granting of the summary judgment motion and remanded the case for further evaluation.[108]

In reversing the District Court's granting of the summary judgment motion, the Sixth Circuit Court noted that the daughter, ("C.A"), could find therapy elsewhere and that the necessity of her requested accommodation was too unclear for the case to not be remanded.[109] Thus, the Sixth Circuit relied not only on necessity, but on the fundamental alteration defense[110], illustrating that when determining the reasonableness of requested accommodations and modifications under the FHA and Title II of the ADA, and in this specific instance the Rehabilitation Act, courts are hesitant to find in favor of the plaintiff.

Here, while the Sixth Circuit found that the zoning ordinance permitting the miniature horse was not a reasonable accommodation under the FHA, the language in other provisions of the ADA and daughter's claims of need for the horse suggested otherwise. Under the ADA and DOJ regulations, a service animal is any dog or miniature horse that is individually trained to do work or perform tasks for the benefit of an individual with a disability, and other species of animals are not service animals.[111] Thus, the DOJ's regulations that accompany the ADA recognize the benefit, or services, that miniature horses often provide to disabled persons.[112]

Additionally, C.A.'s need for the miniature horse should have been clear given the facts of the case. C.A. had multiple disabilities, including autism, epilepsy, chronic lung disease, gastroesophageal reflux, feeding and vision problems, severe allergies, attention deficit

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[108] *City of Blue Ash*, 798 F.3d at 363.
[109] *Id.*
[110] 42 U.S.C. §12181(9); 42 U.S.C. §12182(a)(2)(A)(iii); 28 C.F.R. §36.303(a).
[111] 28 C.F.R. §35.104.
[112] *See e.g.* 28 C.F.R. §35.104l; 28 C.F.R. §35.136(i).

hyperactivity disorder, developmental delay, autonomic dysfunction, and tachycardia.[113] C.A. struggled to independently maintain her balance, and as a result she could not even navigate her own backyard, as it had uneven ground that was difficult to balance on independently.[114] C.A. had a history of working with miniature horses to help her balance from therapy at the Hamilton County Parks facility, and she was using the miniature horse at home for that similar purpose.[115] In *Anderson v. City of Blue Ash*, the law and facts of the case both weighed in favor of the claimant. Nonetheless, the Sixth Circuit did not find in favor of the plaintiff, like the Seventh Circuit and Third Circuits, illustrating how American courts rigidly interpret the FHA and ADA, and often find requested accommodations and modifications unreasonable.[116]

b. Courts Interpret What Constitutes a Reasonable Accommodation Broadly Under the CRPD Because of how the CRPD defines Reasonable Accommodation.

As previously noted, under Article 5 of the CRPD reasonable accommodations must be made for persons with disabilities, and the disabled person bears the burden of proving the reasonableness of the requested accommodation or modification.[117] However, the CRPD frames the meaning of reasonable accommodations differently than the FHA and ADA.[118] Under the FHA, when determining the reasonableness of a requested accommodation a disabled plaintiff bears the burden of proving: (1) that their request is reasonable when a cost and benefit analysis is applied, (2) that the requested accommodation or modification is necessary to address their disability using the "but for" test, and (3) that the zoning board or housing authorities' granting of the requested accommodation or modification will not fundamentally alter the program,

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[113] *City of Blue Ash,* 798 F.3d at 345.
[114] *Id.*
[115] *Id.* at 347.
[116] *See e.g.*, *Wisconsin Cmty. Servs. v. City of Milwaukee,* 465 F.3d 737 (7th Cir. 2006); *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803 (W.D. Pa. 2010)*; Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015).
[117] BRODERICK, *supra* note 77, at 8.
[118] Kanter, *supra* note 5, at 824-25.

service, or activity being challenged.[119] Thus, the burden falls on the disabled plaintiff to persuade a discriminating entity that their request is reasonable.[120] The request can be easily rebutted by the entity, so there is no guarantee that a requested accommodation or modification will be granted.[121]

Under the ADA, if a plaintiff has standing and prevails in proving that a requested accommodation or modification is reasonable, the entity need only provide that particular plaintiff with the accommodation or modification. For example, if a disabled plaintiff is blind, and requests that staff at a restaurant read the menu to them, the restaurant staff does not need to read menus to every blind person that enters the restaurant. Thus, the standing requirement to bring a claim under Title II or III of the ADA means that only certain qualified individuals can benefit from a requested modification.[122] Any individual thereafter must go through the same litigation to seek the modification for themselves.[123] Therefore reasonable accommodations and modifications are limited in nature, as one plaintiff prevailing opens no doors for similarly disabled persons.[124]

By stark contrast, the CRPD recognizes that failure to provide a reasonable accommodation or modification requested by a person with a disability is discrimination, and it also recognizes the right to a reasonable accommodation or modification as an inherent human right that everyone is entitled to.[125] Additionally, the CRPD does not require an injured plaintiff to go through excessive litigation to ensure that they are treated equally and have equal access to

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[119] Malloy, *supra* note 4, at 250.
[120] Malloy, *supra* note 4, at 250.
[121] Kanter, *supra* note 5, at 855.
[122] Kanter, *supra* note 5, at 855.
[123] Kanter, *supra* note 5, at 855.
[124] Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301 at 324-25 (2019).
[125] Kanter, *supra* note 124, at 325.

the world.[126] Under the CRPD, when an injured plaintiff requests a reasonable modification or accommodation, it is the State party's responsibility to ensure modification or accommodation, not the discriminating entity's.[127] The results of a plaintiff prevailing under the CRPD therefore create broader outcomes which can impact more than one individual.[128]

Further, Article 32 of the CRPD provides that a State party must support national efforts to uphold the purpose and objectives of the Convention and undertake appropriate and effective measures to see the purpose and objectives through.[129] Pursuant to Article 32, it is a State party's responsibility to modify internal domestic laws and policies to see that the CRPD is being effectively implemented in their nation.[130] Because the CRPD places the burden on the State party, courts are less reluctant to find accommodations and modifications unreasonable.[131] Since the CRPD recognizes the right to reasonable accommodations as a human right and holds State parties responsible for providing that right to disabled individuals, parties suing in states that have ratified the CRPD are more likely to prevail when requesting an accommodation.

c. Injured Plaintiffs More Frequently Prevail When Requesting Reasonable Accommodations Under the CRPD.

While American courts interpret the reasonable accommodations and modification language of Title II of the ADA narrowly, the CRPD goes further in recognizing what constitutes a reasonable accommodation.[132] Article 5 of the CRPD indicates that entities must take all steps

[126] Kanter, *supra* note 124, at 325.
[127] Kanter, *supra* note 124, at 325.
[128] Kanter, *supra* note 124, at 325.
[129] G.A. Res. 61/106, art. 32 (Dec. 13, 2006).
[130] *Id*.
[131] Kanter, *supra* note 5, at 854.
[132] Kanter, *supra* note 124, at 321-22

necessary to "ensure that reasonable accommodation [are] provided."[133] Thus, resulting in broader interpretations of "reasonable accommodations" under the CRPD than the ADA, despite entities having similar defenses to providing the accommodations.[134] Courts in countries that ratified the CRPD often find that requested accommodations and modifications are reasonable, and therefore favor plaintiffs, as illustrated by Sweden and Argentina, as well as by the words and operative procedure of the CRPD.[135]

In 2010, less than five years after the passing of the CRPD, plaintiff H.M. claimed that her rights under the CRPD were violated by Sweden.[136] H.M. had Ehlers-Danlos Syndrome, a chronic connective tissue disorder that made it difficult for her to sit or lie down.[137] H.M. 's disability continuously got worse and the only way she could obtain treatment was through hydrotherapy in an indoor pool at home.[138] Thus, H.M. applied for permission to expand her home to build a pool for her hydrotherapy.[139] The Örebo Local Housing Committee denied H.M.'s request, but the Administrative Court granted H.M.'s appeal, remanding the case back down to the Örebo Local Housing Committee.[140] Örebo then appealed to the Administrative Court of Appeals, which refused H.M.'s application for permission to expand her home.[141] H.M. then brought a claim against Sweden to the Committee on the Rights of Persons with

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[133] Kanter, *supra* note 124, at 322.
[134] Kanter, *supra* note 124, at 322.
[135] *See generally H.M. v. Sweden*, Commc'n No. 3/2011, Comm. on the Rts. of Pers. with Disabilities, CRPD/C/7/D/3/2011 (Apr. 19, 2012); *Mr. X v. Argentina*, Commc'n No. 8/2012, Comm. on the Rts. of Pers. with Disabilities, CRPD/C/11/D/8/2012 (Apr. 11, 2014).
[136] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.1.
[137] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.1.
[138] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.2.
[139] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.3.
[140] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.4.
[141] Comm. on the Rts. of Pers. with Disabilities, *supra* note 135, ¶ 2.4.

Disabilities[142] ("the Committee").[143] H.M asserted that the refusal to allow her to build the indoor pool in her home for the purpose of hydrotherapy was a violation of the CRPD, for it deprived her of "rights to equal opportunity for rehabilitation and improved health," based on a disability.[144]

In determining the merits of H.M.'s claims, the Committee evaluated whether allowing H.M. to build an indoor pool for hydrotherapy would have caused the State party an undue burden, and therefore whether it was a reasonable accommodation.[145] The Committee held that H.M.'s request for an ordinance permitting her to build a pool for hydrotherapy in her backyard was reasonable because building a pool was "essential," and a way of meeting her health needs.[146]

In so holding, the Committee noted that departure from the State's development plan was further allowed because the accommodation was necessary to ensure that persons with disabilities could enjoy or exercise all human rights on an equal basis with others absent discrimination.[147] Further, the Committee noted that, when evaluating the reasonableness of a request or modification, courts must consider the specific circumstances of a case.[148] Thus, unlike the previously discussed American courts, the Committee ruled in favor of the disabled claimant and found that a zoning ordinance permitting a pool to be built in a backyard, which is more invasive than allowing a mini horse in a backyard, was reasonable given the claimant's

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[142] The Committee on the Rights of Persons with Disabilities is a body of members of the United Nations that monitors implementation of the CRPD by State Parties. State parties provide reports to the Committee, pursuant to CRPD mandates, so that it may monitor CRPD implementation.

[143] Convention of the Rts. of Pers. with Disabilities, Comm. on the Rts. of Pers. with Disabilities, Comm'n No. 3/2011, ¶ 2.6-2.7, CRPD/C/7/D/3/2011 (May 21, 2012).[hereinafter Commc'n. No. 3/20111]

[144] Commc'n. No. 3/20111, *supra* note 143 ¶ 3.1.

[145] Commc'n. No. 3/20111, *supra* note 143, ¶ 8.5.

[146] Commc'n. No. 3/20111, *supra* note 143, ¶ 8.5.

[147] Commc'n. No. 3/20111, *supra* note 143, ¶ 8.5.

[148] Commc'n. No. 3/20111, *supra* note 143, ¶ 8.8.

need for this accommodation and the specific facts of the case.[149] The Committee left no decision-making power to the actual discriminating entity, the Local Housing Committee, despite the fact that the Local Housing Committee would be the entity granting the allowance.[150] This lenient interpretation of what constitutes a reasonable accommodation can be attributed to how the CRPD defines reasonable accommodation and who has the power to determine reasonableness.

Additionally, in 2014, the Committee held in favor of a disabled plaintiff who was discriminated against based on disability by the Federal Criminal Court No. 1 in Argentina.[151] Plaintiff Mr. X was held in pretrial detention at the Marco Paz Federal Prison Complex II ("the Prison") because of a pending criminal trial.[152] While in the Prison, Mr. X underwent spinal surgery to replace a cervical disc, and thereafter suffered from numerous medical issues.[153] While in the Prison, Mr. X could not obtain appropriate medical treatment or rehabilitation for a variety of reasons most notably, the Prison's failure to make reasonable accommodations.[154] For example, Mr. X was only offered partial rehabilitation and treatment did not begin until mid-July 2013, three years after his spinal surgery.[155] Rehabilitation sessions were also interrupted when the ambulance used to transport him was in an accident.[156]

In Mr. X's case, the Committee held that the adjustments made by the Prison authorities were insufficient to prevent irreparable harm to Mr. X's physical and mental health, and

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[149] Commc'n. No. 3/20111, *supra* note 143, ¶ 8.5.
[150] *See generally* Comm'n No. 3/20111, *supra* note 143.
[151] Convention of the Rts. of Pers. with Disabilities, Comm. on the Rts. of Pers. with Disabilities, Commc'n. No. 8/2012, CRPD/C/11/D/8/2012 (June 18, 2014) [hereinafter Commc'n. No. 8/2012].
[152] Commc'n. No. 8/2012, *supra* note 151, ¶ 2.1.
[153] Commc'n. No. 8/2012, *supra* note 151, ¶ 8.3.
[154] Commc'n. No. 8/2012, *supra* note 151, ¶ 8.7.
[155] Commc'n. No. 8/2012, *supra* note 151, ¶ 5.7.
[156] Commc'n. No. 8/2012, *supra* note 151, ¶ 5.7.

therefore, Argentina violated Article 9 of the CRPD.[157] Here, providing accommodations was not in the discretion of the Prison, but should have been provided by the State party to the CRPD.[158] Under the CRPD, Mr. X was entitled to accommodations so that he could obtain proper medical care because accommodations were "required for his personal safety,"[159] In Sweden and Argentina, the Committee has ruled in plaintiff's favor when evaluating the reasonableness of requested accommodations or modifications.[160] Such precedent, combined with the CRPD's broad definition, and means of implementing reasonable accommodations, demonstrates how effective the CRPD is in protecting the rights of persons with disabilities.

V. CONCLUSION AND RECOMMENDATION

Based on the findings above, the FHA and ADA are severely lacking in protecting Americans with disabilities, more specifically Americans with physical disabilities. In the scope of private home expansion, the FHA and ADA recognize that reasonable accommodations or modifications must be made to ensure Americans with disabilities have access to the built environment and can live comfortably in their homes. However, American courts are tentative to require covered entities to grant requests to make private homes accessible, usually by way of zoning variances. Contrastingly, the CRPD recognizes reasonable accommodations and modifications, not as something that must be requested and then provided by the discriminating entity, but rather as inherent human rights that all persons with disabilities are entitled to. Because Article 32 of the CRPD requires State parties to oversee a report on implementation of

[157] Commc'n. No. 8/2012, *supra* note 151, ¶ 9.
[158] Commc'n. No. 8/2012, supra note 151, ¶ 8.5.
[159] Commc'n. No. 8/2012, *supra* note 151, ¶ 8.2.
[160] *See e.g.*, Comm'n No. 3/20111, *supra* note 143; Commc'n. No. 8/2012, *supra* note 151.

the CRPD, the Committee is less likely to reject requests for reasonable accommodations or modifications.

Enforcing laws can be financially taxing and difficult to do. However, since the adoption of the CRPD in 2006, it has required State parties to report on their compliance with the Convention. In the United States, there is no such requirement of any entities or states for the ADA or FHA. Business owners in the United States can apply for certificates of ADA compliance for their buildings and facilities, but certification of ADA compliance does not need to be obtained for a building to be constructed.[161] If the United States approached the root of the problem of building inaccessibly, then there would be less judicial intervention to interpret what constitutes a reasonable accommodation and modification. Since the accessibility of a building starts with its architecture, architects should submit all blueprints to the DOJ for ADA compliance approval before any building may be constructed. This will place a burden on architects and the DOJ, but it does not fix existing buildings. However, such practice aligns with the purpose of the ADA in ensuring that there is a "clear and comprehensive national mandate" for eliminating disability discrimination and will further ensure that the Federal government, by way of the DOJ, plays a role in enforcing the ADA.[162]

It is true that being compliant with the ADA can take away from the design of a building.[163] However, if architects consider design, state and county zoning requirements, and other necessary considerations when constructing a building prior to submitting blueprints to the DOJ, then such issues could be proactively addressed. Alternatively, the United States Courts could interpret reasonable accommodations and modifications as broadly as CRPD ratifying

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[161] *ADA Certification of State and Local Accessibility Requirement*s, DEP'T. OF JUST., https://www.ada.gov/reachingout/codecert.html (last visited Mar. 20, 2022),
[162] 42 U.S.C. §12101(b)(1)(3).
[163] *See* Malloy, *supra* note 21.

countries do, to ensure greater protections for persons with disabilities. The United States is a common law nation,[164] so a shift in judicial interpretation could make a significant difference. The CRPD was adopted with Article 32, so it was never a question that the Convention would be compiled with, or that ratifying parties would have to try and comply with it. If the United States wants to see the ADA's purpose through, then it is time the country act and address the root of the problem of building inaccessibility head on, for the number of inaccessible buildings and people with physical disabilities in the United States is not on a decline.

[164] Toni M. Fine, *Introduction to the American Legal System: A Resource and Reference Guide*, LEXISNEXIS, https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page (last visited Mar 20, 2022).

RAINBOW RAIDS IN EGYPT: THE MASS TARGETING AND SURVEILLANCE OF LGBT+ EGYPTIANS BY THEIR GOVERNMENT

Jameela Suleiman[1]

ABSTRACT

This note focuses on the increase in systematic targeting of LGBT+ individuals in Egypt by Abdel Fattah al-Sisi's government since he took control of the Egyptian presidency in a 2013 coup. In particular, this note discusses the means by which the al-Sisi government uses a law prohibiting the incitement of debauchery to de facto criminalize homosexuality in Egypt. Using this law, the al-Sisi government has specifically targeted and prosecuted LGBT+ Egyptians for their identities, in violation of their rights to privacy and non-discrimination under the Egyptian Constitution, the International Covenant on Civil and Political Rights, and the International Covenant Against Torture.

To portray the human cost of these abuses perpetrated against LGBT+ Egyptians by their government, this note will open with, and be framed by the story of Sarah Hegazi.[2] Hegazi was a gay Egyptian who was targeted, prosecuted, and imprisoned during a massive 2017 crackdown on the Egyptian LGBT+ community now known as the Rainbow Raids. Hegazi was eventually released, and was given asylum in Canada following said release. Ultimately, the trauma that Hegazi endured during her arrest and prosecution, compounded by her separation from her family and support networks in Egypt, led her to commit suicide in 2020. Her death was widely mourned as a tragedy by the global LGBT+ community, and her story is the inspiration for this note. In writing this piece, I want to shed light on the pervasiveness of anti-LGBT+ persecution in Egypt, and to stand in solidarity with LGBT+ Egyptians experiencing this mass tragedy.

[1] J.D. Candidate (2023) at Syracuse University College of Law; Associate Articles Editor of the *Journal of Global Rights and Organizations,* Vol. 12. I want to thank my family and friends for their support and encouragement during my law school journey, and my advisor Emily Brown for her comments and advice on this note. Finally, to the LGBT+ community in Egypt and across the world: this is my love letter to you; and I hope that this collective, constant state of mourning this community has continued to persevere through comes to an end soon.

[2] In English, "Hegazi"can be spelled a variety of ways, with the most popular alternative being "Hegazy;" for the sake of consistency, I will use the former spelling throughout this note, unless directly quoting a source using an alternate spelling. Similarly, there are various acronyms used to describe the LGBT+ community; this paper will use the acronym "LGBT+," unless directly quoting a source using an alternative acronym.

I. INTRODUCTION

The Rainbow Raids

On September 22, 2017, the Lebanese alternative rock band Mashrou'Leila—whose lead singer is openly gay—headlined a concert in Cairo attended by 30,000 people.[3] When Mashrou'Leila came on stage, several younger concert attendees waved rainbow flags, in celebration of the band and of their LGBT+ identities.[4] In the days following this concert, images of the rainbow flag display went viral on social media,[5] which sparked mass public outrage against Mashrou'Leila and the broader LGBT+ community across Egypt.[6] This led to a three-week long police crackdown on those "suspected of being gay or supporting LGBT rights," which is now widely acknowledged as one of the largest police crackdowns on LGBT+ Egyptians in the country's history.[7] Some groups monitoring the arrests, including the Egyptian Initiative for Personal Rights (EIPR), estimated that as many as fifty-four individuals were arrested during this crackdown.[8] Those arrested were charged with debauchery.[9] Many detainees were beaten, tortured, and "at least five" suspected gay male detainees were "subjected to forced anal exams," in order to determine whether they engaged in habitual homosexual sex.[10]

Sarah Hegazi was apprehended during this crackdown by the Egyptian Security Agency, an arm of Egyptian President al-Sisi's security apparatus, on October 1, 2017, after a photo of

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[3] Ahmed Aboulenein, *Rainbow Raids-Egypt Launches its Widest Anti-Gay Crackdown Yet,* REUTERS (Oct. 6, 2017), https://www.reuters.com/article/uk-egypt-rights-idUKKBN1CB1HM.

[4] Aboulenein, *supra* note 3.

[5] Declan Walsh, *Arrested for Waving a Rainbow Flag, a Gay Egyptian Takes Her Life*, THE NEW YORK TIMES (June 15, 2020),https://www.nytimes.com/2020/06/15/world/middleeast/egypt-gay-suicide-sarah-hegazi.html.

[6] Walsh, *supra* note 5.

[7] *Egypt: Mass Arrests Amid LGBT Media Blackout*, HUMAN RIGHTS WATCH (Oct. 6, 2017, 12:01 AM), https://www.hrw.org/news/2017/10/06/egypt-mass-arrests-amid-lgbt-media-blackout [hereinafter HUMAN RIGHTS WATCH].

[8] HUMAN RIGHTS WATCH, *supra* note 7.

[9] *See* Walsh, *supra* note 5.

[10] Aboulenein, *supra* note 3.

her waving a rainbow flag at the concert went viral.[11] This prompted Egypt's Supreme State Security Prosecution to order her detention for fifteen days pending investigation of the incident.[12] In the days preceding her arrest, Hegazi was "inundated" by hate comments and death threats from outraged Egyptians, whose vitriol was amplified by the Egyptian media (an institution dominated by state-aligned television personalities) after it began a coordinated campaign against LGBT+ individuals in support of the police crackdown on the LGBT+ community.[13] Once she was arrested, Hegazi was taken to the al-Sayeda Zeinab Police Station in Cairo,[14] where she was charged with "inciting debauchery."[15] During her first night of detention, special prosecutors—whose jobs usually involved the interrogation of Islamist militants—[16] interrogated her about her religious beliefs and virginity status.[17] Police officers also tortured her with electric shocks,[18] informed other detainees of her sexuality, and encouraged the other detainees to beat and sexually harass her.[19] Hegazi was later transferred to Qanatir prison, where she was placed in solitary confinement.[20] She remained there for about three months pending investigations,[21] and was granted bail "after discreet pressure from Western and South American diplomats to encourage her release.[22]

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[11] Walsh, *supra* note 5; *see also* HUMAN RIGHTS WATCH, *supra* note 7.
[12] HUMAN RIGHTS WATCH, *supra* note 7.
[13] Walsh, *supra* note 5.
[14] *See* HUMAN RIGHTS WATCH, *supra* note 7.
[15] Walsh, *supra* note 5.
[16] Aboulenein, *supra* note 3.
[17] Walsh, *supra* note 5.
[18] Walsh, *supra* note 5.
[19] HUMAN RIGHTS WATCH, *supra* note 7.
[20] Walsh, *supra* note 5.
[21] Nourhan Mustafa, *Sarah Hegazy Lowers Her Flag for the First and Last Time*, AL-MASRY AL-YOUM (June 14, 2020), https://www.almasryalyoum.com/news/details/1246029.
[22] Walsh, *supra* note 5.

After Hegazi's release, she was fired from her job as a software developer, rejected by some of her family members, and forced to flee to Canada out of fear of further detention.[23] She was granted political asylum[24] and was provided mental health treatment in Canada.[25] She struggled with panic attacks and severe depression after the torture she endured while imprisoned in Egypt.[26] These mental health struggles were exacerbated following the death of her mother, who "died from cancer soon after [Hegazi] reached Canada," and whose funeral she was unable to attend.[27] Hegazi never recovered, and on June 13, 2020, she took her own life.[28] Her final words, memorialized in a "short . . . handwritten note," were: "To the world . . . you've been greatly cruel, but I forgive."[29]

Following Hegazi's tragic passing, an outpouring of grief from the LGBT+ community, within and outside of Egypt, ensued.[30] However, Hegazi's story is, in many ways, not a unique one in Egypt. It is for this very reason that the systemic nature of al-Sisi's targeting of LGBT+ Egyptians must be brought to light. To fully explicate the extent of the al-Sisi government's human rights violations, this note will provide: (1) an overview of the international law standards being violated by the government's practices; (2) an overview of Egypt's constitutional guarantees being violated in its targeting of LGBT+ people; (3) a brief history of anti-gay crackdowns in Egypt; (4) a discussion of al-Sisi's escalation of this discriminatory history through the use of electronic entrapment since he came to power; and (5) recommend steps to mitigate some of the more harmful impacts of the al-Sisi government's practices. Ultimately, this

[23] Walsh, *supra* note 5.
[24] Walsh, *supra* note 5.
[25] Mustafa, *supra* note 21.
[26] Walsh, *supra* note 5.
[27] Walsh, *supra* note 5.
[28] Walsh, *supra* note 5.
[29] Walsh, *supra* note 5.
[30] *See* Walsh, *supra* note 5.

analysis reveals (1) that Egypt has a history of discrimination against LGBT+ individuals, in violation of its responsibilities under its own Constitution and under international law; and (2) the government has increased efforts to target LGBT+ individuals over the past few years via electronic surveillance and entrapment. This impunity issue warrants international recognition and action by the responsible enforcement bodies, including The African Commission on Human Rights, The African Union, and the United Nations. In particular, these bodies should enforce existing international law standards of non-discrimination on the al-Sisi government, and pressure the Egyptian government to discontinue forced anal examinations.

II. BACKGROUND

International Law Standards Regarding the Criminalization of Homosexuality

First, it is important to acknowledge that states, especially those with strong theological traditions, have a legitimate interest in preserving their traditional religious and cultural norms. Therefore, when engaging in critique of their social policies, the discussion must be grounded in substantive legal standards, rather than by pathologizing their social ideals as backwards or conservative. In 1966, the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR), which established, in relevant part, that all persons have rights to privacy and nondiscrimination. The right to privacy, as established in Article 17(1) and (2) of the ICCPR, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence," and that "everyone has the right to protection of the law against such interference."[31] The right to nondiscrimination is enshrined in Article 26 of the ICCPR, and establishes that

[31] G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights, art. 17 (Dec. 16, 1966) [hereinafter ICCPR].

> all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[32]

This right to nondiscrimination has since been applied to include discrimination on the basis of sexual orientation in the 1994 case *Toonen v. Australia*. In *Toonen,* the United Nations Human Rights Committee affirmed that sexual orientation does qualify as a protected status under Article 26 of the ICCPR,[33] and held that "laws criminalizing homosexuality violate rights to privacy and nondiscrimination in breach of States' legal obligations under the International Covenant on Civil and Political Rights."[34] States with laws that criminalize same-sex conduct are thus "in material breach of their obligation to protect the human rights of all people, regardless of sexual orientation or gender identity."[35] Furthermore, it is important to note here that the United Nations Human Rights Committee (UNHRC) includes vague, undefined laws "referring, for example, to 'debauchery,' or to crimes against 'morality,' or 'the order of nature,'" in its definition of "discriminatory laws."[36] Therefore, states—like Egypt—that do not explicitly criminalize homosexuality but rather implicitly criminalize homosexual conduct through statutory crimes against morality, are violating the principles articulated in *Toonen* under the above UNHRC definition.

On the regional scale, Egypt is also a member of the African Union and therefore can more directly be held to account by that multinational body. It is also a member of the African

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[32] ICCPR, *supra* note 31, art. 26.

[33] *See* Toonen v. Australia, Communication No. 488/1992, United Nations Human Rights Committee, ¶ 8.7, U.N. Doc CCPR/C/50/D/488/1992 (Mar. 31, 1994), https://juris.ohchr.org/Search/Details/702.

[34] U.N. HUM. RTS. OFFICE OF THE HIGH COMM'R., CRIMINALIZATION 1, 1 (n.d.) https://www.unfe.org/wp-content/uploads/2018/10/Criminalization-English.pdf [hereinafter Free and Equal].

[35] Free and Equal, *supra* note 34 at 1.

[36] Free and Equal, *supra* note 34 at 1.

Commission on Human and People's Rights, which calls on member states to "protect people from violence on the grounds of their real or perceived sexual orientation or gender identity."[37] Egypt is also bound by the African Commission on Human Rights Resolution 275, which was adopted in 2014.[38] This resolution was adopted in response to perceived upticks in state violence against LGBT+ individuals in Africa, and strongly urges states to

> end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.[39]

It is clear that the relevant international legal regimes favor a policy of discouraging and eliminating state violence and discrimination on the basis of sexual orientation. It is also clear that there is a strong legal basis to describe the al-Sisi government's crackdown on LGBT+ individuals during the Rainbow Raids as violative of existing international human rights law.

Egyptian Constitutional Protections

The rights to privacy, nondiscrimination, freedom of association, and freedom from torture are also enshrined in the Egyptian constitution, which imposes upon its government an obligation to uphold those rights.[40] In that vein, Article 57 of the Egyptian constitution provides that "private life is inviolable, safeguarded and may not be infringed upon,"[41] Article 51 provides

[37] HUMAN RIGHTS WATCH, *supra* note 7.

[38] African Comm'n on Hum. & Peoples' Rts. Res. 275 (LV), ¶ 4 (May 12, 2014) [hereinafter ACHPR Res. 27].

[39] ACHPR Res. 275, *supra* note 38.

[40] *See generally*, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, (International IDEA translation) https://www.constituteproject.org/constitution/Egypt_2019?lang=en.

[41] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 57, (International IDEA translation) https://www.constituteproject.org/constitution/Egypt_2019?lang=en.

that "dignity is a right for every person that may not be infringed upon,"[42] Article 75 affords citizens the right to "engage in activities freely,"[43] and Article 52 establishes "all forms of torture," as crimes with "no statute of limitations."[44]

As such, it is clear that the government in Sarah Hegazi's case violated the protections enshrined in the Egyptian constitution. First, Hegazi was arrested for raising a rainbow flag at a concert,[45] and was thus deprived of her right to "engage in activities freely."[46] This also violated her right to privacy under Article 57 of Egypt's constitution because while she was ultimately charged with "promoting sexual deviancy,"[47] Hegazi's arrest represented an attempt to regulate her sexual orientation (and thus seems a clear violation of her privacy). She was subjected to electric shocks and beatings while incarcerated,[48] in violation of Article 52 of the Egyptian Constitution and the United Nations Convention against Torture which, in relevant part, defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[49]

[42] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 51.
[43] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 75.
[44] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014,. art. 52.
[45] Aboulenein, *supra* note 3.
[46] Constitution of the Arab Republic of Egypt, Jan. 18, 2014, art. 75.
[47] Aboulenein, *supra* note 3.
[48] Walsh, *supra* note 5.
[49] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

Ultimately, these violations of Hegazi's rights to privacy and freedom from torture, and the harrassment she endured, both from the police and those she was incarcerated with, deprived her of basic human dignity, and are a part of a larger pattern of anti-LGBT+ discrimination in Egypt.

History of Anti-LGBT+ Crackdowns in Egypt

Despite the existence of international legal bodies that protects individuals from state-enacted violence and discrimination on the basis of sexual orientation, and the constitutional rights enshrined in the Egyptian constitution, the Egyptian government has engaged in targeted crackdowns on LGBT+ people several times in recent history. Since homosexuality is not explicitly illegal in Egypt,[50] the primary mechanism for the repression of sexual minorities in Egypt is Law 10/1961, on the Combating of Prostitution in the United Arab Republic.[51] Article 1 of this law, makes it a criminal offense for whoever "incites a person, be they male or female, to engage in debauchery or in prostitution, or assists in this or facilitates it, and similarly whoever employs a person or tempts him or induces him with the intention of engaging in debauchery or prostitution."[52] Article 9 criminalizes the "habitual practice of debauchery."[53]

According to a report published by the EIPR, the most common charge in public prosecutions against individuals suspected of being LGBT+ in Egypt is "the habitual practice of debauchery."[54] Of the twenty-three prosecutions EIPR studied from the period between 2013 and 2017, this charge—habitual practice of debauchery—was brought in each case.[55] A similar

[50] Walsh, *supra* note 5.

[51] DALIA ABDEL HAMID ET AL, THE TRAP: PUNISHING SEXUAL DIFFERENCE IN EGYPT, 1, 67-71 (Ahmed al-Shibini & Ismail Fayed eds., Naira Antouan & Ismail Fayed, trans.) (2017), https://eipr.org/sites/default/files/reports/pdf/the_trap-en.pdf [hereinafter PUNISHING SEXUAL DIFFERENCE].

[52] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 67.

[53] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.

[54] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.

[55] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.

charge—publicizing materials on the internet that incite debauchery—which is criminalized under article 8 of the same law, was brought in fourteen of the cases.[56]

While this EIPR report focuses on the period between 2013 and 2017, Law 10/1961 on the Combating of Prostitution in the United Arab Republic has been weaponized against LGBT+ individuals by the Egyptian government as far back as the Mubarak administration in the 1990s.[57] Therefore, to understand the ways in which this law has been weaponized under the current al-Sisi government, the ways in which it was historically used for that purpose must be examined.

Safe spaces for gay men to meet began to emerge in Egypt around the 1990s.[58] One such space was the "Queen Boat," which hosted a disco that was informally known to be a hang out for gay men.[59] In the early hours of May 11, 2001, however, several hundred police raided the Queen Boat and arrested "some [sixty] men," who were later detained at various police stations around Cairo.[60] Of these sixty men, fifty-four were transferred to prison, and fifty-two were ultimately charged with "debauchery," under Law 10/1961 on Combating Prostitution.[61] While incarcerated, officers tortured these men, beat them with sticks on the soles of their feet, and whipped them across their backs with hoses.[62] Detainees were also forced to "undergo examinations by forensic experts for evidence of anal sex[,]" and were forced to confess, under duress, as to whether they were active or passive participants in anal sex.[63] Their families were

[56] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.
[57] Nicola Pratt, *The Queen Boat Case in Egypt: Sexuality, National Security and State Sovereignty,* 33 REV. OF INT'L. STUDIES 129, 131 (2007).
[58] Pratt, *supra* note 57.
[59] Pratt, *supra* note 57.
[60] Pratt, *supra* note 57.
[61] Pratt, *supra* note 57.
[62] Pratt, *supra* note 57.
[63] Pratt, *supra* note 57, at 132.

subjected to verbal abuse, including during their trials.[64] Court guards would taunt the defendants' mothers, and stigmatize them as "the ones who spawned the *khawalat*[,]"[65] a derogatory Egyptian slang term used to refer both to cross-dressers and gay people.[66]

The Queen Boat case represented the first time gay men had been put on trial in Egypt.[67] Of the original fifty-two men imprisoned, twenty-nine defendants were acquitted,[68] twenty-one were found guilty of "habitual debauchery[,]" and the two alleged ringleaders were found guilty of "contempt of religion."[69] One key defendant was also found guilty of debauchery.[70] In reaching these verdicts, the courts relied on evidence proving that the defendants had engaged in same-sex relations.[71] The evidence included photographs in which the defendants appeared naked and/or engaged in same-sex acts, results of forensic anal examinations, and confessions[72] — all despite the fact that consensual homosexual sex is not explicitly criminalized under Egyptian penal law.[73]

The Queen Boat trials are important for two reasons. First, they represented the first instance of the mass arrest and imprisonment of LGBT+ people in Egypt.[74] Second, when comparing the tactics used by the state during the Queen Boat trials and during the Rainbow Raids, a pattern emerges, which reveals the systemic nature of the Egyptian government's suppression of sexual minorities, because in both the Queen Boat and Rainbow Raids trials, the

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[64] Pratt, *supra* note 57, at 132.
[65] Pratt, *supra* note 57, at 132.
[66] *The Origins of the Word 'Khawal',* Cairo Scene, Mar. 02, 2016, https://cairoscene.com/ArtsAndCulture/The-Origins-of-the-Word-Khawal.
[67] Pratt, *supra* note 57, at 134.
[68] Pratt, *supra* note 57, at 132.
[69] Pratt, supra note 57, at 132.
[70] Pratt, *supra* note 57, at 132.
[71] Pratt, *supra* note 57, at 132.
[72] Pratt, *supra* note 57, at 133.
[73] Pratt, *supra* note 57, at 133.
[74] Pratt, *supra* note 57, at 134.

government arrested and charged LGBT+ individuals under Law 10/1961 prohibiting the incitement of debauchery.[75]

Ultimately, when comparing the use of Law No. 10/1961 to criminalize LGBT+ individuals as perpetuated by the Mubarak regime during the Queen Boat case, and as perpetuated by the al-Sisi regime during the Rainbow Raids, parallels emerge in the trajectory of those cases and in the manner which the law has been applied. However, the effects of this law on the rights of LGBT+ Egyptians have only been amplified under President al-Sisi. The uptick in the criminalization of LGBT+ Egyptians under this law by the al-Sisi administration will be discussed in greater detail below.

III. ANTI-LGBT+ CRACKDOWNS IN EGYPT UNDER PRESIDENT AL-SISI

New Laws Affecting the LGBT+ Community in Egypt

In the aftermath of the Rainbow Raids, the al-Sisi government passed multiple laws to further suppress the representation of LGBT+ people in media and created additional grounds under which suspected sexual minorities can be prosecuted, including Law No. 180/2018, a media regulations law which in relevant part "prevents press entities, media outlets, or websites from publishing or broadcasting content that violates . . . public order or morals,"[76] and Law No. 175/2018, a cybercrime law that, according to the Egyptian office of Public Prosecution, calls upon citizens to "'protect Egypt's cyber borders.'"[77] This provision of the cybercrime law also allows private citizens to lodge legal complaints against violations of public morality on social

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[75] Neela Ghoshal, *Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions,* HUM. RTS. WATCH 1, 11 (July 2016), https://www.hrw.org/sites/default/files/report_pdf/globallgbtanalexams0716web.pdf [hereinafter *Dignity Debased*].

[76] *The Law Regulating the Press, Media, and the Supreme Council for Media Regulation*, THE TAHRIR INST. FOR MIDDLE E. POL'Y 1, 1 (May 15, 2019), https://timep.org/reports-briefings/timep-brief-the-law-regulating-the-press-media-and-the-supreme-council-for-media-regulation/.

[77] Freedom on the Net 2021: Egypt, Freedom House, Section B3 (2021), Egypt: Freedom on the Net 2021 Country Report | Freedom House [hereinafter Freedom House Report].

media.[78] This new law has led to significant censorship of online content,[79] and has thereby been used by the government to repress digital activism and to crack down on and prosecute social media users–especially women–who allegedly violate "family values and principles."[80] Articles 25 and 26 of the cybercrime law also provide national security agencies unfettered access to electronic data and communications without judicial oversight, whenever a perceived threat to family values and principles emerges.[81] These new laws, in conjunction with a prohibition on homosexuals appearing in any media outlet promulgated by Egypt's Supreme Council for Media Regulation,[82] have served to further suppress the LGBT+ community in Egypt writ large, and have provided an additional avenue under which the al-Sisi government can prosecute the LGBT+ community.

Lack of Internet Freedoms in Egypt

Freedom House recently reported that Egypt scored a twelve out of twenty-five on obstacles to access to the internet, a ten out of thirty-five on limits on content, a score of four out of forty on violations of user rights, and a twenty-six out of 100 (Not Free) on internet freedoms more generally in 2021.[83] Here, lower numbers indicate low levels of freedom, and higher numbers indicate high levels of freedom.[84] Freedom House also reported that internet "discrimination against women, LGBT+ people, and other groups remain serious problems," in Egypt.[85] Additionally, Freedom House identified massive limits on internet content, finding that

[78] *Freedom House Report*, *supra* note 77, Section B2.
[79] *Freedom House Report*, *supra* note 77.
[80] *Freedom House Report*, *supra* note 77.
[81] *Freedom House Report*, *supra* note 77, Section B8.
[82] *Unofficial Translation of Statement by Egypt's Supreme Council for Media Regulation*, HUM. RTS. WATCH (Oct. 6, 2017), https://www.hrw.org/news/2017/10/06/unofficial-translation-statement-egypts-supreme-council-media-regulation [hereinafter *Statement for Media Regulation*].
[83] *Freedom House Report*, *supra* note 77.
[84] *Freedom House Report*, *supra* note 77.
[85] *Freedom House Report*, *supra* note 77.

the Egyptian government has "continued to block news websites . . . as part of a wider crackdown on freedom of expression and civil society activism," with at least 600 websites being blocked by the authorities since May 2017.[86] This relative lack of internet freedoms, combined with the new media law No. 180/2018, has created a virtual environment that is inhospitable to LGBT+ Egyptians, and has set the stage for a new era of LGBT+ persecution in Egypt: electronic entrapment.

Electronic Entrapment

While the Rainbow Raids did represent the largest concentrated crackdown on Egypt's LGBT+ community in recent history, the EIPR alleged that this incident was nothing but a "link in the systematic targeting," of sexual minorities that has continued to rise from the last quarter of 2013 onwards.[87] In its report, the EIPR identified that from October 2013 to March 2017, the total number of people arrested and prosecuted for crimes of debauchery reached 232 people, or an average of sixty-six people per year.[88] This figure far exceeds the number of arrests in the thirteen years prior to the start of the crackdown, where, between 2000 and 2013, only 189 individuals—an average of about 14 people per year—were prosecuted for such offenses.[89] It seems clear, then, that since al-Sisi took control over the Egyptian government in 2013, arrests and prosecutions of sexual minorities have seen a marked increase in Egypt, with the Egyptian authorities making—on average—nearly five times as many arrests per year since 2013 as they did per year between 2000 and 2013.[90]

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[86] *Freedom House Report*, *supra* note 77.
[87] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.
[88] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.
[89] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.
[90] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.

In making some of its findings, the EIPR relied on the legal analysis of twenty-five cases brought against perceived sexual minorities during the period between 2013 and 2017. In so doing, the EIPR found that in twenty-three of the twenty-five cases studied, individuals arrested for their perceived or suspected sexual orientation were charged under Law 10/1961, with the most common accusations under that law being "habitual practice of debauchery," and "advertising material that incites debauchery on the internet."[91]

The EIPR also found that "the first and most common strategy" employed by Egyptian authorities to find and arrest individuals suspected of being LGBT+ was through the "entrapment of individuals, especially transgender women, through fake accounts on LGBTQ dating websites and applications."[92] More specifically, the EIPR reported that among the 232 individuals arrested between 2013 and 2017, 129—or fifty-five percent of arrestees—were arrested via dating and social networking websites.[93] The government has informants create fake accounts on LGBT+ dating websites[94] and other social media platforms—including WhatsApp, Growlr, Manjam, Escort.com, and Tsdating.com—[95] to initiate chats with suspected LGBT+ individuals for variable periods of time, making arrangements to have sex, and then ambushing them at the prearranged time.[96] This technique far outpaces any other method used to track down and arrest suspected LGBT+ individuals.[97] This also shows that the Egyptian authorities' entrapment strategy of those perceived as LGBT+, has "moved away from tracking accounts of individuals

[91] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 7.
[92] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 7.
[93] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6,8, 9.
[94] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 12.
[95] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 15.
[96] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 12.
[97] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 9.

who are open about practicing commercial sex," to "targeting and entrapping the majority of individuals on dating applications and websites, whether in exchange for money or not."[98]

This method of entrapment is particularly insidious because it essentially ensures that LGBT+ individuals who are lured into electronic communication with the police will be charged with an offense under Law 10/1961.[99] This is because even when these conversations do not lead to the actual practice of debauchery, they can still constitute the crime of incitement of debauchery under Article 2(a) of Law 10/1961, as this provision states that "anyone who employs, persuades, or induces a person, be they male or female, with the intention of committing debauchery," will be subjected to criminal penalties as established in Article 2(b) of Law 10/1961.[100] In using Law 10/1961 in such a manner, the Egyptian authorities can criminalize those suspected of being LGBT+ for simply having conversations with prospective sexual or romantic partners, "even if no sexual act takes place."[101] In doing so, the Egyptian authorities violate these individuals' rights to privacy and freedom of association, as evidenced by the fact that in fifty-five percent of the cases EIPR studied that were brought by the Egyptian government against perceived LGBT+ people, the circumstances giving rise to their incarceration involved some form of electronic entrapment.

Anal Examinations

As discussed above, using electronic entrapment to identify suspected LGBT+ people has become a central tactic of the Egyptian government in its attempt to repress the LGBT+

[98] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 11.
[99] *See generally,* PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 13.
[100] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 13.
[101] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 24.

community. Once arrested, most are charged with the habitual practice of debauchery, "which is criminalized in Article 9 of Law 10/1961."[102]

In most "habitual practice of debauchery cases," including several of those studied by the EIPR, "the prosecution refers arrested individuals to the Forensic Medicine Authority to undergo forced pubic and rectal examinations."[103] This practice has long been used in investigations of homosexual conduct in Egypt—with the first documentation of this practice being in 2001 as a part of the Queen Boat arrests—[104] and is used to determine "whether any of those examined [were] 'recently penetrated from behind.'"[105]

Based on testimony from some of the men arrested in the Queen Boat trials, there are a variety of techniques used by the Forensic Medicine Authority to conduct these exams.[106] Some men report that doctors only examined them visually, while others say that doctors placed fingers or other objects inside them,[107] including feathers,[108] pens, and other tools.[109] Other testimonies indicate that some exams take place in the view of third parties, so that others can join in the humiliation of the victim being subjected to the exam.[110] Furthermore, multiple people subjected to these exams testified that they were forced to assume the *sujud* position—which in Islam is a particularly sacred act of bowing or prostrating to God during prayer—while being examined, thus adding further levels of humiliation and debasement to an already-abusive process.[111]

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[102] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.
[103] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 29.
[104] *Dignity Debased*, *supra* note 75, at 24.
[105] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 29.
[106] *Dignity Debased*, *supra* note 75, at 24.
[107] *See generally, Dignity Debased*, *supra* note 75, at 24.
[108] *See generally, Dignity Debased*, *supra* note 75, at 24.
[109] *Dignity Debased*, *supra* note 75, at 27.
[110] *Dignity Debased*, *supra* note 75, at 25.
[111] *Dignity Debased*, *supra* note 75, at 25.

The abusive nature of forced anal exams has been well-established by many major human rights bodies. The Human Rights Watch has stated that forced anal exams "constitute a form of cruel, inhuman, and degrading treatment," that amounts to acts of "sexual assault."[112] The Office of the United Nations High Commissioner for Human Rights (OHCHR) called for banning forced anal examinations in 2015, with 12 other UN agencies following suit that same year.[113] Similarly, the African Commission on Human and People's Rights has also called for member states to prohibit this practice.[114] All of the above agencies have emphasized that these examinations should be considered "invasive body searches," and "may constitute torture,"[115] because they are "often physically painful, profoundly degrading and humiliating, and apt to produce lasting psychological trauma."[116]

Setting aside for a moment the abusive nature of using anal examinations to prove whether a defendant has engaged in homosexual activity, it is also important to note that these exams are "objectively worthless" in evidentiary terms,[117] and have no medical value "in detecting abnormalities," that could be "reliably attributed to consensual anal intercourse."[118] There is no standardized method for these digital rectal examinations, and "no data to support any correlations between digital anal examinations and actual anal . . . pressures" (i.e. injuries).[119] Furthermore, there are no signs of anal penetration that can be discovered through this type of examination that are unique to homosexuality,[120] which makes it a particularly

[112] *Dignity Debased*, *supra* note 75, at 59.
[113] *Dignity Debased*, *supra* note 75, at 60.
[114] *Dignity Debased*, *supra* note 75, at 61-62.
[115] *Dignity Debased*, *supra* note 75at 60.
[116] *Dignity Debased*, *supra* note 75, at 59.
[117] *Dignity Debased*, *supra* note 75, at 63.
[118] *Dignity Debased*, *supra* note 75, at 69-70.
[119] *Dignity Debased*, *supra* note 75, at 70.
[120] *Dignity Debased*, *supra* note 75, at 72.

worthless method to prove whether a defendant has engaged in recent homosexual activity. This is also demonstrated by the testimonies of those subjected to the exam; one detainee "told Human Rights Watch that his test results were "'positive,'" even though he had never had sex in his life.[121]

That these anal examinations are both abusive and unreliable, and are extremely prevalent in the Egyptian government's prosecution of suspected LGBT+ people is even more disturbing in the light of the fact that "a 'negative' test is no guarantee of acquittal."[122] This is in part because "doctors routinely add a caveat," in their medical reports "that concealment of signs of anal intercourse is possible through the use of lubricants and cosmetics."[123] As such, men suspected of being gay may be convicted for the habitual practice of debauchery even when their results are negative;[124] with one notable example taking place in November 2014, when a court sentenced eight men to three years in prison for appearing in a video that showed a gay wedding, despite the fact that the results of their forensic anal exams showed that the men were "not homosexuals."[125]

Therefore, anal exams are not only abusive, but are also legally problematic. As discussed above, these examinations are used in most prosecutions of suspected gay men under Law 10/1961 for the 'habitual practice of debauchery,' and are often outcome-determinative. However, because the strict interpretation of "debauchery" under Law 10/1961 is "the act of a man having sex with other men indiscriminately,"[126] combined with the fact that these

[121] *Dignity Debased*, *supra* note 75, at 25.
[122] *Dignity Debased*, *supra* note 75, at 28.
[123] *Dignity Debased*, *supra* note 75, at 28.
[124] *See generally*, *Dignity Debased*, *supra* note 75, at 28.
[125] *Dignity Debased*, *supra* note 75, at 28.
[126] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 40.

examinations do not produce any reliable evidence of such "debauchery" means that individuals suspected of being LGBT+ are routinely convicted for crimes they did not commit.[127]

Given the above, it seems clear that the abuse of the LGBT+ community in Egypt has reached an all-time high under the al-Sisi regime. As discussed in the above sections, since al-Sisi came to power in 2014, his government has proliferated multiple laws meant to specifically suppress gay people in media, has increased its capacity to access people's data and censor content through the 2018 cybercrime law, and has increasingly relied on electronic surveillance and entrapment to track and arrest individuals suspected of being gay.[128] This use of electronic entrapment, in combination with the government's discriminatory enforcement of Law 10/1961 to prosecute suspected LGBT+ people for their sexuality—even though homosexuality is not explicitly criminalized in the penal law—has likely vastly increased the Egyptian government's ability to repress the LGBT+ community, as evidenced by the fact that the arrest and prosecution of suspected gay people under Law 10/1961 increased fivefold in the period immediately following al-Sisi's ascent to power.[129] Even worse, in these prosecutions, the evidence relied upon for convictions largely consists of the results of forensic anal examinations; which have been widely determined to be medically useless, abusive, and an unreliable form of evidence, and have resulted in several wrongful convictions.[130]

IV. SOLUTIONS

Banning Anal Exams

[127] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 25.
[128] *See generally, Freedom House Report*, *supra* note 77.
[129] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.
[130] *See generally, Dignity Debased*, supra note 75, at 24-28

In a country like Egypt, which qualified as an "authoritarian regime," under the Economist Intelligence Unit's Democracy Index of 2021,[131] any kind of substantive change is necessarily limited in scope to the whims of the authoritarian leader. However, in recent years, there is increasing precedent for banning anal examinations in multiple African countries, with the most notable of which being Kenya,[132] which—as a hybrid authoritarian-democratic regime[133]—is also subject to some of the same limitations as Egypt. In Kenya, its prohibition on anal examinations was effected through the court system in the 2016 case *COI and another v. Chief Magistrate Ukunda Law Courts and 4 Others*, which is also commonly referred to as Civil Appeal No. 56 of 2016.[134] There, the Kenyan Court of Appeals found that "an order that the use of evidence obtained through anal examinations of the petitioners in criminal proceedings against them violates their rights under Article 50 of the Constitution."[135] In reaching its decision, the court relied on several factors.

One such factor was "the right to privacy," as enshrined in the Kenyan Constitution, which the court held "extend[s] to a person not being compelled to undergo a medical examination."[136] Another factor upon which the court made its decision was that "the admission of the results in question . . . went against the appellants' right against self-incrimination."[137] Ultimately, the court held that the appellants' rights against self-incrimination were violated because the "appellants were not arrested in the act," of committing the offense they were charged for.[138]

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[131] *Democracy Index 2021: The China Challenge*, THE ECONOMIST INTEL. UNIT 1, 15 (2021), https://www.eiu.com/n/campaigns/democracy-index-2021/, [hereinafter *Democracy Index 2021*].

[132] *See* COI & Another v. Chief Magistrate Ukunda Law Courts & 4 others (2018) K.L.R. ¶ 1, ¶¶ 32-33 (Kenya).

[133] *Democracy Index 2021*, *supra* note 119, at 14.

[134] *See* COI & Another v. Chief Magistrate Ukunda Law Courts & 4 others (2018) K.L.R. ¶ 1, ¶¶ 32-33 (Kenya).

[135] *Id.* at, ¶ 37(c).

[136] *Id.* ¶ 27.

[137] *Id.* ¶ 33.

[138] *Id.* at ¶¶ 32-33.

Furthermore, because there was no complainant, there was "actually no reasonable explanation as to why they were suspected of having committed that offense."[139] This is important because under Kenyan law, if there is "no proper basis," of suspicion that an appellant has committed the offense laid before the court, any order for the collection of evidence establishing that offense is an "illegal order."[140] Thus, any examinations and tests conducted under that illegal order go against the "appellants' right against self-incrimination."[141] Finally, the third factor the court relied upon—an individuals' fundamental right to human dignity—was "central[]" to the court's analysis.[142] In its finding that human dignity is a fundamental right, the Kenyan court relied on Article 19(2) of its constitution, which provides for the preservation of the "dignity of individuals," as a fundamental freedom.[143] Furthermore, it also relied on the ICCPR, as well as Article 5 of the African Charter on Human and People's Rights, which provides that "every individual shall have the right to the respect of the dignity inherent in a human being."[144] Ultimately, under these definitions, the court held that compelling a person to undergo a medical examination is violative of the fundamental right to human dignity, thus concluding its analysis, and affirming the unconstitutionality of anal examinations under Kenyan law.[145] In banning the use of anal examinations as evidence for criminal proceedings, the court thereby ensured that this practice could not continue as a matter of procedure.

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[139] See COI & Another v. Chief Magistrate Ukunda Law Courts & 4 others (2018) K.L.R. ¶ 1, ¶¶ 32-33.
[140] *Id.* at ¶ 1, ¶¶ 32-33.
[141] *Id.* ¶ 33.
[142] *Id.* ¶ 22.
[143] *Id.* at ¶¶ 32-33.
[144] *See* COI & Another v. Chief Magistrate Ukunda Law Courts & 4 others (2018) K.L.R. ¶ 1, ¶¶ 24 (Kenya).
[145] *Id.* ¶ 27

This Kenyan case is also extremely important because it showcases a possible avenue for analogous legal challenges in Egypt's Supreme Constitutional Court[146] to the Egyptian government's use of anal examinations in its prosecutions of suspected LGBT+ people under Law 10/1961. As in Kenya, Article 57 of the Egyptian constitution provides for an individual's right to privacy.[147] As such, anal examinations as utilized in Egypt arguably violate an individual's right to privacy in the same manner and for the same reasons outlined in the Kenyan decision, and could therefore be challenged on the same grounds. Similarly, the international law standards of human dignity that were central to the Kenyan case also apply in Egypt, and can help inform legal arguments against the constitutionality of anal examinations as performed in Egypt. This case is also useful in that the Kenyan and Egyptian governments are relatively similar, as both lean authoritarian and are subject to similar constraints on social and civil progress.

There is also a role for international bodies in attempts to ban anal exams; for example, in September 2017, the UN Human Rights Council promulgated a recommendation to Tunisia (as a part of its Universal Periodic Review at the UN Human Rights Council) to prohibit the use of forced anal exams, which Tunisia accepted.[148] Similarly, the Committee Against Torture has called on several countries, including Cameroon, Egypt, and Tunisia to stop conducting anal exams.[149] Calls such as these constitute "soft law," and are therefore not legally binding.[150]

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[146] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 192 (establishing the Supreme Constitutional Court, in relevant part, as "exclusively competent to decide on the constitutionality of laws and regulations").

[147] *Id.* at art. 57.

[148] *Kenya: Court Finds Forced Anal Exams Unconstitutional*, HUMAN RIGHTS WATCH (Mar. 22, 2018, 3:04 PM), https://www.hrw.org/news/2018/03/22/kenya-court-finds-forced-anal-exams-unconstitutional.

[149] *Id.*

[150] Dinah Shelton, *Commitment and Compliance: What Role for International Soft Law?*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, (Nov. 22, 1999), https://carnegieendowment.org/1999/11/22/commitment-and-compliance-what-role-for-international-soft-law-event-47.

However, soft law can still serve to draw attention to impunity issues and supplement binding law to fill in gaps within hard law instruments,[151] and is therefore essential to addressing human rights violations, including the practice of forced anal examinations.

Other Recommendations for International Actors

In December 2020, the European Commission promulgated a communication to the European Parliament and other European committees outlining its LGBTIQ Equality Strategy for 2020-2025.[152] This communication and the associated report represent the European Commission's "first-ever LGBTIQ equality strategy," which attempts to address the inequalities and challenges specifically affecting LGBT+ people in Europe, and sets out a series of targeted actions to tackle discrimination against LGBT+ people in member states.[153] It also lays out specific strategies and recommendations to streamline "all EU policies, legislation and funding programmes," to address LGBT+ equality more effectively.[154] Ultimately, this strategy intends to "integrate a LGBTIQ equality perspective into all EU policies," and to integrate efforts and action on LGBT+ discrimination "at every level."[155] While it is still too early to see how effective this new strategy has been; it is extremely promising in its scope and its centralization of European efforts to combat LGBT+ inequality. More importantly, this strategy could be replicated by the African Commission on Human and People's Rights to help streamline, direct, and fund efforts towards LGBT+ equality in Africa.

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[151] Shelton, *supra* note 150.

[152] European Comm'n, *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, COM (2020) 698 final (Dec. 11, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0698&from=EN, [hereinafter EUROPEAN COMMISSION].

[153] *Id*. at 1.

[154] *Id*. at 4.

[155] *Id*. at 23.

The African Commission has already engaged in similar efforts; in 2015 it released its Strategic Plan for "shaping and improving the human rights landscape," of the African continent between the years of 2015-2019.[156] In this plan, the African Commission promulgated several strategies for human rights promotion and protection, with particular emphasis on "capacity building," and "stakeholder participation and collaboration."[157]

Given that the above precedent exists, it seems clear that the African Commission would be well within its mandate if it were to create a similar strategy, specifically targeted towards the improvement of LGBT+ rights across Africa. The African Commission could provide specific benchmarks for the improvement of LGBT+ rights in member states, and hold governments like Egypt accountable when they fall short of the African Commission's goals. Ultimately, creating a framework with this level of specificity and clear criteria for the advancement of LGBT+ rights in Africa could go very far to improve LGBT+ rights across Africa—including in Egypt, and is therefore an important first step towards mitigating the harm perpetuated by the al-Sisi administration.

V. CONCLUSION

As demonstrated above, since President Abdel-Fattah al-Sisi took control of the Egyptian government in a 2013 coup, the rights of LGBT+ Egyptians have undergone rapid deterioration. The average number of annual arrests and prosecutions of suspected LGBT+ individuals have increased fivefold in the years immediately following al-Sisi's ascent to power;[158] such that dozens of people (if not more) are currently being detained and convicted every year.[159] A large

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[156] D*elivering Better: Strategic Plan 2015-2019*, AFR. COMM'N ON HUM. AND PEOPLE'S RTS. (2020), https://www.achpr.org/strategicplan, [hereinafter *African Commission*].

[157] *African Commission*, *supra* note 156, at 17.

[158] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.

[159] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 6.

majority of these detainees were prosecuted under Egyptian Law 10/1961, which was originally drafted to combat prostitution,[160] but which is now the primary mechanism utilized by the Egyptian government to convict those suspected of being gay.[161] This law, which is discriminatory both in its application and interpretation, is broad, and can be used to convict those suspected of being LGBT+ for simply 'inciting debauchery,' even if the associated crime cannot be proven.[162] Suspected LGBT+ individuals can also be charged with the 'habitual practice of debauchery' under this law.[163] Allegedly gay individuals can be charged and convicted even for inciting debauchery.[164] Thus, the Egyptian authorities have increasingly relied on entrapping individuals they suspect are LGBT+ over social media and dating sites by posing as prospective romantic partners, setting up meetings, and then arresting those individuals upon meeting them.[165] In the latter instance, evidence relied upon to prove the habitual practice of debauchery often includes the results of anal examinations,[166] which are both medically useless and extremely debasing. These techniques—which have become systemic under the al-Sisi regime—are severe violations of individuals' rights to privacy and basic human dignity. In the case of Sarah Hegazi, one such gay Egyptian arrested under Law 10/1961,[167] the utter humiliation she experienced while detained ultimately led to her death. Her story, however, is just one of many. Countless LGBT+ Egyptians have suffered and are continuing to suffer and die under this oppressive regime. The international human rights community, including the African Commission on Human and Personal Rights and the United Nations Human Rights Council,

[160] Pratt, *supra* note 57.
[161] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 67.
[162] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 67.
[163] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.
[164] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 27.
[165] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 11.
[166] PUNISHING SEXUAL DIFFERENCE, *supra* note 51, at 29.
[167] Walsh, *supra* note 5.

must act on this impunity issue, in order to prevent the continued death and wrongful conviction of LGBT+ Egyptians. In particular, human rights lawyers in Egypt should consider challenging the constitutionality of anal examinations as utilized in the criminal prosecution of LGBT+ individuals. Furthermore, the African Commission and other relevant international bodies should urge the Egyptian government to end this practice, and should outline specific recommendations for improving the rights of the LGBT+ community in Egypt and across Africa. Without such action, gay Egyptians will continue to struggle and die under a regime that continually violates their rights to privacy, dignity, and non-discrimination. Even more importantly, at this point, it is unacceptable for the global community to continue to mourn the tragic deaths of young gay people in Egypt and across the globe while still abandoning them to the auspices of governments that are actively trying to criminalize, convict, and eradicate them.